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## Torts

Eric S. Palles

*Partner, Ross & Hardies, Chicago, IL*

Ann L. Gibson

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# Torts

*Eric S. Palles\** and  
*Ann L. Gibson\*\**

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## I. INTRODUCTION

During the *Survey* year, the Illinois Supreme Court addressed issues in tort law that ranged from liability for contribution and worker's compensation to damages concerning the parent-child relationship. The court discussed the duty of doctors, hospitals, manufacturers, and owners of recreational facilities. The court also interpreted and analyzed the impact of recent legislation on tort law.

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\* Partner, Ross & Hardies, Chicago, Illinois; A.B., 1973, J.D., 1977, Washington University.

\*\* B.A., 1987, University of Notre Dame; J.D. candidate, 1990, Loyola University of Chicago.

## II. WORKERS' COMPENSATION

In *Page v. Hibbard*,<sup>1</sup> the Illinois Supreme Court held that the portion of a settlement representing a claim for loss of consortium is not subject to a worker's compensation lien.<sup>2</sup> In *Page*, a trooper for the Illinois Department of Law Enforcement ("Department") was injured when a car struck his patrol car.<sup>3</sup> The trooper and his wife filed claims against the driver and the owner of the car. The parties eventually settled, and the plaintiffs released the defendants from all claims arising from the collision.<sup>4</sup> The parties apportioned one-half of the settlement proceeds for the wife's loss of consortium claim, one-fourth for the trooper's pain and suffering, and one-fourth for all other elements of damage.<sup>5</sup>

Because the Department previously had paid worker's compensation benefits to the trooper, the Department claimed a lien on the entire amount of the settlement pursuant to section 5(b) of the Workers' Compensation Act.<sup>6</sup> Nevertheless, the trial court divided the settlement between the wife and the employer; the trial court rejected the trooper's contention that he was entitled to the damages for pain and suffering.<sup>7</sup> The appellate court reversed in part and allowed the employer to claim the entire settlement.<sup>8</sup>

On appeal to the Illinois Supreme Court, the trooper argued that the employer's lien attached only to damages that were compensable under the Workers' Compensation Act and not to damages for pain and suffering or loss of consortium.<sup>9</sup> The Department, on the

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1. 119 Ill. 2d 41, 518 N.E.2d 69 (1987).

2. *Id.* at 50, 518 N.E.2d at 73.

3. *Id.* at 43-44, 518 N.E.2d at 70.

4. *Id.* at 45, 518 N.E.2d at 70.

5. *Id.*

6. ILL. REV. STAT. ch. 48, para. 138.5(b) (1987). Paragraph 138.5(b) provides in part:

Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act . . . . [If] judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid . . . . [T]he employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party.

*Id.*

7. *Page*, 119 Ill. 2d at 45, 518 N.E.2d at 71.

8. *Id.* at 46, 518 N.E.2d at 71.

9. *Id.*

other hand, contended that it could recover the portion attributed to the wife's claim for loss of consortium because that claim was derivative of the trooper's suit. The court held that the employer was entitled to a lien on the entire amount of the employee's recovery, regardless of whether the recovery included compensation for damages that did not fall within the purview of the Workers' Compensation Act.<sup>10</sup>

The supreme court acknowledged that the Workers' Compensation Act assures the employee compensation from an employer who may not be responsible for the injuries.<sup>11</sup> In light of this fact, the court reasoned that the legislature was justified in giving priority to the employer's right to reimbursement over the employee's right to common law recovery.<sup>12</sup>

The court, however, did not allow the employer to be reimbursed out of the wife's settlement for loss of consortium.<sup>13</sup> The Workers' Compensation Act allows the employer to be reimbursed only out of proceeds from an action brought by the injured employee or his representative.<sup>14</sup> The spouse's action for loss of consortium was not a derivative claim brought by a personal representative; rather, it was an independent claim for the spouse's injuries.<sup>15</sup> Therefore, the spouse's loss-of-consortium recovery was not subject to the lien.<sup>16</sup>

The employer also contended that the parties themselves should not be allowed to allocate the settlement between the employee's injuries and his wife's consortium claim.<sup>17</sup> Rather, an impartial trier of fact must determine the value of the consortium claim. Because no evidence in the record addressed the reasonableness of the

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10. *Id.* at 47, 518 N.E.2d at 71.

11. *Id.* at 49, 518 N.E.2d at 72.

12. *Id.* Moreover, the court recognized that an employee is precluded from recovering damages that are not compensable under the Workers' Compensation Act only when the third-party recovery is insufficient to satisfy the entire lien. *Id.* Thus, the proceeds of the third-party recovery are applied first to those damages that are compensated under the Workers' Compensation Act, and then any surplus is applied to damages not recoverable as worker's compensation. *Id.*

13. *Id.* at 50, 518 N.E.2d at 73.

14. *Id.* at 47-48, 518 N.E.2d at 72.

15. *Id.* at 48, 518 N.E.2d at 72.

16. *Id.* The court relied on *Brown v. Metzger*, 104 Ill. 2d 30, 38, 470 N.E.2d 302, 306 (1984), and *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 208-09, 454 N.E.2d 210, 218 (1983), in which the court held that a wife's claim for loss of consortium is an independent claim. See also *Gass v. Carducci*, 52 Ill. App. 2d 394, 203 N.E.2d 289 (1st Dist. 1964) (the wife was entitled to the insurance proceeds regardless of her husband's recovery because loss of consortium is a claim for a separate bodily injury).

17. *Page*, 119 Ill. 2d at 50, 518 N.E.2d at 73.

allocation, the court remanded the case for a determination of whether the allocation was proper.<sup>18</sup>

In *Hall v. Archer-Daniels-Midland Co.*,<sup>19</sup> the Illinois Supreme Court established that a joint tortfeasor need not extinguish the employer's workers' compensation liability before bringing a contribution claim against him.<sup>20</sup> In *Hall*, the plaintiff's decedent was fatally injured when he fell through a catwalk on a construction site. The plaintiff brought an action pursuant to the Structural Work Act<sup>21</sup> against the owner of the site and the contractor.<sup>22</sup> The plaintiff also sought punitive damages for wilful and wanton misconduct.<sup>23</sup> The owner then filed a claim for contribution against the contractor and the decedent's employer.<sup>24</sup> Subsequently, the owner settled with the plaintiff, agreeing to pay a lump sum and to indemnify the plaintiff for any workers' compensation lien of the employer, in exchange for the plaintiff's release of all parties' claims.<sup>25</sup> The parties also agreed to secure dismissal and satisfaction of the still pending worker's compensation proceedings.<sup>26</sup>

After the trial court ruled in favor of the owner in its contribution claim, the employer and the contractor appealed.<sup>27</sup> The appellate court reversed the trial court's decision and held that workers' compensation liability must be extinguished before an employer can be subject to contribution.<sup>28</sup>

The Illinois Supreme Court held that an employer can be liable for contribution even though its workers' compensation liability has not been extinguished.<sup>29</sup> The court looked to the language and purpose of the Contribution Act for support.<sup>30</sup> The Contribution

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18. *Id.* at 50-51, 518 N.E.2d at 73. See *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 122-23, 499 N.E.2d 1373, 1380 (1986) (the trial court has discretion to determine the precise nature of the proceedings by which it will determine the reasonableness of the allocation).

19. 122 Ill. 2d 448, 524 N.E.2d 586 (1988).

20. *Id.* at 454, 524 N.E.2d at 589.

21. ILL. REV. STAT. ch. 48, para. 60 (1987).

22. *Hall*, 122 Ill. 2d at 450, 524 N.E.2d at 587.

23. *Id.*

24. *Id.*

25. *Id.* at 450-51, 524 N.E.2d at 587. The release of all parties' liability is a prerequisite to a settling tortfeasor's maintenance of a contribution claim against the other tortfeasors. ILL. REV. STAT. ch. 70, para. 302 (1987).

26. *Hall*, 122 Ill. 2d at 450-51, 524 N.E.2d at 587.

27. *Id.* at 451, 524 N.E.2d at 588.

28. *Id.*

29. *Id.* at 454, 524 N.E.2d at 589.

30. *Id.* The Contribution Act provides a right of contribution for a tortfeasor who has paid more than his pro rata share. Section 2(e) of the Act, however, provides: "A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover

Act focuses on the culpability of the tortfeasors;<sup>31</sup> an employer's obligation under the Worker's Compensation Act is based on status rather than on tortious conduct.<sup>32</sup> The owner had completely extinguished the employer's tort liability, as required by the Contribution Act.<sup>33</sup>

The employer and contractor also contended that even if they were liable for contribution, the owner could obtain contribution only for compensatory damages and not punitive damages.<sup>34</sup> Moreover, the failure to designate the type of damages in the settlement precluded the owner from recovering contribution because the "one seeking contribution must be able to establish the amount to which he is entitled."<sup>35</sup> The court stated that the Contribution Act did not expressly require the parties to allocate the settlement proceeds between alternative theories of recovery.<sup>36</sup> Although the

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contribution from another tortfeasor whose liability is not extinguished by the settlement." ILL. REV. STAT. ch. 70, para. 302 (1987).

31. *Hall*, 122 Ill. 2d at 454-55, 524 N.E.2d at 589. In *Doyle v. Rhodes*, 101 Ill. 2d 1, 14, 461 N.E.2d 382, 388 (1984), *petition for leave to appeal denied*, 116 Ill. 2d 552, 515 N.E.2d 105 (1987), the court stated that "the Contribution Act focuses, as it was intended to do, on the culpability of the parties rather than on the precise legal means by which the plaintiff is ultimately able to make each defendant compensate him for his loss." The court held that an employer is subject to liability in tort and, therefore, may be liable under the Contribution Act. *Id.*

32. See ILL. REV. STAT. ch. 48, para. 138.1 (1987) (employers are liable for worker's compensation by virtue of their status).

33. *Hall*, 122 Ill. 2d at 455, 524 N.E.2d at 589.

34. *Id.* at 458, 524 N.E.2d at 591. The employer and contractor relied on *Batteast v. St. Bernard's Hospital*, 134 Ill. App. 3d 843, 480 N.E.2d 1304 (1st Dist. 1985). In *Batteast*, the court precluded the manufacturer of a drug that injured a child from recovering under comparative fault principles from the other defendants because the defendants had engaged in wilful and wanton misconduct. *Id.* at 853-54, 443 N.E.2d at 1311. The court relied on the general rule from *Farwell v. Becker*, 129 Ill. 261, 21 N.E. 792 (1889), that prohibits contribution among intentional tortfeasors.

An apparent conflict exists among the appellate courts on this issue. Compare *Dovin v. Winfield Township*, 164 Ill. App. 3d 326, 517 N.E.2d 1119 (2d Dist. 1987), and *Bresland v. Ideal Roller & Graphics Co.*, 150 Ill. App. 3d 445, 501 N.E.2d 830 (1st Dist. 1986) (court disallowed contribution for wilful and wanton misconduct) with *Pipes v. American Logging Tool Corp.*, 139 Ill. App. 3d 269, 487 N.E.2d 424 (5th Dist. 1985) (contribution was allowed even though the conduct was wilful and wanton).

Also, although the Illinois Contribution Act is patterned after the 1955 Uniform Act, the section of the Uniform Act that explicitly excludes intentional torts was omitted from the Illinois version.

35. *Hall*, 122 Ill. 2d at 459, 524 N.E.2d at 591 (quoting *Houser v. Witt* 111 Ill. App. 3d 123, 127, 443 N.E.2d 725, 727 (4th Dist. 1982)). In *Houser*, the settlement agreement for the personal injury claims of two individuals did not allocate the proceeds between the two. *Houser*, 111 Ill. App. 3d at 124-25, 443 N.E.2d at 726. The *Hall* court distinguished *Houser* in that the settlement in *Hall* involved a single injury "notwithstanding the plaintiff's assertion of two distinct theories of recovery." *Hall*, 122 Ill. 2d at 459, 524 N.E.2d at 591.

36. *Hall*, 122 Ill. 2d at 459, 524 N.E.2d at 592.

settlement did not distinguish between punitive and compensatory damages, the court stated that both the owner and the plaintiff would benefit for tax purposes if the entire settlement were labelled as compensatory damages.<sup>37</sup> Additionally, the record indicated that the amount of the settlement was at least equal to the amount of the plaintiff's claim for compensatory damages.<sup>38</sup> Thus, the court is more likely to scrutinize a settlement in which the parties make their own allocation between certain damage elements, as in *Page*, than a settlement in which the parties make no allocation whatsoever, as in *Hall*.

### III. CONTRIBUTION AND INDEMNITY

#### A. *Liability under the Dram Shop Act*

In *Jodelis v. Harris*,<sup>39</sup> the Illinois Supreme Court reaffirmed its position that the statutory nature of Dram Shop Act liability precludes a party from receiving contribution.<sup>40</sup> In that case, an intoxicated patron suffered injuries when he left a tavern and was struck by a car.<sup>41</sup> After the patron sued the driver for negligence, the driver sought contribution from the tavern owner pursuant to the Dram Shop Act<sup>42</sup> and the Contribution Act.<sup>43</sup> The trial court dismissed the driver's third-party complaint against the tavern and the appellate court affirmed.<sup>44</sup>

On appeal, the Illinois Supreme Court found that the tavern

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37. *Id.* at 459-60, 524 N.E.2d at 592. Punitive damages are subject to federal income taxation; compensatory damages are not. See *Klawonn v. Mitchell*, 105 Ill. 2d 450, 453, 475 N.E.2d 857, 858 (1985); 34 AM. JUR. 2D *Federal Taxation* § 5334 (1987).

38. *Hall*, 122 Ill. 2d at 460, 524 N.E.2d at 592.

39. 118 Ill. 2d 482, 517 N.E.2d 1055 (1987).

40. *Id.* at 488, 517 N.E.2d at 1058. In *Hopkins v. Powers*, 113 Ill. 2d 206, 497 N.E.2d 757 (1986), the court determined that the Dram Shop Act created purely statutory liability. *Id.* at 212, 497 N.E.2d at 759-60. It rejected the contribution claims of intoxicated persons against a dramshop owner for injuries caused to third parties. *Id.* A driver who was found liable for damages that he caused while intoxicated was denied contribution from the dramshop that had served him. *Id.*

41. *Jodelis*, 118 Ill. 2d at 483-84, 517 N.E.2d at 1056.

42. ILL. REV. STAT. ch. 43, para. 135 (1987). Section 6-21 of the Dram Shop Act provides in part: "Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person . . . who, by selling or giving alcoholic liquor . . . causes the intoxication of such person." *Id.*

43. ILL. REV. STAT. ch. 70, para. 302(a) (1987). Paragraph 302(a) provides in pertinent part: "[W]here 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, these persons have a right of contribution among them, even though judgment has not been entered against any or all of them." *Id.*

44. *Jodelis*, 118 Ill. 2d at 484, 517 N.E.2d at 1056.

owner was not liable either to the injured plaintiff or to the driver of the automobile.<sup>45</sup> The court explained that the Dram Shop Act created liability only for dramshops that contribute to the intoxication of a person who injures a third party; dramshops are not liable for patrons who were injured because of their own intoxication.<sup>46</sup> Thus, the driver was not entitled to seek contribution from the tavern<sup>47</sup> because the Contribution Act provides a restricted right to contribution from only those subject to liability in tort.<sup>48</sup>

The Illinois Supreme Court's analysis of the Contribution Act's effect on the Dram Shop Act is sound if one accepts the premise that "tort liability" is that which was recognized at common law.<sup>49</sup> Moreover, the court correctly refused to distinguish between the driver's "injury" for which he sought contribution and the injury incurred by the intoxicated person.<sup>50</sup> The question remains whether *Jodelis* represents a limited dramshop exception to the Contribution Act or whether contribution will be denied when liability is sought under other statutory schemes.<sup>51</sup>

### B. Indemnity

In two companion cases decided during the *Survey* year, the Illi-

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45. *Id.* at 487-88, 517 N.E.2d at 1058.

46. *Id.* The court explained that a dramshop's liability stems exclusively from the Dram Shop Act when a third party suffers injury due to the sale or gift of intoxicating liquors. *Id.* See *Demchuk v. Duplancich*, 92 Ill. 2d 1, 440 N.E.2d 112 (1982) (widow and child of motorist injured by intoxicated motorist were not allowed to recover under common law negligence because they alleged a violation of the Dram Shop Act).

47. *Jodelis*, 118 Ill. 2d at 485, 517 N.E.2d at 1057.

48. *Id.* In *Doyle v. Rhodes*, 101 Ill. 2d 1, 461 N.E.2d 382 (1984), the court previously held that an employer who was liable under the Workers' Compensation Act also could be liable for contribution. *Id.* at 19, 461 N.E.2d at 391. The *Jodelis* court distinguished the *Doyle* decision because the Dram Shop Act created purely statutory liability for dramshops. *Jodelis*, 118 Ill. 2d at 486-87, 517 N.E.2d at 1057-58. The Worker's Compensation Act, on the other hand, merely operates to immunize an employer from a tort action after the employer already has become subject to liability in tort. *Id.*

49. *But see Hopkins v. Powers*, 113 Ill. 2d 206, 215-16, 497 N.E.2d 757, 761 (1986) (Simon, J., dissenting).

50. The Contribution Act imposes liability "where two or more persons are subject to liability in tort arising out of the same injury to person." ILL. REV. STAT. ch. 70, para. 302(a) (1987). To distinguish between the tortfeasors' "injury" in being subjected to tort liability and the plaintiff's personal injury would prove too much. The Contribution Act would not be applicable.

51. Some possible exceptions might be the Safety Appliances Act, 45 U.S.C. §§ 1-16 (1982), and the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1982), both of which have been used to impose "absolute liability" upon railroad carriers, but which, at least, impose a species of strict liability previously unknown at common law. See generally *McCoid, The Federal Railroad Safety Acts and the F.E.L.A.: A Comparison*, 17 OHIO ST. L.J. 494, 498-514 (1956).



nois Supreme Court held that a culpable tortfeasor was precluded from seeking indemnity from other tortfeasors. Although the court declined to hold that the enactment of the Contribution Act abolished entirely the doctrine of implied indemnity, the doctrine has a limited scope.

In *Frazer v. Munsterman, Inc.*,<sup>52</sup> the plaintiff sought damages for personal injuries she received when a trailer that was attached to a pickup truck in front of her disengaged and struck her automobile.<sup>53</sup> The plaintiff brought a product liability action against the manufacturers, sellers, and owner and operator of the trailer.<sup>54</sup> The manufacturers and sellers settled with the plaintiff, while the owner was found liable based on theories of strict liability and negligence.<sup>55</sup> The owner sought contribution and indemnity from the manufacturers and sellers of the trailer.<sup>56</sup> Pursuant to section 2(c) of the Contribution Act,<sup>57</sup> the trial court reduced the plaintiff's award by the amount of the prior settlement and dismissed the owner's claim for indemnity.<sup>58</sup> The appellate court affirmed.<sup>59</sup>

The Illinois Supreme Court held that the owner was not entitled to contribution or indemnity and affirmed the dismissal of the third-party complaint.<sup>60</sup> The court recognized that section 2(d) of the Contribution Act<sup>61</sup> discharges a tortfeasor who has settled in "good faith" with the plaintiff from all liability for contribution to other tortfeasors. Thus, the manufacturers were not subject to the owner's contribution claim because the manufacturers and sellers settled with the plaintiff.<sup>62</sup> In dismissing the indemnity claim, the

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52. 123 Ill. 2d 245, 527 N.E.2d 1248 (1988).

53. *Id.* at 249-50, 527 N.E.2d at 1249.

54. *Id.*

55. *Id.* at 252, 527 N.E.2d at 1250.

56. *Id.*

57. ILL. REV. STAT. ch. 70, para. 302(c) (1987). Section 2(c) provides:

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.

*Id.*

58. *Frazer*, 123 Ill. 2d at 254, 527 N.E.2d at 1251.

59. *Id.*

60. *Id.* at 270, 527 N.E.2d at 1259.

61. ILL. REV. STAT. ch. 70, para. 302(d) (1987). Section 2(d) provides: "The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to any other tortfeasor." *Id.*

62. *Frazer*, 123 Ill. 2d at 253, 527 N.E.2d at 1250.

court rejected the appellate court's broad reasoning that the Contribution Act eliminated implied indemnity.<sup>63</sup>

The supreme court stated that implied indemnity is available only to defendants who are not at fault, but who are subject to liability because of a legal relationship with the plaintiff or a non-delegable legal duty.<sup>64</sup> In the instant case, the owner was negligent because he knew or should have known of the dangerous defect in the trailer. Therefore, the owner was not able to claim contribution for the entire loss from the other defendants.<sup>65</sup>

In *Thatcher v. Commonwealth Edison Co.*,<sup>66</sup> the supreme court relied on the *Frazer* decision to preclude a negligent defendant from seeking indemnity from other tortfeasors.<sup>67</sup> The plaintiff was injured at a Commonwealth Edison plant while using a defective water hose manufactured by Dow Chemical Company ("Dow").<sup>68</sup> After the plaintiff filed suit against Commonwealth Edison and Dow, Commonwealth Edison filed a third-party product liability

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63. *Id.* at 254, 527 N.E.2d at 1251.

64. *Id.* at 255, 527 N.E.2d at 1252. See *Heinrich v. Peabody Int'l Corp.*, 99 Ill. 2d 344, 459 N.E.2d 935 (1984) (maintenance company, denying charges of negligence, was allowed to seek indemnity from plaintiff's employer after plaintiff sued for injuries caused by his own activation of a trash compactor); *Gulf, Mobile & Ohio R.R. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (1st Dist. 1951) (railroad allowed to seek indemnity where its liability under the Federal Employer's Liability Act was caused by a trucking contractor). See also Appel & Michael, *Contribution Among Joint Tortfeasors in Illinois: An Opportunity for Legislative and Judicial Cooperation*, 10 LOY. U. CHI. L.J. 169, 171 (1979) (a promise to indemnify also can be implied from the relationship among the tortfeasors).

65. *Frazer*, 123 Ill. 2d at 262, 527 N.E.2d at 1255. Nonetheless, the owner argued that the doctrine of active/passive negligence allowed him to sue for indemnity as a passively negligent tortfeasor. Under that doctrine, a passively negligent defendant who merely failed to discover and correct a dangerous condition was allowed to sue for implied indemnity. *Id.* at 259, 527 N.E.2d at 1253. In *Allison v. Shell Oil Co.*, 113 Ill. 2d 26, 495 N.E.2d 496 (1986), the Illinois Supreme Court explained that indemnity implied by an active-passive distinction was inequitable. The court stated:

In *Alvis v. Ribar* (1981), 85 Ill. 2d 1, 27, 52 Ill. Dec. 23, 421 N.E.2d 886, [establishing comparative negligence,] the court determined that total justice can only be attained where the law 'apportions damages according to the relative fault of the parties.' . . . Having adopted comparative negligence and the principles of apportioning rather than affixing liability, not only in *Alvis*, but also in *Skinner* and by the Contribution Act, the need for implied indemnity based upon an active-passive distinction has . . . evaporated.

*Id.* at 31, 495 N.E.2d at 500-01.

66. 123 Ill. 2d 275, 527 N.E.2d 1261 (1988).

67. *Id.* at 278-79, 527 N.E.2d at 1263. The court stated: "[G]overning principle[s] in this jurisdiction [dictate] that the costs of accidental injury are to be apportioned in accordance with the relative fault of all concerned in the action." *Id.* (quoting *Allison*, 113 Ill. 2d at 31, 495 N.E.2d at 499).

68. *Id.* at 277, 527 N.E.2d at 1262.

claim against Dow seeking contribution and indemnity.<sup>69</sup> Commonwealth Edison then entered into a settlement with the plaintiff.<sup>70</sup> The trial court dismissed the third-party action and the appellate court affirmed.<sup>71</sup>

The Illinois Supreme Court held that Commonwealth Edison was neither entitled to contribution from Dow, pursuant to section 2(e) of the Contribution Act,<sup>72</sup> nor was it entitled to indemnity because Commonwealth Edison was a tortfeasor subject to the principle of comparative fault.<sup>73</sup> Again, the court declined to abolish entirely the common law doctrine of implied indemnity.<sup>74</sup>

Implied indemnity, however, has little scope after these two decisions. When the court previously had eliminated the "active/passive" form of indemnity, it reserved the question of whether a "downstream" seller could be indemnified by an "upstream" product manufacturer.<sup>75</sup> Notwithstanding the *Frazer* majority's attempt to distinguish this situation, there is merit to Justice Ryan's position in his dissent that the case was "a products liability case, whether it is based on the concept of negligence or strict liability."<sup>76</sup> Moreover, the duty imposed on the negligent tortfeasor to discover a product defect is greater than that imposed under comparative fault principles.<sup>77</sup>

Nevertheless, the *Frazer* and *Thatcher* holdings may be justified under the view that the Contribution Act provides a workable framework for dealing with settling tortfeasors. Any potential inequity to the non-settling defendant in *Frazer* is ameliorated by the requirement that the settlement be in good faith;<sup>78</sup> the settling tortfeasor in *Thatcher* could have maintained a contribution action and recovered most, if not all, of the monies it paid by the simple expedient of settling the entire case and obtaining a release of the

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69. *Id.* at 277-78, 527 N.E.2d at 1262.

70. *Id.*

71. *Id.*

72. ILL. REV. STAT. ch. 70, para. 302(e)(1987). Section 2(e) provides: "A tortfeasor who settles with a claimant pursuant to paragraph (c) is not entitled to recover contribution from another tortfeasor whose liability is not extinguished by the settlement." *Id.*

73. *Thatcher*, 123 Ill. 2d at 279, 527 N.E.2d at 1263.

74. Although the lower courts held that implied indemnity abolished the Contribution Act, the Illinois Supreme Court considered these holdings to be too broad. *Id.* See *Frazer*, 123 Ill. 2d at 255, 527 N.E.2d at 1252; *supra* note 65 and accompanying text.

75. *Allison*, 113 Ill. 2d at 27, 495 N.E.2d at 497.

76. *Frazer*, 123 Ill. 2d at 274-75, 527 N.E.2d at 1261 (Ryan, J., dissenting).

77. See *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983) (plaintiff's negligence in failing to discover a defect in the product did not reduce his recovery).

78. The non-settling defendant in *Frazer* did not contest this issue. *Frazer*, 123 Ill. 2d at 253, 527 N.E.2d at 1250.

other tortfeasor.<sup>79</sup>

#### IV. DAMAGES CONCERNING THE PARENT-CHILD RELATIONSHIP

In the *Survey* year, the Illinois Supreme Court decided two cases that dealt with claims for damages in the context of a parent-child relationship. In determining whether to recognize the plaintiffs' causes of action in these cases, the court was compelled to consider delicate and profound issues, including whether an impaired human life has value, and the value of this life to its parents.

In *Siemieniec v. Lutheran General Hospital*,<sup>80</sup> a divided court found that the child did not have a legally cognizable claim for wrongful life.<sup>81</sup> The court, however, recognized the parents' claim for wrongful birth<sup>82</sup> and awarded damages for extraordinary medical expenses.<sup>83</sup> The court rejected the parents' claim for negligent infliction of emotional distress.<sup>84</sup> In *Dralle v. Ruder*,<sup>85</sup> the court denied the parents' claims for loss of companionship and society for a child who sustained non-fatal injuries.<sup>86</sup>

##### A. *Wrongful Birth and Wrongful Life*

In *Siemieniec*, two parents who had a family history of hemophilia conceived a child.<sup>87</sup> The parents sought genetic counseling and testing to determine the risk of the child being afflicted with the disorder. The physicians informed the parents that the risk of the mother carrying hemophilia was "very low," and the parents

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79. See ILL. REV. STAT. ch. 70, paras. 302(c), 302(d) (1987).

80. 117 Ill. 2d 230, 512 N.E.2d 691 (1987).

81. *Id.* at 236, 512 N.E.2d at 695. An action for wrongful life is brought by or on behalf of an infant who has a genetic or congenital disorder. *Id.* The child alleges that the health care provider was negligent by failing accurately to test or counsel the parents, or by failing to use surgical procedures to prevent the genetic or congenital defect. *Id.* The child does not claim that the negligence of the health care provider actually caused his affliction. Rather, the child asserts that, but for the negligence of the health care provider, his parents would have aborted him and he would not have been born to experience his impaired life. *Id.*

82. *Id.* at 235, 512 N.E.2d at 695. An action for wrongful birth is brought by parents who claim that they would have prevented or terminated a pregnancy if the health care provider had informed them that the child would be born with a genetic or congenital disorder. *Id.* The parents allege that the health care provider's negligent counseling deprived them of the opportunity to make an informed decision concerning the pregnancy. *Id.*

83. *Id.* at 260, 512 N.E.2d at 706-07.

84. *Id.* at 262-63, 512 N.E.2d at 707.

85. 124 Ill. 2d 61, 529 N.E.2d 209 (1988).

86. *Id.* at 72-74, 529 N.E.2d at 214-15.

87. *Siemieniec*, 117 Ill. 2d at 231, 512 N.E.2d at 693.

proceeded with the pregnancy.<sup>88</sup> Subsequently, the child was born with hemophilia.<sup>89</sup>

The parents then filed a complaint against the doctors and the hospital, alleging that a negligent diagnosis and a failure to advise them accurately of the risk of hemophilia prevented them from aborting the child.<sup>90</sup> The parents did not allege that the physicians caused the child's affliction; rather, they claimed that the physicians' negligence caused the impaired child to be born.<sup>91</sup> On behalf of the child, the parents brought a claim for wrongful life and sought damages for extraordinary expenses for the treatment and management of the child's hemophilic condition, which expenses the child would incur after reaching the age of majority.<sup>92</sup> On their own behalf, the parents brought a claim for wrongful birth and sought damages for the extraordinary expenses that they would incur during the child's minority.<sup>93</sup> The parents also sought damages for the emotional distress and mental anguish that they would experience in raising their impaired child.<sup>94</sup>

The trial court denied the defendants' motions to dismiss.<sup>95</sup> The appellate court recognized the parents' claim for wrongful birth<sup>96</sup> and the child's claim for wrongful life,<sup>97</sup> but denied the parents'

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88. *Id.* at 232-33, 512 N.E.2d at 693.

89. *Id.*

90. *Id.* at 233, 512 N.E.2d at 693-94.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 233, 512 N.E.2d at 694.

96. *Siemieniec v. Lutheran General Hosp.*, 134 Ill. App. 3d 823, 827, 480 N.E.2d 1227, 1230 (1st Dist. 1985). In recognizing the wrongful birth cause of action, the appellate court distinguished *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983) from *Siemieniec*. In *Cockrum*, the defendant-physician negligently performed a vasectomy, resulting in an unwanted pregnancy and birth. *Cockrum*, 95 Ill. 2d at 195, 447 N.E.2d at 386. The parents brought a claim for wrongful pregnancy, seeking damages for the pain of childbirth and the expenses of raising the normal, healthy child. *Id.* The court refused to recognize the parents' cause of action, declaring that the "benefit of life should not be outweighed by the expense of supporting it." *Id.* at 201, 447 N.E.2d at 389. In *Siemieniec*, on the other hand, the parents absorbed these expenses and sought damages only for the extraordinary expenses that they would experience due to the child's genetic defect. *Siemieniec*, 134 Ill. App. 3d at 827, 480 N.E.2d at 1230.

97. *Siemieniec*, 134 Ill. 2d at 833, 480 N.E.2d at 1233-34. In recognizing the child's claim for wrongful life, the appellate court relied on *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), which established an infant's right to be born whole. The court reasoned that the health care provider not only had a duty to properly counsel the parents regarding genetic testing, but also should have foreseen the probable damaging effects that negligent counseling would have on the child's right to be born whole. *Siemieniec*, 134 Ill. 2d at 833, 480 N.E.2d at 1233-34.

The appellate court did not engage in an ontological discussion over the recognition of

claim for negligent infliction of emotional distress.<sup>98</sup>

The Illinois Supreme Court upheld the appellate court's recognition of the parents' wrongful birth cause of action.<sup>99</sup> The court found the wrongful birth cause of action to be a logical extension of tort principles.<sup>100</sup> The court noted that expanding technological abilities allow health care providers to detect abnormalities before birth or conception.<sup>101</sup> The social interest in preventing defects coincides with the fundamental tort policy to "compensate victims, deter negligence and encourage due care."<sup>102</sup> The court limited the parents' recovery, however, to the extraordinary expenses of treating and managing the disorder prior to the child's majority.<sup>103</sup>

Even though the Illinois Supreme Court recognized the wrongful birth cause of action, it refused to recognize the child's claim for wrongful life.<sup>104</sup> The court based this decision on public policy

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the wrongful life claim, nor did it evaluate an impaired life compared to nonexistence. Rather, the court merely allowed the child to recover special damages for the extra costs the child would incur during his adult life as a result of his condition. *Id.* at 835, 480 N.E.2d at 1235.

98. *Siemieniec*, 134 Ill. 2d at 831, 480 N.E.2d at 1232. The appellate court rejected the parents' claim for negligent infliction of emotional distress by holding that the parents were not within the "zone-of-danger," as required by the Illinois Supreme Court in *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 457 N.E.2d 1 (1983). *Siemieniec*, 134 Ill. App. 3d at 831, 480 N.E.2d at 1232.

99. *Siemieniec*, 117 Ill. 2d at 260, 512 N.E.2d at 706.

100. *Id.* at 257, 512 N.E.2d at 705. The court followed other jurisdictions in this ruling. *See, e.g., Eisbrenner v. Stanley*, 106 Mich. App. 351, 308 N.W.2d 209 (1981); *Schroeder v. Perkel*, 87 N.J. 53, 432 A.2d 834 (1981); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); *Naccash v. Burger*, 223 Va. 406, 290 S.E.2d 825 (1982); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983).

101. *Siemieniec*, 117 Ill. 2d at 257, 512 N.E.2d at 705.

102. *Id.* at 258, 512 N.E.2d at 705. *See, e.g., Robak v. United States*, 658 F.2d 471, 476 (7th Cir. 1981) (wrongful birth action allowed for child with rubella syndrome after failure to diagnose mother's rubella); *Phillips v. United States*, 508 F. Supp. 544, 550 (D.S.C. 1981) (wrongful birth action against doctor for failure to advise before birth of child having Down's Syndrome).

103. *Siemieniec*, 117 Ill. 2d at 259-60, 512 N.E.2d at 706. The defendants argued that no damages should be allowed for denying the opportunity to take an embryonic life because the asserted injury becomes life itself. *Id.* at 254, 512 N.E.2d at 703-04. The defendants relied on *Cockrum v. Baumgartner*, 95 Ill. 2d 193, 447 N.E.2d 385 (1983), which did not allow recovery for the costs of rearing a healthy child under a wrongful pregnancy cause of action. *See supra* note 96. As the defendants pointed out, section 1 of the Illinois Abortion Law of 1975 reflected the public policy favoring respect for life. ILL. REV. STAT. ch. 38, para. 81-21 (1979). *See infra* note 105.

104. *Siemieniec*, 117 Ill. 2d at 248, 512 N.E.2d at 701. The court extended its decision in *Goldberg v. Ruskin*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986), by refusing to award special damages. In *Goldberg*, the court refused to recognize a wrongful life action that the parents brought against the physicians for failure to advise the parents that the child would be born with Tay-Sachs disease. *Id.* at 491-92, 499 N.E.2d at 410. The plaintiffs sought to recover damages for pain and suffering and not for the extraordinary expenses resulting from the child's ailment. *Id.* at 483, 499 N.E.2d at 406. The court rejected the

and the Illinois Abortion Law,<sup>105</sup> which expresses an intention to "preserve the sanctity of human life."<sup>106</sup> In addressing the plaintiffs' argument that the child had a fundamental right not to be born when birth would lead to an impaired life of hardship, the court stated that the determination of damages was impossible.<sup>107</sup> The court emphasized the dilemma faced by the courts in assessing damages: "Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly left to the philosophers and the theologians . . . . [B]y what standard or by whom would perfection be defined?"<sup>108</sup> The court rejected the position that life itself could be an injury.<sup>109</sup> Public policy favors life and dictates that the child did not have a right not to be born.<sup>110</sup>

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child's claim for general damages, including pain and suffering, but left recovery of special damages at issue. *Id.* at 491, 499 N.E.2d at 410.

The *Siemieniec* court did not allow general damages and, additionally, refused the child's request for special damages for medical and other costs associated with the disease. *Siemieniec*, 117 Ill. 2d at 248, 512 N.E.2d at 701. In denying extraordinary medical expenses, the Illinois Supreme Court followed the vast majority of jurisdictions. Three jurisdictions, however, have allowed recovery of extraordinary medical expenses in wrongful life cases. *See 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). The court also affirmed the lower court's rejection of the parents' claim for negligent infliction of emotional distress. *Siemieniec*, 117 Ill. 2d at 262-63, 512 N.E.2d at 707.

105. ILL. REV. STAT. ch. 38, para. 81-21 (1979). The Abortion Law of 1975 provides in part:

Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under [the decisions of the United States Supreme Court], the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.

*Id.* The court found that the legislative policy underlying this statute favored birth over abortion and recognized that the unborn are human from conception. *Siemieniec*, 117 Ill. 2d at 249, 512 N.E.2d at 701. The court's reliance on the Illinois Abortion Law sparked a controversy among the justices. Justices Miller and Simon criticized the use of the statute, asserting that the court should not attribute a "pro-life" character to public policy or to the previous decisions of the court. *Id.* at 265-68, 512 N.E.2d at 709-10 (Miller and Simon, JJ., special opinions).

106. *Siemieniec*, 117 Ill. 2d at 240, 512 N.E.2d at 697.

107. *Id.* at 242, 512 N.E.2d at 698.

108. *Id.* at 243, 512 N.E.2d at 698 (quoting *Becker v. Schwartz*, 46 N.Y.2d 401, 411, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978)).

109. *Id.* at 246, 512 N.E.2d at 700.

110. *Id.*

### B. *Loss of Consortium and Society*

Although the court in *Siemieniec* allowed the parents to recover damages for the extraordinary expenses involved in raising their minor child, the court limited the parents' claims in *Dralle v. Ruder*.<sup>111</sup> The Illinois Supreme Court held that in a product liability action, the parents could not recover for the loss of filial society resulting from nonfatal injuries to their child.<sup>112</sup> The court again struggled with the problem of assessing damages.

In *Dralle*, a child was born with various birth defects allegedly caused by his mother's use of the drug Bendectin<sup>113</sup> during her pregnancy.<sup>114</sup> As a result, the parents filed suit for the child's injuries. In counts I and II of the complaint, the plaintiffs alleged negligence on the part of the physicians and hospitals during the child's delivery.<sup>115</sup> In count III, the parents brought a product liability claim on the child's behalf against the manufacturer of Bendectin.<sup>116</sup> In count IV, the parents sought damages for loss of consortium and society. The trial court dismissed count IV and the appellate court reversed.<sup>117</sup>

In considering count IV, the Illinois Supreme Court held that the parents were not entitled to loss of consortium damages for the nonfatal injuries to their child.<sup>118</sup> In reaching its decision, the

111. 124 Ill. 2d 61, 529 N.E.2d 209 (1988).

112. *Id.* at 73, 529 N.E.2d at 214.

113. Current Bendectin litigation has been resolved largely in favor of the manufacturer:

Approximately 1,650 personal injury cases have been filed against Merrell Dow Pharmaceuticals Inc. for alleged birth defects and other health-related injuries as a result of the morning sickness drug Bendectin. So far, defendants have the upper hand in a significant legal battle over the issue of causation, winning 15 out of 19 cases that have been tried to verdict.

About 1,150 of those cases were decided in the company's favor in March 1985 (In re Merrell Dow Pharmaceuticals "Bendectin" Litigation, MDL No. 486, S.D. Ohio, Judge Carl Rubin).

*Inside Litigation*, vol. 2, no. 11, at 39-40 (1988).

114. *Dralle*, 124 Ill. 2d at 64, 529 N.E.2d at 210.

115. *Id.* at 63, 529 N.E.2d at 210.

116. *Id.* at 63-64, 529 N.E.2d at 210.

117. *Id.* The plaintiffs pointed to a number of jurisdictions that have allowed recovery of these damages under similar circumstances. *See, e.g.*, Howard Frank M.D., P.C. v. Superior Ct., 150 Ariz. 228, 722 P.2d 955 (1986) (parents recovered loss of consortium damages for brain-damage caused to their adult child by negligent physician); Reben v. Ely, 146 Ariz. 309, 705 P.2d 1360 (Ariz. Ct. App. 1985) (parents recovered loss-of-filial-consortium damages for brain damage to child caused by negligently administered drug); Shockley v. Prier, 66 Wis. 2d 394, 225 N.W.2d 495 (1975) (parents allowed to maintain derivative action for loss of consortium for blindness and disfigurement suffered by child due to doctors' negligence).

118. *Dralle*, 124 Ill. 2d at 68-69, 529 N.E.2d at 212. In *Bullard v. Barnes*, 102 Ill. 2d



court looked to public policy and declined to expand the scope of tort liability.<sup>119</sup> Without limitations placed upon emotional distress claims, parties such as grandparents, siblings, or friends would bring claims for loss of consortium and society.<sup>120</sup> Additionally, the court reasoned, the trier of fact would face the impossible task of assessing a monetary amount for the reduced value of the parent-child relationship due to the child's condition.<sup>121</sup> The court concluded that public policy militated against allowing parents to demonstrate that their child amounted to an unwanted burden.<sup>122</sup>

## V. DEFINING DUTY

### A. *Duty to Third Parties*

In two cases decided during the *Survey* year, the Illinois Supreme Court considered the duty of doctors, hospitals, and drug manufacturers to third parties. In both cases, the court refused to

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505, 514, 468 N.E.2d 1228, 1232 (1984), the court previously established that a parent could recover damages for loss of a child's society in a wrongful death action. In *Bullard*, the parents of a minor child, who was fatally injured in an automobile accident, brought a claim for wrongful death against the defendant driver. *Id.* at 508-09, 468 N.E.2d at 1230. The court followed the trend in Illinois and other states by expanding the scope of pecuniary damages under the Wrongful Death Act to include non-monetary losses and by allowing the parents to recover for loss of their child's society. *Id.* at 514, 468 N.E.2d at 1232.

Although the plaintiffs argued that the logical extension of *Bullard* was to allow loss of consortium and society to parents of a child who sustained non-fatal injuries, the court distinguished the *Bullard* decision from *Dralle*. Although the victim in *Dralle* retained his own cause of action against the tortfeasor, the surviving family's only remedy in *Bullard* was under the Wrongful Death Act. *Dralle*, 124 Ill. 2d at 68-69, 529 N.E.2d at 212.

119. The court stated that "[t]o recognize claims for loss of society resulting from nonfatal injuries to a child would threaten a considerable enlargement of liability." *Dralle*, 124 Ill. 2d at 70, 529 N.E.2d at 213. See also *Baxter v. Superior Ct.*, 19 Cal. 3d 461, 464-65, 563 P.2d 871, 873, 138 Cal. Rptr. 315, 316-17 (1977) (parents of brain-damaged child denied loss of filial consortium damages).

The plaintiffs argued that *Dymek v. Nyquist*, 128 Ill. App. 3d 859, 469 N.E.2d 659 (1st Dist. 1984) supported their position. In *Dymek*, a parent recovered for the loss of society of a "brainwashed" child. *Id.* at 868, 469 N.E.2d at 666. The court distinguished *Dymek*, which involved an intentional and direct interference with the parent-child relationship, from *Dralle*, in which the claim derived from an injury to the child. *Dralle*, 124 Ill. 2d at 73, 529 N.E.2d at 214. Further, the trier of fact in *Dralle* would have difficulty distinguishing the child's claim from the parent's claim. *Id.*

120. *Dralle*, 124 Ill. 2d at 70, 529 N.E.2d at 213.

121. *Id.*

122. *Id.* at 70-71, 529 N.E.2d at 213. Justice Clark specially concurred with the decision. In his opinion, the court should have based its decision on *Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 38, 402 N.E.2d 194, 200 (1980), wherein the court held that a plaintiff in a strict product liability action may not recover damages for emotional distress. *Dralle*, 124 Ill. 2d at 74-75, 529 N.E.2d at 215 (Clark, J., specially concurring).

expand the liability of doctors and hospitals beyond the duty owed to those who are in a special relationship with them.

In *Kirk v. Michael Reese Hospital & Medical Center*,<sup>123</sup> the plaintiff was injured while riding as a passenger in an automobile. The automobile was driven by a psychiatric patient who, earlier that day, had been discharged from the defendant-hospital.<sup>124</sup> While he was a patient, the driver was given the drugs Thorazine and Prolixin Decanoate, and, after being discharged, he consumed an alcoholic beverage.<sup>125</sup> The plaintiff sued the hospital and the driver's treating doctors for negligence and the drug manufacturers for strict products liability.<sup>126</sup> The trial court dismissed the plaintiff's complaint for failure to state a cause of action, but the appellate court reversed.<sup>127</sup>

The Illinois Supreme Court held that neither the drug manufacturers, nor the hospital, nor the doctors owed a duty to the plaintiff.<sup>128</sup> The drug manufacturers did not have a duty to warn the patient and, therefore, the drug manufacturers owed no duty to the plaintiff, a nonuser of the drugs.<sup>129</sup> The court followed the "learned intermediary" doctrine, which provides that prescription drug manufacturers have a limited duty to warn prescribing physicians of a drug's known dangers.<sup>130</sup> In turn, physicians have a duty to warn their patients, based on their medical judgment.<sup>131</sup> The court noted that the drug manufacturers could not have foreseen that the physicians would dispense the drugs without the warnings.<sup>132</sup>

Furthermore, the hospital did not have a duty to the patient under either strict product liability or negligence.<sup>133</sup> The court also

123. 117 Ill. 2d 507, 513 N.E.2d 387 (1987), *cert. denied*, 108 S. Ct. 1077 (1988).

124. *Id.* at 514, 513 N.E.2d at 390.

125. *Id.*

126. *Id.* at 514-15, 513 N.E.2d at 391.

127. *Id.* at 515, 513 N.E.2d at 391.

128. *Id.* at 533, 513 N.E.2d at 399.

129. *Id.* at 519, 513 N.E.2d at 393. The general rule of product liability law is that manufacturers are required to warn only foreseeable ultimate users of the dangers posed by the product. *Id.* at 517, 513 N.E.2d at 392; *Hammond v. North Am. Asbestos Corp.*, 97 Ill. 2d 195, 206, 454 N.E.2d 210, 216 (1983); *Woodill v. Parke-Davis & Co.*, 79 Ill. 2d 26, 29, 402 N.E.2d 194, 197 (1980); RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

130. *Kirk*, 117 Ill. 2d at 517, 513 N.E.2d at 392. The Illinois appellate courts previously adopted and applied the "learned intermediary" doctrine. *See, e.g.*, *Eldridge v. Eli Lilly & Co.*, 138 Ill. App. 3d 124, 485 N.E.2d 551 (4th Dist. 1985).

131. *Kirk*, 117 Ill. 2d at 517, 513 N.E.2d at 392.

132. *Id.* at 521, 513 N.E.2d at 394.

133. *Id.* at 524, 513 N.E.2d at 395.

indicated that the hospital was not liable under the doctrine of respondeat superior for the physician's failure to warn.<sup>134</sup> Relying on the "learned intermediary" doctrine,<sup>135</sup> the court concluded that the hospital, as a part of the chain of distribution, did not have a duty to warn the patient-user of the drugs.<sup>136</sup> The court found that the plaintiff's injuries were not reasonably foreseeable to the hospital.<sup>137</sup> In addition, public policy disfavors holding hospitals liable to members of the public at large, who lack a special relationship to the hospital or the patient.<sup>138</sup>

Finally, the court concluded that the physicians did not owe a duty to the plaintiff.<sup>139</sup> Public policy dictates against holding physicians liable to the public for the conduct of a third party.<sup>140</sup> Thus, the court again followed the general rule that a party does not have a duty to control the conduct of third persons absent a special relationship.<sup>141</sup>

The Illinois Supreme Court's application, for the first time, of the "learned intermediary" doctrine in prescription drug cases is justifiable given the context in which the drugs are distributed and their associated warnings are given. The physician ultimately must make a medical judgment, based upon the drug's propensities and his patient's susceptibilities, as to whether the benefits of the medication outweigh its potential dangers.<sup>142</sup> It is less clear, however, whether the doctrine applies when the drug manufacturer provides inadequate warnings. Justice Simon, in his dissent, criticized the majority for assuming that the warnings were adequate because, Simon argued, this matter came up for decision upon a motion to dismiss and the adequacy of the warnings had not been established.<sup>143</sup> The majority, however, thought that the contention that

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134. *Id.*

135. *See supra* note 130 and accompanying text.

136. *Kirk*, 117 Ill. 2d at 522-23, 513 N.E.2d at 394.

137. *Id.* at 526, 513 N.E.2d at 396.

138. *Id.* at 527, 513 N.E.2d at 397. The public policy concerning medical malpractice and health care providers was discussed by the court in *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

139. *Kirk*, 117 Ill. 2d at 529-30, 513 N.E.2d at 397-98.

140. *Id.* at 529, 513 N.E.2d at 397.

141. *Id.* at 530, 513 N.E.2d at 398. *See Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (child not conceived at the time that the negligent acts were committed against its mother by a doctor and hospital employees permitted to sue for the negligence directed against its mother). Apparently, the relationship between the driver-patient and the passenger-plaintiff is not a special one.

142. *Kirk*, 117 Ill. 2d at 518-19, 513 N.E.2d at 392 (quoting *Stone v. Smith, Kline & French Laboratories*, 731 F.2d 1575, 1579 (11th Cir. 1984)).

143. *Id.* at 538, 513 N.E.2d at 402 (Simon, J., dissenting in part).

the warnings were inadequate was subordinate to the question of whether the plaintiff was owed a legal duty. In addressing the latter question and the claims against the doctors, the court relied upon a less overt policy consideration: the plaintiff's injuries under the facts of this case were not reasonably foreseeable.<sup>144</sup> Here again, Justice Simon diverged from the majority, even though both concluded that the famous case of *Palsgraf v. Long Island Railroad Co.*<sup>145</sup> supported their respective positions concerning the existence of a duty and of reasonable foreseeability. It may be pertinent to recall Justice Andrews' observation in his dissent to *Palsgraf* that "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."<sup>146</sup> The *Kirk* majority made the political decision that the defendants' duty did not extend to third parties injured by hospital patients.

A similar result was reached with less controversy and based upon similar, though perhaps more attenuated facts, in *Estate of Johnson v. Condell Memorial Hospital*.<sup>147</sup> In that case, the plaintiff's decedent was killed when struck by a police car that was pursuing a hospital patient. The police were pursuing a patient who left the hospital after threatening the hospital's employees with a knife.<sup>148</sup> The plaintiff sought damages from the hospital under the Survival Act and the Wrongful Death Act. The trial court dismissed the counts against the hospital, and the appellate court reversed.<sup>149</sup>

The Illinois Supreme Court held that the hospital did not have a duty to control the patient who was admitted upon her own request.<sup>150</sup> The court followed the general rule that one does not have a duty to control another for the prevention of harm to a third party absent a special relationship that creates such a duty.<sup>151</sup>

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144. *Id.* at 526, 513 N.E.2d at 396.

145. 248 N.Y. 339, 162 N.E. 99 (1928).

146. *Id.* at 352, 162 N.E. at 103 (Andrews, J., dissenting).

147. 119 Ill. 2d 496, 520 N.E.2d 37 (1988).

148. *Id.* at 499, 520 N.E.2d at 38.

149. *Id.*

150. *Id.* at 506, 520 N.E.2d at 41.

151. *Id.* at 503, 520 N.E.2d at 40. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). The plaintiff argued that a special relationship existed because the hospital took charge of the patient whom it knew could harm others if he was not controlled. *Johnson*, 119 Ill. 2d at 504, 520 N.E.2d at 40. The plaintiff relied on section 319 of the RESTATEMENT (SECOND) OF TORTS, which provides as follows: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not

The court did not find such a special relationship. According to the court, because the patient was admitted under an informal admission procedure, she was entitled, by statute and by the Constitution, to be released during the facility's normal day-shift hours.<sup>152</sup>

The court also rejected the plaintiff's alternative argument that the hospital voluntarily assumed the duty to control the patient and, therefore, was obligated to discharge that duty with due care.<sup>153</sup> The court reasoned that even if the hospital had assumed the duty, the hospital reasonably exercised the requisite due care by calling the police to pursue the patient.<sup>154</sup> This action was sufficient to fulfill any duty assumed by the hospital because the patient was informally admitted to the hospital.<sup>155</sup>

### B. Exculpatory Clause

In *Harris v. Walker*,<sup>156</sup> the court considered the element of contractual freedom as a limit on liability. The plaintiff was injured when he fell from a horse that he rented from the defendant's riding stables.<sup>157</sup> The plaintiff filed an action against the stable owner, alleging common law negligence and statutory liability under the Animal Control Act.<sup>158</sup> Before renting the horse, the plaintiff, who

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controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (1965).

152. *Johnson*, 119 Ill. 2d at 507, 520 N.E.2d at 41. ILL. REV. STAT. ch. 91 1/2, para. 3-300 (1987). See *In re Smith*, 145 Ill. App. 3d 1002, 1005, 496 N.E.2d 497, 499 (4th Dist. 1986) (voluntarily admitted patient entitled to discharge until hearing that changed the patient's status to that of an involuntarily admitted patient). In previous cases that held that medical or penal institutions had a duty to prevent patients from harming third parties, the institutions had actual custody of dangerous patients through judicial action. *Johnson*, 119 Ill. 2d at 508, 520 N.E.2d at 42. See, e.g., *White v. United States*, 780 F.2d 97 (D.C. Cir. 1986); *Abernathy v. United States*, 773 F.2d 184 (8th Cir. 1985); *Semler v. Psychiatric Inst. of Wash., D.C.*, 538 F.2d 121 (4th Cir.), cert. denied, 429 U.S. 827 (1976).

153. *Johnson*, 119 Ill. 2d at 510, 520 N.E.2d at 43. The plaintiff relied on *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964), wherein the court held that the defendant who gratuitously undertook to make safety inspections had a duty to execute inspections with due care. *Id.* at 83, 199 N.E.2d at 778.

154. *Johnson*, 119 Ill. 2d at 510, 520 N.E.2d at 43.

155. *Id.*

156. 119 Ill. 2d 542, 519 N.E.2d 917 (1988).

157. *Id.* at 545, 519 N.E.2d at 918.

158. *Id.* Section 16 of the Animal Control Act provides:

If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

ILL. REV. STAT. ch. 8, para. 366 (1987).

was an experienced rider, read and signed a release.<sup>159</sup> Based on evidence of the release, the trial court granted the defendant's motion for summary judgment, and the appellate court reversed and remanded the case.<sup>160</sup>

On appeal, the Illinois Supreme Court first determined that the plaintiff did not have a cause of action pursuant to the Animal Control Act.<sup>161</sup> The court found that the legislative purpose of the Act was to eliminate the "one-bite rule," thereby lightening the burden on dog-bite plaintiffs.<sup>162</sup> Moreover, the court concluded that the plaintiff was not within the class of persons subject to the Animal Control Act.<sup>163</sup> Unlike the plaintiff in *Harris*, the class of potential plaintiffs covered by the Animal Control Act does not have a relationship with the owner of the animal and is without knowledge of the risks.<sup>164</sup> The plaintiff in *Harris* knowingly accepted the risks of horseback riding by signing the release agreement.<sup>165</sup>

The court also dismissed the negligence count against the owner of the stable because the plaintiff signed a valid release.<sup>166</sup> Even though the court strictly construed the exculpatory clause against the drafter and the riding stables, the court determined that the plaintiff had equal bargaining power and voluntarily accepted the risks.<sup>167</sup> In addition, the court acknowledged the public policy favoring freedom of contract.<sup>168</sup>

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159. *Harris*, 119 Ill. 2d at 548-49, 519 N.E.2d at 919-20. The exculpatory agreement provided:

Your signature below indicates that you have read the posted rules and will abide by them. Also, your signature shall release Ky-Wa Acres and employees of any liabilities you may incur while on the premises or for any injury which may result from horseback riding. If your signature is not reliable please do not sign or ride.

*Id.* at 548-49, 519 N.E.2d at 919. The defendant also displayed the rules at the stable, including that "riders rode at their own risk." *Id.* at 549, 519 N.E.2d at 919.

160. *Id.* at 545, 519 N.E.2d at 918.

161. *Id.* at 546, 519 N.E.2d at 918.

162. *Id.* at 547, 519 N.E.2d at 918. The court, in *Beckert v. Risberg*, 33 Ill. 2d 44, 46, 210 N.E.2d 207, 208 (1965), established the "one-bite rule," which required a plaintiff to prove that a dog owner knew or should have known that the dog had the propensity to injure people.

163. *Harris*, 119 Ill. 2d at 547, 519 N.E.2d at 919.

164. *Id.*

165. *Id.*

166. *Id.* at 550, 519 N.E.2d at 919-20.

167. *Id.*

168. *Id.* at 548, 519 N.E.2d at 919. See *McClure Eng'g Assocs. v. Reuben H. Donnelly Corp.*, 95 Ill. 2d 68, 72, 447 N.E.2d 400, 402 (1983) (exculpatory clause in contract

## VI. THE IMPACT OF LEGISLATION ON TORT LAW

During the *Survey* year, the Illinois Supreme Court interpreted relatively recent legislation concerning the procedural aspects of medical malpractice and product liability.<sup>169</sup> The legislature also repealed the longstanding interspousal tort immunity in Illinois.

### A. Medical Malpractice

Section 2-622 of the Illinois Code of Civil Procedure, effective August 1985, requires a plaintiff to file attorneys' affidavits and experts' certificates of merit when initiating medical malpractice actions.<sup>170</sup> In *McCastle v. Sheinkop*,<sup>171</sup> the Illinois Supreme Court

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for Yellow Pages advertisement limiting damages to amount paid for services was upheld in light of public policy favoring freedom of contract).

The general rule regarding the legality of exculpatory clauses is to enforce the clause unless public policy or the relationship between the parties mandates against upholding the agreement. *Harris*, 119 Ill. 2d at 548, 519 N.E.2d at 919. See *Schlessman v. Henson*, 83 Ill. 2d 82, 87, 413 N.E.2d 1252, 1254 (1980) (an exculpatory agreement signed by an experienced race-car driver who voluntarily assumed the obvious risks of using the defendant's racetrack was valid); *O'Callaghan v. Waller & Beckwith Realty Co.*, 15 Ill. 2d 436, 437, 155 N.E.2d 545, 546 (1958) (court deferred to legislature to determine whether exculpatory clause in residential lease was against public policy).

169. In addition, the court further defined the scope of the Structural Work Act. In *Puttman v. May Excavating Co.*, 118 Ill. 2d 107, 514 N.E.2d 188 (1987), the plaintiff was injured while working in a ditch that collapsed due to improper shoring. The plaintiff sued May Excavating Company ("May") for a violation of the Structural Work Act and negligence. *Id.* at 109, 514 N.E.2d at 189. May had completed work on the construction site and its only connection with the site at the time of the plaintiff's accident was that May leased equipment and operators to the general contractor. *Id.* at 110, 514 N.E.2d at 189. Thus, the trial court granted the defendant's motion for summary judgment and the appellate court reversed. *Id.* at 109, 514 N.E.2d at 189.

On appeal, the Illinois Supreme Court held that summary judgment was proper. *Id.* at 116, 514 N.E.2d at 192. The Structural Work Act, ILL. REV. STAT. ch. 48, para. 60 (1987), places liability on the person or entity "having charge of" the work. Even though a comprehensive definition of the phrase "having charge of" did not exist, the court determined that the evidence was insufficient to raise a jury question as to whether May was in charge of the work. *Puttman*, 118 Ill. 2d at 112-13, 514 N.E.2d at 190-91. The fact that May and its operators did not have any independent authority to direct the work was critical to this determination. The mere leasing of equipment and operators to the contractor at the site was not enough to bring May within the operation of the Structural Work Act. *Id.* at 112, 514 N.E.2d at 190.

170. ILL. REV. STAT. ch. 110, para. 2-622 (1987). Paragraph 2-622 provides in part: Healing art malpractice.

- (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:

- .....
- (g) The failure to file a certificate required by this Section shall be grounds for dismissal under Section 2-619.

held that the failure to comply with section 2-622 should not result in dismissal with prejudice.<sup>172</sup> In that case, the plaintiff filed a medical malpractice action and failed to attach the attorney's affidavit and health professional's report required by section 2-622.<sup>173</sup> The trial court dismissed the plaintiff's action with prejudice and the plaintiff appealed directly to the Illinois Supreme Court.<sup>174</sup>

On appeal, the defendant argued that the dismissal should be with prejudice and without court discretion because section 2-622 provides for dismissal pursuant to section 2-619,<sup>175</sup> which concerns incurable defects.<sup>176</sup> The supreme court acknowledged that the trial court had the discretion to dismiss with prejudice and to grant leave to amend pleadings.<sup>177</sup> The court recognized that the purpose of section 2-622, however, is to reduce the filing of frivolous medical malpractice lawsuits by imposing additional pleading requirements.<sup>178</sup> In accordance with this legislative intent, the court decided that section 2-622 should not provide a substantive defense that would forever bar a plaintiff for noncompliance.<sup>179</sup>

### B. Product Liability

Section 2-621 of the Illinois Code of Civil Procedure, which became effective in 1985, allows non-manufacturer defendants to be dismissed from product liability actions once the product manufacturer has been identified and brought into the action.<sup>180</sup> In *Keller-*

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*Id.*

171. 121 Ill. 2d 188, 520 N.E.2d 293 (1987).

172. *Id.* at 193, 520 N.E.2d at 296.

173. *Id.* at 190, 520 N.E.2d at 294.

174. *Id.*

175. ILL. REV. STAT. ch. 110, para. 2-619 (1987).

176. *McCastle*, 121 Ill. 2d at 191, 520 N.E.2d at 295.

177. *Id.* at 194, 520 N.E.2d at 296.

178. *Id.* at 193, 520 N.E.2d at 296. See HOUSE PROCEEDINGS, 84th Ill. Gen. Assem., at 385-86 (May 23, 1985).

179. *McCastle*, 121 Ill. 2d at 193, 520 N.E.2d at 296.

180. ILL. REV. STAT. ch. 110, para. 2-621 (1987). Paragraph 2-621 provides in relevant part:

Product liability actions.

- (a) In any product liability action based in whole or in part on the doctrine of strict liability in tort commenced or maintained against a defendant or defendants other than the manufacturer, that party shall upon answering or otherwise pleading file an affidavit certifying the correct identity of the manufacturer of the product allegedly causing injury, death or damage . . . .
- (b) Once the plaintiff has filed a complaint against the manufacturer or manufacturers, and the manufacturer or manufacturers have or are required to have answered or otherwise pleaded, the court shall order the dismissal of a strict liability in tort claim against the certifying defendant or defendants,



*man v. Crowe*,<sup>181</sup> the Illinois Supreme Court held that dismissals pursuant to section 2-621 cannot be made final and appealable because section 2-621 does not dispose of the rights of the parties to the action.<sup>182</sup>

In *Kellerman*, several people died from poisoned Tylenol purchased at Jewel and Woolworth stores.<sup>183</sup> The plaintiffs filed product liability actions against the stores, which then moved for dismissal pursuant to section 2-621.<sup>184</sup> Subsequently, the trial court granted the dismissals and made the orders final and appealable.<sup>185</sup>

The Illinois Supreme Court held that such orders are not final and appealable.<sup>186</sup> The court also concluded that dismissals with prejudice would limit severely a plaintiff's ability to reinstate cases and would enlarge the limited benefit to non-manufacturers that the legislature intended section 2-621 to provide.<sup>187</sup>

### C. Interspousal Immunity

The Illinois Legislature amended the law of interspousal immunity with Public Act 85-625.<sup>188</sup> Previously, one spouse could not sue the other for a tort committed during the marriage.<sup>189</sup> As of January 1, 1988, spouses may sue each other for a tort committed during the marriage.<sup>190</sup>

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provided the certifying defendant or defendants are not within the categories set forth in subsection (c) of this Section.

*Id.*

181. 119 Ill. 2d 111, 518 N.E.2d 116 (1987).

182. *Id.* at 115, 518 N.E.2d at 118. Section 2-621 permits a non-manufacturer to be dismissed from a product liability action to avoid the costs of defense by filing an affidavit certifying the correct manufacturer of the product. *Id.* at 116, 518 N.E.2d at 119. In addition, the non-manufacturer must not be responsible for or have knowledge of the defect. *Id.* The plaintiff can move to have the dismissal vacated and reinstate the non-manufacturer as a defendant if an action against the manufacturer would be fruitless. *Id.* at 117, 518 N.E.2d at 119.

183. *Id.* at 113, 518 N.E.2d at 117.

184. *Id.*

185. *Id.* at 112, 518 N.E.2d at 117.

186. *Id.* at 115, 518 N.E.2d at 118.

187. *Id.* at 116, 518 N.E.2d at 118.

188. See ILL. ANN. STAT. ch. 40, para. 1001 (Smith-Hurd Supp. 1988).

189. Before Public Act 85-625 became effective in 1988, the Illinois Supreme Court decided *Nelson v. Hix*, 122 Ill. 2d 343, 522 N.E.2d 1214 (1988). In *Nelson*, the court permitted a wife to sue her husband in tort. *Id.* at 353, 522 N.E.2d at 1219. The court followed Canadian law, the law of the domicile of the couple, although Illinois law maintained spousal immunity at the time. *Id.*

190. ILL. ANN. STAT. ch. 40, para. 1001 (Smith-Hurd Supp. 1988). Paragraph 1001 provides:

A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried. *A husband or wife*

## VII. CONCLUSION

During the *Survey* year, the Illinois Supreme Court confronted issues of significance to tort law. Perhaps the most important decisions involved the court's refusal to recognize any damages for a wrongful life cause of action and its limitation of damages for wrongful birth claims. Also, the court continued to balance the effect of settlements and contribution claims upon those liable under the Workers' Compensation Act, and it recognized the "learned intermediary" defense for drug manufacturers. As some jurisdictions take contrasting positions to the Illinois Supreme Court's decisions, the court may be confronted with variations of these issues in the future.

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*may sue the other for a tort committed during the marriage.* No finding by any court under Section 401 of the Illinois Marriage and Dissolution of Marriage Act shall be admissible or be used as prima facie evidence of a tort in any civil action brought pursuant to the provisions of this Act. An attachment or judgment in such action may be enforced by or against her as if she were a single woman.

*Id.* (emphasis added).

