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I. INTRODUCTION

During the *Survey* period, the Illinois judicial system was confronted with a variety of situations that required the application of the comparative fault doctrine. The result was a clarification of the scope and effect of this and other doctrines. Clarification, however, was not the court's only response. The Illinois Supreme Court abolished the doctrines of secondary assumption of risk and implied indemnity, both of which have confused members of the Illinois legal system for a long period of time. The Illinois Supreme Court also ruled on the constitutionality of the Medical Malpractice Act. Finally, the Illinois courts addressed certain controversial aspects of both the Structural Work Act and the Dram Shop Act. The Tort Reform Act was the most significant statutory development in the area of torts during the *Survey* period. A synopsis here, however, would not suffice; instead, an in-depth discussion of the Act will follow this article.

II. NEGLIGENCE

A. Comparative Fault

In *Alvis v. Ribar*,[1] the Illinois Supreme Court determined that total justice can be attained only when the law apportions damages according to the relative fault of the parties.[2] Accordingly, the court in *Alvis* adopted the doctrine of pure comparative fault.[3] Under this doctrine, "the parties may recover damages not attributable to their own fault."[4] Though the Illinois Supreme Court adopted comparative fault as the method by which damages would be determined in negligence actions, numerous issues remained unclear. Several issues concerning the application of comparative fault were addressed during the *Survey* year, including the burden of proof, the application of assumption of risk in negligence actions, and the extension of comparative principles in strict liability.

1. Burden of Proof Regarding Plaintiff's Fault

The defendant has the burden of proving the plaintiff's negli-

1. 85 Ill. 2d 1, 421 N.E.2d 886 (1981).
2. *Id.* at 27, 421 N.E.2d at 898.
3. *See supra* note 1.
4. *Alvis*, 85 Ill. 2d at 16, 421 N.E.2d at 892. The doctrine of pure comparative fault affected many areas of procedural law, including the burden of proof. *See infra* notes 6-13 and accompanying text.

gence in a comparative fault case.[5] In *Casey v. Baseden*,[6] the jury instructions provided that if the jury found the defendants liable and found that their conduct caused the plaintiff to sustain damages, then the defendants must prove the plaintiff's contributory negligence to diminish the plaintiff's recovery.[7] The plaintiff in *Casey* was injured when the defendant's truck collided with the rear of the plaintiff's automobile.[8] The jury found that the defendant had been negligent and that the plaintiff was thirty percent at fault.[9]

After the appellate court affirmed,[10] the defendants appealed the jury's decision, arguing that the instructions confused the burden of proof on the question of liability with the burden of proof on the issue of damages.[11] On appeal, the supreme court held that the jury was instructed adequately regarding the burden of proof.[12] The *Casey* court stated that the defendant must persuade the trier of fact that the plaintiff was negligent because it is the defendant who stands to benefit from that showing.[13] Prior to *Casey*, a majority of the defense bar had assumed the burden by going forward with the affirmative defense of comparative fault. The *Casey* decision laid to rest any vestige of the dispute regarding which party bears the burden.

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5. Casey v. Baseden, 111 Ill. 2d 341, 347, 490 N.E.2d 4, 6 (1986). According to the Illinois Supreme Court in *Casey*, the decision in *Alvis*, 85 Ill. 2d 1, 421 N.E.2d 886, supports the holding that a defendant carries the burden of proving the plaintiff's negligence in a comparative fault case. *Casey*, 111 Ill. 2d at 346-47, 490 N.E.2d at 6. A rationale for this burden is that a plaintiff's comparative fault is similar, in effect, to the defense of failure to mitigate damages: it does not defeat the cause of action, but only diminishes plaintiff's recovery. *Id.* at 347, 490 N.E.2d at 6. The defendant has the burden of proving failure to mitigate, Rozny v. Masnul, 43 Ill. 2d 54, 73, 250 N.E.2d 656, 666 (1969), and should, likewise, carry the burden of proving plaintiff's negligence. *Casey*, 111 Ill. 2d at 347, 490 N.E.2d at 6.

6. 111 Ill. 2d 341, 490 N.E. 2d 4.

7. *Id.* at 344, 490 N.E.2d at 5. The jury instructions stated "[i]f you find for the plaintiffs on the issue of liability, and find that the plaintiffs have proven that they have sustained damages, then the defendants have the burden of proving that the plaintiff, Kay Casey, was contributorily negligent." *Id.*

8. *Id.* at 343, 490 N.E.2d at 5.

9. *Id.* at 343-44, 490 N.E.2d at 5. The plaintiff and her husband sued the defendant, alleging negligence and loss of consortium. *Id.* at 343, 490 N.E.2d at 5.

10. *Id.* at 344, 490 N.E.2d at 5.

11. *Id.*

12. *Id.* at 347, 490 N.E.2d at 7.

13. *Id.* at 346, 490 N.E.2d at 6. The court stated that "both logic and fairness dictate that the defendant, who stands to benefit from a showing that the plaintiff was negligent, should have the burden of persuading the trier of fact on that issue." *Id.* The *Casey* court relied heavily on the Maine Supreme Court case of Crocker v. Coombs, 328 A.2d 389 (Me. 1974). In *Crocker*, the court held that the adoption of comparative fault required the defendant to prove the plaintiff's negligence. *Crocker*, 328 A.2d at 392.

2. Abolition of Secondary Assumption of Risk

Assumption of risk has operated as a complete bar to a plaintiff's recovery in negligence law.[14] The doctrine has developed in both implied[15] and express forms.[16] Under the implied form of assumption of risk, the court assesses the parties' conduct to determine whether the plaintiff was willing to assume a known risk.[17]

The implied form of the doctrine of assumption of risk has been further subdivided into primary and secondary categories.[18] The primary label applies to situations in which the plaintiff has assumed known risks inherent in a particular activity or situation.[19] The nature of the activity creates the assumed risk; plaintiff's neg-

14. Duffy v. Midlothian Country Club, 135 Ill. App. 3d 429, 433, 481 N.E.2d 1037, 1041 (1st Dist. 1985). A vast majority of states have either abolished or severely limited the assumption of risk defense following their adoption of comparative fault. *See, e.g.*, Leavitt v. Gillaspie, 443 P.2d 61 (Alaska 1968); W.M. Bashlin Co. v. Smith, 277 Ark. 406, 643 S.W.2d 526 (1982); Segoviano v. Housing Authority, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983); Brown v. Kreuser, 38 Colo. App. 554, 560 P.2d 105 (1977); Wendland v. Ridgefield Construction Services, Inc., 190 Conn. 791, 462 A.2d 1043 (1983); Blackburn v. Dorta, 348 So.2d 287 (Fla. 1977); Burrows v. Hawaiian Trust Co., 49 Hawaii 351, 417 P.2d 816 (1966); Fawcett v. Irby, 92 Idaho 48, 436 P.2d 714 (1968); Smith v. Blakey, 213 Kan. 91, 515 P.2d 1062 (1973); Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Mass. Ann. Laws ch. 231, par. 85 (Michie/Law Co-op. 1974); Melendres v. Soales, 105 Mich. App. 73, 306 N.W.2d 399 (1981); Iepson v. Noren, 308 N.W.2d 812 (Minn. 1981); Yarbrough v. Phipps, 285 So.2d 788 (Miss. 1973), Abernathy v. Eline Oil Field Services, Inc., 650 P.2d 772 (Mont. 1982); Bolduc v. Crain, 104 N.H. 163, 181 A.2d 641 (1962); Meistrich v. Casino Arena Attractions, Inc., 31 N.J. 44, 155 A.2d 90 (1959); Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971); N.Y. Civ. Prac. Law § 1411 (McKinney 1976); Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974); Hirschbach v. Cincinnati Gas & Electric Co., 6 Ohio St. 3d 206, 452 N.E.2d 326 (1983); Minor v. Zidell Trust, 618 P.2d 392 (Okla. 1980); Thompson v. Weaver, 277 Or. 299, 560 P.2d 620 (1977); Rutter v. Northeastern Beaver County School District, 496 Pa. 590, 437 A.2d 1198 (1981); Farley v. M.M. Cattle Co., 529 S.W.2d 751 (Tex. 1975); Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981); Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978); Lyons v. Redding Construction Co., 83 Wash. 2d 86, 515 P.2d 821 (1973); McConville v. State Farm Mutual Automobile Insurance Co., 15 Wisc.2d 374, 113 N.W.2d 14 (1962); Barnette v. Doyle, 622 P.2d 1349 (Wyo. 1981).

15. *See infra* notes 17-40 and accompanying text.

16. *Duffy*, 135 Ill. App. 3d at 433, 481 N.E.2d at 1041. Under express assumption of risk, the plaintiff cannot recover for injuries caused by risks inherent in the situation or dangers created by the defendant's negligence because the plaintiff and defendant explicitly agree the defendant owes no legal duty to the plaintiff. *Id.* The defendant, however, may be held liable if the court finds his conduct wanton, wilful or reckless, or if the damages arise from an agreement deemed contrary to public policy. PROSSER, TORTS § 68, at 439-45 (4th ed. 1971).

17. *Duffy*, 135 Ill. App. 3d at 433, 481 N.E.2d at 1041.

18. *Id.*

19. *Id. See, e.g.*, Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966) (second baseman's ankle broken by runner's hard slide); Moe v. Steenberg, 275 Minn. 448, 147 N.W.2d 587 (1966) (plaintiff injured in collision with defendant while ice skating).

ligence need not be alleged.[20] Primary implied assumption of risk appears not to be a negligence defense because this defense is not used in response to complaints alleging negligence.[21]

Secondary implied assumption of risk, however, has traditionally barred recovery in a negligence action.[22] When this defense is raised, defendant alleges that "the plaintiff implicitly assume[d] the risks created by the defendant's negligence."[23] Similar to contributory negligence, secondary implied assumption of risk bars recovery.[24] Accordingly, critics have argued for its abolition.[25] These critics maintain that comparative negligence, which effectively abolished contributory negligence,[26] should also abolish secondary implied assumption of risk.[27] If these recommendations were accepted, comparative negligence would prevent assumption of risk from operating as a complete bar to recovery in negligence actions.[28]

Following a *Survey* year decision, implied assumption of risk no longer bars a plaintiff's recovery in a negligence action.[29] The court in *Duffy v. Midlothian Country Club*[30] noted that comparative fault[31] abolished the doctrine of secondary implied assumption of risk.[32] In *Duffy*, a professional golfer participating in a tournament hit a golf ball that struck the plaintiff-spectator, causing injury to her right eye.[33] In response to the plaintiff's complaint alleging negligence, the defendants, Midlothian Country Club and the

20. *Duffy*, 135 Ill. App. 3d at 433, 481 N.E.2d at 1041.

21. *Id. See generally* Kionka, *Implied Assumption of Risk: Does it Survive Comparative Fault?*, 1982 S. ILL. L.J. 371.

22. *Duffy*, 135 Ill. App. 3d at 434, 481 N.E.2d at 1041. Courts traditionally have upheld secondary implied assumption of risk as a valid negligence defense if plaintiff's knowledge and volition could be proven. *Id. See, e.g.*, Bugh v. Webb, 231 Ark. 27, 328 S.W.2d 379 (1959); Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977).

23. *Duffy*, 135 Ill. App. 3d at 434, 481 N.E.2d at 1041.

24. *Id. See supra* note 21.

25. *Duffy*, 135 Ill. App. 3d at 434, 481 N.E.2d at 1041.

26. *See supra* notes 1-4 and accompanying text.

27. *Duffy*, 135 Ill. App. 3d at 434, 481 N.E.2d at 1041-42.

28. *Id.* at 434, 481 N.E.2d at 1042.

29. *Id.* at 435, 481 N.E.2d at 1042.

30. 135 Ill. App. 3d 429, 481 N.E.2d 1037 (1st Dist. 1985).

31. *See supra* notes 1-4 and accompanying text. *See also* Prewein v. Caterpillar Tractor Co., 108 Ill. 2d 141, 483 N.E.2d 224 (1985) (comparative negligence does not apply to the conduct of a plaintiff bringing an action under the Structural Work Act). *See also infra* notes 310-19 and accompanying text.

32. *Duffy*, 135 Ill. App. 3d at 435, 481 N.E.2d at 1043. The court did not find that comparative fault affected express assumption of risk, under which the plaintiff explicitly assumes the inherent risks created by defendant's negligence. *Id.*

33. *Id.* at 431, 481 N.E.2d at 1040.

Western Golf Association,[34] argued that the plaintiff voluntarily had assumed a known risk and, therefore, was barred from recovery.[35] On remand,[36] the plaintiff's damages were reduced by ten percent because the jury found her ten percent negligent.[37]

The Illinois Appellate Court for the Third District affirmed the trial court and held that the doctrine of comparative fault abolished the doctrine of secondary implied assumption of risk.[38] Therefore, a plaintiff's implied assumption of risk, created by the defendant's negligence, will no longer bar recovery in negligence actions.[39] Rather, plaintiff's assumption of risk will aid the finder of fact in determining what percentage of the damages plaintiff may recover.[40] The complex issue of implied assumption of risk was further complicated by the *Alvis* decision. Though the *Duffy* holding does not resolve all related issues, it does provide some guidance. The *Duffy* decision is consistent with the trend towards the wide ranging application of comparative fault principles.

3. Products Liability Developments

As previously noted, the Illinois Supreme Court has been called upon to clarify and refine the application of comparative fault to a wide variety of situations. In 1983, the court held that comparative fault principles applied to the apportionment of damages in strict products liability cases.[41] The decision in *Coney v. J.L.G. Industries, Inc.*,[42] generally was interpreted as retaining misuse and

34. *Id.* at 432, 481 N.E.2d at 1040. The complaint also named the Professional Golfers Association ("PGA") and the golfer who struck the plaintiff as defendants in the same action. The PGA subsequently was dismissed on plaintiff's motion. The complaint against the golfer went to the jury, which found for him and against the plaintiff. *Id.* at 432 n.1, 481 N.E.2d at 1040 n.1.

35. *Id.* at 432, 481 N.E.2d at 1040.

36. At the trial court level, defendant's motion to dismiss was granted. On an initial appeal, the court reversed and remanded, holding that the defendants had a duty of care toward spectators as business invitees and that the applicable standard of reasonable care was a question of fact for the jury to decide. *Duffy*, 92 Ill. App. 3d 193, 415 N.E.2d 1099 (1st Dist. 1980).

37. *Duffy*, 135 Ill. App. 3d at 432, 481 N.E.2d at 1040.

38. *Id.* at 435, 481 N.E.2d at 1043. The appellate court determined that comparative fault affected neither express assumption of risk nor primary implied assumption of risk because "these branches of the assumption of risk doctrine [were] neither analytically nor functionally similar to contributory negligence. . . ." *Id.* at 435, 481 N.E.2d at 1042.

39. *Id.* at 435-36, 481 N.E.2d at 1043.

40. *Id.* at 436, 481 N.E.2d at 1043.

41. Coney v. J.L.G. Industries, Inc., 97 Ill. 2d 104, 119, 454 N.E.2d 197, 204 (1983).

42. *Id.* In *Coney*, the supreme court ruled that a plaintiff's assumption of risk or misuse is merely a factor in the apportionment of damages, rather than a bar to recovery. *Id.* at 119, 454 N.E.2d at 204. The *Coney* court relied on Williams v. Brown Manufacturing Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), in which the court held misuse and as-

assumption of risk as defenses to strict products liability claims. Under *Coney*, the defenses were to be compared to defendant's contribution and would not act as a total bar to plaintiff's recovery. Additionally, *Coney* was relied upon for the proposition that a plaintiff's ordinary negligence was not to be compared in any way, just as contributory negligence was not applicable in strict liability prior to *Alvis*. Thus, *Coney* clearly ruled out negligent omissions on the part of a plaintiff, but left some doubt regarding negligent acts or omissions.

The doctrine of comparative fault does not require consideration of contributory fault in a products liability action.[43] In *Simpson v. General Motors Corp.*,[44] the decedent died from injuries suffered while operating an earth scraper which overturned on an icy hill.[45] The earth scraper was designed and manufactured by the defendant, General Motors ("GM"), and was sold to the decedent's employer by the other defendant, Midco Sales and Service ("Midco").[46] At trial, the plaintiff, as administrator of the decedent's estate, introduced expert testimony that the earth scraper was unreasonably dangerous because it lacked a roll-over protective structure.[47] Moreover, the evidence showed that the decedent was aware of the risk created by the absence of this structure.[48] The jury returned a verdict for the plaintiff against both GM and Midco.[49] The defendants filed cross-claims for indemnification against each other.[50] The circuit court directed a verdict in favor of Midco and against GM.[51]

On appeal, GM contended that limiting the consideration of decedent's comparative fault to his misuse of the product and assumption of risk, defeated the purpose of the comparative fault

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sumption of risk were complete defenses to a strict products liability action, but that contributory negligence is not. The *Williams* court implied that one who is contributorily negligent is much less culpable than one who assumes the risk or misuses a product. *Id.* at 425-26, 261 N.E.2d at 309.

43. Simpson v. General Motors Corp., 108 Ill. 2d 146, 152, 483 N.E.2d 1, 3-4 (1985). *See also* Anton v. Cogan Landfill, Inc., 105 Ill. 2d 537, 475 N.E.2d 817 (1984) (comparative fault does not require consideration of contributory negligence in a products liability action in which decedent was crushed to death by road scraper).

44. 108 Ill. 2d 146, 483 N.E.2d 1 (1985).

45. *Id.* at 148, 483 N.E.2d at 1.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The jury found the plaintiff-decedent assumed part of the risk, attributing 95% of the fault to the defendants and 5% to the decedent. *Id.*

50. *Id.* at 148, 483 N.E.2d at 2.

51. *Id.*

doctrine.[52] GM also argued that under *Coney*,[53] all of the decedent's contributory negligence, except his failure to discover the defect, should reduce the plaintiff-decedent's recoverable damages in this strict tort liability action.[54] GM contended that the application of comparative negligence did not conflict with any principle of strict liability in tort.[55]

The supreme court disagreed with GM's arguments.[56] According to the supreme court, *Coney* held that a "consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor."[57] Relying on this interpretation of *Coney*, the supreme court in *Simpson* ruled that the doctrine of comparative fault does not require consideration of contributory negligence in a products liability case.[58]

Justice Ryan dissented, stating that the majority's decision allowed plaintiffs to recover damages for injuries partially caused by their own conduct.[59] A vast majority of the jurisdictions that have considered whether comparative fault principles should be applied in products liability cases have concluded the principles are applicable.[60] In those jurisdictions, when a plaintiff's injury arises from a defective product, his conduct that contributed to the injury

52. *Id.* at 149, 483 N.E.2d at 2. GM argued that the purpose of the comparative fault doctrine was to avoid inconsistent and inequitable results. *Id.*

53. *See supra* notes 41-42 and accompanying text.

54. *Simpson*, 108 Ill. 2d at 149, 483 N.E.2d at 2.

55. *Id.*

56. *Id.* at 152, 483 N.E.2d at 3.

57. *Id.* (citing *Coney*, 97 Ill. 2d at 119, 454 N.E.2d at 204). *See supra* notes 41-42 and accompanying text.

58. *Simpson*, 108 Ill. 2d at 152, 483 N.E.2d at 3 (citing *Coney*, 97 Ill.2d 104, 454 N.E.2d 197). In an amicus curiae brief, the Motor Vehicle Manufacturers Association and the Product Liability Advisory Council, argued that applying comparative fault to strict products liability cases advances the fundamental goals of tort law. *Simpson*, 108 Ill. 2d at 149, 483 N.E.2d at 2.

59. *Simpson*, 108 Ill. 2d at 160, 483 N.E.2d at 7 (Ryan, J., dissenting). For a discussion of damages when plaintiff injured in car accident while not wearing seat belt, see *infra* notes 117-28 and accompanying text.

60. *Simpson*, 108 Ill. 2d at 154, 483 N.E.2d at 4 (Ryan, J., dissenting). Not all states have considered the applicability of contributory negligence in strict liability cases. The following states have declined to apply comparative negligence or fault principles in strict liability actions: Colorado, Nebraska, Oklahoma, Rhode Island, and South Dakota.

The vast majority of those states considering the applicability of comparative negligence theory in strict liability cases have found comparative negligence theory applicable: Alaska, Arkansas, California, Florida, Idaho, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York, Oregon, Utah, Washington, and Wisconsin. *Coney*, 97 Ill. 2d at 112-14, 454 N.E.2d at 201.

reduces his award.[61] Justice Ryan asserted that the majority had deviated from the concept of pure comparative fault previously adopted in *Alvis v. Ribar*.[62] Justice Ryan stated that the court should avoid carving out exceptions to the pure comparative fault doctrine.[63] Following *Simpson*, the court has made it clear that no form of negligent act or omission will be compared to defendant's contribution.

B. Negligent Entrustment

The Illinois Supreme Court seldom has analyzed the cause of action of negligent entrustment. During the *Survey* period, the Illinois Supreme Court in *Teter v. Clemens*[64] examined this cause of action, clarifying the conduct required on the part of the defendant. If for no other reason than the paucity of decisions in this area, the supreme court's decision in *Teter* will stand out.

Negligent entrustment consists of a lender giving "a dangerous article to one whom he knows, or should know, is likely to use it in a manner involving an unreasonable risk of harm to others."[65] A complaint for negligent entrustment is insufficient unless it alleges conduct by which the instrumentality that caused the injury came

61. *Simpson*, 108 Ill. 2d at 154, 483 N.E. 2d at 4 (Ryan, J., dissenting). Justice Ryan agreed with the views of those states that applied comparative principles to strict product liability actions. *Id. See supra* note 60. Justice Ryan specifically concurred with the court's view in Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978), that all forms of fault on the part of the plaintiff should be considered in diminishing his recovery. *Simpson*, 108 Ill. 2d at 155, 483 N.E.2d at 4-5 (Ryan, J., dissenting).

62. *Simpson*, 108 Ill. 2d at 159-60, 483 N.E.2d at 7 (Ryan, J., dissenting). *See supra* note 1 and accompanying text.

63. *Simpson*, 108 Ill. 2d at 160, 483 N.E.2d at 7 (Ryan, J., dissenting). Other products liability cases decided by Illinois courts during the *Survey* period include Kramer v. Weedhopper of Utah, Inc., 141 Ill. App. 3d 217, 490 N.E.2d 104 (1st Dist. 1986) (defendant's provision of 90% of allegedly defective bolts sufficient circumstantial evidence to overcome defendant's motion for a summary judgment); Rivera v. Mahogany Corp., 145 Ill. App. 3d 213, 494 N.E.2d 660 (1st Dist. 1986) (defendant "financial" lessor not within distributive chain of product leased and not subject to imposition of strict tort liability); Tennant v. Clark Equipment Co., Inc., 143 Ill. App. 3d 28, 492 N.E.2d 632 (1st Dist. 1986) (comparative-negligence principles include both proximate cause and foreseeability); Mason v. Caterpillar Tractor Co., 139 Ill. App. 3d 511, 487 N.E.2d 1043 (1st Dist. 1985) (summary judgment appropriate when defendant-manufacturer's product was safe for intended purpose and no material question existed regarding dangerous design of product) Skarski v. Act-Chicago Great Dane Corp., 138 Ill. App. 3d 301, 485 N.E.2d 1312 (1st Dist. 1985) (summary judgment for the defendant improper when defendant, though not manufacturer, is in distributive chain and liable for injuries resulting from defects in trailer).

64. 112 Ill. 2d 252, 492 N.E.2d 1340 (1986).

65. 15 DOOLEY, MODERN TORT LAW § 23.01, at 613 (1982).

into the defendant's possession.[66] In *Teter*, the five-year old plaintiff was shot with a gun by the defendants' five-year old grandson.[67] The plaintiff asserted two alternative theories for recovery:[68] negligent entrustment, and the presence of a dangerous condition on the defendants' premises.[69]

In addressing the negligent entrustment issue, the court stated that for liability in a negligence action, a plaintiff must establish that his injury was caused by the defendant's fault.[70] In *Teter*, allowing the child to possess the gun was the basis of the defendant's fault.[71] The complaint, however, failed to allege conduct by the defendants which made the child's possession of the gun possible.[72] Therefore, the court concluded that the plaintiffs had failed to state a cause of action for negligent entrustment.[73]

The Illinois Appellate Court for the First District, however, held a cause of action for negligent entrustment was set forth in *Luethi v. Yellow Cab Co.*.[74] *Luethi* involved an action for injuries allegedly sustained by the plaintiff when she was a passenger in a vehicle owned by the defendant cab company and driven by a

66. Teter v. Clemens, 112 Ill. 2d 252, 258-59, 492 N.E.2d 1340, 1343 (1986).

67. *Id.* at 255, 492 N.E.2d at 1341.

68. *Id.* at 256, 492 N.E. 2d at 1342. In a third count, the plaintiff sought to set aside an earlier release of his claims against the defendant on the ground of mutual mistake. *Id.*

69. *Id.* The supreme court affirmed the appellate court's dismissal of plaintiff's count for premises liability which alleged the injury resulted from the failure of the defendants to warn of the alleged danger or to take adequate precautions against it. *Id.* at 260, 492 N.E.2d at 1343-44. The complaint failed to state a cause of action because the allegations failed to show facts that would cause the presence of such a duty. *Id.*

Several Illinois cases have considered the issue of premises liability. *See, e.g.*, Wright v. Mr. Quick Inc., 109 Ill. 2d 236, 486 N.E.2d 908 (1985) (defendant-lessor of lot owed no duty in tort to plaintiff who fell in parking lot of her employee-lessee); Larson v. City of Chicago, 142 Ill. App. 3d 81, 491 N.E.2d 165 (1st Dist. 1986) (defendant city owed duty to maintain sidewalks in reasonably safe condition for all foreseeable uses including rollerskating); Lohan v. Walgreens Co., 140 Ill. App. 3d 171, 488 N.E.2d 679 (1st Dist. 1986) (defendant vendor not liable for natural accumulations of moisture and under no duty to continue voluntary undertaking to remove accumulations); Zimring v. Wendrow, 137 Ill. App. 3d 847, 485 N.E.2d 478 (2d Dist. 1985) (defendant homeowners had no duty to prevent social guests from assaulting the plaintiff-licensee on defendant's property under "premises doctrine"); St. Phillips v. O'Donnell, 137 Ill. App. 3d 639, 484 N.E.2d 1209 (2d Dist. 1985) (operator of tavern owed no duty to protect patron from negligent or intentional harmful acts of third persons when decedent knew of violent propensities of third person and assault occurred on common parking area of shopping center); Walton v. Spidle, 137 Ill. App. 3d 249, 484 N.E. 2d 469 (4th Dist. 1985) (tavern owner not liable for injury occurring after plaintiff left premises).

70. *Teter*, 112 2d at 258, 492 N.E.2d at 1343.

71. *Id.*

72. *Id.*

73. *Id.*

74. 136 Ill. App. 3d 829, 834, 483 N.E.2d 1058, 1061 (1st Dist. 1985).

company's lessee.[75] The plaintiff sought damages from the cab company because it had leased a taxi to a driver[76] whom it knew possessed no public chauffeur license.[77]

The plaintiff sought to establish wilful and wanton conduct on the part of the cab company.[78] The plaintiff, however, failed to allege that the cab company aggravated or approved of the driver's conduct.[79] Instead, the complaint alleged only that the cab company's wilful disregard for the plaintiff proximately caused her injuries.[80]

Although the complaint failed to contain allegations sufficient to support the action plaintiff sought to establish, the court held that the allegations did set forth a cause of action for negligent entrustment.[81] The cab company's entrustment of the car to the unlicensed driver was, in effect, an entrustment of the car to an incompetent driver and, therefore, an independent act of negligence.[82] In addition, the negligence of the unlicensed driver provided a causal connection between the negligence of the cab company, who negligently entrusted, and the plaintiff, who was injured.[83] Therefore, the court held that the plaintiff's complaint stated a valid cause of action.[84]

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75. *Id.* at 830, 483 N.E.2d at 1059. The defendant cab company's lessee also was named as a defendant. *Id.*

76. *Id.* The driver was a co-defendant. *Id.*

77. *Id.* at 833, 483 N.E.2d at 1060. The complaint alleged that the lack of a proper license violated provisions of the Municipal Code of Chicago and city regulations. *Id.*

78. *Id.* at 833, 483 N.E.2d at 1061.

79. *Id.* (citing Samuels v. Checker Taxi Co., 65 Ill. App. 3d 63, 382 N.E.2d 424 (1st Dist. 1978)). The court in *Samuels* held that in order to establish wilful and wanton conduct on the part of the cab company, plaintiff must allege that the cab company aggravated or approved of the driver's conduct. *Samuels*, 65 Ill. App. 3d at 66-68, 382 N.E.2d at 425-27.

80. *Luethi*, 136 Ill. App. 3d at 833, 483 N.E.2d at 1061.

81. *Id.* at 834, 483 N.E.2d at 1061 (citing Seward v. Griffin, 116 Ill. App. 3d 749, 452 N.E.2d 558 (3d Dist. 1983)). In *Seward*, the plaintiffs were injured when their van was struck by a vehicle driven by an unlicensed driver. The evidence established that the defendant had supplied the driver with the car knowing that he was unlicensed. The court held the defendant liable on a negligent entrustment theory of liability. *Seward*, 116 Ill. App. 3d at 755, 452 N.E.2d at 563.

82. *Seward*, 116 Ill. App. 3d at 754-55, 452 N.E.2d at 563. *See, e.g.*, Kinney v. Smith, 95 Idaho 328, 508 P.2d 1234 (1973); Hardwick v. Bublitz, 119 N.W.2d 886 (Iowa 1963); Anthony v. Covington, 187 Okla. 27, 100 P.2d 461 (1940); Barnes v. Zinda, 464 S.W.2d 501 (Tex. Cir. App. 1971); Mundy v. Pirie Slaughter Motor Co., 206 S.W.2d 587 (Tex. 1947).

83. *Luethi*, 136 Ill. App. 3d at 834, 483 N.E.2d at 1061 (citing *Seward*, 116 Ill. App. 3d at 754-55, 452, N.E.2d at 563).

84. *Luethi*, 136 Ill. App. 3d at 834, 483 N.E. 2d at 1061. The *Luethi* court noted that when a complaint states a good cause of action, even one not contemplated by the plaintiff, it should not be dismissed. *Id.* at 833, 483 N.E.2d at 1060 (citing Browning v. Heri-

C. Proximate Cause

Proximate cause is an essential element that must be proven in order to invoke tort liability and collect damages.[85] Two Illinois appellate court cases, which may be characterized as proximate cause "landmark decisions," were decided during the *Survey* year: *Northern Trust Co. v. Louis A. Weiss Memorial Hospital*[86] and *Kemp v. Sisters of the Third Order of St. Francis.*[87]

In *Northern Trust Co.*, the Illinois Appellate Court for the First District recognized the strain placed on plaintiffs in medical malpractice cases in which many factors have contributed to the ultimate injury. The court noted that when multiple causes or factors exist, a determination of the exact degree of contribution of any one may well be impossible. Thus, when there is evidence that a defendant has contributed to increase the risk of harm to the plaintiffs and the harm in fact was sustained, the court in *Northern Trust Co.* concluded that the plaintiff has provided sufficient evidence to present the matter to the trier of fact.[88]

In *Northern Trust Co.*, the guardian of the estate of a severely brain-damaged baby sought money damages for the child's injuries.[89] The child's parents also sought compensation for past and future medical expenses.[90] The suit named as defendants Weiss Hospital, the pediatrician, and the two registered nurses who had been working in the newborn nursery during the time when the child's condition deteriorated.[91] The trial court found the child's injuries resulted from his failure to receive adequate post-delivery care.[92] The court, however, found only one of the defendants, Weiss Memorial Hospital, liable.[93]

Weiss Memorial Hospital appealed the verdict on behalf of the child's estate, based on the issue of proximate cause.[94] The hospi-

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tage Insurance Co., 33 Ill. App. 3d 943, 947, 338 N.E.2d 912, 915 (2d Dist. 1975)). *See also* Salvi v. Montgomery Ward and Co., Inc., 140 Ill. App. 3d 896, 489 N.E.2d 394 (1st Dist. 1986) (defendant-retailer owed duty to plaintiff-buyer injured by fourteen-year old child, who negligently handled an air gun).

85. PROSSER, TORTS § 18, at 767 (5th ed. 1981).

86. 143 Ill. App. 3d 479, 493 N.E.2d 6 (1st Dist. 1986).

87. 143 Ill. App. 3d 360, 493 N.E.2d 372 (3d Dist. 1986).

88. *Northern Trust Co.*, 143 Ill. App. 3d at 488, 493 N.E.2d at 12.

89. *Id.* at 482, 493 N.E.2d at 8.

90. *Id.* at 482, 493 N.E.2d at 9.

91. *Id.* at 484, 493 N.E.2d at 8-9.

92. *Id.* The standard of care applicable to this case was that which prevailed in 1970, at the time of the minor's birth. *Id.* at 484, 493 N.E.2d at 9. The suit was instituted in 1978.

93. *Id.* at 484, 493 N.E.2d at 8-9.

94. *Id.* at 484-93, 493 N.E.2d at 9-12. The hospital also appealed the reimbursement

tal contended that the verdicts in favor of the other defendants were inconsistent with the verdict against itself.[95] The appellate court addressed this contention by noting that a different standard of care applied to the hospital than to the other defendants, particularly the nurse on duty when the minor's condition grew worse.[96] With respect to the hospital's standard of care, there existed a Chicago Board of Health Regulation requiring that "one registered professional nurse specially trained in the care of newborn and premature infants supervise each nursery at all times."[97] Pursuant to the regulation, if a hospital failed to provide a nurse to supervise the care of the injured child, it deviated from its standard of care.[98] In contrast, the nurse's standard of care was simply "to possess and apply the knowledge and use the skill and care that is ordinarily used by reasonably well-qualified nurses . . . in similar cases and circumstances."[99] In *Northern Trust Co.*, the nurse was not "specially-trained" as required pursuant to the regulation; rather, she was a nurse who worked for the hospital's maternity department.[100] The appellate court thus determined that the jury properly could have found that the nurse satisfied her standard of care, while also finding that the hospital failed to meet its standard by failing to provide a nurse "specially-trained" within the meaning of the regulation.[101]

Furthermore, the appellate court stated that the evidence supported the conclusion that the hospital's omission proximately caused the child's injuries.[102] The court examined the testimony of

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award to the parents. This verdict was reversed because the statute of limitations barred the action. *Id.* at 493, 493 N.E.2d at 15 (citing Fess v. Parke, Davis & Co., 113 Ill. App. 3d 133, 135, 446 N.E.2d 1255, 1256 (1st Dist. 1983)). The parents cross appealed, contending that the verdict in favor of one nurse was contrary to the manifest weight of the evidence. That verdict was affirmed. *Northern Trust Co.*, 143 Ill. App. 3d at 493-94, 493 N.E. 2d at 16.

95. *Northern Trust Co.*, 143 Ill. App. 3d at 484, 493 N.E.2d at 9.

96. *Id.* at 485, 493 N.E.2d at 10.

97. *Id.* The hospital also contended that the trial court's interpretation of this regulation was erroneous. *Id.* at 489, 493 N.E.2d at 13. The appellate court, however, found that the trial court had committed no error. *Id.*

98. *Id.* at 485, 493 N.E.2d at 10.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 486, 493 N.E.2d at 12. The appellate court took this opportunity to advocate the adoption of section 323 of the Second Restatement of Torts in medical malpractice actions. *Id.* at 487-88, 493 N.E.2d at 12 (citing RESTATEMENT (SECOND) OF TORTS, § 323 (1965)). Section 323 states in relevant part:

> One who undertakes . . . to render services to another which he should recognize as necessary for the protection of the other's person . . . is subject to liabil-

the plaintiff's expert, who testified that a specially trained nurse, if provided, would have notified the pediatrician of complications much earlier than the defendant nurse had notified the defendant pediatrician.[103] Plaintiff's expert further testified that if the doctor had been consulted earlier, the child would have received oxygen earlier and as a result, the child's respiratory difficulties would have been less severe.[104] Therefore, the court in *Northern Trust Co.* held the jury reasonably could have found the hospital's failure to provide a nurse, who would have known to consult the physician earlier in this situation, proximately caused a delay in treatment which contributed substantially to the child's injuries.[105]

In the second "landmark decision," *Kemp v. Sisters of the Third Order of St. Francis*, the Illinois Appellate Court for the Third District held the creation of a condition which makes an injury possible will not establish liability when the act of an independent third party is the proximate cause of injury.[106] In *Kemp*, an independently employed nurse knocked over an intravenous ("IV") pole and an attached glass IV bottle while the plaintiff was lying on the operating room table.[107] The IV bottle struck the plaintiff in the mouth, causing dental injuries.[108] The plaintiff sued the hospital, alleging that the defendant was negligent in using a hard glass IV bottle, rather than a soft plastic bag, in the operating room.[109] The trial court granted the defendant's second motion for summary

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ity to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if . . .his failure to exercise such care increases the risk of such harm. . . . *Id.*

103. *Northern Trust Co.*, 143 Ill. App. 3d at 488, 493 N.E.2d at 11.

104. *Id.* at 488, 493 N.E.2d at 12.

105. *Id. See also* Tennant v. Clark Equipment Co., Inc., 143 Ill. App. 3d 28, 492 N.E.2d 632 (1st Dist. 1986) (plaintiff injured when a wrench broke as he attempted to remove a rusty bolt from a crane; evidence that defendant-crane manufacturer had notice of alleged design defect in crane and that injury was foreseeable was sufficient to overcome defendant's motion for summary judgment alleging wrench as sole proximate cause of injury). For further discussion of comparative fault cases, *see supra* notes 43-63 and accompanying text.

106. Kemp v. Sisters of the Third Order of St. Francis, 143 Ill. App. 3d 360, 361, 493 N.E.2d 372, 373 (3d Dist. 1986). During the *Survey* period, the Illinois courts decided several other cases concerning proximate cause. *See, e.g.*, Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 493 N.E.2d 1022 (1986); Chem-Pac, Inc. v. Simborg, 145 Ill. App. 3d 520, 495 N.E.2d 1124 (1st Dist. 1986) (defendants' negligence proximate cause of fire when defendants failed to keep vagrants out, post watchmen, or remedy building code violations); Mathieu v. Venture Stores, Inc., 144 Ill. App. 3d 783, 494 N.E.2d 806 (1st Dist. 1986) (improper scheduling of work proximate cause of injury and violation of the Structural Work Act).

107. *Kemp*, 143 Ill. App. 3d at 360, 493 N.E.2d at 372.

108. *Id.* at 360-61. 493 N.E.2d at 372.

109. *Id.* at 361, 493 N.E.2d at 372.

judgment.[110]

The appellate court stated that the furnishing of a condition that makes the injury possible will not establish liability if a subsequent independent act by a third party causes the injury.[111] Given the series of events, the court determined that the creation of the condition was not the proximate cause of the injury.[112] Rather, the subsequent independent act was considered the intervening cause that became the proximate cause of the injury.[113] Thus, the appellate court in *Kemp* agreed with the trial court's determination that the hospital had furnished only the condition of the accident[114] by its use of the glass IV bottle.[115] The reviewing court concluded that the trial court did not abuse its discretion, and held that the hospital's conduct was not the proximate cause of the plaintiff's injuries.[116] In the continuing debate concerning mere conditions versus active negligence, the Illinois Appellate Court for the Third District has further emphasized the significance of independent intervening acts.

D. Liability and Damages

1. The Seat Belt Defense

In *Clarkson v. Wright*,[117] the Illinois Supreme Court held that in automobile personal injury litigation, evidence of failure to wear a seat belt should not be admitted with respect to either the question of liability or damages.[118] In *Clarkson*, the plaintiff was injured in

110. *Id.*

111. *Id.* at 361, 493 N.E.2d at 373 (citing Merlo v. Public Service Co., 381 Ill. 300, 45 N.E.2d 665 (1942)).

112. *Kemp*, 143 Ill. App. 3d at 361, 493 N.E.2d at 373.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* An additional Illinois case regarding intervening cause was decided during the *Survey* period. In Bauer v. City of Chicago, 137 Ill. App. 3d 228, 484 N.E.2d 422 (1st Dist. 1985), the defendant's failure to strip an officer of his, star and shield the leading officer to believe he had a right to carry a gun was a mere creation of a passive condition that made the injury possible. The officer's actions were the intervening cause; therefore, the condition created by the defendant-city was not the proximate cause of the injury. *Id.* at 236, 484 N.E.2d at 427-28.

117. 108 Ill.2d 129, 483 N.E.2d 268 (1985).

118. *Id.* at 133-34, 483 N.E.2d at 270. *Clarkson* was a case of first impression for the Illinois Supreme Court. *Id.* at 132, 483 N.E.2d at 269. The Illinois appellate courts, on the other hand, previously had addressed this issue. *Id.* The rule articulated by the appellate courts requires the trier of fact not consider the failure to use seat belts on the issue of liability. *Id.* (citing Josel v. Rossi, 7 Ill. App. 3d 1091, 288 N.E.2d 677 (1st Dist. 1972)). The trier of fact, however, may consider the failure to use a seat belt on the issue of damages if there is sufficient evidence that the plaintiff's injuries were caused by his fail-

a car accident and thereafter sued the defendant for injuries allegedly caused by the defendant's negligence.[119] The jury returned a verdict in favor of the plaintiff but reduced the award by fifty percent because of the plaintiff's comparative negligence.[120]

The plaintiff appealed, contending that the trial court erred in admitting into evidence plaintiff's failure to use a seat belt.[121] The appellate court affirmed the trial court's decision.[122] On appeal, the supreme court concluded that the plaintiff's failure to use a seat belt did not cause the accident.[123] Instead, the court concluded that, at most, the failure to use the seat belt may have increased the severity of plaintiff's injuries.[124]

Justice Ryan, in dissent,[125] asserted that under pure comparative fault,[126] the court must diminish the plaintiff's recovery to the extent his failure to use an available seat belt contributed to his injuries.[127] Justice Ryan argued that a plaintiff should not be awarded damages for injuries aggravated by his own failure to wear a seat belt.[128]

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ure to use a seat belt. *Id.* (citing Eichorn v. Olson, 32 Ill. App. 3d 587, 335 N.E.2d 774 (3d Dist. 1975)). *See also* Hukill v. DiGregorio, 136 Ill. App. 3d 1066, 484 N.E.2d 795 (2d Dist. 1985) (failure of motorcycle rider to wear protective helmet held inadmissible regarding liability and/or damages absent a statutory requirement to wear a helmet).

119. *Clarkson*, 108 Ill. 2d at 130, 483 N.E.2d at 268.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 132, 483 N.E.2d at 269.

124. *Id.* The court recognized plaintiff's duty to mitigate damages once an injury occurs. *Id.* at 133, 483 N.E.2d at 270. This duty, however, arises after the injury. In contrast, the act of putting on a seat belt occurs before the injury is sustained. *Id.*

125. *Id.* at 134-40, 483 N.E.2d at 270-73 (Ryan, J., dissenting).

126. For a discussion of comparative fault, see *supra* notes 1-63 and accompanying text.

127. *Clarkson*, 108 Ill. 2d at 134-35, 483 N.E.2d at 270. Justice Ryan referred to Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981), in which the court held that parties are permitted to recover damages provided those damages are "not attributable to their own fault." *Clarkson*, 108 Ill. 2d at 135-36, 483 N.E.2d at 271 (citing *Alvis*, 85 Ill. 2d at 16, 421 N.E.2d at 892).

128. *Clarkson*, 108 Ill. 2d at 136, 483 N.E.2d at 271. Justice Ryan qualified this statement by adding that "a plaintiff should not be permitted to recover damages brought about by his failure to wear a seat belt if a reasonably prudent person would be expected to use a seat belt under similar circumstances." *Id.* While the *Clarkson* appeal was pending, the Illinois General Assembly enacted Public Act 83-1507, which is consistent with the majority's opinion. The relevant section of that Act provides:

> (c) Failure to wear a seat belt in violation of this section shall not be considered evidence of negligence, shall not limit the liability of the insurer, and shall not diminish any recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle.

ILL. REV. STAT. ch. 95½, para. 12-603.1 (1985).

At the time of the *Clarkson* decision, the court had not yet passed on the constitution-

2. The Moorman Economic Loss Doctrine

Under the Moorman Economic Loss Doctrine ("Moorman Doctrine"), one is unable to recover in tort for purely economic loss.[129] A cause of action for purely economic loss fails to allege personal injury or damage to property; and the damage must be to property other than the defective product.[130] If a plaintiff's complaint is based solely on qualitative defects, and therefore a purchaser's disappointed expectations, then contract law, as opposed to tort law, applies.[131] Tort theory, however, is appropriate when a party sues for "personal injury or property damage resulting from a sudden or dangerous occurrence."[132]

The supreme court examined the Moorman Doctrine in *Scott & Fetzer Co. v. Montgomery Ward & Co.*.[133] The issue for the court's determination was whether the Moorman Doctrine prohibited the plaintiffs' action in tort.[134] The court concluded that the alleged losses fell outside the definition of pure economic loss and therefore were properly recoverable under a tort theory.[135]

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ality of this provision. *Clarkson*, 108 Ill. 2d at 139, 493 N.E.2d at 273. In Justice Ryan's opinion, the new provision conflicted with an earlier provision which required the wearing of seat belts. *Id.* at 139-40, 493 N.E.2d at 273 (Ryan, J., dissenting). The allegedly conflicting provision of Public Act 83-1507, approved January 8, 1985, effective July, 1985, provided that: "(a) Each driver and front seat passenger of a motor vehicle operated on a street or highway in this State shall wear a properly adjusted and fastened seat safety belt;. . . .(d)A violation of this Section shall be a petty offense and subject to a fine not to exceed $25." ILL. REV. STAT. ch. 95½, para. 12-603.1 (1985).

Justice Ryan argued that a violation of this statutory duty should at least be considered as evidence of plaintiff's failure to act as a reasonably prudent person. *Clarkson*, 108 Ill. 2d at 140, 483 N.E.2d at 273 (Ryan, J., dissenting).

129. Moorman Manufacturing Co. v. National Tank Co., 91 Ill. 2d 69, 91, 435 N.E.2d 443, 453 (1982). Contrary to *Moorman*, the Illinois Supreme Court has held that "economic loss is recoverable where one intentionally makes false representations." Soules v. General Motors Corp., 79 Ill. 2d 282, 287, 402 N.E.2d 599, 601 (1980). The supreme court also has held that economic loss is recoverable where one who is in the business of supplying information for the guidance of others in their business transactions makes negligent representations. Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

130. *Moorman Manufacturing Co.*, 91 Ill. 2d at 86, 435 N.E.2d at 451. The Moorman court noted that economic loss has been defined as " 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits - without any claim of personal injury or damage to other property. . . .' " *Id.* at 82, 435 N.E.2d at 449 (quoting Note, *Economic Laws in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966)).

131. Scott & Fetzer Co. v. Montgomery Ward & Co., 112 Ill. 2d 378, 387, 493 N.E.2d 1022, 1026 (1986) (citing *Moorman*, 91 Ill. 2d at 82, 435 N.E.2d at 449).

132. *Scott & Fetzer Co.*, 112 Ill. 2d at 388, 493 N.E.2d at 1026 (citing *Moorman*, 91 Ill. 2d at 86, 435 N.E.2d at 450).

133. 112 Ill. 2d 378, 493 N.E.2d 1022.

134. *Id.* at 387, 493 N.E.2d at 1025.

135. *Id.* at 388, 493 N.E.2d at 1026.

In *Scott & Fetzer Co.*, Montgomery Ward & Company ("Wards") occupied a portion of a large warehouse.[136] Wards contracted with a fire alarm service company. Subsequently, the alarm system allegedly malfunctioned during a fire.[137] The fire spread and caused extensive damage to the other portions of the warehouse belonging to the other tenants.[138] When sued by both Wards and the other tenants, the fire alarm company claimed that under a tort theory of liability, the plaintiffs could not recover for purely economic loss.[139]

The defendant maintained that the adjacent tenants' complaints were insufficient because the alleged harm only affected their expectations regarding the system's function.[140] Because the adjacent tenants were seeking damages for the loss of property other than the defective alarm system,[141] the court concluded that their losses[142] were not purely economic.[143] In addition, the complaint specifically alleged that due to the alarm service company's negligence, a "sudden and dangerous conflagration destroyed their property."[144] Applying the Moorman Doctrine to the facts of this case, the *Scott & Fetzer Co.* court concluded the economic loss doctrine did not bar recovery.[145]

3. Physician's Duty to Warn

During the *Survey* year, the Illinois Appellate Court for the First District held that psychiatrists, hospitals, and drug manufacturers have a duty to warn[146] their patients of the adverse effects of drugs

136. *Id.* at 382, 493 N.E.2d at 1023.

137. *Id.* at 382-83, 493 N.E.2d at 1023.

138. *Id.*

139. *Id.* at 383, 493 N.E.2d at 1023. *See also* Swaw v. Ortell, 137 Ill. App. 3d 60, 484 N.E.2d 780 (1st Dist. 1985) (plaintiffs who suffered only economic loss unable to recover in negligence against defendant, despite structural defects that rendered home uninhabitable).

140. *Scott & Fetzer Co.*, 112 Ill. 2d at 387, 493 N.E.2d at 1025.

141. *Id.* at 388, 493 N.E.2d at 1026.

142. The court in *Scott & Fetzer Co.* addressed only the adjacent tenants' losses. *Id.*

143. *Id.*

144. *Id.* For a discussion of the applicability of tort theory, see *supra* note 132 and accompanying text.

145. *Id. See also supra* note 132 and accompanying text. In addition to holding that the Moorman Doctrine did not bar recovery, the supreme court held that plaintiffs' complaints were sufficient and a finding that the fire alarm service company proximately caused the losses reasonably could be supported by the evidence. *Scott & Fetzer Co.*, 112 Ill. 2d at 394, 493 N.E.2d at 1029.

146. A duty to warn implicitly includes a duty to warn adequately. Kirk v. Michael Reese Hosp. & Med. Ctr., 136 Ill. App. 3d 945, 950 n.1, 483 N.E.2d 906, 910 n.1 (1st

prescribed to them.[147] The duty to warn implicitly extends to members of the general public whose injuries are proximately caused by the failure to warn of these effects.[148]

In *Kirk v. Michael Reese Hospital & Medical Center*,[149] two psychiatrists ordered drugs for a patient.[150] Hospital personnel administered the drugs and discharged the patient without advising him of any possible adverse effects.[151] The patient then consumed an alcoholic beverage and drove his automobile with the plaintiff as a passenger.[152] As a result of the drugs and diminishment of the patient's mental and physical abilities, he lost control of his car, hit a tree, and injured the plaintiff.[153]

The plaintiff sued the drug manufacturers, the psychiatrists, and the hospital for their failure to warn the patient of the drugs' adverse effects, despite their knowledge of these effects.[154] The trial court dismissed all the claims; the appellate court, however, held that the plaintiff had stated a valid cause of action.[155] The appellate court held that prior to the patient's discharge, the hospital had a duty to warn the patient of the adverse effects of the drugs.[156] The duty, however, arose only if the hospital knew or should have known of the adverse effects of the drugs.[157]

The appellate court in *Kirk* held that the duty owed to the patient implicitly extended to the plaintiff in addition to the general public.[158] In determining whether the defendants owed a legal duty to the plaintiff, the court considered three factors.[159] First,

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Dist. 1985) (citing Mahr v. G.D. Searle & Co., 72 Ill. App. 3d 540, 562, 390 N.E.2d 1214, 1230 (1979)).

147. *Kirk*, 136 Ill. App. 3d at 956, 483 N.E.2d at 914.

148. *Id.*

149. 136 Ill. App. 3d 945, 483 N.E.2d 906.

150. *Id.* at 949, 483 N.E.2d at 909.

151. *Id.*

152. *Id.* at 949-50, 483 N.E.2d at 909.

153. *Id.* at 950, 483 N.E.2d at 909-10.

154. *Id.* at 950, 483 N.E.2d at 910.

155. *Id.* at 949, 483 N.E.2d at 909.

156. *Id.* at 954-55, 483 N.E.2d at 913. The appellate court stated: "A patient should not be discharged from a hospital under circumstances which make the patient unknowingly a potential danger to himself or herself and the public at large, because of drugs administered by hospital personnel." *Id.* at 955, 483 N.E.2d at 913.

157. *Id.*

158. *Id.* at 956, 483 N.E.2d at 914.

159. *Id.* at 950, 483 N.E.2d at 910. *See infra* notes 160-173 and accompanying text. For further discussion of these factors, see Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 356, 367 N.E.2d 1250, 1254 (1977); Cunis v. Brennan, 56 Ill. 2d 372, 374, 308 N.E.2d 617, 618 (1974); Barnes v. Washington, 56 Ill. 2d 22, 26, 29, 305 N.E.2d 535, 538, 539 (1973); Meiher v. Brown, 54 Ill. 2d 539, 541, 544-45, 301 N.E.2d 307, 309-10 (1973); Orrico v. Beverly Bank, 109 Ill. App. 3d 102, 105-06, 440 N.E.2d 253, 256 (1982).

the court discussed the foreseeability of the defendants' acts or omissions resulting in an injury to the plaintiff.[160] The court determined that the patient's consumption of an alcoholic beverage, his presence with the plaintiff in the automobile, and the negligent manner in which he drove, were all foreseeable.[161] Therefore, the court held that the defendants should have known that their failure to warn of the adverse effects of the drugs would cause injury to a member of the general public.[162]

Next, the court addressed the magnitude of the burden of guarding against an injury to a member of the public because of a failure to warn.[163] Because many new drugs are continually introduced and utilized, the court asserted that the public should be protected from their varying adverse effects.[164] Therefore, the psychiatrists, hospital, and drug manufacturer had a duty to give an adequate warning of the drugs' adverse effects.[165] This duty implicitly extended to those who may have been injured as a result of their failure to warn.[166] The court believed that this duty was not an undue burden on the defendants in light of the great risks to which the public was exposed.[167]

Finally, the *Kirk* court examined the public policy considerations involved in the extension of the duty to the general public.[168] The court stated that the duty in question "simply required a warning, not control or prevention."[169] The court expressed a con-

160. *Kirk*, 136 Ill. App. 3d at 950, 483 N.E.2d at 910.

161. *Id.* at 950-51, 483 N.E.2d at 910. The defendants argued that the collision with the tree was not foreseeable because the patient-driver's consumption of alcohol and negligent driving constituted superseding intervening causes. *Id.* at 951, 483 N.E.2d at 910. The court, however, noted that independent intervening acts will not break the chain of causation if they were reasonably foreseeable. The court held that such acts were reasonably foreseeable absent the applicable warning, and therefore did not break the chain of causation. *Id.* at 951, 483 N.E.2d at 910-11.

162. *Id.* at 951, 483 N.E.2d at 910. Under the court's standard of duty to warn, it was not essential that the defendants foresee the precise injury nor the precise plaintiff injured as a result of their failure to warn; "[a] duty may exist to one who is unknown and remote in time and place." *Id.* at 950-51, 483 N.E.2d at 910. For a discussion of to whom a duty is owed, see Renslow v. Mennonite Hospital, 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1254-55 (1977); Neering v. Illinois Central R.R. Co., 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943); Wintersteen v. National Cooperage & Woodenware Co., 361 Ill. 95, 103, 197 N.E. 578, 582 (1935); Orrico v. Beverly Bank, 109 Ill. App. 3d 102, 107, 440 N.E.2d 253, 257 (1982).

163. *Kirk*, 136 Ill. App. 3d at 951, 483 N.E.2d at 911.

164. *Id.* at 952, 483 N.E.2d at 911.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 953, 483 N.E.2d at 912.

169. *Id.*

cern for persons injured as a result of medical negligence;[170] and thus concluded that in order to protect these victims, "the wrongful acts must be curtailed."[171] After examining the three relevant factors, the court concluded that each of the defendants owed a legal duty to the plaintiff.[172] Whether the defendants breached their respective duties was an issue for the trier of fact to determine upon remand.[173]

The court in *Kirk* determined that the trial court may find the hospital strictly liable for the plaintiff's injuries.[174] The court noted that all of the elements for a products liability action were present: the case involved a product; the hospital was within the distributive chain of the product;[175] the product was unreasonably dangerous because it was dispensed without adequate warning; the hospital knew or should have known of the unreasonably dangerous condition; the unreasonably dangerous condition existed at the time the product left the hospital's control; and the failure to warn was a proximate cause of the plaintiff's injuries.[176]

III. INDEMNITY

A. Abolition of Implied Indemnity

During the *Survey* year, the Illinois Supreme Court clarified third-party actions and their accompanying jury instructions by abolishing implied indemnity. The rule of comparative negligence and the principles of apportioning by relative fault have eliminated the need for adherence to the confusing fiction of active-passive negligence.

An implied indemnity suit is an ordinary negligence action to recover damages from an indemnitor.[177] The doctrine of implied

170. *Id.* at 954, 483 N.E.2d at 912.

171. *Id.*

172. *Id.* at 956, 483 N.E.2d at 914. The court noted that the duty of each defendant to warn was nondelegable. *Id.* at 955 n.5, 483 N.E.2d at 913 n.5.

173. *Id.* at 955, 483 N.E.2d at 913. Justice McNamara dissented, stating he believed that the "plaintiff's injury was not reasonably forseeable and the manufacturers and hospital [had] no duty to warn a nonpatient, nonuser of a prescription drug. . . ." *Id.* at 960, 483 N.E.2d at 917 (McNamara, J., dissenting).

174. *Id.* at 955-56, 483 N.E.2d at 913-14.

175. *Id.* at 955 n.6, 483 N.E.2d at 913 n.6. The court noted that hospitals charge patients for the drugs that they dispense. Therefore, a sale was involved, and the hospital was clearly within the distribution chain of the product. *Id.* (citing Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 447-53, 266 N.E.2d 897, 899-902 (1980)).

176. *Kirk*, 136 Ill. App. 3d at 955-56, 483 N.E.2d at 913-14.

177. Allison v. Shell Oil Co., 113 Ill. 2d 26, 33, 495 N.E.2d 496, 500 (1986).

indemnity is based upon an active-passive distinction.[178] An indemnitee's conduct is considered "passive" if the indemnitee was not contributorily negligent[179] or if the indemnitor squandered the last clear chance.[180] Under implied indemnity, a party whose conduct is considered "active" is denied all forms of relief regardless of how much the other tortfeasors are at fault.[181]

The supreme court noted in the past, parties who were less at fault could transfer the entire cost of their liability to those who were more at fault.[182] During the *Survey* period, however, implied indemnity was held to no longer be a viable doctrine for shifting the entire cost of tortious conduct from one tortfeasor to another.[183] In *Allison v. Shell Oil Co.*,[184] Shell Oil Company ("Shell") contracted with Strange & Coleman ("S & C") for the latter to rebuild a catalytic cracker at Shell's refinery.[185] S & C subcontracted J.J. Wuellner ("Wuellner") to provide scaffolding for the S & C welders.[186] To reach an area which the scaffolding left inaccessible, the welders ran a board from the top of the catcracker to the scaffold.[187] The plaintiff, an S & C welder, was injured when he fell off the board that had slipped while he was standing on it.[188]

The plaintiff sued both Shell and Wuellner on two theories: common law negligence and the Structural Work Act.[189] Shell and Wuellner impleaded S & C as a third-party defendant seeking complete indemnification or, in the alternative, contribution.[190] Prior

178. *Id.*

179. *Id.* (citing Moroni v. Intrusion Prepakt, Inc., 24 Ill. App. 2d 534, 165 N.E.2d 346 (1st Dist. 1960)).

180. *Allison*, 113 Ill. 2d at 33-34, 495 N.E.2d at 500 (citing Sargent v. Interstate Bakeries, Inc., 86 Ill. App. 2d 187, 229 N.E.2d 769 (1st Dist. 1967)).

181. *Id.* at 34, 495 N.E.2d at 501 (citing Alvis v. Ribar, 85 Ill.2d 1, 27, 421 N.E.2d 886, 898 (1981)). *See also* Gillette v. Todd, 106 Ill. App. 2d 287, 245 N.E.2d 923 (1969) (one who is passively negligent may seek indemnity from one whose active negligence primarily caused the damage or injury).

182. *Allison*, 113 Ill. 2d at 31, 495 N.E.2d at 499. *But See* Carver v. Grossman, 55 Ill. 2d 507, 305 N.E.2d 161 (1973) (indemnity not allowed because negligence of both tortfeasors was "active").

183. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501. *Accord* Skinner v. Reed Prentice Division Package Machinery Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977) (analogy of active-passive indemnity to the no-contribution rule held to be inequitable), *cert. denied sub nom.* Hinckley Plastic, Inc. v. Reed-Prentice Division Package Machinery Co., 436 U.S. 946 (1978).

184. 113 Ill. 2d 26, 495 N.E.2d 496.

185. *Id.* at 27, 495 N.E.2d at 497.

186. *Id.*

187. *Id.* at 27-28, 495 N.E.2d at 497.

188. *Id.* at 28, 495 N.E.2d at 497.

189. *Id.* at 28, 495 N.E.2d at 497-98 (citing ILL. REV. STAT. ch. 48, para. 60 (1985)).

190. *Id.* at 28, 495 N.E.2d at 498. *See also* Pipes v. American Logging Tool Corp.,

to trial, all defendants settled with the plaintiff, but the third-party claims proceeded to trial to determine each defendant's liability for the settlement amount.[191]

The jury was instructed regarding both implied indemnity and contribution,[192] and found that Shell and Wuellner were entitled to indemnification from S & C.[193] The appellate court reversed the jury's finding on the grounds that contribution had replaced implied indemnity.[194] On appeal to the supreme court, the defendants contended that implied indemnity remained a viable alternative to contribution when both a pretort relationship and a substantial difference in the amount of fault attributable to the tortfeasors were present.[195]

The supreme court in *Allison* noted that active-passive indemnity, like contributory negligence,[196] perpetuated inequality by not apportioning loss and denying relief to a party whose conduct was considered "active."[197] The court reasoned that the adoption of comparative fault[198] and the principles of apportioning have led to the abolition of implied indemnity.[199] Because implied indemnity was no longer a viable doctrine for shifting the entire cost of tortious conduct from one tortfeasor to another, the supreme court concluded the jury should not have been instructed on the law of this doctrine.[200]

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139 Ill. App. 3d 269, 487 N.E.2d 424 (5th Dist. 1985) (Contribution Act intended to place loss in proportionate amounts on those whose actions proximately cause the injury).

191. *Allison*, 113 Ill. 2d at 28, 495 N.E.2d at 498.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 32, 495 N.E.2d at 499.

196. Prior to the adoption of the comparative fault doctrine in *Alvis*, plaintiff's contributory negligence barred his recovery. *See supra* notes 1-4 and accompanying text.

197. *Allison*, 113 Ill. 2d at 34, 495 N.E.2d at 501.

198. For a discussion of the comparative fault doctrine, see *supra* notes 1-4 and accompanying text. The principles of apportioning also were adopted in *Skinner*, 70 Ill. 2d 1, 374 N.E.2d 437, and the Illinois Contribution Act, ILL. REV. STAT. ch. 70, paras. 301-305 (1979).

199. *Allison*, 113 Ill. 2d at 34, 495 N.E.2d at 501. *See also* Heinrich v. Peabody International Corp., 139 Ill. App. 3d 289, 486 N.E.2d 1379 (1st Dist. 1985) (Illinois Contribution Act provided full and fair remedy among parties liable for injuries to plaintiff and thus eliminated doctrine of implied indemnity).

200. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501. Under the Structural Work Act, liability would be imposed only if Shell or Wuellner were actually at fault. *Id.* (citing ILL. REV. STAT. ch. 48, para. 60 (1985)). *See infra* notes 293-309 and accompanying text. Additionally, the defendants, Shell and Wuellner, were concerned that if they requested contribution, the jury would consider them liable. *Allison*, 113 Ill. 2d at 35, 495 N.E.2d at 501. The court responded that this concern was best voiced to the judge who

B. Judicial Indemnification

New legislation expanded the representation and indemnification of state employees to include judges. The expansion facilitates two vital policies requisite to the fullest administration of justice: an unencumbered focus on the merits of a case and the unimpeded growth of the common law.

This expansion was achieved by inserting a new section in the paragraph of the Illinois Revised Statutes entitled Representation and Indemnification of State Employees.[201] This section provides a judge who is sued for a decision or an order made in the course of his or her duties with representation and indemnification.[202] A judge will be indemnified for all damages awarded, all court costs, attorneys' fees, and litigation expenses.[203]

C. Public Defender Indemnification

The addition of public defenders to the governmental indemnity scheme will reduce the fallibility inherent in public office. The enlarged protection shields public servants and thus promotes uninhibited advocacy.

The Indemnity of Public Defender or Assistant Public Defender Act,[204] provides that the county will indemnify a public defender or assistant public defender for any judgment against him as a result of injuring a party or a party's property in the course of his duties.[205] The duty to indemnify is conditional upon the county receiving notice of the action against the public defender or assistant public defender in the manner described in the Act.[206] The Act further provides that the county which may be liable may intervene in the action and shall be permitted to appear and

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may then instruct the jury regarding its options under the Act. *Id.* For a discussion of other cases applying the Structural Work Act, see *infra* notes 293-339 and accompanying text.

201. ILL. REV. STAT. ch. 127, para. 1302(d) (1985).

202. *Id.* The judge is entitled to representation and indemnification regardless of the plaintiff's theory of recovery. *Id.*

203. *Id.* Judges convicted of a crime resulting from intentional misconduct in a trial, who are sued as a direct result of that misconduct, may receive neither representation nor indemnification under this amendment. *Id.*

204. ILL. REV. STAT. ch. 34, para. 301.2 (1985).

205. *Id.* The public defender is entitled to indemnification under this amendment unless the injury at issue resulted from the public defender's wilful misconduct. *Id.*

206. *Id.* Within 10 days of service of process upon a public defender or assistant public defender, the public defender must notify the county that the action has been instituted against him. *Id.* The notice must be in writing and filed in both the states attorney's office and the county clerk's office. *Id.*

defend.[207]

IV. MEDICAL MALPRACTICE[208]

During the *Survey* year, the supreme court ruled on the constitutionality of the Medical Malpractice Act (the "Act").[209] This Act made a number of significant changes in the Code of Civil Procedure[210] concerning medical malpractice actions.[211]

In *Bernier v. Burris*,[212] the plaintiff[213] challenged the constitutionality of various provisions of the Act and sought to enjoin the disbursement and expenditure of funds for carrying out these provisions.[214] The plaintiff attacked the constitutionality of five parts of the legislation: the establishment of a system of review panels,[215] the provision for the periodic payment of future damages,[216] the modification of the collateral source rule,[217] the prohibition of punitive damages,[218] and the limitations on the amount of contingent, fees.[219] These provisions apply to healing art malpractice actions, which are ordinarily actions against physicians and hospitals, but also may include actions against other health professionals.[220]

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207. *Id.*

208. The Illinois courts also addressed legal malpractice during the *Survey* period. *See, e.g.*, Sexton v. Smith, 112 Ill. 2d 187, 492 N.E.2d 1284 (1986) (plaintiff-seller of farm not entitled to malpractice award from attorney who prepared installment contract concerning real estate but did not obtain security interest for seller in chattels because parties understood that bank would have first lien on cattle and machinery); Yates v. Muir, 112 Ill. 2d 205, 492 N.E.2d 1267 (1986) (Illinois courts have no jurisdiction over a legal malpractice claim against a Kentucky attorney when all legal services for the Illinois resident were rendered in Kentucky); Makela v. Roach, 142 Ill. App. 3d 827, 492 N.E.2d 191 (2d Dist. 1986) (attorney did not owe a duty of reasonable skill and care to non-client who was not a direct third-party beneficiary of services rendered); Gelsomino v. Gorov, 149 Ill. App. 3d 809, 502 N.E.2d 264 (1st Dist. 1986) (affidavits of plaintiff's legal malpractice expert created question of fact by noting defendant's failure to investigate and present favorable testimony of at least six persons).

209. 1985 Ill. Laws 84-7.

210. ILL. REV. STAT. ch. 110, paras. 1-101 to 19c-101 (1985).

211. *Bernier v. Burris*, 113 Ill. 2d 219, 225, 497 N.E.2d 763, 766 (1986).

212. 113 Ill. 2d 219, 497 N.E.2d 763.

213. The plaintiff had standing because she instituted her action in her capacity as taxpayer. *Id.* at 226, 497 N.E.2d at 767.

214. *Id.* Various state officials were named as defendants in the action. *Id.*

215. *Id. See infra* notes 221-40 and accompanying text. *See also* Comment, *Illinois' Medical Malpractice Review Panel Provision: A Constitutional Analysis*, 17 LOY. U. CHI. L.J. 275 (1986) [hereinafter Comment, *Review Panel*].

216. *Bernier*, 113 Ill. 2d at 226, 497 N.E.2d at 767. *See infra* notes 241-55 and accompanying text.

217. *Id. See infra* notes 256-69 and accompanying text.

218. *Id. See infra* notes 270-78 and accompanying text.

219. *Id. See infra* notes 279-92 and accompanying text.

220. *Id.* at 226-27, 497 N.E.2d at 767. *See, e.g.*, ILL. REV. STAT. ch. 110, para. 2-622

A. Review Panels

Pursuant to the Act, prior to trying a case for healing-art malpractice, a panel, composed of a circuit judge, a practicing attorney, and a health-care professional, must determine the issues of liability and damages.[221] The parties, however, may unanimously agree to forego the panels and proceed directly to trial.[222]

Proceedings before the panel are adversarial; both the parties and the panel may call and examine witnesses.[223] The circuit judge presides over the proceedings and determines all questions of law, including matters of evidence.[224] Following the hearing, the panel renders a written decision: the judge determines the questions of law and the panel, including the judge, determines the questions of fact.[225] At any time, the parties may unanimously agree to be bound by the panel's decision.[226] In the event such an agreement is made, the decision of the panel is final and judgment is entered accordingly.[227] If the parties have not agreed to be bound by the panel's decision, the judge conducts a pretrial conference and the matter proceeds to trial.[228]

The supreme court in *Bernier* held the procedures for review

(1985). The *Bernier* court noted that its task was not to determine whether a malpractice crisis existed, but instead to determine whether the legislation in question was constitutional. *Bernier*, 113 Ill. 2d at 230, 497 N.E.2d at 769. Whether a malpractice crisis existed at all was disputed by the plaintiff in the Circuit Court of Cook County. The trial judge found that there was no crisis and that the provisions challenged were therefore unnecessary. *Id.* at 229, 497 N.E.2d at 768.

221. *Bernier*, 113 Ill. 2d at 230, 497 N.E.2d at 769. The legislation also provided special procedures for maintaining rosters of judges, attorneys, and health-care professionals from which the parties select the panel members. *Id.* (citing ILL. REV. STAT. ch. 110, para. 2-1014 (1985)). The legislature further provided time limitations in which the panel must be formed and render a decision. *Bernier*, 113 Ill. 2d at 230-31, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para. 2-1013 (1985)). Additionally, the two nonjudicial members of the panel are compensated. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para, 2-1019(a),(b) (1985)).

222. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para. 2-1012(b) (1985)).

223. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para. 2-1016(b) (1985)).

224. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citng ILL. REV. STAT. ch. 110, para. 2-1016(a) (1985)).

225. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para. 2-1017(a) (1985)).

226. *Bernier*, 113 Ill. 2d at 231, 497 N.E.2d at 769 (citing ILL. REV. STAT. ch. 110, para. 2-1018(b) (1985)).

227. *Id.*

228. *Id.* (citing ILL. REV. STAT. ch. 110, para. 2-1018(d) (1985)). If the matter proceeds to trial, the panel judge may not preside, nor may the panel's decision be admitted. *Id.* Also, a party who rejects a unanimous decision by the review panel and who does not prevail on the issue of liability at trial is liable for "the costs, reasonable attorneys' fees

panels unconstitutional.[229] Under the provisions, the judge either acts in his judicial capacity but is forced to share his judicial authority with the nonjudicial members, or is denied his judicial authority and has no greater authority than the other two panel members.[230] The court held that neither alternative was proper[231] because of the failure to distinguish between the roles of the judge and the nonjudicial members.[232] The court concluded that the judge's factfinding and decision making authority was shared with the judge and the nonjudicial panel members.[233] Because the judge was forced to share his authority with the lawyer and the health-care professional, the nonjudicial members "were empowered to exercise a judicial function in violation of sections 1 and 9 of article VI of the constitution."[234] Accordingly, the *Bernier* court held that the procedures for review panels were unconstitutional.[235]

Justice Ryan, dissenting in part, stated the provisions of the Act clearly separated the judicial and nonjudicial functions of the panel.[236] Justice Ryan noted that in jury trials, the factfinding

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and expenses of the prevailing party." *Bernier*, 113 Ill. 2d at 231-32, 497 N.E.2d at 769, (citing ILL. REV. STAT. ch. 110, para. 2-1019(c) (1985)).

229. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 771. *See* Wright v. Central DuPage Hospital Association, 63 Ill. 2d 313, 324, 347 N.E.2d 736, 741 (1976), in which the Illinois Supreme Court invalidated a system of medical malpractice screening panels composed of a circuit court judge, an attorney, and a physician. The *Wright* court held that the panel procedures violated provisions in the Illinois Constitution concerning the source of the judicial power and the jurisdiction of the circuit courts. *Id.* at 322, 347 N.E.2d at 739-41 (citing ILL. CONST. art. VI, §§ 1, 9). Furthermore, the court in *Wright* held that these procedures were an unconstitutional burden on the right to a jury trial. *Wright*, 63 Ill. 2d at 324, 347 N.E.2d at 741 (citing ILL. CONST. art. I, § 13). *See also* Blumstein v. Clayton, 139 Ill. App. 3d 611, 487 N.E.2d 1176 (1st Dist. 1985) (provisions prohibiting stay of administrative review not in violation of equal protection as greater risk of harm to public presented by sanctioned doctors justifies separate treatment of such decisions).

230. *Bernier*, 113 Ill. 2d at 233-34, 497 N.E.2d at 770.

231. *Id.* at 234, 497 N.E.2d at 770. The *Bernier* court noted that statutes that call for the creation of panels consisting of three circuit court judges previously had been held unconstitutional on the grounds that the legislature lacks the authority to create a new court. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 770 (citing *In re Contest of Election for Governor*, 93 Ill. 2d 463, 444 N.E.2d 170 (1983)).

232. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 770. The *Bernier* court stated the review panel problems considered in *Wright*, 63 Ill. 2d at 319, 347 N.E.2d at 738, had not been sufficiently resolved by the new legislation. *Bernier*, 113 Ill. 2d at 233, 497 N.E.2d at 770. *See supra* note 229.

233. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 770-71.

234. *Id.* at 233, 497 N.E.2d at 770 (citing *Wright*, 63 Ill. 2d at 322, 347 N.E.2d at 739-40).

235. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 771.

236. *Id.* at 254, 497 N.E.2d at 780. (Ryan, J., concurring in part and dissenting in part).

function has been vested completely in nonjudicial personnel.[237] Therefore, he did not view the judge's sharing of factual determinations with the nonjudicial members of the panel as a violation of judicial authority.[238] Justice Ryan asserted that a panel of three individuals, including one judge, is constitutional if the judicial functions are clearly separated from the nonjudicial functions.[239] Moreover, Justice Ryan opined that the Act clearly had vested the judicial functions in the judge.[240]

B. Periodic Payment of Damages

The plaintiff in *Bernier* also challenged the provisions[241] of the Medical Malpractice Act that permit the payment of large awards of future damages in periodic installments.[242] The circuit court judge found that the provisions denied rights to trial by jury, equal

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237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* Justice Ryan, however, did assert that the section of the Medical Malpractice Act that provides for the assessment of costs and attorneys' fees, is unconstitutional. *Bernier*, 113 Ill. 2d at 255, 497 N.E.2d at 780 (Ryan, J. concurring in part and dissenting in part) (citing ILL. REV. STAT. ch. 110, para. 2-1019(c) (1985)). *See infra* notes 279-92 and accompanying text. Justice Ryan observed that no limit was placed on the costs and attorney fees that may be assessed. Accordingly, Justice Ryan asserted that the lack of restrictions on the potential assessment could divert a party from proceeding to trial with a meritorious claim. *Bernier*, 113 Ill. 2d at 255, 497 N.E.2d at 780. In Justice Ryan's opinion, the costs and fees provision was unconstitutional because it infringed upon the right to a jury. *Id.* at 255, 497 N.E. 2d at 781 (Ryan, J., concurring in part and dissenting in part).

Justice Ryan further questioned the provision found in section 2-1018(d) of the Code of Civil Procedure which provides that "any judge who served on a review panel in the case may not preside at trial". *Id.* at 256, 497 N.E.2d at 781 (Ryan, J., concurring in part and dissenting in part) (citing ILL. REV. STAT. ch. 110, para. 2-1018(d) (1985)). Justice Ryan noted that, although this restriction appeared to be logical, this provision may be a violation of the court's constitutional powers in light of a recent decision of this court. *Bernier*, 113 Ill. 2d at 256, 497 N.E.2d at 781 (Ryan, J., concurring in part and dissenting in part) (citing People v. Joseph, 113 Ill. 2d 36, 495 N.E.2d 501 (1986)).

For a critical analysis of the review panels provision and its constitutionality, see generally Comment, *Review Panel*, *supra* note 215. *See also* Baumgartner v. The First Church of Christ, Scientist, 141 Ill. App. 3d 898, 490 N.E.2d 1319 (1st Dist.) (allegations of Christian Science malpractice and negligence in wrongful death action properly dismissed because Medical Malpractice Act exempts religious treatment) *cert. denied*, 107 S. Ct. 317 (1986).

241. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 763 (citing ILL. REV. STAT. ch. 110, paras, 2-1701, 2-1704 (1985)).

242. *Bernier*, 113 Ill. 2d at 234, 497 N.E.2d at 763. Sections 2-1701 and 2-1704 of the Code of Civil Procedure do not apply unless an effective election has been made by a party. *Id.* at 234-35, 497 N.E.2d at 771 (citing ILL. REV. STAT. ch. 110, para. 2-1705). An effective election first requires a party to make a timely motion for application of these provisions. *Id.* at 235, 497 N.E.2d at 771 (citing ILL. REV. STAT. ch. 110, para. 2-1705).

protection, and due process as provided by the Illinois Constitution.[243] In addition, the court held that the provisions constituted special legislation.[244]

On direct appeal, the supreme court held that the provisions did not interfere with the right to trial by jury.[245] Under these provisions, the jury continues to make all damage computations.[246] The jury, however, is instructed not to reduce the amounts to their present value; instead, the statute provides the discount factor the trial court must use.[247]

The supreme court concluded that the provisions allowing periodic payments in healing art malpractice cases offend neither equal protection nor constitute special legislation.[248] The court determined that multimillion dollar lump sum awards have had a great impact on the availability and affordability of bodily injury liability insurance.[249] Moreover, the court noted that these awards have caused the most severe problems in the areas of products liability and medical malpractice.[250] The court further recognized that because large judgments often include future damages, the damages

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For a list of other conditions which must be met for an effective election, see ILL. REV. STAT., ch. 110, para. 2-1705 (1985).

If the procedure applies in a case, the trier of fact must compute the future damages without reducing them to present value. Only future damages to be paid at the present time require reduction to present value. *Bernier*, 113 Ill. 2d at 235, 497 N.E.2d at 771. Under the damages provision, the six percent statutory discount factor only reduces economic damages. *Id.* at 236, 497 N.E.2d at 771 (citing ILL. REV. STAT. ch. 110, para. 2-1712 (1985)). " '[E]quivalent lump sum value' is calculated by 'applying the discount factor, compounded annually, to those elements of damages for future economic loss, and then adding, without discounting, those elements of damages for future noneconomic loss. . . .' " *Bernier*, 113 Ill. 2d at 235-36, 497 N.E.2d at 763 (citing ILL. REV. STAT. ch. 110, para. 2-1712 (1985)). If a defendant is liable for a periodic award, he must post adequate security. *Bernier*, 113 Ill. 2d at 236, 497 N.E.2d at 772 (citing ILL. REV. STAT. ch. 110, para. 2-1711 (1985)).

243. *Bernier*, 113 Ill. 2d at 236, 497 N.E.2d at 772 (citing ILL. CONST. art. I, § 13). For standards of determining equal protection challenges, see McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); and Illinois Housing and Development Authority v. Van Moter, 82 Ill. 2d 116, 412 N.E.2d 151 (1980). For standards of determining due process challenges, see Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483 (1955); and Harris v. Manor Health Care Corp., 111 Ill. 2d 350, 489 N.E.2d 1374 (1986).

244. *Bernier*, 113 Ill. 2d at 236, 497 N.E.2d at 772.

245. *Id.* at 237, 497 N.E.2d at 772.

246. *Id.*

247. *Id.* The court noted that sections 2-1701 and 2-1704 of the Code of Civil Procedure are no greater an impediment to the right to a jury trial than a statute setting a predetermined interest rate for judgments. *Id.*

248. *Id.* at 238, 497 N.E.2d at 772-73.

249. *Id.* at 238, 497 N.E.2d at 773.

250. *Id. See* Model Periodic Payment of Judgments Act, 14 U.L.A. 20 (1986).

are often spent before the damages are actually incurred.[251] Thus, the court reasoned that the legislature could have believed that the periodic payment of future damages would be an effective way of preserving awards for when they were needed in the future.[252] The fact that the provisions applied only to medical malpractice actions was of no consequence according to the *Bernier* court, because the legislature may choose to address the problem or problems that it perceives to be in the most need.[253] Because the provisions were rationally related to a legitimate governmental interest,[254] the court held they did not violate due process or equal protection.[255]

C. *Collateral Source Rule*

In *Bernier*, the plaintiff also challenged the constitutionality of section 2-1205,[256] which provided that sums received from collateral sources may be used to reduce a judgment against a tortfeasor in some circumstances.[257] The statute was limited to negligence

251. *Bernier*, 113 Ill. 2d at 238-39, 497 N.E.2d at 773. *See* Comment, *Variable Periodic Payment of Damages: An Affirmative to Lump Sum Awards*, 64 IOWA L. REV. 138, 143-45 (1978).

252. *Bernier*, 113 Ill. 2d at 239, 497 N.E.2d at 773.

253. *Id. See also* Chicago National League Ball Club, Inc. v. Thompson, 108 Ill. 2d 357, 483 N.E.2d 1245 (1985) (Chicago Cubs failed to show unconstitutionality of statutory amendment which makes certain nighttime professional sporting events subject to certain regulations).

254. The inquiry under due process and equal protection challenges is whether the legislation bears a rational relationship to a legitimate governmental interest. *Bernier*, 113 Ill. 2d at 228, 497 N.E.2d at 768 (citing McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); Illinois Housing Development Authority v. Van Mekr, 82 Ill. 2d 116, 412 N.E.2d 151 (1980)).

255. *Bernier*, 113 Ill. 2d at 239, 497 N.E.2d at 773. *See supra* note 254. The court also held section 2-1713(b) of the Illinois Revised Statute constitutional. *Bernier*, 113 Ill. 2d at 241, 497 N.E.2d at 774 (citing ILL. REV. STAT. ch. 110, para. 2-1713(b) (1985)). This section provided for the distribution of the deceased beneficiary's future installments among the group of beneficiaries. *Bernier*, 113 Ill. 2d at 241, 497 N.E.2d at 774. The court found the method of distribution which limited payments of future damages to the beneficiaries of the wrongful death constitutional. *Id.*

The plaintiff also objected to the forms of security that may be required and to the discharge of tortfeasors upon the posting of adequate security. *Id.* (citing ILL. REV. STAT. ch. 110, paras. 2-1710, 2-1718 (1985)). The court noted that different forms of security may be required and in an appropriate case, the circuit court may require the payment of a lump sum judgment. *Bernier*, 113 Ill. 2d at 242, 497 N.E.2d at 774 (citing ILL. REV. STAT. ch. 110, paras. 2-1710, 2-1708(10) (1985)). The court described the plaintiff's fears as "speculative" and stated that her objections failed to "rise to the level of a constitutional infirmity." *Bernier*, 113 Ill. 2d at 241-42, 497 N.E.2d at 774.

256. *Id.* at 242, 497 N.E.2d at 774 (citing ILL. REV. STAT. ch. 110, para. 2-1205 (1985)).

257. *Bernier*, 113 Ill. 2d at 242, 497 N.E.2d at 774. Traditionally, sums received from collateral sources are not used to reduce a judgment against a tortfeasor. *Id.*

actions against hospitals and physicians.[258] Under section 2-1205, benefits received from collateral sources may reduce a judgment up to one half.[259] The circuit judge found, however, that section 2-1205 violated equal protection and due process, and that it conflicted with a federal law.[260]

The supreme court, however, determined that because section 2-1205 allows for the consideration of sums received from collateral sources to reduce the plaintiff's judgment, it eliminates certain duplicative recoveries.[261] The court further reasoned that elimination of duplicative recoveries was rationally related to the legitimate governmental interest of reducing the cost of malpractice actions and thus did not violate equal protection.[262] Moreover, the supreme court concluded that the modification of the collateral source rule did not offend due process.[263] In eliminating part of the duplication inherent in recovering sums from both the tortfeasor and a collateral source, the *Bernier* court held that the provision did not diminish the plaintiff's recovery but only reduced the amount of the recovery from the tortfeasor.[264] The court also concluded that the provision was not invalid as special legislation, but failed to elaborate on this issue.[265]

The plaintiff also contended that the deduction allowed by section 2-1205 conflicted with a federal statute, section 407(a) of the Social Security Act, which prohibits the transfer or assignment of any right to future payment.[266] In addition, section 407(a) provides that the moneys paid or payable or rights that exist under the section are not subject to legal process such as attachment or garnishment.[267] The court held that because section 2-1205 did not

258. *Id.*

259. *Id.*

260. *Id.* at 242-43, 497 N.E.2d at 775.

261. *Id.* at 243, 497 N.E.2d at 775.

262. *Id.*

263. *Id.* at 243-44, 497 N.E.2d at 775. For a recitation of the due process inquiry, see *supra* note 254. The *Bernier* court also noted that the modification of the collateral source rule did not result in the impairment of contracts. *Bernier*, 113 Ill. 2d at 243-44, 497 N.E.2d at 775.

264. *Bernier*, 113 Ill. 2d at 244, 497 N.E.2d at 775.

265. *Id.* at 243, 497 N.E.2d at 775.

266. *Id.* at 244-45, 497 N.E.2d at 775 (citing 42 U.S.C. § 407(a) (Supp. II 1984)).

267. *Id.* Section 407(a) of the Social Security Act provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process. . ." 42 U.S.C. § 407(a) (Supp. II 1984).

The plaintiff argued that the law cannot exist under the Supremacy Clause of the

pertain to the attachment of social security benefits,[268] there was no conflict between the two provisions.[269] In upholding this modification of the collateral source rule, the *Bernier* court has derogated more than a century of common law tradition.

D. Punitive Damages

The plaintiff in *Bernier* also challenged the provision of the Act that prohibits awards of punitive damages in actions for healing art or legal malpractice.[270] The circuit court judge found that this provision violated the rights to due process and equal protection, and that it constituted special legislation.[271]

The supreme court, however, determined that such prohibitions were rationally related to a legitimate governmental interest, and therefore, constitutional.[272] The court noted that more severe limitations had been upheld and that the avoidance of excessive liability was a legitimate interest of the legislature.[273] The Illinois Supreme Court previously had held limits on the recovery of compensatory damages in medical malpractice actions invalid as special legislation.[274] This holding, however, did not require that punitive damages be available in every case.[275] The purposes of the two damage awards are quite different: punitive damages are intended to punish, while compensatory damages are intended to compensate.[276]

The supreme court in *Bernier* held that the elimination of

United States Constitution. *Bernier*, 113 Ill. 2d at 244, 497 N.E.2d at 775 (citing U.S. CONST. art. VI, § 2, cl. 2).

268. The court held that section 2-1205 of the Code of Civil Procedure did not pertain to the attachment of social security benefits under a set-off system. *Bernier*, 113 Ill.2d at 244, 497 N.E.2d at 775.

269. *Id.* The *Bernier* court recognized that the collateral source rule is of common law origin and therefore could be changed statutorily. *Id.*

270. *Id.* at 245, 497 N.E.2d at 776 (citing ILL. REV. STAT. ch. 110, para. 2-1115 (1985)). Section 2-1115 of the Code of Civil Procedure provides that "[i]n all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed." ILL. REV. STAT. ch. 110, para. 2-1115 (1985).

271. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776.

272. *Id.* at 245-46, 497 N.E.2d at 776 (citing *In re Air Crash Disaster*, 644 F.2d 594 (7th Cir.), *cert. denied sub nom.* Lin v. American Airlines, Inc., 454 U.S. 878 (1981)). For an explanation of the equal protection and due process inquiries, see *supra* note 254.

273. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

274. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d 776 (citing *Wright*, 63 Ill. 2d at 329-30, 347 N.E.2d at 746).

275. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d 776.

276. *Id.*

awards for punitive damages in medical malpractice actions served the legislative goals of reducing damages against the medical profession.[277] Therefore, the court held that this provision did not violate equal protection or due process, nor did it constitute special legislation. The supreme court, however, failed to elaborate on this holding.[278]

E. Attorney's Fees

Plaintiff Bernier further challenged the provision that establishes a sliding scale for the contingent fees an attorney may receive for representing a plaintiff in a medical malpractice action.[279] The provision defines a contingent fee as "any fee arrangement under which the compensation is to be determined in whole or in part on the result obtained."[280] Under section 2-1114 of the Act, such fees cannot exceed one-third of the first $150,000 recovered, one-fourth of the next $850,000 recovered, and one-fifth of any amount over $1,000,000 recovered.[281] In addition, the section provides that a court may review the contingent fee arrangements for fairness.[282] In circumstances in which an attorney has put forth an unusual amount of effort or performed an extraordinary service, the attorney may, upon the court's approval, receive additional

277. *Id.*

278. *Id.* at 246-47, 497 N.E.2d at 776. Section 2-1115 of the Code of Civil Procedure also was challenged on the grounds that it violated the single-subject requirement contained in the Illinois Constitution. *Id.* at 247, 497 N.E.2d at 776 (citing ILL. CONST. art. IV, § 8(d)). Article IV, section 8(d) of the constitution provides that "[b]ills, except for appropriations and for codification, revision or rearrangement of laws, shall be confined to one subject." ILL. CONST. art. IV, § 8(d). The plaintiff in *Bernier* argued that because the provision concerns actions for both healing art malpractice and legal malpractice, it pertained to more than one subject. *Bernier*, 113 Ill. 2d at 247, 497 N.E.2d at 776. The supreme court responded that the single-subject clause prohibited "discordant" provisions in the same legislation. *Id.* at 247, 497 N.E.2d at 777. Because the Code of Civil Procedure could contain separate prohibitions of awards of punitive damages in medical malpractice actions and legal malpractice actions, the court held that their presence together in the same provision did not offend the single-subject requirement. *Id.* at 248, 497 N.E.2d at 777 (citing Schlenz v. Castle, 84 Ill. 2d 196, 209-11, 417 N.E.2d 1336, 1343 (1981)).

279. *Bernier*, 113 Ill. 2d at 248, 497 N.E.2d at 777 (citing ILL. REV. STAT. ch. 110, para. 2-1114 (1985)).

280. *Bernier*, 113 Ill. 2d at 248, 497 N.E.2d at 777 (citing ILL. REV. STAT. ch. 110, para. 2-1114(a) (1985)).

281. *Bernier*, 113 Ill. 2d at 248, 497 N.E.2d at 777 (citing ILL. REV. STAT. ch. 110, para. 2-1114(a) (1985)). The statute also provided that "in determining any lump sum contingent fee, any future damages recoverable by the plaintiff in periodic installments shall be reduced to a lump sum value. ILL. REV. STAT. ch. 110, para. 2-1114(b) (1985).

282. *Bernier*, 113 Ill. 2d at 248, 497 N.E.2d at 777 (citing ILL. REV. STAT. ch. 110, para. 2-1114(c) (1985)).

compensation.[283]

The plaintiff contended that with section 2-1114 the legislature had made an unconstitutional attempt to regulate the legal profession.[284] The supreme court, however, rejected plaintiff's argument.[285] The court reasoned that because the trial court had the discretion to approve larger fees when appropriate, the provision did not limit the scope of a court's authority over attorney activities.[286] Therefore, the court held that the provision was not an unconstitutional attempt to regulate the legal profession.[287]

The plaintiff also argued that section 2-1114 violated equal protection and constituted special legislation.[288] Plaintiff's argued that litigants in cases not relating to medical malpractice are free to pay their attorney any fee they desire.[289] The court stated that the goal of the legislation was to reduce the problems in the health profession allegedly caused by the malpractice crisis.[290] Moreover, the supreme court noted that the legislature reasonably may have believed that placing a limit on attorney fees would have the three following effects: 1) to expedite the dispute resolution; 2) to deter the filing of frivolous suits; and 3) to preserve a greater part of plaintiff's recovery.[291] Thus, the supreme court in *Bernier* held that the limits on fees were rationally related to these desired effects and therefore constitutional.[292]

The limitation on attorney's fees may foreclose the right of some disadvantaged victims to a jury trial in medical negligence cases. In particular, the limitation will make it more difficult for victims to engage counsel with the expertise and financial resources necessary to prosecute complex and difficult cases.

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283. *Bernier*, 113 Ill. 2d at 248-49, 497 N.E.2d at 777 (citing ILL. REV. STAT. ch. 110, para. 2-1114(c) (1985)).

284. *Bernier*, 113 Ill. 2d at 250, 497 N.E. 2d at 778.

285. *Id.*

286. *Id.*

287. *Id.* The court also held that section 2-1114 did not violate due process or limit litigants' access to the courts because the statute's restrictions are not severe. *Id.* at 252-53, 497 N.E.2d at 779 (citing ILL. CONST. art. I, § 12). Furthermore, the statute contained a special provision allowing for greater than normal compensation when the circumstances warrant. *Bernier*, 113 Ill. 2d at 252, 497 N.E.2d at 779 (citing ILL. REV. STAT. ch. 110, para. 2-1114(c) (1985)).

288. *Bernier*, 113 Ill. 2d at 252, 497 N.E.2d at 779.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 252-534, 497 N.E.2d at 779. For explanation of inquiry under due process and equal protection challenges, see *supra* note 254.

V. STRUCTURAL WORK ACT

Three supreme court cases decided during the *Survey* year will have a major impact on future actions under the Structural Work Act (the "Act").[293] In *Innis v. Elmhurst Dodge, Inc.*,[294] the supreme court continued its recent trend of strictly construing the statute in determining what structures are covered by the Act. This restrictive approach is contrary to the long standing liberal interpretation utilized to protect persons involved in extrahazardous occupations. In the other two cases, *Prewein v. Caterpillar Tractor Co.*[295] and *Hollis v. R. Latoria Construction Co.*,[296] the supreme court determined the role of comparative fault in actions brought under the Act.

A. Determination of a Structure

The Act states that all ladders erected by any person, firm, or corporation for use in repairing a structure must be erected in a safe manner.[297] The ladders also must be placed and operated in such a manner that those who use them in the course of their employment are adequately protected.[298] Further, the Act provides injured persons a right to recover for a tortfeasor's wilful violations[299] of the Act or wilful failure to comply with its provisions.[300]

In *Innis*, the plaintiff sued to recover for injuries allegedly received during a fall from a ladder in the defendant's service department.[301] The accident occurred while the plaintiff was repairing air compressors that rested on an elevated concrete platform.[302] The

293. ILL. REV. STAT. ch. 48, para. 60 (1979).
294. 107 Ill. 2d 151, 481 N.E.2d 709 (1985).
295. 108 Ill. 2d 141, 483 N.E.2d 224 (1985).
296. 108 Ill. 2d 401, 485 N.E.2d 4 (1985).
297. ILL. REV. STAT. ch. 48, para 60 (1985).
298. The Structural Work Act provides in relevant part:

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

Id.
299. *See* Dickmann v. Midwest Interstate Elec. Constr. Co., 143 Ill. App. 3d 494, 493 N.E.2d 33 (1st Dist. 1986) (question of whether defendant's opportunity to discover the dangerous condition constituted a wilful violation of the Structural Work Act was an issue of material fact).
300. ILL. REV. STAT. ch. 48, para. 69 (1985).
301. *Innis*, 107 Ill. 2d at 153, 481 N.E.2d at 710.
302. *Id.*

plaintiff claimed that the air-compressors came within the meaning of "structure" for the purpose of alleging liability under the Structural Work Act.[303] The supreme court disagreed, holding that the air compressors were nothing more than movable pieces of equipment which the Act did not cover.[304]

The court noted that the Act covered ladders used to perform an activity upon a "house, building, bridge, viaduct, or other structure."[305] Therefore, the issue before the *Innis* court was whether the "other structure" category of the Act encompassed the air compressors.[306]

The court determined that the other structures included those "structures of the general type specified therein."[307] Because the air compressors were nothing more than movable pieces of equipment, the court considered them dissimilar from houses, buildings, bridges, and viaducts.[308] The supreme court in *Innis* declined to extend the Act to cover air compressors or other movable equipment.[309]

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303. *Id.* The defendants filed a motion for summary judgment at the trial court level. The Circuit Court of Cook County granted defendant's motion, finding that the Act did not cover the air-compressor equipment. The appellate court reversed and remanded for further determination on the merits. *Id.*

304. *Id.* at 156, 481 N.E.2d at 711. *See also* Gill v. Parcable, 138 Ill. App. 3d 409, 485 N.E.2d 1215 (5th Dist. 1985) (attaching cable TV wires to electric utility pole not covered by Act because regardless of whether pole classified as a structure, decedent's task did not relate to electrical system); Smrynrotis v. Brokob Constr. Co., 142 Ill. App. 3d 340, 491 N.E.2d 1246 (1st Dist. 1986) (Act inapplicable when plaintiff injured by contact with overhead powerline while working on roof of building because injury was not a result of the roof's failure to support and the occurrence was not the type of extrahazardous risk covered by the Act.)

305. *Innis*, 107 Ill. 2d at 155, 481 N.E.2d at 711 (citing ILL. REV. STAT. ch. 48, para. 69 (1985)). *See supra* note 298.

306. *Innis*, 107 Ill. 2d at 155, 481 N.E.2d at 711. The court noted that the Act should be given liberal interpretation in order to effectuate protection of persons engaged in extrahazardous occupations. *Id.*

307. *Id.*

308. *Id.* at 155-56, 481 N.E.2d at 711.

309. *Id.* at 156, 481 N.E.2d at 711. The *Innis* court observed that the importance of a piece of equipment is irrelevant for a determination of whether the item is a structure under the Act. *Id.*

In his dissenting opinion, Justice Simon stated that the majority's narrow interpretation of the Act failed to support the Act's principle of "broad protection to working men." *Id.* at 157-58, 481 N.E.2d at 712 (Simon, J., dissenting). Justice Simon's opinion was based on the court's recent decision in Simmons v. Union Electric Co., 104 Ill. 2d 444, 483 N.E.2d 946 (1984), in which the court set out a broad definition of "structure." *Innis*, 107 Ill. 2d at 157, 481 N.E.2d at 712 (Simon, J., dissenting) (citing *Simmons*, 104 Ill. 2d 444, 483 N.E.2d 946).

B. Comparative Fault

Comparative fault does not apply to claims made under the Structural Work Act.[310] In *Prewein*,[311] the supreme court addressed two different factual situations. In one, the plaintiff alleged that, while employed as an iron worker, he was injured when a hydraulic lift he was using for support toppled.[312] In the other, the plaintiff alleged that he was injured when the concrete slab on which he was standing collapsed.[313] Both complaints alleged that the injuries occurred as a result of violations of the Act.[314] In response to both complaints, the defendants alleged that the plaintiff's own negligence contributed to the accidents and any damages awarded should be reduced by the degree to which the defendants were at fault.[315]

In *Prewein*, the Illinois Supreme Court stated that it previously held that comparative fault did not apply to claims brought under the Act.[316] Under that prior decision, a plaintiff's alleged fault must be disregarded in order to provide complete protection for construction workers as the legislature intended.[317] Further, the *Prewein* court noted that the Act was intended to place full responsibility on "the person in charge,"[318] while eliminating an employee's contributory negligence as a defense.[319] Accordingly, the supreme court in *Prewein* held that a plaintiff's contributory negligence does not apply to claims made under the Act and therefore will not reduce the damages awarded.[320]

The role of comparative fault in a cause of action under the Act also was considered by the Illinois Supreme Court in *Hollis*.[321] The

310. *Prewein*, 108 Ill. 2d at 146, 483 N.E.2d at 226.
311. *Id.* at 141, 483 N.E.2d at 224.
312. *Id.* at 143, 483 N.E.2d at 224.
313. *Id.* at 144, 483 N.E.2d at 225.
314. *Id.* at 143-44, 483 N.E.2d at 224-25.
315. *Id.* at 145, 483 N.E.2d at 225. The petitions for leave to appeal in both cases were allowed prior to the supreme court's decision in Simmons v. Union Electric Co., 104 Ill. 2d 444, 473 N.E.2d 946 (1984). *Prewein*, 108 Ill. 2d at at 145, 483 N.E.2d at 225.
316. *Prewein*, 108 Ill. 2d at 145, 483 N.E.2d at 225 (citing *Simmons*, 104 Ill. 2d 444, 473 N.E.2d 946)). *See supra* note 315 and accompanying text.
317. *Prewein*, 108 Ill. 2d at 145, 483 N.E.2d at 225 (citing *Simmons*, 104 Ill. 2d at 461, 473 N.E.2d at 954).
318. *Prewein*, 108 Ill. 2d at 145, 483 N.E.2d at 225 (citing Bryntesen v. Carroll Construction Co., 27 Ill. 2d 566, 569, 190 N.E.2d 315, 317 (1963)).
319. *Prewein*, 108 Ill. 2d at 145, 483 N.E.2d at 225. *See also* Mathieu v. Venture Stores, Inc., 144 Ill. App. 3d 783, 494 N.E.2d 806 (1st Dist. 1986) (improper scheduling of work barred safest method of performing work and constituted violation of Structural Work Act and proximate cause of injury).
320. *Prewein*, 108 Ill. 2d at 146, 483 N.E.2d at 226.
321. *Hollis*, 108 Ill. 2d 401, 485 N.E.2d 4.

court again held that a plaintiff's conduct is not a factor in an action brought under the Act.[322] In Hollis, the plaintiff filed an action under the Act[323] for injuries sustained while working as a roofer.[324] The jury returned a verdict for the plaintiff.[325] The appellate court, however, held the award to be inadequate and therefore reversed and remanded it to the circuit court for a new trial on the issue of damages.[326]

On appeal to the supreme court, the defendant contended that the verdict resulted from "a compromise by the jury on the issue of liability."[327] The plaintiff responded that the defendant's closing argument contained references to the plaintiff's alleged negligence and that these references caused the jury to reduce improperly the amount of damages awarded.[328] At trial, the plaintiff's attorney objected to those references and argued that they were contrary to the terms of the Act.[329]

The supreme court determined that the jury's inadequate award resulted from the defense attorney's improper argument that the plaintiff contributed to his own injuries.[330] The court concluded that the plaintiff's conduct was not a factor to consider, but instead the only consideration was whether the defendant's conduct made him culpable.[331] Therefore, the court remanded the case.[332] Because the issues of liability and damages are separate and distinct,

322. *Id.* at 411, 485 N.E.2d at 8.

323. ILL. REV. STAT. ch. 48, paras. 60-69 (1985).

324. *Hollis*, 108 Ill. 2d at 403, 485 N.E.2d at 4.

325. *Id.*

326. *Id.* at 403, 485 N.E.2d at 4-5. The supreme court determined that the appellate court did not err in substituting its judgment for that of the jury when it held the damages inadequate. *Id.* at 408, 485 N.E.2d at 7. Having judged that the damages awarded were inadequate, it was necessary to determine whether a new trial on all issues, or solely on damages, was warranted. *Id.*

327. *Id.* at 409, 485 N.E.2d at 7.

328. *Id.* During closing argument, despite several objections by the plaintiff's attorney, the trial court allowed the defendants' attorney to argue that the plaintiff's negligent conduct was a contributing cause of his own injuries. *Id.* at 409, 485 N.E.2d at 7.

329. *Id.* The court noted that in 1981, the time of the trial, neither a plaintiff's contributory negligence nor assumption of risk bar plaintiff's recovery in an action under the Structural Work Act. *Id.* at 410, 485 N.E.2d at 8 (citing Barthel v. Illinois Central R.R. Co., 74 Ill. 2d 213, 384 N.E.2d 323 (1978); Gannon v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co., 22 Ill. 2d 305, 175 N.E.2d 785 (1961); Smith v. Georgia Pacific Corp., 86 Ill. App. 3d 570, 408 N.E.2d 117 (1980)).

330. *Hollis*, 108 Ill. 2d at 411, 485 N.E.2d at 8.

331. *Id.* The evidence showed that the defendant was "in charge of" the construction, that he wilfully violated the Act, and that the violation was the proximate cause of the plaintiff's injuries. The plaintiff did not need to demonstrate anything else to establish liability. *Id.* at 410-11, 485 N.E.2d at 8. *See supra* note 319 and accompanying text.

332. *Hollis*, 108 Ill. 2d at 411, 485 N.E.2d at 8.

the supreme court directed that the court retrying the case be concerned only with a determination of the damages.[333]

Justice Ryan, writing in dissent, stated that the case should have been remanded on all issues, not only on the question of damages.[334] Justice Ryan asserted that the defendant's argument was not that the plaintiff's conduct, along with other factors, contributed to his injury, but that plaintiff's conduct was the only proximate cause of the injury.[335] In the dissenter's opinion, the majority's statement that the defendant's conduct was the sole consideration was too broad.[336] Justice Ryan further stated that if the plaintiff's conduct was the proximate cause of his injury, defendant should have been free from liability.[337]

Justice Ryan thus considered the jury's verdict "a compromise between those who thought the plaintiff's conduct was *the sole* proximate cause of his injury and those who felt that the defendant's culpable conduct was *a* proximate cause of the injury."[338] Because there was evidence in the record for both sides, Justice Ryan stated that the case should have been remanded on all issues.[339]

The supreme court in *Prewein* determined that fault of the employee is no defense in either the liability or damage portion of the trial. Plaintiff's limine motions, objections, and instructions should reflect these decisions. It remains unclear whether the injured party's conduct is admissible with regard to the issue of proximate cause.

VI. DRAM SHOP ACT

Injuries caused by intoxicated individuals have been a great concern both to Illinois' courts and the legislature.[340] The legislative

333. *Id.*

334. *Id.* (Ryan, J., dissenting).

335. *Id.* at 411, 485 N.E.2d at 9. (Ryan, J., dissenting). *See also* Quinlin v. Northwestern Steel & Wire Co., 139 Ill. App. 3d 535, 487 N.E.2d 1125 (1st Dist. 1985) (Structural Work Act not violated when injury to plaintiff working on a roof deck resulted from wind-blown metal sheeting stored on roof rather than a defect in the roof supporting plaintiff).

336. *Hollis*, 108 Ill. 2d at 412, 485 N.E.2d at 9. (Ryan, J., dissenting).

337. *Id.*

338. *Id.* at 413, 485 N.E.2d at 9 (Ryan, J., dissenting) (emphasis in original). If a defendant's culpable conduct is found to be a proximate cause, liability will attach under the Act. *Id.* at 412, 485 N.E.2d at 9 (Ryan, J., dissenting).

339. *Id.* at 413, 485 N.E.2d at 9 (Ryan, J., dissenting).

340. The new Illinois statutes manifest the concern for victims of intoxicated individuals. Under ILL. REV. STAT. ch. 95½, para. 1-203.1 (1985), the circuit court may withdraw a person's license or privilege to operate a motor vehicle without a hearing. The basis for this withdrawal of driving privileges is the individual's refusal to submit to a

response to this concern was the enactment of the Dram Shop Act.[341] During the past year, the courts have clarified certain aspects of the Act,[342] resulting in legislative amendments.[343]

Under common law, no cause of action existed against a tavern or tavernkeeper who sold intoxicating beverages to a patron who later causes damages.[344] The theory was that the act of the purchaser caused the damages, rather than the act of the seller.[345] Under the Dram Shop Act, the plaintiff has a statutory remedy against a tavern or tavernkeeper when his injuries are caused by the intoxication of the buyer and the sale has caused or contributed to such intoxication.[346] Because the statute involves strict liability, the plaintiff is not required to prove the negligent sale of the liquor.[347]

A. Liability

The Illinois Dram Shop Act[348] applies to sales of liquor by Illi-

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chemical test following an arrest for the offense of driving under the influence of alcohol or drugs, or submission to such tests indicating an alcohol concentration of 0.10 or more. *Id.*

The suspension for refusal to submit to chemical tests to determine alcohol or drug concentration is six months from the effective date of the statutory summary suspension. If an individual submits to the tests and registers an alcohol concentration of 0.10 or more, the suspension is three months from the effective date of the statutory summary suspension. A one year suspension from the effective date of the statutory summary suspension is required for any person other than a first offender. *Id.* at para. 6-208.1.

341. ILL. REV. STAT. ch. 43, para. 135 (1985).

342. *See infra* notes 348, 355 and accompanying text.

343. "The Liquor Control Act of 1934" has been amended in the following manner: For all causes of action involving persons injured, killed or incurring property damage after the effective date of the Act, the limitation on the judgment or recovery for injury to the person or property is raised to $30,000 per person and for loss of means of support resulting from the death or injury of any person is raised to $40,000; separate claims which, in the aggregate, exceed any one limit in instances where one person incurs more than one type of compensable damage may be brought; all persons claiming loss to means of support (from death of or injury to a person) shall be limited to an aggregate recovery of $40,000; and actions for injuries to the person or property of the intoxicated person himself or for any person claiming to be supported by such intoxicated person are prohibited. ILL. REV. STAT., ch. 43, para. 135 (1985).

344. *See, e.g.*, Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P. 2d 952 (3d Dist. 1943); Hyba v. C.A. Horneman, Inc., 302 Ill. App. 143, 23 N.E.2d 564 (2d Dist. 1939).

345. *Hitson*, 61 Cal. App. 2d 803, 143 P.2d 952 (3d Dist. 1943).

346. BLACK'S LAW DICTIONARY 444 (5th ed. 1979).

347. BARRON'S LAW DICTIONARY 144 (2d ed. 1984).

348. Wimmer v. Koenigseder, 108 Ill. 2d 435 440-41, 484 N.E.2d 1088, 1091 (1985) (citing ILL. REV. STAT. ch. 43, para 135 (1981)). *See also* Graham v. General U. S. Grant Post No. 2664, V.F.W., 43 Ill. 2d 1, 248 N.E.2d 657 (1969) (Act held inapplicable to an accident that occurred in Wisconsin after the sale of liquor by an Illinois tavernkeeper in Illinois).

nois tavernkeepers for injuries sustained in Illinois.[349] The Illinois Supreme Court recently held that a third party who is injured in Illinois after a sale of liquor by a tavernkeeper in Wisconsin has no cause of action under the Illinois Dram Shop Act.[350]

In *Wimmer v. Koenigseder*,[351] the supreme court stated that the Illinois Dram Shop Act was important because it specifically regulated the sale of liquor by Illinois tavernkeepers to Illinois patrons.[352] The supreme court in *Wimmer* also recognized that the Illinois courts frequently have announced that no common law liability for negligent sale of liquor exists in Illinois.[353]

Following *Wimmer*, increases in the statutory damage awards are to no avail for third parties injured in Illinois after liquor sales to drivers by Wisconsin tavernkeepers. In refusing to expand the Dram Shop Act protection extraterritorially, the court in *Wimmer* has limited the negligent parties from which a plaintiff may seek redress. This judicial decision may prompt legislative response from federal and state bodies.

B. Contribution

A dram shop that contributes to the intoxication of a patron who later injures a third party is not liable in tort for purposes of an action for contribution.[354] Therefore, contribution does not apply to dram shop actions.[355]

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349. *Wimmer*, 108 Ill. 2d at 444, 484 N.E.2d at 1093. Wisconsin has no dram shop statute, nor any common law action in tort against a tavernkeeper who sells liquor to an intoxicated patron who later injures a third party. *Id.* at 440, 484 N.E.2d at 1091 (citing Hennes v. Lock Ness Bar, 117 Wis. 2d 397, 344 N.W.2d 205 (1983); Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979); Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970)). *Olsen* and *Garcia* subsequently were overruled by Sorenson v. Jarvis, 119 Wis. 2d 627, 350 N.W.2d 108 (1984) ("vendor who negligently supplies intoxicating beverages to a minor and the intoxicants so furnished cause the minor to be intoxicated or cause the minor's driving ability to be impaired shall be liable to third persons in the proportion that the negligence in selling the beverage was a substantial factor in causing the accident or injuries as determined under the rules of comparative negligence").

350. *Wimmer*, 108 Ill. 2d at 442, 484 N.E.2d at 1092. The court commented that nothing in the statute reflected legislative intent to extend the statute to Wisconsin tavernkeepers. *Id.*

351. 108 Ill. 2d 435, 484 N.E.2d 1088 (1985).

352. *Id.* (citing *Graham* 43 Ill. 2d 1, 248 N.E.2d 657). *See supra* note 348.

353. *Wimmer*, 108 Ill.2d at 442, 484 N.E.2d at 1092 (citing Demchuk v. Duplancick, 92 Ill. 2d 1, 440 N.E.2d 112 (1982); Knierim v. Izzo, 22 Ill. 2d 73, 174 N.E.2d 157 (1961)).

354. Hopkins v. Powers, 113 Ill. 2d 206, 211, 497 N.E.2d 757, 759 (1986).

355. *Id.* at 212, 497 N.E.2d at 760. The statutory provisions relevant to the resolution of the issue presented in this case were section 6-21 of the Liquor Control Act of 1934 and section 2(a) of the Contribution Act. *Id.* at 209, 497 N.E.2d at 758. Section 6-21 of the Liquor Control Act of 1934 provides in relevant part: "[e]very person who is

In *Hopkins v. Powers*,[356] the plaintiff, after consuming intoxicating beverages at the defendant-tavern, lost control of his automobile and damaged various properties.[357] After settling with all claimants, the plaintiff filed suit seeking contribution from the tavern for that portion of the total settlement proportionate to the tavern's relative culpability.[358] The appellate court affirmed the trial court's dismissal of the complaint, holding that "dram shop liability is not tort liability and, therefore, a dram shop cannot be liable in tort for purposes of contribution."[359]

On appeal to the supreme court, the tavern contended that the Dram Shop Act did not create a statutory duty in tort that would allow the plaintiff to obtain contribution.[360] Further, the defendant noted that in Illinois there was no common law duty to this effect.[361] In the absence of either a statutory or common law duty, the defendant concluded that he could not be "liable in tort" for purposes of contribution as required by the Contribution Act.[362]

The supreme court in *Hopkins* agreed with defendant's contentions.[363] There was no common law duty of tavernkeepers in Wisconsin or Illinois to refrain from serving liquor to patrons who, as a result of their intoxication, injure third parties.[364] Thus, the court held that the defendant tavernkeeper was not "liable in tort" for purposes of the Contribution Act.[365]

The court in *Hopkins* also discussed the class of persons who may bring actions under the Dram Shop Act.[366] The court as-

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injured in person or property by an intoxicated person, has a right of action in his or her own name, generally or jointly, against any person who by selling or giving alcoholic liquor, causes the intoxication of such person." ILL. REV. STAT. ch. 43, para. 135 (1985).

Section 2(a) of the Contribution Act read as follows: "[w]here two or more persons are subject to liability in tort arising out of the same injury to person or property, there is a right of contribution among them, even though, judgment has not been entered against any or all of them." ILL. REV. STAT. ch. 70, para. 302(a) (1983).

356. 113 Ill. 2d 206, 497 N.E.2d 757.

357. *Id.* at 209, 497 N.E.2d at 758.

358. *Id.*

359. *Id.* at 210, 497 N.E.2d at 759.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.* The supreme court in *Hopkins* based its holding on a recent supreme court decision in which the court held the Illinois Dram Shop Act applies to sales of liquor by Illinois tavernkeepers for injuries sustained in Illinois. *Id.* (citing *Wimmer*, 108 Ill. 2d 435, 484 N.E.2d 1088 (1985)). *See supra* notes 348-52 and accompanying text.

364. *Hopkins*, 113 Ill. 2d at 211, 497 N.E.2d at 759.

365. *Id.* The court noted that the defendant's liability was limited to the exclusive nontort liability of the Dram Shop Act. *Id.*

366. *Id.*

serted that recovery under the Act was limited to innocent third parties who are injured as a result of the sale of liquor.[367] Because the plaintiff in *Hopkins* had admitted liability, the court held that the plaintiff was not entitled to recover under the Act.[368]

In *Hopkins*, the Illinois Supreme Court declared that dram shop liability is not tort liability for the purpose of the Contribution Act. Thus, liquor selling establishments are sheltered from contribution even though they could have been liable had the plaintiff originally sued them under the Dram Shop Act. The decision in *Hopkins* is a clear departure from earlier decisions holding that dram shop liability sounds in tort.[369] Not allowing contribution when plaintiff's fault is at issue is reminiscent of the procedural outcomes of the discarded law of contributory negligence.[370] Moreover, the *Hopkins* decision may be viewed as undercutting legislative and social policy that promotes responsible conduct by tavernkeepers.

VII. CONCLUSION

During the *Survey* period, the Illinois judicial system applied the doctrine of comparative fault in a variety of situations. In some cases, the courts resorted to the abolition of certain doctrines; in others, the courts simply clarified their scope and effect. In all instances, the courts simplified and clarified the judicial process.

367. *Id.* at 211, 497 N.E.2d at 759. In his dissent, Justice Simon stated that the majority undercut legislative policy by allowing the tavern to avoid contribution when it could have been liable had the plaintiff originally sued it under the Dram Shop Act. *Id.* at 214-19, 497 N.E.2d at 760-63 (Simon, J., dissenting). Justice Simon opined that "the majority's decision was motivated by their desire to deal harshly with those individuals who drink and drive . . . ", but noted that only liquor-selling establishments will benefit by the decision in *Hopkins*. *Id.* at 218-19, 497 N.E.2d at 763 (Simon, J., dissenting). *See also* Reeves v. Beno Inc., 138 Ill. App. 3d 861, 486 N.E.2d 405 (2d Dist. 1985) (plaintiff should not recover in proportion to his degree of fault when found guilty of complicity in the inebriate's intoxication).

368. *Hopkins*, 113 Ill. 2d at 212, 497 N.E.2d at 759.

369. *Id.* at 215, 497 N.E.2d at 760 (Simon, J., dissenting). *See also* Dworak v. Tempel, 17 Ill. 2d 181, 161 N.E.2d 258 (1959) (when liable under the Act, dram shop owners and operators are considered "statutory tortfeasors"); Wanack v. Michels, 215 Ill. 87 (1905) (violation of dram shop statute is a "tortious act").

370. For further discussion of contributory negligence, see *supra* notes 22-28 and accompanying text.