DAMAGES IN ILLINOIS CIVIL TRIAL PRACTICE

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Damages in Illinois Civil Trial Practice

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I. Initial Considerations

A. Types of Damages

1. Compensatory

a) Defined - sum of all non-punitive damages.

b) Purpose - The purpose of awarding compensatory damages is to make the injured party whole and restore him to the position he was in before the loss. Harris v. Peters, 274 Ill. App. 3d 206 (1st Dist. 1995).

c) Elements of damage

(1) Survival cases

(a) Medical bills – Illinois Pattern Jury Instruction (Civil), 30.06

(b) Lost time – Illinois Pattern Jury Instruction (Civil), 30.07

(c) Disability/Loss of Normal Life – Illinois Pattern Jury Instruction (Civil), 30.04.01, 30.04.02

(d) Disfigurement – Illinois Pattern Jury Instruction (Civil), 30.04

(e) Pain and suffering – Illinois Pattern Jury Instruction (Civil), 30.05, 30.05.01 (emotional distress)

(f) Other damages – See Illinois Pattern Jury Instruction (Civil) 30.00

(2) Wrongful death cases

(a) Pecuniary injuries (740 Ill. Comp. Stat. § 180/1, 180/2)

(b) Money, goods, services received by the next of kin from the deceased

(c) Presumption of substantial pecuniary loss because of the death. Bullard v. Barnes, 102 Ill.2d 505 (1984)

(d) See Illinois Pattern Jury Instructions (Civil), 31.00

(e) Survival cases see 755 Ill. Comp. Stat. § 5/27-6.

2. Punitive

a) 2-604.1 Statute

Pleading of punitive damages. In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on strict tort liability, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Any motion to amend the complaint to include a prayer for relief

seeking punitive damages shall be made not later than 30 days after the close of discovery. A prayer for relief added pursuant to this Section shall not be barred by lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted if the time prescribed or limited had not expired when the original pleading was filed.

b) Cases

(1) Procedural – must submit evidence for court to consider. Stojkovich v. Monadnock Bldg., 281 Ill. App. 3d 733 (1st Dist. 1996).

(2) What conduct is necessary

(a) Punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. Barton v. Chicago and N.W. Trans. Co., 325 Ill. App. 3d 1005 (1st Dist. 2001).

(b) Punitive damages may be awarded against a corporation based on vicarious liability where: the principal authorized the doing and the manner of the act or omission; the agent was unfit and the principal was reckless in employing the agent; the agent was employed in a managerial capacity and was acting within the scope of employment; or the principal or a managerial agent thereof ratified or approved of the act. Barton v. Chicago and N.W. Trans. Co., 325 Ill. App. 3d 1005 (1st Dist. 2001).

B. Apportionment of Damages

Courts like people to settle, period. However, when some defendants settle and others elect to proceed to trial, a problem arises. Do the settling defendants end up on the verdict form? Generally, the answer is no. See Batteast v. Wyeth Laboratories, Inc., 137 Ill.2d 175 (1990). However the issue is still one of debate by some jurist.

Plaintiff's lawyers cite the Contribution Act, 740 Ill. Comp. Stat. § 100/0.01 et seq., as mandating finality of settlements. Dubina v. Mesirow Realty Dev., Inc., 308 Ill. App. 3d 348 (1st Dist. 2000). Defense attorneys cite Illinois Pattern Jury Instruction (Civil), B45.03.A and its commentary which suggests non-parties may be included in certain circumsantces (attached).

Logic dictates that if settlements are truly final, then the settling defendants should not be permitted to be on a verdict form subjected to apportionment of damages. Defendants who fail to settle do so at their own peril.

It is clear that apportionment of damages is not proper in a Wrongful Death case. Jones v. Chicago Osteopathic Hosp., 316 Ill. App. 3d 1121 (1st Dist. 2000).

C. Interest

1. Pre-judgment

a) Generally

(1) Tort claims do not generally allow for imposition of pre-judgment interest. Cress v. Recreation Servs., Inc., *341 Ill. App. 3d 149 (2nd Dist. 2003).*

(2) However, if there is a breach of fiduciary duty or the imposition of prejudgment interest is necessary to make the plaintiff whole, courts will impose such penalties. Neumann v. Neumann, *334 Ill. App. 3d 305 (3rd Dist. 2002).*

b) Purpose – to fully compensate a party when money has been wrongfully withheld. McKenzie Dredging Co. v. Deneen River, 249 Ill. App. 3d 694 (3rd Dist. 1993).

c) When applicable:

(1) Statutes, agreements of the parties, or equity requires it

(a) Tri-G, Inc. v. Burke, Bosselman & Weaver, 817 N.E.2d 1230 (2nd Dist. 2004) (prejudgment interest is proper where authorized by statute, agreement of the parties, or in cases where warranted by equitable considerations)

(b) Kleczek v. Jorgensen, 328 Ill. App. 3d 1012 (4th Dist. 2002) (prejudgment interest may be recovered

when warranted by equitable considerations, and disallowed if such an award would not comport with justice and equity).

(2) Equity

(a) Jones v. Hryn Development, Inc., 334 Ill. App. 3d 413 (1st Dist. 2002) (prejudgment interest is available in equity without the need of statutory authority).

(3) Question of discretion

(a) In re Blinderman, 283 Ill. App. 3d 26 (1st Dist. 1996) (prejudgment interest must comport with justice; whether equitable considerations exist to support prejudgment interest is question of fact within sound discretion of trial court).

(b) Jones v. Hryn Develop., Inc., 334 Ill. App. 3d 413 (1st Dist. 2002) (trial court refusal to grant purchasers prejudgment interest on partial award for earnest money after vendor sold house to third party was abuse of discretion, where judgment awarding vendor a portion of earnest money was erroneous in that vendor had no actual damages from purchasers' breach of purchase agreement and purchasers were entitled to refund of all earnest money).

(4) Easily calculated damages

(a) Janes v. Western States Ins. Co., 335 Ill. App. 3d 1109 (5th Dist. 2001) (prejudgment interest is proper even when the amount due requires legal ascertainment).

(b) Marcheschi v. Illinois Farmers Ins., 298 Ill. App. 3d 306 (1st Dist. 1998) ($75,000 needed to bring an insured's award of uninsured motorist (UM) benefits up to the policy limits was a liquidated amount of damages from which prejudgment interest could be easily calculated; thus, such interest could be awarded).

(5) Good faith defenses

(a) Liberty Mut. Ins. Co. v. Westfield Ins. Co., 301 Ill. App. 3d 49 (1st Dist. 1998) (the existence of a good-faith defense does not preclude prejudgment interest under the Interest Act. 815 Ill. Comp. Stat. § 205/2).

d) Statutes authorizing prejudgment interest:

(1) Interest Act, 815 Ill. Comp. Stat. § 205/2

(a) Milligan v. Gorman, 348 Ill. App. 3d 411 (1st Dist. 2004) (Interest Act directs the award of prejudgment interest to fully compensate the injured party for the monetary loss suffered).

(2) Child Support, 750 Ill. Comp. Stat. § 5/505

(a) Burwell v. Burwell, 324 Ill. App. 3d 206 (4th Dist. 2001) (prejudgment interest on child support judgment was mandatory, rather than discretionary, and thus divorced mother was entitled to such interest on father's child support arrearage).

(3) Insurance Code, Bad faith insurance practice – 215 Ill. Comp. Stat. § 5/155

(a) Janes v. Western States Ins. Co., 335 Ill. App. 3d 1109 (5th Dist. 2001) (insurer's delay in paying stacked uninsured motorist benefits to insured was "vexatious conduct" that permitted additional costs assessed against insurer, and thus, insured was entitled to prejudgment interest on the award, even though insurer alleged that amount due was not liquidated or subject to easy determination; there was no bona fide dispute over permissibility of stacking, and purpose of sanction under Interest Act and insurance statute was to deter delay of payment in absence of bona fide dispute).

(b) Oak Park Trust & Savings Bank v. Intercounty Title Co. of Illinois, 287 Ill. App. 3d 647 (1st Dist. 1997) (prejudgment interest may be recovered from time money becomes due under insurance policy).

(4) Drug Dealer Liability Act, 740 Ill. Comp. Stat. § 57/65

(5) Commercial Real Estate Broker Lien Act, 770 Ill. Comp. Stat. § 15/10 (prevailing party gets prejudgment interest)

(6) Illinois Business Brokers Act, 815 Ill. Comp. Stat. § 307/10-115 (prevailing party gets prejudgment interest)

(7) Illinois Supreme Court Rule 219(c)(vii) (if judgment entered as sanction, the offending party may have to pay prejudgment interest for "any

period of pretrial delay attributable to the offending party's conduct")

e) **Prime Rate – U.S. Fidelity & Guar. Co. v. Alliance Syndicate Inc., 286 Ill. App. 3d 417 (1st Dist. 1997) (Illinois law permits award of prejudgment interest, at prime rate, where equitable considerations warrant it).**

f) **Discretionary standard - Whether to grant prejudgment interest is within the discretion of the trial court. The General Star Indemnity Co. v. Lake Bluff School Dist. No. 65, 2004 WL 2676558 (2nd Dist. Nov. 22, 2004).**

2. Post-judgment

a) **735 Ill. Comp. Stat. § 5/2-1303**

(1) Interest on judgment. Judgments recovered in any court shall draw interest at the rate of 9% per annum from the date of the judgment until satisfied or 6% per annum when the judgment debtor is a unit of local government, as defined in Section 1 of Article VII of the Constitution, a school district, a community college district, or any other governmental entity. When judgment is entered upon any award, report or verdict, interest shall be computed at the above rate, from the time when made or rendered to the time of entering judgment upon the same, and included in the judgment. Interest shall be computed and charged only on the

unsatisfied portion of the judgment as it exists from time to time. The judgment debtor may by tender of payment of judgment, costs and interest accrued to the date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of an appeal, or other steps to reverse, vacate or modify the judgment.

b) Appeals bond

(1) Old Law

(a) Price v. Philip Morris, 341 Ill. App. 3d 941 (5th Dist. 2003)

(b) Illinois Supreme Court, Civ. Docket No. 96236, 96644 (Sept. 16, 2003) (attached)

(c) Press Release (Jun. 15, 2004) (attached)

(2) New Illinois Supreme Court Rule 305(a) (eff. July 1, 2004):

(a) Stay of Enforcement of Money Judgments. The enforcement of a judgment for money only, or any portion of a judgment which is for money, shall be stayed if a timely notice of appeal is filed and an appeal bond or other form of security, including, but not limited to, letters of credit, escrow agreements, and certificates of deposit, is presented to, approved by, and filed with the court within the time for filing the notice of appeal or within any extension of time granted under paragraph (c) of this rule. Notice of the presentment of the bond or other form of security shall be given by the judgment debtor to all parties.

> The bond or other form of security shall be in an amount sufficient to cover the amount of the judgment and costs plus interest reasonably anticipated to accrue during the pendency of the appeal. If a form of security other than an appeal bond is presented, the appellant shall have the burden of demonstrating the adequacy of such other security. If the court, after weighing all the relevant circumstances, including the amount of the judgment, anticipated interest and costs, the availability and cost of a bond or other form of security, the assets of the judgment debtor and of the judgment debtor's insurers and indemnitors, if any, and any other factors the court may deem relevant, determines that a bond or other form of security in the amount of the judgment plus anticipated interest and costs is not reasonably available to the judgment debtor, the court may approve a bond or other form of security in the maximum amount reasonably available to the judgment debtor. In the event that the court approved a bond or other form of security in an amount less than the amount of the judgment plus anticipated interest and costs, the court shall impose additional conditions on the judgment debtor to prevent dissipation or diversion of the judgment debtor's assets during the appeal.

c) Other Statutes

(1) 735 Ill. Comp. Stat. § 5/2-1303

(2) Public Utilities Act, 220 Ill. Comp. Stat. § 5/4-203 (actions to recover civil penalties)

(3) Illinois Oil and Gas Act, 225 Ill. Comp. Stat. § 725/19.1 (leaking wells, repair) and 225 Ill. Comp. Stat. § 725/19.9 (delinquent fees)

(4) Code of Corrections, Restitution, 730 Ill. Comp. Stat. § 5/5-5-6 (in cases of injury due to criminal acts, restitution orders include post-judgment interest)

(5) Enforcement of Judgments, 735 Ill. Comp. Stat. § 5/12-109 ("Every judgment except those arising by operation of law from child support orders shall bear interest thereon as provided in Section 2-1303. Every judgment arising by operation of law from a child support order shall bear interest as provided in Section 2-1303 commencing 30 days from the effective date of each such judgment.")

(6) Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. § 505/10a

D. For Plaintiff's Attorney

1. Choosing and developing a case theme

a) Introduction

Few decisions of the trial lawyer impact a trial more than the selection of a theme. A good theme will incorporate the major elements of the trial strategy and drive home the point that your side is right and the other is wrong.

b) Why themes work

From the beginning of spoken language, man has struggled to convey his point in oration. Through trial and error, it was discovered that when presented in a common, systematic way, listeners were able to better listen and retain to the spoken word.

From our earliest times, we have been "taught" through stories, though we may not have known it at the time. We have been programmed to receive information in this way. Even the Bible says that Jesus taught through stories.

Today, everyone is bombarded with information. Mentally, we ignore the vast majority of information we receive and to only store much of the remaining in our short-term psyche. We are overwhelmed and as a coping mechanism we simple pass much of the information we receive in one ear and out the other.

At trial, jurors have no reason to pay attention. Most trials are conducted in dull, drab courtrooms. Jurors sit in uncomfortable chairs for hours on end. They listen to condescending lawyers and witnesses who drone on in monotone language. They ache for some excitement. And though they truly try, most find it almost impossible to pay attention to anything that is going on.

Themes unify. Themes give structure. Themes give life. Themes move people. When used effectively, themes give judge, jurors, and even lawyers(!) something exciting to talk about. A well-chosen theme can make even the driest subject come to life. But most importantly, themes help people remember what your case is about and that helps you win.

c) Selection of a Theme

Ideally, the theme of the case should be selected at the time of the initial client interview. However, practical considerations often make that impossible. Thus, a prudent practitioner will start with a loose theme in mind at the inception of the case but make it flexible enough so that the theme can be modified throughout the course of the case. In large measure, the theme will depend on the evidence developed. For example, responsibility might be a theme developed early on but the specific responsibility is not defined until much later. In any event, plaintiff's lawyers should always be on the lookout for good case themes throughout the course of the case.

Selection of a case theme is personal. Some lawyers always use the same themes. Some lawyers rely on consultants to help them develop a theme. Some just wait until a theme drops into their lap. However, it is most common that lawyers will attempt

to use words or phrases from the evidence itself to help define the themes.

For example, in a trucking accident case, the weight of the truck might serve as a basis for a theme on damages. In a medical malpractice case, a doctor's statement about effectiveness of treatments might serve as a liability theme. In a slip and fall case, the decision of a witness not to clean up a spill might serve as a theme for liability. Indeed, the possibilities are endless.

d) Choice of theme

A good theme will encapsulate the entire case into a brief, simple statement. The four year-old test applies here: if your four year-old son/daughter/ nephew/niece cannot understand what you are saying, the theme is too complicated. Keep it simple, direct, and concise.

Many times, a theme will be one word repeated in various contexts throughout the case. For example, words like choice, responsibility, and accountability are all good thematic words for liability. Words like pain, disability, or normal are all words that can be used as damages themes.

No matter which theme is used, it must be simple and non-offensive. Generally, themes involving

strong language are to be avoided. The idea is to give your central idea, not a bully pulpit.

e) Materials/Resources

There is no end to the resources for themes. There are dozens of articles on the topic, but one particularly good one is McElhaney, Great Arguments, ABA Journal, p. 48 (Mar. 2004). For plaintiff's lawyers, the Association of Trial Lawyers of America has a number of very good resources on the topic.

But lawyers often forget to think like human beings. Go to the Children's section in a library and start pulling stories out for little children. Almost every story has a theme to it and most can be modified to fit any plaintiff's case. Other resources include the Bible, the Constitution, even jury instructions.

f) Common themes - plaintiff

(1) Trust

(2) Responsibility

(3) Safety

(4) Irreparable harm

g) Common themes – defense

(1) Reasonableness

(2) Hindsight

(3) Judgments

(4) Emergencies

(5) Sole proximate cause

(6) So what?

2. Calculating the amount of compensatory damages

a) Economic loss

Calculation of economic loss need not be complicated or difficult. In most circumstances, the lost wages calculation is a simple math problem. Likewise, medical bill calculation involves totaling the bills and making sure a foundation is laid for them.

Economic loss gets more complicated in cases in which there is a contention of future loss. The jury instructions require that future medical expenses (Illinois Pattern Jury Instruction (Civil), 30.06) and future lost wages (Illinois Pattern Jury Instruction (Civil), 30.07) be reduced to present cash value. Likewise, in wrongful death cases, the amount of the pecuniary loss must also be reduced to present cash value. Illinois Pattern Jury Instruction (Civil), 31.12. In these circumstances, an economist can prove invaluable but is not required.

b) Non-economic losses

Few topics generate more controversy than the calculation of non-economic damages. Our current President, many legislators, and even "the man on the street" think that juries have no basis for compensating victims for non-economic loss. Yet a conversation with ANY trial lawyer and every juror where compensation for non-economic loss is given reveals that such compensation is almost always based on a reasoned and considered approach based on the evidence and nothing more. Contrary to what pundits might say, the amount of compensation for non-economic losses has remained nearly constant for the last 10 years. The system is not broken.

A plaintiff's lawyer must consider several factors when discussing non-economic loss. The foremost consideration is the nature of the loss. In other words, what type of non-economic loss is in play? Pain and suffering is far different than loss of normal life and that surely must be considered.

Additionally, the plaintiff's attorney must consider how long the loss lasted. Is this a short-term, transitory problem or a life-long condition? The age of the plaintiff, their activity level before (and after) the accident are also important. Finally, what kind of an impression will the plaintiff and other damage witnesses make?

The plaintiff's lawyer does not have to guess on numbers. One resource is the jury verdict reporters. Both local and national reporters can tailor a search based on many factors including age and type of injury.

Another resource is other trial lawyers. Speaking candidly about what other lawyers have done and think is reasonable can be a very useful tool.

Finally (and most expensive), a lawyer can use mock juries and/or trial consultants. This can be of enormous help but tends to be very expensive. For a further discussion of this topic, see the next section.

3. Deciding to use a trial consultant

In the right case, using a trial consultant is not an option, it is a necessity. Use of an effective trial consultant can help a plaintiff's lawyer turn a "NG" into a substantial verdict. But they are not appropriate for every case.

a) Factors

Several factors play into the decision of whether to use a trial consultant. However, the most important contribution of a trial consultant is preparation. Having a trial consultant forces the plaintiff's attorney to prepare earlier. You cannot make a presentation unless you have prepared. Moving the time-line up to

have trial consultants involved is primarily helpful in this regard.

Additionally, the trial consultant provides additional perspective. A good trial consultant has years of experience in a variety of cases and brings that experience to bear when doing her job for the plaintiff's attorney. Nothing is more dangerous to a plaintiff's case than a myopic eye. The trial consultant helps counteract that deficiency.

As stated above, not every case is ripe for trial consultant use. Factors to consider are:

(1) Potential case value

It is not unusual for a good trial consultant doing a full-scale work-up to cost $10,000 or more. Thus, the potential value of the case must support such an expenditure. A automobile crash involving transitory neck pain will almost never merit use of a trial consultant. A medical malpractice case almost always will.

(2) Risk of NG

Though a factor, it should not be the factor. If a lawyer took on a case, the time to be conservative about preparation is not in the months before trial. If the case is a loser, the time to get out is long before the time to hire a trial consultant.

(3) Types of services required

Which services you require will drive the cost. A discussion of the types of services offered is listed below. However, you should consider how much involvement you might need from a consultant before you make the call.

b) Types of trial consultant services

Most trial consultants have a variety of services they offer. Basic services can include document and exhibit preparation and witness preparation. Complicated (read expensive) services can include mock trials, surveys of juror attitudes, and case evaluation. Full trial simulations are possible as well. Some examples where trial consultants can provide services are:

(1) Themes and theme selection

(2) Jury selection

(3) Witness examination

(4) Opening/closing

(5) Damages

II. Plaintiff's Tactics for Maximizing Damages At Trial

A. Use of Economic Testimony to Prove Damages

1. Medical bills

The standard for admissibility of medical bills is whether they are reasonable AND necessary. Baker v. Hutson, 333 Ill. App. 3d 486 (5th Dist. 2002). Necessity has to be established through medical testimony. However, reasonableness can be established through one of two ways. If the bill has been paid, testimony that the bill is paid is *prima facie* evidence of reasonableness. An unpaid bill may still be established as reasonable if a knowledgeable person testifies that the bill for those services was reasonable. This may be someone in the billing department who can testify about the reasonableness of the charges.

2. Lost time

For a lost wages claim to be admitted, there must be testimony of the actual lost wages. Most typically, the plaintiff herself testifies she missed this many weeks from work and earns so many dollars per hour. However, the supervisor may be someone who is better suited to render such testimony. Likewise, an economist may be used.

B. How to Prepare a Damages Case Through Medical Testimony

1. Witnesses

When medical testimony is considered, most lawyers think of the treating physicians. Indeed, they are a potent source for medical testimony. However, many doctors can be stogy witnesses with little jury appeal. More importantly, the treating doctor may actually have limited hands-on time with the patient.

Prudent practitioners consider all medical providers as witnesses. Some of the best witnesses are physical therapists. Private duty nurses and home health care providers are often the best witnesses. They see the difficulties and problems the plaintiff experiences first hand. And they have the experience that puts those problems into perspective. They likewise don't have the attitude that often accompanies a medical doctorate.

Of course, hiring an expert witness may be needed. In those cases, a rehabilitative medicine person can be vital. Likewise, a home health care planner, and even an architect for home improvements can be used.

2. Preparation of witnesses

Months before trial, meet with the witnesses. Map out the general form of the testimony and the questions to be asked. Decide what areas are strongest for the medical person and which are weakest. Consider the defense arguments and questions for the witness and prepare the witness specifically for those questions.

Within about 60 days of trial, have the witness examine your client again. This will form the basis for permanency testimony and familiarize the witness with your client. Also have the witness review any exhibits you plan on using at trial and make sure they agree they are accurate and will be useful for her testimony.

C. How to Prove Non-Economic Damages

1. ***Question jurors – See below***

2. ***Exhibits***

   a) **Photos**

   b) **Day in the life films**

   c) **Devices**

      (1) Fixators

      (2) Hips, knees, etc.

3. Testimony

a) Victim

b) Family

c) Co-workers

d) Medical providers

D. Providing Necessary Proof for Punitive Damages

For a complete discussion of punitive damages and the proof necessary to sustain them, see above.

E. Jury Selection – Using Voir Dire to Choose the Best Jury Possible

1. Illinois Supreme Court Rule 234

The court shall conduct the voir dire examination of prospective jurors by putting to them questions it thinks appropriate touching upon their qualifications to serve as jurors in the case on trial. The court may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate, and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper for a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages. Questions shall not directly or indirectly concern matters of law or instructions. The

court shall acquaint prospective jurors with the general duties and responsibilities of jurors.

Illinois Supreme Court Rule 234 (emphasis added).

The rule gives the parties of the case the right to supplement examination of jurors. This right can be limited to "a reasonable period of time depending upon the length of examination by the court, the complexity of the case, and the nature and extent of the damages" but questioning cannot be barred.

2. Challenges for Cause

a) Rule – 735 Ill. Comp. Stat. § 5/2-1105.1

b) Case law

Many cases address the need for a juror to be "fair" in order to serve. York v. El Ganzouri, 1-03-0222, 2004 WL 2192556 (1st Dist. Sept. 30, 2004). However, absent such a statement by the juror, courts are reluctant to excuse jurors for cause. For example, giving equivocal responses will not be a valid challenge for cause. People v. Williams, 173 Ill.2d 48, 670 N.E.2d 638, 218 Ill.Dec. 916 (1996). Neither will isolated statements of bias be enough. People v. Childress, 158 Ill.2d 275, 633 N.E.2d 635, 198 Ill.Dec. 794 (1994). There is no precise formula to determine whether a juror is biased. People v. Gregg, 247 Ill.Dec. 820, 315 Ill.App.3d 59, 732 N.E.2d 1152 (1st

Dist. 2000). Such conclusions are left to the sound discretion of the trial court. See, e.g., People v. Sims, 192 Ill.2d 592, 736 N.E.2d 1048, 249 Ill.Dec. 610 (2000).

c) Examples of Cause Challenges

(1) Party to a pending case (705 Ill. Comp. Stat. § 305/14)

(2) Served on a jury in the last year (705 Ill. Comp. Stat. § 305/14)

(3) Been asked to be a juror within the last 60 days (705 Ill. Comp. Stat. § 305/13)

(4) Not a U.S. citizen (705 Ill. Comp. Stat. § 305/2)

(5) Not living in county of case (705 Ill. Comp. Stat. § 305/2)

(6) Not 18 years of age (705 Ill. Comp. Stat. § 305/2)

(7) Not "free" from legal exception (705 Ill. Comp. Stat. § 305/2)

(8) Not of fair character (705 Ill. Comp. Stat. § 305/2)

(9) Not of approved integrity (705 Ill. Comp. Stat. § 305/2)

(10) Not of sound judgment (705 Ill. Comp. Stat. § 305/2)

(11) Not well informed (705 Ill. Comp. Stat. § 305/2)

(12) Not able to understand English (705 Ill. Comp. Stat. § 305/2)

(13) Someone asked them to be on a jury (705 Ill. Comp. Stat. § 305/13)

(14) Undue juror hardship (705 Ill. Comp. Stat. § 305/10.2(b))

(15) Physical impairment (735 Ill. Comp. Stat. § 5/2-1105.1)

3. Peremptory Challenges

a) 735 Ill. Comp. Stat. § 5/2-1106(a)

Each side shall be entitled to 5 peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed 3, on account of each additional party on the side having the greatest number of parties. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court.

When multiple parties are involved, counsel is well advised to clarify the number of peremptory challenges the court allows for each side. See Vrzal v.

Contract Trans. Sys. Co., 312 Ill. App. 3d 755, 728 N.E.2d 722, 245 Ill.Dec. 640 (1st Dist. 2000).

b) Back-striking

If you tender the juror(s) to the opposing side and then, during their questioning, they uncover information unfavorable to your client, can you then exercise a challenge? Until the panel is ACCEPTED by both sides, anyone can exercise a challenge. See People v. Murray, 73 Ill. App. 2d 376, 220 N.E.2d 84 (1st Dist. 1966).

4. Jury Selection Tips

a) Deselect, don't select

From the beginning, the "selection" mentality is wrong. Attorneys do not select the jurors they like to serve on their juries. Rather, they select the jurors they like the least to remove. With very few exceptions, the people you see are the people you get and the only hope you have is to deselect the ones you consider worst for your case.

b) Conversation, not indoctrination

Study after study reveals that lawyers who try to shove their case down the necks of potential jurors looses. So if you are in jury selection, talk WITH not to the jurors. Focus on them one at a time. Don't rush. Don't use lawyers' words. Speak like a human.

Now is the time to build rapport. Remember, you are pulling out and exposing private and personal information. Do it in a way that is least likely to show the juror is wrong.

c) Know Your Case

To succeed, you must be considered THE authority on every aspect of the case. A juror must not perceive un-filled holes or weaknesses in your case or it will spell doom. Therefore, you must be familiar with the liability and medical aspects of the case as well as all care provided.

Early on in the process, you should let jurors know what your case is about; not just the medical issue but the theme you emphasize. Use exhibits, diagrams, and models to the extent the Court allows it. This process won't happen with the first juror but will come out one piece at a time to juror after juror. However, it is critical that the venire know what issues you will be discussing during the course of the case. You want to know their feelings about those issues and, most importantly, what experience they have had with those issues.

d) Know Your Opponent's Case

There are defenses to the case. Do you know what they are? If so, what questions will the defense want to ask in order to emphasize their theme? You

should ask those to make their questions redundant and useless.

e) Juror's Medical Experience

In a trillion dollar industry, it seems everyone works in the medical field somehow. It is critical that each juror is questioned about medical experience. Do they/family members/friends work in medicine or a medicine-related field? Do they/family members/friends have any experience with the doctors/institutions in this case?

f) Burden of Proof

Most members of the venire have seen reports of criminal cases on television. Most have seen TV shows about lawyers and criminal investigations. And most believe the standards there apply in all cases.

Dissuade jurors from any mistaken belief that this is a criminal case. Explain the burden of proof and its distinction from your case. Quote the burden of proof jury instruction. Make sure they understand what you have to prove.

g) Money

It's a case about money. We don't send the defendant to jail or take away his license. Our system of justice – the best ever conceived – requires

defendants compensate victims for what defendants have done wrong.

You should ask about legal system experience. Have they had any and what was it like? Both positive and negative experiences are important. You can and should ask about preconceived notions of value. Questions in this area have been approved by Appellate Courts:

(1) If the law and the evidence leads you to a verdict, even for millions of dollars, would you be willing to sign that verdict?

(2) Is there any dollar amount – even millions of dollars – that you would never accept?

5. Other Resources

a) Jury consultants – See above

b) VoirDireBase – www.voirdirebase.com

c) ATLA and ATLA Exchange

d) Articles:

(1) Hans, Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection, Chicago Kent Law Review, vol. 78, pp. 1179-1201 (2003).

(2) Smith, Challenges of Jury Selection, ABA Journal, pp. 35-39 (Apr. 2002).

(3) Karp, Jury Selection in Catastrophe Cases, The Brief, pp.12-19 (Summer 2002).

(4) Singer, 10 Common Mistakes Attorneys Make With Jurors, Trial, pp. 76-81 (Jan. 2000).

(5) Carlton, Generation X and Civil Juries, Illinois Bar Journal, vol. 87, pp. 436-38 (Aug. 1999)

(6) Heaney, Jury Selection in the Era of Tort Reform, Trial, pp. 73-75 (Nov. 1995).

F. Starting with a Strong Opening Statement

1. What is an opening?

An opening statement is what an attorney expects the evidence will be. Illinois Pattern Jury Instruction (Civil), 1.01.

a) Case law

(1) Purpose

The purpose of an opening statement is to advise the jury of what each party expects the evidence to prove, including a discussion of reasonable inferences to be drawn from the evidence. People v. Sutton, 2004 WL 2272261 (Oct. 8, 2004)

(2) Latitude

Considerable latitude must be afforded counsel in opening statement or closing arguments. Northern Trust Co. v. Skokie Valley Community Hosp., 81 Ill. App. 3d 1110 (1st Dist. 1980); Augenstein v. Pulley, 191 Ill. App. 3d 664 (5th Dist. 1989)

(3) What the evidence will show

Counsel should be permitted to set forth on opening statement his theory as to amount of damages the evidence will show, and to set forth on closing argument the amount of compensation he deems proved and warranted under the evidence. Turner v. Wallace, 71 Ill. App. 2d 160 (3rd Dist. 1966).

(4) Good faith commentary

The comments made by an attorney in an opening statement concerning evidence to be introduced at trial are not improper if made in good faith and with reasonable belief that the evidence is admissible, although the intended proof referred to is later excluded. Dowd & Dowd, Ltd. v. Gleason, 352 Ill. App. 3d 365 (1st Dist. 2004).

(5) Admissible evidence

Opening statement must be based on the admissible evidence, not the evidence that expert relied on which was inadmissible. Rios v. City of Chicago, 331 Ill. App. 3d 763 (1st Dist. 2002).

(6) Out but in

Counsel's commentary that was admission of fault prevented showing some evidence was clearly improper but violation did not merit a new trial. Kinzinger v. Tull, 329 Ill. App. 3d 1119 (4th Dist. 2002).

(7) What you can't do:

Cannot argue evidence was tampered with unless you can substantiate it. Schaffner v. Chicago & N.W. Trans. Co., 129 Ill.2d 1 (1987).

Improper to ask jurors to step into the shoes of a party in rendering their decision. Robinson v. Wieboldt Stores, Inc., 104 Ill. App. 3d 1021 (1st Dist. 1982).

2. When is it conducted?

a) Illinois Supreme Court Rule 235

As soon as the jury is empanelled the attorney for the plaintiff may make an opening statement. The attorney for the defendant may immediately follow with an opening statement. An opening statement may not be made at any other time, except in the discretion of the trial court.

3. How long can it be?

An opening statement is to be a summary of what the evidence is intended to show. It will vary in length depending on how much evidence will be presented at trial. A simple automobile case with no liability arguments and simple damages might have an opening statement that takes 10 minutes. A complex product

liability case with multiple defendants might have an opening that takes 90 minutes. In most cases, less is more.

4. Use exhibits

One of the most basic mistakes young lawyers make is not using exhibits during opening statements. Exhibits have a natural way of breaking up long, monotonous statements and making them more interesting. It has been said that we remember more than 80% of what we learn visually (see Melvin M. Belli, MODERN TRIALS (2d ed. 1982)) so any time a lawyer can use exhibits to enhance her presentation, she should.

However, there is one caveat. Make sure you obtain permission from the Court (and preferably a written order) to use the exhibits before you start your opening statement. Failure to do so may not be reversible but can certainly cause innumerable headaches if you prevail. For an example, see Velarde v. Illinois Central Gulf, Co., 2004 WL 2546825 (Nov. 8, 2004) (day in the life film used in voir dire and opening not disclosed on timely basis).

G. Presentation of Evidence at Trial

Perhaps it's obvious, but the primary purpose of evidence at trial is to win the case. As Steven Covey says in his best seller, 7 Habits of Highly Effective People, "start with the end in mind." This means that plaintiff's

attorneys need to remember what it is that must be proved.

Most cases involve disputes over liability and damages. Therefore, the attorney must present evidence on every element of damage and every aspect of liability in order to prevail.

Organization is important. Several commercial publications offer guides on how to analyze and prove elements of each and many are useful. However, a nearly free resource is overlooked on many occasions – the jury instructions.

It is so obvious; why don't more trial lawyers don't use jury instructions to organize their presentations? The jury will be instructed on a pre-determined set of rules. They lay out the elements of the case that the plaintiff is required to prove. They spell out the elements of damage. And most importantly, the jury gets to use them during deliberations.

In using the instructions, plaintiff's attorneys should use the phraseology from the instructions themselves. If the liability issue is negligence, ask your questions using the definition of negligence from the instructions. If the damages issue is loss of normal life, quote the jury instruction when asking your questions.

The use of the instructions in your questioning serves two purposes. First, it shows the jury (in advance)

that you know the law and want to work within it to prove your case. That builds your credibility and if the jury thinks you are credible, more often you are going to win.

Second and equally important, psychologically the terms the jurors will hear in the instructions from the judge will resonate. The "aha!" occurs – "I remember him asking a question about that." This gives a common theme to your case and ties the whole case into a nice package.

H. Use of Demonstrative Evidence and Exhibits

1. Importance

The importance of using exhibits at trial cannot be overstated. No matter how dry the topic, no matter how boring the witness, exhibits ALWAYS bring the topic to life. According to Nielsen Media Research, Americans watch an average of 4 hours of television every day. This same research group found that an average American child spent more time watching TV in 2001 (1,023 hours) than he or she did in school (900 hours). Likewise, most jurors are accustomed to watching television in 10 to 15 minute bites. Remember, your favorite sit-com was only 30 minutes and had two breaks. The use of exhibits breaks up the trial and makes the case more tangible.

2. Real Evidence v. Demonstrative Evidence

Real evidence – this is the actual evidence of the case. It can be medical records, the car involved in the crash, or the pathology slides at issue in a medical malpractice case.

Demonstrative evidence – this is not real but it is not fake either. It is typically a summary or representation of real evidence. For example, it is impossible to show what plaintiff's spine looks like so an anatomically-correct model is a demonstrative exhibit that can be used. Likewise, it is often impossible to present thousands of pages of records showing lab values

in a medical malpractice case but a simple summary can bring that evidence to life.

3. Real Evidence

a) Foundation

Someone must be called to lay the foundation for the object. In other words, someone must testify that this object is what the plaintiff claims it is.

b) Examples

(1) Business Records

Illinois Supreme Court Rule 236

(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility. The term "business," as used in this rule, includes business, profession, occupation, and calling of every kind.

(b) Although police accident reports may otherwise be admissible in evidence under the law, subsection (a) of

this rule does not allow such writings to be admitted as a record or memorandum made in the regular course of business.

(2) Display of Personal Injuries

In cases in which a plaintiff is left maimed or otherwise has injuries which can be seen, display of those injuries is appropriate, even if gruesome. Generally this is considered the plaintiff's right. Stegall v. Carlson, 6 Ill. App. 2d 388 (1955).

4. Demonstrative Exhibits

a) Foundation and admissibility

(1) Foundation – there must be testimony that the exhibit is a fair and accurate representation of those things it tries to portray.

(2) Admissibility – demonstrative evidence has no probative value in and of itself. Therefore, courts consider whether the demonstrative evidence offered is relevant, fair, and assists the trier of fact in understanding the witness' testimony. Whether a particular exhibit is admitted lies within the discretion of the trial court. Bachman v. General Motors Corp., 332 Ill. App. 3d 760 (4th Dist. 2002).

b) Types

(1) Photographs and videos

Photographs and videos may be real evidence and they may be demonstrative. For example, a photograph of the damage to the car in an automobile crash can be considered real.

(2) Animations

The computer is a powerful tool for trial lawyers. Demonstrative exhibits using computer animation can make accidents come to life. For example, in a product liability case, an animation might show how the defective product injured the plaintiff.

(3) Summaries

Often these can be the most powerful of all exhibits. People rarely can wrap their minds around thousands of pages of records but can readily understand to a one-page demonstrative summary of those same records. As was noted by the Court in Murray v. Kleen Leen, Inc., 41 Ill.App.3d 436 (5th Dist. 1976), "[W]here the records to be examined are voluminous and the facts to be testified to may be ascertained by calculations, then a competent person who has examined the records may testify thereto, as this is the only method of intelligible presentation to the jury."

(4) Medical models and diagrams

Few types of demonstrative exhibits are used more than medical models and drawings. These can range from simple black and white diagrams to complicated working models. Whatever is used, it still must meet the foundational requirements for demonstrative evidence. Preston ex rel Preston v. Simmons, 321 Ill. App. 3d 789 (1st Dist. 2001).

(5) Other Models

(a) Scene

Scaled diagram of the scene drawn by police officer was admissible as demonstrative exhibit. Stenger v. Germanos, 265 Ill. App. 3d 942 (1st Dist. 1994).

(b) Planes, trains, automobiles

Working models of machinery and mock-ups are admissible in evidence when their admission tends to further clarify a subject or question in issue. Sherman by Sherman v. City of Springfield, 111 Ill.App.2d 391 (4th Dist. 1969).

(c) Lines of sight

(d) Drawings

A hand-drawn diagram of an accident scene showing the intersection where the accident occurred has been found admissible. Burke v. Toledo, Peoria & Western R.R., 148 Ill.App.3d 208 (1st Dist. 1986).

(e) Courtroom demonstrations

A courtroom demonstration showing that a three-year-old could reach the blades of a machine was held to be within the discretion of the trial court. Yassin by

Yassin v. Certified Grocers of Illinois, Inc.,
150 Ill.App.3d 1052 (1st Dist. 1986).

I. Handling Defense Experts

Perhaps the height of good lawyering is the ability to effectively handle an adverse expert witness. These individuals are usually very well versed in the methods of effective testimony. They rarely waiver from their opinions. In reality, they are professional witnesses as well as experts in their fields. That makes the task of cross-examination daunting at best.

Nevertheless, effective cross-examination can and should be made. Below are listed some ideas that will help even the novice do a good job of effectively handling the expert.

1. Start before the expert is disclosed

In every major case, the defense will hire an expert. Often from the initial pleadings, a plaintiff's attorney can sense where the defenses will be. Certainly by the time your client is presented for deposition, the defenses to the case should be crystal clear.

Make your best effort to destroy those defenses early in the case. Ask the witnesses questions relevant to those defenses and, hopefully, have them discredit them.

2. Demand opinions

When the expert is disclosed, make sure his or her opinions are disclosed. Don't tolerate wishy-washy opinions. The rule requires specificity and you should

demand it. Bring motions if you have to but get specific, detailed opinions.

3. Get the file

The disclosure of the expert witness means that the expert has reviewed materials. You are entitled to a copy of those materials. Get EVERYTHING. Get every piece of paper, note, x-ray, and picture the expert has reviewed. Then when you have it, Bates stamp each page so you know you have everything.

4. Get background

It is very likely the expert has a history. You want that information. Check the local court databases to see if he has been sued. Is he incorporated? Is he a member of any associations? Has he written any articles? Get them.

If the expert has testified in prior cases, ask for a list of them. Run a jury verdict search on the expert and find the cases she has testified in. Get those depositions and talk to those lawyers for their impressions.

5. Prepare, prepare, prepare

Nothing beats preparation. You need to know as much as you can about the topic about which the expert will testify. Starting reading up on the topic. Hire your own consultant to teach you the subject. Do whatever it takes so that when you walk in to the deposition, you know the topic.

6. Discovery Deposition

At the deposition, start with a list of opinions. Get the expert to provide you with the opinions in the deposition. Start with that list and work from there.

With the opinions in hand, start attacking them one at a time. There are holes, weakness, and problems. Expose them and get acknowledgement that there is an issue with that topic.

Get concessions. All experts concede something. Find areas of agreement and work with those. This can be critical.

Also at the deposition, mark the file with which you were provided. Get the expert to agree that is all the material he reviewed and prepared AND that nothing was omitted or destroyed.

7. Consider rebuttal

Many lawyers let the retained witness' testimony go unanswered. It is often prudent to retain a rebuttal expert to contradict the critical portions of the expert's testimony.

8. Trial

First, limit the opinions. Perhaps some of the opinions are inadmissible. Bar them. Perhaps the best you can do is limit the opinions to those disclosed.

Whatever you can do to parse down the totality of opinions, do it.

Second, remember they have their points. Steal their thunder throughout the whole trial. Co-op their expert's opinions and show how you and he agree and why he's wrong. Make it sound like a out-of-tune piano when the expert opens his mouth.

Third, don't try and kill him. The expert cannot be "attacked" except in the rarest of circumstances. In most cases, you simply want to expose the deficiencies in the opinions. Of course, make sure you do that. But do so in a nice way.

Fourth, talk money. The expert is being paid – by the defense – a lot of money. He has made thousands on testifying in the past, perhaps millions. Expose that. Jurors understand bias better than we appreciate.

If you follow these steps, you will effectively handle the defense expert.

J. Proving Damages in Closing Argument

To bicker with the title of this section, damages are NEVER proven in closing argument. Rather, in closing argument the lawyer provides the trier of fact with insight into what the evidence has shown regarding damages. That being said, a jury must be given guidance in the damages arena. They crave it and if you have done your

job well through the case, they will listen to your arguments. Below are some suggestions on how a jury can be reminded about damages.

1. Hit every element

In a few short minutes after your brilliant closing, the jury will be instructed on the damage elements of the case. Your closing argument must cover each and every element of damage in the jury instructions.

Remind the jury of the testimony they heard on each element of damage. Perhaps pain and suffering was best described by the plaintiff, perhaps disability best by the spouse. Remind the jury what was said and the significance attached to it at the time.

Use the "book on the shelf" method for damages. The jury instructions require that each element be considered separately. Thus, provide the jury with your guidance on an element and then, "put that book on the shelf." In other words, forget about that element in consideration of the other elements of damage.

2. Hit the defense

There is an issue about damages, most likely. If so, what evidence has the defense given to show the damages are not what is contended? What aspects of the damages will the defense argue in closing to rebut your evidence of damage? Whatever it was, you must respond to it now.

3. Never total

Some lawyers like totals. Some like to put a big number up on the board and flaunt it. Rarely does this author find it effective, however. Rather, put your number up for each element and then set it aside.

The "never total" rule is also a good way to beat the occasional 10% argument. Some defense attorneys have the habit of arguing that the plaintiff's actual damages should be 10% of the total suggested in closing. So if the plaintiff's lawyer asked for $100,000, the defense would suggest $10,000 as fair. If you never total, the defense can never divide by ten.

4. Always rebut

It is perplexing that some lawyers waive rebuttal but it happens. Never give up the right to counter what was said by the defense.

You will not counter every point. However, you can counter the most significant ones. If the case really turns on liability, pick on the liability issue of the defense. If the damages are hotly contested, pick on those. But always, always, always rebut.

III. After the Trial

After your hard fought battle, few lawyers like to consider an appeal. However, regardless of the outcome, there are certain circumstances in which an appeal is necessary.

A. Plaintiff Considerations – Deciding to Appeal

Appeals are not easy and perhaps other than the oral argument are not a lot of fun. In making a decision to appeal, some factors you should consider are detailed below.

1. Appeal-able issues?

No client is guaranteed a perfect, error-free trial. Only major errors are worthy of appeal and careful consideration of those is prudent.

a) Judge's errors

Common errors seen here are rulings on motions, admissibility of evidence, rulings on the law, and jury instructions. However, most of the Court's rulings are tested by an "abuse of discretion" standard. Therefore, the error has to be well outside the bounds of reasonableness to prevail.

b) Your errors

You screwed up. Maybe you missed something. Maybe you tried to put something into evidence that you should not have. If so, you should be prepared to appeal the error. Why? Because if you won, your opponent may want to appeal YOUR error.

c) Opponent's errors

Your opponent made some inflammatory remarks. Maybe he violated a Motion in Limine. Maybe he tried to admit improper evidence. Whatever it was, consider carefully the ramifications of the error and what the ruling of the court was.

d) Jury Errors

Juries make mistakes. Perhaps the jury improperly answered a special interrogatory. Perhaps they made a trip to the scene without permission. Perhaps they failed that they work for an insurance company. In any event, whatever the error, it is important to consider these for appellate purposes.

2. Who will do it?

The appellate process is complex. There is an entire chapter of rules that are different for appeals. The slope of time limitations is slippery and unforgiving. Thus, the trial lawyer should think long and hard about doing the work for an appeal.

At least one factor weighs in favor of doing the appeal yourself. No one knows what happened at the trial court better than you. You were a firsthand witness to the errors and can give life to the often lifeless transcript.

But this personal involvement can also skew your perspective. Minor errors that seem like a travesty of justice would be ignored by appellate counsel. Likewise, your view might be missing an entirely difference argument someone with fresh ideas could bring to bear.

If you chose to hire outside counsel to do the appeal, chose carefully. These practitioners are often expensive and frequently have far more work than they can do. Check into their history with the court and how many continuances they seek for their briefs. Finally, read some of their submissions. These should be easily accessible now that Westlaw has briefs on line.

3. Is it worth it?

Appeals are not cheap no matter who does them. The time alone could cost thousands of dollars. Add the cost of printing, binding, and delivering the briefs to oral argument time and you have to consider whether it is worth the expenditure.

Attachment to Section I, B

Illinois Pattern Jury Instruction (Civil), B45.03.A

Illinois Pattern Jury Instructions-Civil
Illinois Supreme Court Committee On Pattern Jury Instructions In Civil Cases

Multiple Parties And Pleadings-Verdict Forms
45.00. Forms Of Verdicts

B45.03.A Verdict Form A--Single Plaintiff and Claimed Multiple Tortfeasors-- Comparative Negligence--Verdict for Plaintiff Against Some But Not All of Defendants

VERDICT FORM A

We, the jury, find for _____ and against the fol-

name of plaintiff

lowing defendant or defendants:

_____ Yes ___ No ___
name of first defendant
_____ Yes ___ No ___
name of second defendant
_____ Yes ___ No ___
etc.

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the [negligence] [fault] of _____, if any, we find that the total amount of dam-

name of plaintiff

ages suffered by _____ as a proximate result of the oc-

name of plaintiff

currence in question is [$_____.] [itemized as follows:

The reasonable expense of past medical and medically related expenses:	$_____
The present cash value of future reasonable medical and medically related expenses reasonably certain to be necessary in the future:	$_____
(See Notes on Use.)	
(Other Damages: Insert from 30.03, 30.04, 30.05, 30.05.01, 30.07, 30.08, 30.09, or as applicable.)	$_____
PLAINTIFF'S TOTAL DAMAGES:	$_____

]

Second: Assuming that 100% represents the total com-bined [negligence] [fault] of all persons or entities whose [neg-ligence] [fault] proximately caused _____'s injury, in-

name of plaintiff

cluding _____, [and] any defendant whom you have

name of plaintiff

found liable, [and any other person or entity identified on this verdict form whose (negligence) (fault) proximately caused _____'s injury] we find the percentage of such [negli-

name of plaintiff

gence] [fault] attributable to each as follows:

(a) _____ _____%
name of plaintiff
(b) _____ _____%
name of first defendant
(c) _____ _____%
name of second defendant
(d) _____ _____%
name of third-party defendant
(e) _____ _____%
name or describe non-party
TOTAL 100%

(*Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any non-party was not [negligent] [at fault] in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily [negligent] [at fault], then you should enter a zero (0) as to that person or persons.*)

Third: After reducing the plaintiff's total damages [(from paragraph First)] by the percentage of [negligence] [fault], if any, of _____ [(from line (a) in paragraph Third)], we

name of plaintiff

award _____ recoverable damages in the amount of

name of plaintiff

$_____.
[*Signature Lines*]

Notes On Use

Each of those types of cases involves more than one person or entity claimed to have caused the plaintiff's injury or damage. These cases involve claimed multiple tortfeasors and not necessarily multiple defendants.

If contribution is sought against third-party defendants, use IPI 600.14.

The bracketed itemization of damages in paragraph [First] should be used in any case where itemization of damages is required under 735 ILCS 5/2-1117 (joint and several liability) or if requested pursuant to 735 ILCS 5/2-1109, by any party.

Fill in the names of the parties and others before submitting this form to the jury.

Where "Defendant A," "Defendant B," etc. appear, insert the names of each defendant on a separate line. Provision is made for the possible inclusion on the verdict form of tortfeasors who are not parties. *See* the Comment for a discussion of the considerations involved regarding tortfeasors who are not named as parties.

This instruction, or a variation of it, should be used in cases where there is one plaintiff and more than one defendant. If there are multiple counts, the operative paragraphs may need to be repeated for each count with the count identified, e.g. "under Count _____"

If there is no issue as to plaintiff's contributory negligence, delete all references to contributory negligence.

In the event that any party moves for a separate verdict on any count, separate verdicts in addition to this verdict must be submitted. 735 ILCS 5/2- 1201(c) (1994).

SPECIAL NOTE ON USE

The following notes and instructions were drafted prior to the amendment of ¢ Y735 ILCS 5/2¢ Y¢ R;00005;;ES;IL735P5/2;1000008;¢ R-1117, which became effective 6/4/03. This amendment should be considered when utilizing the following instructions and notes.

Comment

I. Introduction

This computational verdict form to be used in cases involving a single plaintiff and more than one entity which could or might have caused the plaintiff's injury or damage, where comparative negligence, contribution between defendants or joint and several liability is an issue. IPI 600.14 is identical to this instruction, with the addition of a paragraph in that instruction providing for express findings for or against third-party defendants. Because there are many issues in common between the use of a verdict form involving multiple tortfeasors (but not contribution) and cases which do involve contribution, this comment is a combined discussion of matters pertaining to both this instruction and IPI 600.14.

These two verdict forms (IPI B45.03A and 600.14) are intended to reflect the jury's findings as to damages and fault, which provide the necessary data for the calculations necessary to the entry of a judgment or judgments. Although the committee has attempted to provide some guidance (in this comment and elsewhere) on the legal issues involved in those calculations, it should be emphasized that the committee takes no position on undecided legal issues. These forms attempt to be "neutral" on all major issues, providing an open framework in which both plaintiffs and defendants can make arguments to the trial judge concerning the treatment of various issues and the legal effect to be given to the findings of the jury.

Inclusion of "nonparties" within the calculation of fault may be necessary for correct consideration of

comparative fault, joint and several liability and contribution. The inclusion of nonparties on the verdict form is a matter of law for decision by the court. There is little guidance in the case law at the present time. Although a nonparty will most always be identifiable by name, there is no Illinois decision as to whether a nonparty can be described on the form with specificity, but without name.

The need for the jury to consider the fault of nonparty tortfeasors arose subsequent to the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). "Consideration of the negligence of both parties and non-parties to an action is essential for determining liability commensurate with degree of total fault." *Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053, 466 N.E.2d 1064, 1074, 81 Ill.Dec. 262, 272 (1st Dist.1984). "Moreover, in cases where contributory negligence is involved, it is permissible to introduce evidence of the liability of a non-party. The liability of non-party tortfeasors may be considered in order to determine the extent of plaintiff's responsibility for his injuries." *Smith v. Central Illinois Public Service Co.*, 176 Ill.App.3d 482, 531 N.E.2d 51, 60, 125 Ill.Dec. 872, 881 (4th Dist.1988). *See also American Motorcycle Assoc. v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 190, 578 P.2d 899, 906 (Cal.1978).

In *Bofman*, a plaintiff was able to obtain reversal of a verdict because the jury was not properly instructed to account for the negligence of a settled nonparty. Although the jury is presently instructed to consider the fault of nonparties in determining the contributory negligence of a plaintiff even under the regime of pure comparative negligence (IPI B45.03A), the jury has not previously reported the percentage attributed to nonparties back to the court.

735 ILCS 5/2-1117 (1994), as amended by P.A. 84-1431, effective November 25, 1986, provides for joint liability in all actions based upon negligence or products liability based on strict tort liability, except environmental pollution and in any medical malpractice action, in the following terms:

[I]n actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medical and medically related expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the total fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the total fault attributable to the plaintiff, the defendants sued by plaintiff, and any third party defendants who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages.

Section 3 of the Contribution Act (740 ILCS 100/3 (1994)) provides that "the pro rata share of each tortfeasor shall be determined in accordance with his relative culpability."

Section 3 of the Contribution Act further provides: "However no person shall be required to contribute to one seeking contribution an amount greater than his pro rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro rata liability."

Prior to the adoption of these verdict forms, two separate forms of verdict were used in cases involving a simultaneous claim by the plaintiff and claims for contribution: (1) the plaintiff's verdict form set out the amount of the plaintiff's damages and the percentage of the plaintiff's comparative negligence; and (2) the contribution verdict form asked the jury to allocate fault among all of the contribution parties, with that fault adding up to 100 percent.

That prior separation of the calculation of the plaintiff's fault in the first verdict form from the calculation of the contribution allocations in the second form permitted inconsistent calculations by the jury. That inconsistency resulted in a reversal in *Hackett v. Equipment Specialists, Inc.*, 201 Ill.App.3d 186, 559 N.E.2d 752, 147 Ill.Dec. 412 (1st Dist.1990). In *Hackett*, the jury found the defendant to be 55 percent at fault with respect to the plaintiff, but not at fault at all with respect to the third-party defendant. The appellate court held that the fault of the defendant could not simply have disappeared for contribution purposes.

Section 2-1117 requires a comparison of the fault of the plaintiff, the defendants sued by the plaintiff and third-party defendants who could have been sued by the plaintiff. To apply the statute, the fault of the plaintiff and of the specified tortfeasors must be considered on the same "scale."

Contemporaneously with these developments, Illinois practitioners were confronted with tortfeasors who were not parties to the litigation at the time of verdict. That situation often arose in cases involving parties who had settled under the terms of the Contribution Act (often employers) and governmental entities which had limited liability as a result of legislation providing them with special defenses.

When all of these developments are taken together, the role of absent tortfeasors becomes more prominent and raises simultaneous questions with respect to comparative negligence, contribution and joint and several liability.

Although it was possible, prior to the passage of P.A. 84-1431 (the 1986 tort reform legislation), to determine the contribution percentages of the parties without express resort to the fault of nonparties, such a procedure made it possible for there to be the internal inconsistency in the verdict which was evidenced in *Hackett*. Furthermore, the omission of nonparties from the contribution calculation, as was the case under the previous contribution instructions, did not adequately give guidance to a contribution defendant who did not have direct liability to the plaintiff.

For these reasons, this form of verdict, and the additional instructions found in the 600 series, as appropriate, are to be used in all contribution cases, for occurrences which took place both before and after November 25, 1986, the effective date of P.A. 84-1431.

If contribution claims are tried simultaneously with the plaintiff's underlying action, this verdict form (in the event of only counterclaims among defendants) or IPI 600.14 (in the event of third-party claims) is to be used as the form of verdict for both the plaintiff's claim and those contribution claims. This verdict form is also to be used in those cases where contribution is not sought but where one or more defendants seek to be held only severally liable.

This form eliminates the need for separate calculations or allocations by the jury for comparative negligence, joint and several liability, and contribution. Further, it was designed to provide the bar with sufficient resemblance to the prior verdict forms such that the transition would be comfortable. Although it is not practically or legally necessary, provision is made for the jury to continue the former practice of calculating the plaintiff's net recovery by reducing the plaintiff's total damages by the plaintiff's fault.

These forms allow for the inclusion of nonparties. They permit the possibility of a recalculation of a verdict upon appeal if an appellate court, in deciding any of the numerous questions still unanswered in this area, decides that that procedure is appropriate in Illinois as it is in some other states.

Burke v. 12 Rothschild's Liquor Mart, 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992), holds that a wilful and wanton tortfeasor cannot use the plaintiff's comparative negligence to reduce damages. *Ziarko v. Soo Line Railroad*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994), holds that "a defendant found guilty of wilful and wanton conduct may seek contribution from a defendant found guilty of ordinary negligence if the wilful and wanton defendant's acts were found to be simply reckless and thus were determined to be less than intentional conduct." *Ziarko* and *Burke* raise a number of comparative fault issues among all parties that must be considered in the preparation and use of instructions and verdict forms.

First, if it is known prior to the submission of the case to the jury that one of the defendants can be liable *only* upon a wilful and wanton theory, the calculation of the percentage to be attributable to that defendant's conduct may still be an issue for the jury's consideration, even if that defendant is not entitled to a reduction of damages for comparative negligence purposes. Both the plaintiff (for comparative negligence purposes as to the other defendants) and the other defendants and third-party defendants (for several liability purposes, and perhaps for contribution purposes) might wish to argue that the percentage of causation attributable to the wilful and wanton defendant be compared with the rest of the causal fault.

Second, a particular defendant might be liable for (1) negligent conduct, (2) "reckless" willful and wanton conduct, or (3) that type of willful and wanton conduct described in *Ziarko* as "intentional." If the plaintiff's case and the contribution issues are submitted together to the same jury, the court must determine (1) the allowable basis of comparison between the party or parties found to be negligent and the party or parties whose fault was willful and wanton, (2) whether any aspect of those issues is to be decided by the court as a matter of law as opposed to being determined by the jury, and (3) the extent to which any willful and wanton defendant's fault is not considered in allocating fault.

The committee takes no position on these issues.

Because of the absence of case law on various issues, the committee does not yet have sufficient guidance from the courts to draw instructions which would expressly accommodate every situation. In the meantime, it is anticipated that most cases can be tried using these forms and instructions accompanied by special interrogatories on the issue of willful and wanton conduct.

The statutes and case law are currently silent on the procedural issues that might arise concerning the allocation of fault to nonparties. It is beyond the scope of this committee's work or authority to supply those missing procedural directives. At a minimum, it is the committee's recommendation that a nonparty not be included on the verdict form until the trial judge first makes the determination that sufficient evidence has been presented to support a jury finding of fault with respect to that nonparty.

II. Judgment Calculation

After the jury has returned its verdict, the trial judge and the parties will take the jury's allocated percentages of fault and use them for the calculations necessary to enter a judgment or judgments consistent with the principles of comparative negligence, contribution and joint and several liability. This Comment will set out examples of how these computations might be made. *Any assumption or treatment of particular percentages in these examples does not constitute an opinion by the committee as to the resolution of the substantive issue of law involved but is made for illustration purposes only.* There are numerous unresolved substantive law, issues only some of which are listed in the introduction to the contribution series, IPI 600.00. The resolution of these issues must be accomplished by trial judge and counsel, with the judgment then being constructed based upon those decisions.

A. Comparative Negligence

The percentage of the plaintiff's fault for comparative negligence purposes will be obtained directly from the verdict form. The plaintiff's fault is to be calculated in comparison to the fault attributable to not only all parties to the lawsuit but also with consideration of the fault attributable to nonparties who proximately contributed to the plaintiff's injury. *See Bofman v. Material Service Corp.*, 125 Ill.App.3d 1053, 466 N.E.2d 1064, 1074, 81 Ill.Dec. 262, 272 (1st Dist.1984); *Smith v. Central Illinois Public Service Co.*, 176 Ill.App.3d 482, 531 N.E.2d 51, 60, 125 Ill.Dec. 872, 881 (4th Dist.1988).

B. Contribution

In most cases, the percentages of contribution liability will be calculated by the court by determining the aggregate amount of fault attributable solely to the contribution parties and then redistributing that fault on a proportional basis just among those contribution parties, with these recalculated percentages adding up to 100 percent. This will not always be the final result, however. There might be some circumstances where a third-party defendant would be potentially liable in contribution to the defendants but would not have direct liability to the plaintiff. Although there is, as yet, no Illinois case on point, it would appear that such a third-party defendant can argue that it is responsible *only* for its pro rata share in contribution to the third-party plaintiff, and would not be responsible for any reallocation that might be necessary among the original defendants who are responsible for the entirety of the verdict to the plaintiff.

In appropriate cases, consideration need also be given to 740 ILCS 100/3 (1994), which provides that "if equity

requires, the collective liability of some as a group shall constitute a single share." For example, where one defendant's alleged liability is vicarious, based on the tort of another defendant (e.g., master and servant), these two defendants should be treated as a single share and one percentage assigned to them by the jury.

C. Joint and Several Liability

Determination of the "joint and several" questions present the most numerous and difficult threshold questions of law. *See* IPI 600.00. Again, the trial court resorts to the particular applicable percentages reported back by the jury, makes the calculation required by § 2-1117, and then determines whether a particular defendant is only severally liable for the nonmedical elements of the plaintiff's damages. Although the statute presents numerous unresolved questions, the court will determine whether the fault attributable to the defendant in question "is less than 25 percent of the total fault attributable to the plaintiff, the defendants sued by the plaintiff and any third-party defendant who could have been sued by the plaintiff." The court will have to make various legal determinations on a case by case basis before solving that particular equation. Among other questions presented are: (1) whether a previous party, who has settled, is a "defendant"; (2) whether a settled tortfeasor who was never made a formal party is a "defendant"; (3) whether an absent tortfeasor against whom no claim has been made is a "defendant"; (4) whether a single defendant can attempt to claim several liability; and (5) whether an immune or otherwise protected third-party defendant "could have been sued by the plaintiff."

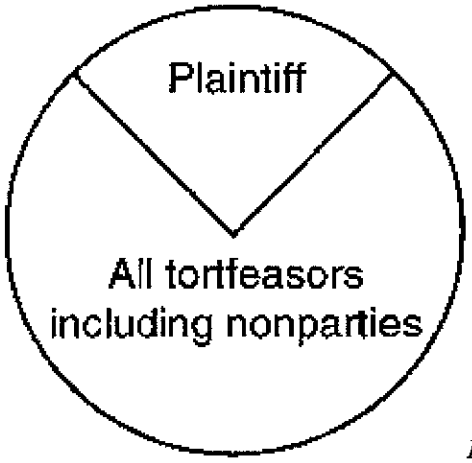
It is important to note that the percentage figure calculated for a particular defendant for § 2-1117 purposes may or may not equal the percentage for which that defendant is severally liable. Once it is determined through the appropriate calculation under § 2-1117 whether a particular defendant is severally liable, the percentage amount of that "several" liability must still be determined. Depending upon (1) whether the plaintiff was assigned fault by the jury, and (2) whether the court interprets the § 2-1117 phrase "the plaintiff, the defendant sued by the plaintiff, and any third-party defendant who could have been sued by the plaintiff" as including a different group of tortfeasors from those to be counted for purposes of determining the amount of several liability, the percentage assigned for the amount of several liability may be different from the percentage calculated under § 2-1117.

Section 2-1117 provides that a defendant found severally liable "shall be severally liable for all other damages." There is no case, as of yet, interpreting that phrase. If the trial court interprets the phrase to mean that a severally liable defendant is liable only for that proportion of recoverable nonmedical damages that the amount of that defendant's fault bears to the aggregate amount of all other tortfeasors, including nonparties, then the court's subsequent calculation would reallocate the severally liable defendant's fault among all such tortfeasors. If, in contrast, the court interprets the phrase to require a proportional allocation of fault just among the parties liable to the plaintiff, then the court would redistribute the fault on a proportional basis among those parties. The court might determine that the phrase has yet other meanings.

D. Graphical Depiction of Fault Comparisons

Subject to the cautionary disclaimers stated throughout this comment, the following illustrations are offered as possible aid to the understanding of the various fault comparisons that might be involved in converting the jury's findings of fault into a final judgment. These are offered for purposes of illustration only, and any treatment of substantive issues inherent in an illustration does not necessarily constitute an opinion of the committee as to the proper resolution of that substantive issue of law. These illustrations must be considered in conjunction with the discussion in the preceding sections of this comment. These illustrations do not purport to depict all possible comparative fault situations.

For Plaintiff's Comparative Fault:

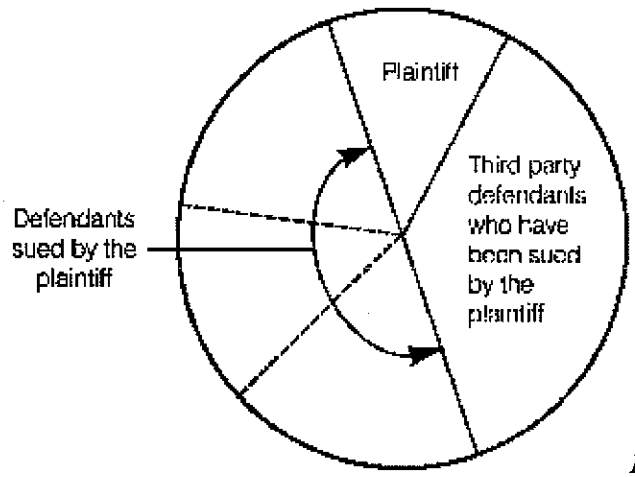


For Contribution:

1. An express caution is offered concerning a claim for contribution made against a third party defendant who is not directly liable to the plaintiff by way of judgment. Such a party might argue that it is liable for a proportional share computed with reference to both parties and nonparties.

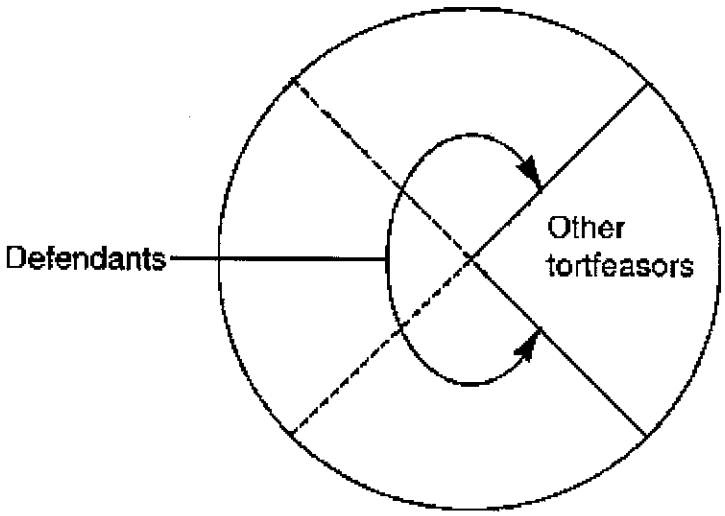
2. This hypothetical assumes that all defendants and third party defendants have claimed contribution as necessary.

For the Determination of the section 2-1117 "Test":



For the Percentages of Several Liability to the

Plaintiff:



1. This illustration assumes, by way of example only, that the trial court interprets § 2-1117 to require the inclusion of nonparties. Alternative decisions are possible.

2. This illustration makes no determination as to how the fault of third party defendants is to be treated.

III. Hypotheticals

Subject to the previously stated caution that the treatment of the fault of nonparties in these examples is for illustrative rather than substantive purposes, the following examples are offered:

Example 1

Assume that there are four defendants, A, B, C and D, that the nonparty ("Person X") was a cause of the injury, and that the jury finds damages in the total amount of $1,000,000, including $200,000 in past and future medical expenses, with the plaintiff's contributory negligence at 20%, and with the total fault distributed as follows:

Plaintiff:	20%
Defendant A:	20%
Defendant B:	10%
Defendant C:	40%
Defendant D:	0%
Person X:	10%
TOTAL:	100%

Under the above assumptions, the verdict form would be filled out as follows:

We, the jury, find for _____ and against the following defend-

name of plaintiff

ant or defendants:

	Yes	/	No	
name of Defendant A	Yes	/	No	
name of Defendant B	Yes	/	No	
name of Defendant C	Yes		No	/
name of Defendant D				

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of _____, if any, we find that the

name of plaintiff

total amount of damages suffered by _____ as a proximate result

name of plaintiff

of the occurrence in question is itemized as follows:

The reasonable expense of past medical and medically related expenses:	$ 100,000.00
The present cash value of future reasonable medical and medically related expenses reasonably certain to be necessary in the future:	$ 100,000.00
[Total of itemization of other nonmedical damages]	$ 800,000.00
PLAINTIFF'S TOTAL DAMAGES:	$ 1,000,000.00

Second: Assuming that 100% represents the total combined negligence of all persons or entities whose negligence proximately caused _____'s

name of plaintiff

injury, including _____, any defendant whom you have found li-

name of plaintiff

able, and any other person or entity identified on this verdict form whose negligence proximately caused _____'s injury, we find the percent-

name of plaintiff

age of such negligence attributable to each as follows:

(a)	20	%
name of plaintiff		
(b)	20	%
name of Defendant A		
(c)	10	%
name of Defendant B		
(d)	40	%
name of Defendant C		
(e)	0	%
name of Defendant D		
(f)	10	%
name of Person X		
TOTAL	100	%

(*Instructions to Jury: If you find any defendant not liable to the plaintiff, or that* _____ *was not negligent in a way*

name of Person X

that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily negligent, then you should enter a zero (0) as to that person or persons.)

Third: After reducing the plaintiff's total damages (from paragraph First) by the percentage of negligence, if any, of _____ (from line

name of plaintiff

(a) in paragraph Third), we award _____ recoverable damages in

name of plaintiff

the amount of $800,000.00.

[*Signature lines.*]

Defendants A, B and C are jointly and severally liable for 80 percent of the plaintiff's recoverable past and future medical expenses, $160,000.

The relative liability of the defendants found liable, A, B and C depends in the first instance upon the trial judges decisions as to the substantive questions under the statute. Assuming, for purposes of illustration *only* that the trial judge has decided that the fault attributable to "Person X" will *not* be included within the calculation of the test percentage, under § 2-1117. The relevant calculations might be as follows:

Defendants A, B and C are jointly and severally liable for the $160,000 medical expense recovered ($200,000 less 20%). *See* 735 ILCS 5/2-1117 (1994).

To illustrate how joint and/or several liability might be calculated:

Illustrative Calculation

(1) Defendant	(2) Determination by Jury % of Fault	(3) % of Fault for Eligibility for Several Liability	(4) % of Fault Among Defendants	(5) Potential Liability to Plaintiff for Medical	(6) Potential Liability to Plaintiff for Other Damages
A.	20	22% (20/90th)*	28.57% (20/70th)	$160,000	$160,000
B.	10	11% (10/90th)	14.28% (10/70th)	$160,000	$ 80,000
C.	40	44% (40/90th)	57.15% (40/70th)	$160,000	$640,000
	70				

*100% minus Person X's 10%

Column (1) designates the defendants against whom the jury has found.

Column (2) is the percentage of fault as found by the jury, as a percentage of 100%.

Column (3) reflects the percentage of fault to determine joint or several liability under 735 ILCS 5/2-1117 (1994). For this column, the fault is redistributed among plaintiff (20%), defendants sued by plaintiff (Defendant A, 20%; B, 10%; and C, 40%) and any "third party defendant who could have been sued by plaintiff" (none in this example). It is assumed *for illustration only* that "Person X" does not qualify as an entity to be included within the calculation required by § 2-1117. As of the preparation of this comment, there is no case law interpreting this phrase, and argument must be made on a case-by-case basis. However, two cases have briefly discussed the possible application of § 2-1117 with respect to a "nonparty" who had previously been a third party defendant. In *Alvarez v.*

Fred Hintze Construction, 247 Ill.App.3d 811, 617 N.E.2d 821, 826, 187 Ill.Dec. 364, 369 (3d Dist.1993), the court noted that the existence of a good faith settlement with the third party defendant "does not necessarily deny a nonsettling defendant the potential benefit provided by section 2-1117...." In *Lannom v. Kosco*, 158 Ill.2d 535, 634 N.E.2d 1097, 199 Ill.Dec. 743 (1994), the Illinois Supreme Court rejected claims that a dismissal of an employer as a third-party defendant would obstruct the purpose of § 2-1117. The third-party plaintiff argued that dismissal of the employer would "preclude the jury from apportioning any fault to the (settled parties) due to its absence from the litigation." The court replied:

[T]he defendant's rights under Section 2-1117 are not abolished simply because a defendant or third-party settles or is dismissed from an action. The jury may still assess the remaining defendants' relative culpability and if the degree of fault attributable to one or more defendants is less than 25 percent, those defendants' liability is several only.

These cases did not discuss the point under consideration here at any greater length.

In this example, defendants A and B, by virtue of the § 2-1117 computation being less than 25 percent, as set forth in Column 3, are only severally liable for their share of the nonmedical damages but remain jointly and severally liable for the medical damages.

Defendant C is jointly and severally liable for both the medical and nonmedical damages.

Once it has been determined by the computation required by 735 ILCS 5/2-1117 that a defendant is either jointly or severally liable for the plaintiff's other damages, depending upon whether the percentage of fault is more or less than 25%, this percentage has no further use in the computations.

Column (4) sets out the calculation of the contribution percentages of fault based upon a redistribution of fault over the contribution parties. In other words, in most cases, absent the possible operation of several liability, the contribution parties, if they are defendants in the case, are responsible for the entirety of the plaintiff's recoverable damages and the contribution percentage is determined upon the relative rights of the contribution parties among themselves.

Column (5) merely reflects the fact that all parties are jointly and severally liable to the plaintiff for the net recoverable amount of the plaintiff's past and future medical expenses.

Column (6) relates to the operation of several liability. If a defendant is found by the court to be only severally liable, then the percentage amount of that several liability must be determined. As noted earlier in this comment, the court must interpret the meaning of the term "severally liable." For purposes of this illustration, if the court interprets the phrase to mean that a severally liable defendant is liable only for that proportion of the recoverable nonmedical damages that its fault bears to the aggregate amount of all other tortfeasors, then the two severally liable defendants, A and B, are to have their fault reallocated on a proportional basis to the total fault attributable to defendants A, B, and C and also to the nonparty tortfeasor, Person X. The total fault attributable to those entities is 80% (Defendant A = 20%, Defendant B = 10%, Defendant C = 40%, and Person X = 10%). Defendant A is severally liable for 20/80, or 25% and severally liable Defendant B is responsible for 10/80, or 12.5%, of the plaintiff's recoverable nonmedical damages of $640,000.00. Thus, Defendant A would be severally liable only for 25% or $160,000.00 of the noneconomic damages and Defendant B would be severally liable only for 12.5% or $80,000.00 of the noneconomic damages. The figures in column 6 reflect this particular interpretation by the court. If, as discussed in "Joint and Several Liability" above, the court interprets § 2-1117 in a different manner, then the figures in Column 6 would be correspondingly altered.

Several additional simple examples follow:

Example 2

Plaintiff	0%
Defendant	20%
Nonparty, settled, employer	80%

If (1) a single defendant can assert that he is severally liable and (2) the court decides that an employer is "a third-party defendant who could have been sued by the plaintiff," then the defendant is only severally liable.

If the court decides that the employer is not to be included within the § 2- 1117 calculation, then the defendant is liable for the entire verdict.

Example 3

Plaintiff	20%
Defendant 1	20%
Defendant 2	10%
Nonparty	50%

If, as illustration only, the court holds that the nonparty is *not* included in the § 2-1117 calculation:

Plaintiff	20%	20/50 =	40%
Defendant 1	20%	20/50 =	40%
Defendant 2	10%	10/50 =	20%
	50%		100%

Defendant 1, found 20% at fault by the jury, is found to be at 40% for the § 2- 1117 calculations. She is therefore jointly and severally liable for the entire verdict.

Defendant 2, at 20% for the § 2-1117 calculation, is severally liable for 10/80 or 12.5% of the nonmedical verdict (unless the court rules that the nonparty is not to be included in determining the amount of several liability), and jointly liable for all of the medical expenses.

If, in contrast, the nonparty is ruled by the court to be *included* within the § 2-1117 calculation, then defendants 1 and 2 are only severally liable for the nonmedical portions of the verdict.

(2005)

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Attachment to Section I, C, (2)(b)(1)(b)

SUPREME COURT OF ILLINOIS

SEPTEMBER 16, 2003

CIVIL DOCKET

Price v. Philip Morris, Inc., No. 96236, 96644

SUPREME COURT OF ILLINOIS

TUESDAY, SEPTEMBER 16, 2003

THE FOLLOWING ANNOUNCEMENTS WERE MADE:

CIVIL DOCKET

No. 96236 - Sharon A. Price et al., etc., appellees, v. Philip Morris, Incorporated, appellant.

On the Court's own motion, the order of June 11, 2003, denying the motion for direct appeal pursuant to Supreme Court Rule 302(b) is vacated. The motion of appellant for direct appeal pursuant to Supreme Court Rule 302(b) is allowed.

Order entered by the Court.

No. 96644 - Philip Morris Incorporated, movant, v. Illinois Appellate Court, Fifth District, et al., respondents.

The conditional motion of movant for supervisory order and the renewed motion of movant for supervisory order are allowed.

In the exercise of this Court's supervisory authority, and pursuant to Supreme Court Rule 305(g), the Appellate Court, Fifth District, is directed to vacate its judgment in Price et al. v. Philip Morris, Inc., No. 5-03-0320. The Circuit Court of Madison County is directed to vacate its order of August 15, 2003, and to reinstate its orders of April 14, 2003, and May 9, 2003, setting a modified appeal bond in Price et al. v. Philip Morris, Inc., Madison County, No. 00 L 112.

Order entered by the Court.

LEAVE TO APPEAL DOCKET

No. 96643 - Sharon A. Price et al., etc., respondents, v. Philip Morris, Incorporated, petitioner.

The petition for leave to appeal is denied.

Attachment to Section I, C, (2)(b)(1)(c)

"Illinois Supreme Court Amends Rules on Appeal Bonds and Malpractice Insurance"
(June 15, 2003)

FOR IMMEDIATE RELEASE
June 15, 2004

ILLINOIS SUPREME COURT AMENDS RULES ON APPEAL BONDS AND MALPRACTICE INSURANCE

The Supreme Court of Illinois amended two of its rules on Tuesday, one dealing with the setting of appeal bonds and the other requiring attorneys to disclose as part of their licensing procedures whether they have malpractice insurance.

The Court amended Supreme Court Rule 305 to clearly give discretion to a trial judge in setting an appeal bond if the judge determines a bond in the amount of the judgement plus costs and interest is beyond the means of the judgement debtor.

The change is designed to preserve the right of appeal.

The traditional method of securing a judgement is to require an appeal bond in the amount of the judgement plus anticipated interests and costs. In commentary accompanying amended Rule 305, the Court noted, however, that changes in the insurance market have made appeal bonds costly in many cases and unavailable in some cases. Also, in limited instances, the appeal bond requirement may be so onerous that it creates a barrier to appeal, forcing a party to settle a case or declare bankruptcy, the Court noted in its commentary.

The amended rule thus gives a judge discretion in a money judgment case to approve a bond that covers less than the entire amount of the judgement plus anticipated interest and costs when that amount is not "reasonably available" to the judgement debtor. A lower appeal bond does not lessen the obligation of the defendant on the judgement, but simply allows the defendant to obtain a stay of execution on the judgement pending appeal.

The amended rule also allows a defendant to file a form of security other than an appeal bond, such as letters of credit, an escrow agreement or a certificate of deposit when the alternative form of security offers comparable assurance of payment at lower cost.

MORE

If a judge approves a bond or other form of security in an amount less than the amount of judgement plus anticipated interest and costs, the judge must also impose conditions to prevent the judgement debtor from disposing of any assets outside the ordinary course of business, the amended rule states.

The appeal bond issue received nationwide publicity in March, 2003 after a $10.1 billion verdict against Philip Morris in Madison County. Initially, the trial judge set the appeal bond at $12 billion, an amount Philip Morris USA said it would be unable to meet. The Illinois Supreme Court ordered the appeal bond be reduced to $6 billion, and the appeal to be heard directly by the Supreme Court. Oral arguments in that case are pending.

Proposals to amend Rule 305 were the subject of a public hearing by the Court's Rules Committee in January 2004.

In its other action, the Supreme Court amended Rule 756 dealing with attorney registration in Illinois. The amended rule now requires each lawyer to disclose whether the lawyer has malpractice insurance on the date of the lawyer's annual registration with the Attorney Registration and Disciplinary Commission.

It is anticipated that the administrator of the ARDC will post the information for each lawyer on the Commission's web site, making it available to the public. The amendment also allows the Commission to conduct random audits to assure the accuracy of information reported by lawyers.

If a lawyer fails to provide the information regarding malpractice coverage, the lawyer's name will be removed from the master roll of licensed attorneys in the state and the lawyer will be unable to engage in the authorized practice of law.

Proposals dealing with the malpractice insurance for lawyers were the subject of public hearings by the Court's Rules Committee in 2002 and 2003.

Amended Rule 305 is effective July 1, 2004 and amended Rule 756 is effective October 1, 2004.