MONTHLY LUNCHTIME SEMINAR SERIES

31ST SESSION:

DAMAGES: WHAT, WHEN & HOW

Judge Lynn M. Egan
Judge Michael R. Panter

February 24, 2015

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 15 years. She has presided over high volume motion calls, an Individual Commercial Calendar and bench and jury trials. Her current assignment is to the only General Individual Calendar in the Law Division and includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, wrongful termination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling nearly 200 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court ordered medical exams, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a 7 member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in the case of *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

Judge Mike Panter is assigned to Courtroom 2401 in Cook County's Law/ Jury division. Previously, he heard Motion call "X" and before that was in Expedited Child Support. He graduated from DePaul Law School in 1978 and started his own firm in 1980. He was an active trial lawyer until 2007 when he taught law school full-time. He started a new class called Litigation Lab which is still being taught at DePaul as well as other law schools. He became an associate judge in September 2008. He is on the Illinois Supreme Court Discovery Rules Committee, has taught at the Judicial Education Conference, and is a peer reviewer of the Civil Benchbook. He is married to Holly and has two children.

SECTION A

- *"Damages," by Judge Lynn M. Egan, February 24, 2015.*

DAMAGES

by

Judge Lynn M. Egan

February 2014

I. Elements of Damages

When considering the appropriate elements of damages in a particular case, the Illinois Pattern Jury Instructions are a good initial resource. The IPI provides guidance about the following elements of damages:

- General measure of damages instructions: IPI 30.01 – 30.23
- Wrongful death damages: IPI 31.01 – 31.13
- Damages to spouses and family members: IPI 32.01 – 32.06
- Mitigation of damages: IPI 33.01 – 33.02
- Future damages & mortality tables: IPI 34.01 – 34.05
- Punitive damages: IPI 35.01 – 35.02
- Damages under Dram Shop Act: IPI 150.13 – 150.14
- Damages under the Drug or Alcohol Impaired Minor Responsibility Act: IPI 155.04 – 155.05
- FELA damages: IPI 160.13 – 160.16
- Damages under Magnuson-Moss Act: IPI 185.09 – 185.12
- Eminent domain damages: IPI 300.42 – 300.60
- Contract damages: IPI 700.13
- Insurance bad faith damages: IPI 710.07
- Fraud & deceit damages: IPI 800.05 – 800.07

II. Burden of Proof

"Damages must be proved to be recovered." *Chrysler v. Darnall, 238 Ill.App.3d 673, 680 (1st Dist., 1992).* This basic concept is easily understood with the objective elements of damages, such as medical expenses or lost wages, but can be challenging with the more subjective elements, such as pain and suffering, loss of consortium/society or future damages. Thus, it is helpful to look at cases interpreting the specific elements of damage for guidance.

III. Specific Line Items

Although it is without dispute that only those elements of damages that have been proved by the evidence should be considered by the trier of fact, lawyers and judges are well advised to remain aware of ongoing issues related to certain specific elements.

A. Medical Expenses

In order to recover for medical expenses, a plaintiff must prove that the bills are paid or that he/she is liable to pay them, that they were incurred as a result of defendant's negligence & that the charges are reasonable. Baker v. Hutson, *333 Ill.App.3d 486 (5th Dist., 2002). Accord,* Arthur v. Catour, *216 Ill.2d 72, 82 (2005).*

CAUTION: Demonstrating that a bill was paid or is fair & reasonable is but one part of the required foundation for admission of medical expenses. "It must be emphasized that offering a paid bill or the testimony of a knowledgeable witness that a bill is fair and reasonable merely satisfies the requirement to prove reasonableness. The proponent must also present evidence that the charges were necessarily incurred because of injuries caused by the defendant's negligence. Only then have the evidentiary requirements for admission into evidence been satisfied." Id. *See also,* Fraser v. Jackson, *2014 IL App (2d) 130283.*

NOTE: Do not forget application of the collateral source rule. *See,* Arthur v. Catour, *216 Ill.2d 72 (2005)(Plaintiff may present the jury with the total amount billed by health care providers, even if the providers accepted a lesser amount due to agreements with insurance carriers. "It is well established that damages recovered by the plaintiff...are not decreased by the amount...received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums.")*

B. Pain & Suffering

What is pain & suffering and when is an award for this element appropriate? The traditional line item for pain and suffering is not meant to include injuries limited solely to emotional distress. Instead, "an award for pain and suffering is proper where there is evidence of physical injury." Carter v. Azaran, *332 Ill.App.3d 948 (1st Dist., 2002). But see,* Holston v. Sisters of The Third Order of St. Francis, *165 Ill.2d 150, 173 (1995)("Accompanying mental anguish" included as part of pain & suffering.).* Additionally, there must be evidence that the plaintiff was conscious of his or her pain and suffering. Id. However, this does not mean a plaintiff must present *medical* testimony establishing consciousness. Id. *See,* Drews v. Gobel Freight Lines, *144 Ill. 2d 84 (1991)(Photos of crushed car admissible as circumstantial evidence of conscious pain & suffering.).* It is sufficient if lay witnesses describe the plaintiff's actions "together with evidence concerning the injuries...to support a pain and suffering claim." Id. Although medical testimony is not required, evidence from a health care professional that a particular injury is likely to cause pain is relevant when determining whether a plaintiff actually experienced pain. Id.

NOTE: An award for pain & suffering is not automatically required merely because the plaintiff received an award for medical expenses. Chrysler v. Darnall, *238 Ill.App.3d 673 (1st Dist., 1992)("It is well established that a verdict of liability with an award of damages for medical expenses but not for pain and suffering is entirely*

proper."). See also, Snover v. McGraw, 172 Ill.2d 438 (1996)(There is no inherent inconsistency in awarding damages for medical expenses, but not for pain & suffering.).[1] *Accord, Balough v. Northeast Illinois Regional Commuter Railroad Corporation, 409 Ill.App.3d 750, 774-775 (1st Dist., 2010); Orava v. Plunkett Furniture Company, 297 Ill.App.3d 635, 637 (2d Dist., 1998) & Chrysler v. Darnall, 238 Ill.App.3d 673 (1st Dist., 1992)("It is well established that a verdict of liability with an award for damages for medical expenses but not for pain and suffering is entirely proper.").*

CAUTION: Per diem arguments that direct jurors to use a formula and suggested dollar amount for pain and suffering are improper. *Caley v. Manicke, 24 Ill.2d 390 (1962).* Why? Such argument is improper because "pain and suffering have no commercial value to which a jury can refer in determining what monetary allowance should be given"...and suggesting a formula creates "an illusion of certainty, thereby discouraging "reasonable and practical consideration." *Id. at 392-393.* For examples, see *Watson v. City of Chicago, 124 Ill.App.3d 348 (1st Dist., 1984)(argument was permissible) & Ramirez v. City of Chicago, 318 Ill.App.3d 18 (1st Dist., 2000)(argument was improper).*

Significantly, this rule does NOT apply to medical expenses. *Lepore v. Chicago Transit Authority, 2011 IL App (1st) 092576-U, ¶ 29. ("Precedent establishes that per diem arguments are only improper where they refer to pain & suffering.").*

C. Disability, Loss of a Normal Life & Disfigurement

Disability is understood as the "absence of competent physical, intellectual, or moral powers,***[or an] incapacity caused by physical defect or infirmity." *Obszanski v. Foster Wheeler Construction, Inc., 328 Ill.App.3d 550 (1st Dist., 2002). See also, Lewis v. Avila, 405 Ill.App.3d 1192 (1st Dist., 2011).*

Loss of a normal life is a component of disability that compensates "for a change in the plaintiff's lifestyle." *Jones v. Chicago Osteopathic Hospital, 316 Ill.App.3d 1121, 1135 (1st Dist., 2000).* It is formally defined in IPI 30.04.02 as "the temporary or permanent diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life." Is this element of damages appropriately included when the plaintiff's injury occurred prenatally or at birth? Stated differently, is "lifestyle change" a prerequisite to a loss of normal life award? Although *Jones, supra,* raised this issue, the answer is probably "no."[2] In fact, a number of courts have held that "loss of a normal life" can be used interchangeably with "disability," even though the two have different definitions. *See, Burcham v. West Bend Mutual*

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[1] *In Snover, the Illinois Supreme Court expressly rejected the "reversal per se" approach when a jury awards an amount for medical expenses but no corresponding amount for pain & suffering or disability.*

[2] *In Foley v. Fletcher, 361 Ill.App.3d 39 (1st Dist., 2005), the jury returned a verdict that included $5 million for loss of a normal life in a birth injury case. However, the Appellate Court did not address the issue of "lifestyle change."*

Insurance Company, 2011 IL App (2d) 101035, ¶ 19 & Stift v. Lizzadro, 362 Ill.App.3d 1019 (1st Dist., 2005).

NOTE: Although disability and loss of a normal life are both recognized as compensable elements of damages (*Holston v. Sisters of the Third Order of St. Francis, 165 Ill.2d 150, 175 (1995)*), a plaintiff must choose between these two elements because it is improper to include both on a verdict form. *Baker v. Hutson, 333 Ill.App.3d 486 (5th Dist., 2002)("'Loss of a normal life' was approved as an alternative to 'disability' because of concerns that the term 'disability' was often misunderstood and led juries to disregard a proper element of damages or to duplicate damages."). See also, Committee Comment to IPI 30.04.01("The Committee recommends that either "disability" or "loss of a normal life" be used, but not both.").*

In contrast to disability, disfigurement is interpreted as "'less complete, perfect or beautiful in appearance or character.'" *Kresin v. Sears, Roebuck & Company, 316 Ill.App.3d 433 (1st Dist., 2000). See also, Walter v. Somasundaram, 2012 IL App (2d) 120800-U("that which impairs or injures the beauty, symmetry, or appearance.").*

D. Loss of Consortium/Society

Loss of consortium is separate and distinct from loss of society. The former evolves out of the marital relationship and belongs exclusively to an injured spouse. The Illinois Supreme Court defined it as an "interference with the continuance of a healthy and happy marital life and injury to the conjugal relation." *Blagg v. Illinois F.W.D. Truck & Equipment Company, 143 Ill.2d 188, 199 (1991).* IPI No. 32.04 defines loss of consortium more specifically as "society, companionship & sexual relations between husband and wife." Not surprisingly, the postmarital discovery of a premarital injury cannot create a cause of action for loss of consortium. *Monroe v. Trinity Hospital-Advocate, 345 Ill.App.3d 896, 899 (1st Dist., 2003).*

Loss of society can be a separate element of damages for parents, children and siblings and is defined as the "deprivation of the companionship, guidance, comfort, love and affection of the deceased." *In Re Estate of Williams, 223 Ill.App.3d 505 (5th Dist., 1992).* Significantly, there is a presumption of pecuniary injury to parents for the loss of a child's society. *In Re Estate of Finley, 151 Ill.2d 95 (1992).*

NOTE: Parents may not recover for loss of society of a non-fatally injured child. *Vitro v. Mihelcic, 209 Ill.2d 76 (2004).* Similarly, a child cannot recover for loss of society of a non-fatally injured parent. *Karagiannakos v. Gruber, 274 Ill.App.3d 155 (1st Dist., 1995).*

What does it mean to enjoy a presumption of pecuniary loss? First, the presumption is rebuttable. Second, even in the absence of any direct evidence of loss, the presumption works to establish plaintiff's *prima facie* case as to this element of damages. *Chrysler v. Darnall, 238 Ill.App.3d 673, 679 (1st Dist., 1992).* Importantly,

however, this presumption does not apply to siblings. Even though siblings can claim loss of society stemming from the death of a sibling, they must prove their damages. *Id.* Yet, siblings do not necessarily need to provide direct testimony about their relationship with their deceased sibling in order to receive an award for loss of society. *Jones v. Chicago Osteopathic Hospital, 316 Ill.App.3d 1121, 1137 (1st Dist., 2000).*

CAUTION: Because jurors are not allowed to apportion wrongful death damages among survivors, the verdict form should not contain separate lines for each survivor. *Barry v. Owens-Corning Fiberglass Corporation, 282 Ill.App.3d 199, 204-205 (1st Dist., 1996).* Instead, "the statute clearly envisions a single jury award, with the judge who heard the case to distribute the money to the survivors based on a certain statutory formula." *Id. at 205. Accord, Jones v. Chicago Osteopathic Hospital, 316 Ill.App.3d 1121, 1137 (1st Dist., 2000). See also, 740 ILCS 180/2 (West 2014).* In fact, not only does Section 180/2 of the Wrongful Death Act require judicial apportionment, but so too does Cook County Circuit Court Rule 6.5(1)(a). Judicial apportionment is based on the "proportionate percentages of the eligible beneficiaries' dependency on the decedent." *Johnson v. Provena St. Therese Medical Center, 334 Ill.App.3d 581 (2d Dist., 2002).*

Damages for loss of consortium and loss of society are not reduced to present cash value. *Drews v. Gobel Freight Lines, Inc., 144 Ill.2d 84 (1991); Lorenz v. Air Illinois, Inc., 168 Ill.App.3d 1060 (1st Dist., 1988).* This principle is formally incorporated into IPI 31.12 ("Damages for [loss of sexual relations][loss of society] are not reduced to present cash value.").

Additionally, a worker's compensation lien does NOT attach to a loss of consortium award. *Glenn v. Johnson, 198 Ill.2d 575, 585 (2002).*

NOTE: Punitive damages are not recoverable in loss of consortium claims. *Hammond v. North American Asbestos Corporation, 97 Ill.2d 195 (1983).* Additionally, recovery for loss of consortium is limited by the injured spouse's comparative negligence. *Blagg, supra. See also, Flath v. Madison Metal Services, 212 Ill.App.3d 367, 379 (5th Dist., 1991).*

CAUTION: Because loss of consortium is a derivative claim that is predicated on the directly injured spouse's claim, it must be supported by an underlying tort claim; without such a claim by the directly injured spouse, there can be no claim for loss of consortium. *Flesor v. Unisource, 2014 IL App (1st) 132559-U.*

Also, loss of consortium terminates upon remarriage of the surviving spouse, but cohabitation short of marriage does not impact the recovery for loss of consortium. In fact, it is irrelevant. *Martin v. Illinois Central Gulf Railroad, 237 Ill.App.3d 910 (1st Dist., 1991). See also, McClain v. Owens-Corning Fiberglass Corporation, 139 F.3d 1124 (7th Cir., 1998).* However, separation or infidelity during marriage may be relevant to a loss of consortium claim because they may demonstrate a

diminishment in the value of the claim. *Countryman v. County of Winnebago, 135 Ill.App.3d 384 (2d Dist., 1985).*

E. Lost Wages/Profits/Earning Capacity

While it is without question that lost wages and profits may be recovered in appropriate cases, and that expert testimony is not necessary, there are specific foundational requirements. *LaFever v. Kemlite, 293 Ill.App.3d 260 (1st Dist., 1997); Aardvark Art v. Lehigh/Steck-Warlick, 284 Ill.App.3d 627 (2d Dist., 1996).*

For instance, loss of future earnings may be recovered only when they are reasonably certain to occur; evidence that is remote or merely speculative is improper. *Carlson v. City Construction Company, 239 Ill.App.3d 211 (1st Dist., 1992).* Thus, it has been deemed error to admit testimony about future earnings based merely upon an "ambition for advancement." *Id.* Instead, the plaintiff must establish that he had the ability and opportunity to realize the ambition. *Id.* Additionally, there must be some evidence that plaintiff's injury was permanent and that it prevented him from continuing employment. *LaFever v. Kemlite, 293 Ill.App.3d 260 (1st Dist., 1997), as modified on denial of rehearing.*

Lost profits do not need to be proven with absolute certainty. Prairie Eye Center, Ltd. v. Butler, 329 Ill.App.3d 293 (4th Dist., 2002) & Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill.2d 325 (2002)

F. Future Damages & Increased risk of future harm

As with all elements of damages, requests for future damages must be supported by evidence which demonstrates the damage is reasonably certain to occur. Thus, claims for possible future injuries such as cancer or AIDS have been rejected unless there is proof of actual exposure to a harmful agent. *Majca v. Beekil, 183 Ill.2d 407 (1998).*

Claims for increased risk of future harm represent a bit of a departure from established precedent regarding future damages and are governed by the Supreme Court decision in *Dillon v. Evanston Hospital, 199 Ill.2d 483 (2002),* which allowed recovery for damages less than 50% likely to occur. Although absolute certainty is unnecessary in this context, the increased risk of future injury must still be proven within a reasonable degree of certainty and must be proximately caused by defendant's negligence. *Kamp v. Preis, 332 Ill.App.3d 1115 (5th Dist., 2002). See also, Foley v. Fletcher, 361 Ill.App.3d 39, 51 (1st Dist., 2005)($1 million award for infant's increased risk of future harm due to scoliosis or hip dislocation vacated because experts failed to specify the level of increased risk or the probability of these injuries occurring.).* The concept of increased risk of future harm is now commonplace (*Knollenberg v. Kincade, 2012 IL App (4th) 120125-U & Corwin v. Investigative Protection Agency, 2012 IL App (1st) 111983-U))* and formally incorporated in IPI 30.04.03 and IPI 30.04.04, the latter of which provides jurors with

the requisite calculation for such damages. ("To compute damages for increased risk of future harm only, you must multiply the total compensation to which the plaintiff would be entitled if [specific condition] were to occur by the proven probability that [it] will in fact occur.")

CAUTION: IPI 30.04.03 & IPI 30.04.04 should only be given when the plaintiff alleges damages that are less than 50% certain to occur. Further, attorneys must be specific in identifying the Dillon-type of future damages in the jury instructions when plaintiff also seeks future damages that are more certain to occur.

G. Wrongful Death (740 ILCS 180/2) vs. Survival Damages (755 ILCS 5/27-6)

The basic distinction between wrongful death and survival damages is as follows: wrongful death actions cover the time after death & compensate the next of kin for their loss due to the death. In contrast, survival actions allow for recovery of damages personally sustained by the deceased up to the time of death. *Carter v. SSC Oden Operating Company, LLC, 2012 IL 113204, ¶ 34.*

In terms of relevant evidence under a wrongful death claim involving a child, the birth of subsequent children is irrelevant to the parent's claim for loss of society for the deceased child. *Simmons v. University of Chicago Hospitals & Clinics, 162 Ill.2d 1 (1994).*

Punitive damages are not recoverable under either Act. As to the Survival Act specifically, see *Vincent v. Alden-Park Strathmoor, 241 Ill.2d 495, 503 (2011)(Generally, the right to seek punitive damages does not survive the death of the injured party.).*

Pecuniary losses, such as money, benefits, goods or services, are reduced to present cash value. However, awards for loss of society are not similarly reduced. *IPI 31.12 & IPI 32.02 -- IPI 32.06.*

NOTE: Traditionally, damages for bereavement by the next of kin were not recoverable under the Wrongful Death Act. *Dorsey v. State, 63 Ill.Ct.Cl. 177, 207 (1st Dist., 2011).* However, effective May 31, 2007, the Act was amended so as to expressly allow damages for the "grief, sorrow and mental suffering of the next of kin." *740 ILCS 180/2. See also, Mankowski v. Nemec, 2014 IL App (2d) 140154, ¶ 65.* This additional element of damage is incorporated into IPI 31.01 – 31.06.

NOTE: Effective in 1999, the Wrongful Death Act was also amended to incorporate a modified approach to the comparative fault of the decedent's beneficiaries so that their fault is no longer a complete bar to their recovery. *Johnson v. Best Western Corporation, 2012 IL App (1st) 111837-U, ¶ 47-48.*

CAUTION: Medical expenses are recoverable under the Survival Act, not the Wrongful Death Act, a fact that must be taken into consideration during settlement

negotiations, as well as trial, because failure to properly allocate the settlement amount between plaintiff's individual theories of recovery may preclude a nonsettling defendant from receiving a setoff after verdict. *Thornton v. Garcini, 237 Ill.2d 100 (2009). Accord, Jackson v. Matthews, 2012 IL App (1st) 102221-U (party seeking setoffs bears the burden of proving what portion of prior settlement was allocated to the claim for which he is liable.).*

IV. Statutory Reduction of Damages: 735 ILCS 2-1205, 2-1205.1 & 2-1207

Sections 2-1205 & 2-1205.1 represent an "exception to the collateral source rule & allow a...judgment to be reduced..." by the amount paid by third parties. *Perkey v. Portes-Jarol, 2013 IL App (2d) 120470, ¶ 93.* The intent behind the legislation was to eliminate duplicative recoveries. Despite the fact that several statutory provisions allow for post-judgment reduction of damages, very few defendants invoke them. Thus, it is important to understand the scope of the following provisions:

- Section 2-1205 -- reduction of awards for medical expenses & lost wages in medical malpractice cases.
- Section 2-1205.1 -- reduction of awards for medical expenses (not lost wages) in all tort cases other than medical malpractice.
- Section 2-1207 – reduction of excessive punitive damage awards.

Both sections 2-1205 & 2-1205.1 include the following limitations:

- Reductions are timely only if made within 30 days of judgment or the time allowed by the court. *See, Flavell v. Ripley, 247 Ill.App.3d 842 (2d Dist., 1993).*
- Reductions shall not apply to the extent there is a right of recoupment through subrogation, trust agreement, lien or otherwise; all reductions are limited to the dollar amount of the right of recoupment. *York v. El-Ganzouri, 353 Ill.App.3d 1, 47 (1st Dist., 2004), affirmed 222 Ill.2d 147.*
- Reductions shall not reduce the judgment by more than 50% of the total verdict;
- Judgment shall be increased by the amount of any insurance premiums or direct costs paid by plaintiff for the collateral benefits in the 2 years prior to injury or death.

Section 2-1205 contains the additional caveat that no reductions are allowed for medical expenses that are directly attributable to the defendant's negligence. This has been interpreted to mean the actual services involving negligence, not subsequent services made necessary by the negligence.

Section 2-1205.1 does not apply unless the medical expenses exceed $25,000. *Hosier v. Dulgar, 2013 IL App (4th) 120640-U.*

NOTE: Defendant bears the burden of proving plaintiff's insurer does NOT have a right of recoupment. *York, supra.* Additionally, defendant bears the burden of producing admissible evidence on this point in a timely manner. *Perkey, supra.*

CAUTION: There is no requirement that the right of recoupment be perfected in order to avoid reduction under the statute. *First Springfield Bank v. Galman, 299 Ill.App.3d 751, 764 (4th Dist., 1998), reversed on other grounds, 188 Ill.2d 252 (1999).*

Additionally, a generalized, nonitemized verdict does not prevent application of the statute. *DeCastris v. Gutta, 237 Ill.App.3d 168 (2d Dist., 1992).*

V. Quotient Verdicts – What Are They?

A quotient verdict results from advance juror agreement to reach a verdict by adding different damage figures suggested by each individual juror and then accepting the average of the total as the final verdict. *Urbas v. Saintco, Inc., 264 Ill.App.3d 111, 135 (5th Dist., 1994).* Although jurors may "experiment" by considering such amounts, advance agreements to use the average amount as the final verdict is improper and will vitiate a verdict reached under such an agreement. *Illinois Central R.R. Company v. Able, 59 Ill. 131 (1871).* This continues to be the law in Illinois. *Stone v. Mitek Industries, Inc., 2014 IL App (3d) 120122-U, ¶ 48.* In fact, "this prohibition was incorporated into Illinois Rule of Evidence 606(b)(adopted January 1, 2011)." *Id.*

CAUTION: Although older cases conflict about the use of juror affidavits to establish that the final judgment was a quotient verdict,[3] the current view is that such affidavits are strictly verboten. *Carroll v. Preston Trucking Company, Inc. 349 Ill.App.3d 562, 570 (1st Dist., 2004)("We believe that, under current supreme court cases, juror affidavits cannot be used to impeach a jury verdict on the ground that it was reached through an impermissible quotient method unless it can be shown that the decision to employ it was the result of extraneous influences.") Accord, Stone v. Mitek Industries, 2014 IL App (3d) 120122-U.* Thus, *Department of Transportation v. J.W. Graham, 130 Ill.App.3d 589, 593 (5th Dist., 1985) is not good law and should not be relied upon.*

VI. Additur & Remittitur

Additur and remittitur are both judicial interventions that allow courts to correct verdicts that are deemed erroneous or excessive.

Additur may be used "to correct an omission of easily calculated damages" (*Sheth v. SAB Tool Supply Company, 2013 IL App (1st) 110156, ¶ 90)* or when the jury award bears no reasonable relationship to the loss suffered by plaintiff. Typically,

[3] *See, City of Pekin v. Winkel, 77 Ill.56, 58 (1875)("Can it be that a busy body about the purlieus of the court shall communicate such information, and shall it inspire belief, and must the court act on it? We think not. It would be the destruction of trials by jury, should it be permitted."). But see, Kelley v. Call, 324 Ill.App.3d 143 (3d Dist., 1944)(Affidavit of foreman was considered because it was used in support of the verdict, not to impeach it.)*

additur is applied when the omission concerns liquidated damages. Importantly, additur is not appropriate where the jury makes credibility determinations based on conflicting testimony. *Id. at ¶ 84.*

CAUTION: Additur may only be awarded where the defendant consents to it. However, failure to consent after the court concludes the verdict is erroneous will mandate a new trial on damages only. *Merrill v. Hill, 335 Ill.App.3d 1001, 1008 (2d Dist., 2003).*

Remittitur is an agreement by plaintiff to reduce the portion of a jury verdict which is excessive and to accept the sum which has been judicially determined to be proper. *Roach v. Union Pacific Railroad, 2014 IL App (1st) 132015.* It has long been accepted in Illinois as promoting the administration of justice. *Best v. Taylor Machine Works, 179 Ill.2d 367, 412 (1997).* It is premised on the notion that courts have a duty to correct excessive verdicts, which are defined as those verdicts that fall outside the range of fair and reasonable compensation, result from passion or prejudice or are so large so as to shock the judicial conscience. *Id.*

NOTE: Plaintiff must consent to remittitur. *Roach, supra.* Failure to do so after the court concludes the verdict is excessive mandates a new trial.

Significantly, the Appellate Court can remit the damages to a proper amount. *Brannen v. Seifert, 2013 IL App (1st) 122067.*

SECTION B

- "Hot Topics on Damages," by Judge Michael R. Panter, February 24, 2015.

(1) LAY WITNESS DAMAGE TESTIMONY

IRE 701 states: "*If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*"

DATE	CASE	DISTRICT	RESULT	ALLOWED/NOT ALLOWED	NOTES
9/18/2014	*Thomason v. Evergreen Energy, LLC*, 2014 IL App (5th) 130511-**U**	5th	Reversed	Allowed	The witness's observations of plaintiff's tone of voice after he had been informed that he was being terminated from his job were within the scope of Rule 701 because they were rationally based on his perception and were not based on scientific, technical, or other specialized knowledge.
9/18/2014	*Israel v. Israel*, 2014 IL App (1st) 131707-**U**	1st	Reversed	Not allowed	Medical testimony by a lay witness regarding a medical diagnosis was not permitted as lay opinion testimony because it required specialized knowledge.
5/5/2014	*People v. Lee*, 2014 IL App (1st) 113670-**U**	1st	Affirmed	Allowed	The testimony was confined to the personal knowledge of the witness about the defendant's demeanor. The defendant was withdrawn, staring into space, and not very communicative, all testimony that did not require any specialized, technical, or scientific knowledge.
4/25/2014	*People v. Thompson*, 2014 IL App (5th) 120079	5th	Reversed	Allowed	The witness did not testify as to changes in personal appearance of the defendant, but was merely identifying the defendant in a video. To be able to make that identification, the witness must have been familiar with the defendant prior to trial.
11/6/2013	*People v. Gibson*, 2013 IL App (3d) 120294-**U**	3rd	Affirmed	Allowed	Testimony regarding the defendant's intoxication was allowed based upon her experience with intoxicated individuals as a social worker.

9/24/2013	*Steele v. Provena Hospitals*, 2013 IL App (3d) 110374	3rd	Reversed	Not allowed	Lay testimony that a "rash looked like chicken pox" was an abuse of discretion because the testimony acted as a substitute for a medical diagnosis.
1/10/2013	*Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412	1st	Affirmed	Allowed	The lay witness' (and eye witness) testimony regarding an injured pedestrian's physical and mental status before and after the accident was allowed because the lay witness had been a close personal friend of the victim for 25 years and gave the proper foundation.
4/3/2012	Isom v. Barham, 2012 IL App (5th) 100359-U	5th	Affirmed	Allowed	Lay witness was allowed to give testimony that was rationally based on perceptions - what she saw at the scene of a motor vehicle accident
7/29/2009	*People v. Kando*, 397 Ill.App3d 165	1st	Reversed	Allowed	The trier of fact may determine the issue of sanity solely on the basis of testimony of lay witnesses if such opinions are based on personal observations of the defendant. However, in this case, lay testimony relied on by the court to counteract the undisputed testimony of the two expert witnesses was insufficient to overcome the clear and convincing evidence offered by the experts.
2/2/2009	*People v. Botsis* 388 Ill.App.3d 422	1st	Affirmed	Allowed	A lay opinion must be based on personal observations and recollection of concrete facts. Witnesses testified to their observations and did not attempt to offer a medical diagnosis. Trial court did not err in allowing their testimony.
12/28/2007	*Rose v. Mercedes-Benz USA*, 378 Ill.App.3d 615	1st	Reversed	Not allowed	The trial court abused its discretion by allowing the Plaintiff to give a lay opinion testimony as to the value of a car. A lay witness may testify as to value, but must have some foundation or specific knowledge to testify to value.

2/24/2006	*Noakes v. National R.R. Passenger Corp.* 363 Ill.App.3d 851	1st	Reversed and Remanded	Not Allowed	Plaintiff was properly barred from testifying to his own past injury in a claim for the exacerbation of that injury against his employer. The original cause of plaintiff's carpal tunnel injury was never established because his claim with respect to that purported injury was time-barred. Any "causation" testimony would have been speculation, and would lead a jury to erroneously conclude that because defendant caused the carpal tunnel syndrome, it must have made it worse.
10/21/2004	*Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444	1st	Affirmed	Not allowed	In order for lay witnesses to testify regarding their own personal property, they should, at a minimum, be able to testify as to the following factors: (1) familiarity with the property in question; (2) actual knowledge of the value of the subject property; and (3) the basis of the knowledge of that value.
7/22/2002	Carter v. Azaran	1st	Affirmed	Allowed	To recover damages for pain and suffering, Illinois courts require evidence that the injured party was conscious of his or her pain and suffering. Medical testimony establishing consciousness is not required; rather, lay testimony describing the injured party's actions together with evidence concerning the injuries is sufficient to support a pain and suffering claim.
9/27/2002	*Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill. App. 3d 1116	2nd	Affirmed in part and Reversed in part	Allowed	A lay witness may give an opinion as to the value of personal property if he has sufficient personal knowledge of the property and its value. The appellate court reversed the damage award because plaintiff failed to provide testimony or an affidavit from any of the manufacturer's employees who had personal knowledge of the value of the microscope before and after the accident.

6/28/1996	*State Farm v. Best in the West Foods, Inc.*, 282 Ill. App. 3d 470	5th	Affirmed	Not allowed	At trial, the court barred the store manager from testifying about the value of the inventory of his store which was destroyed by a natural gas explosion. The appellate court affirmed and acknowledged that although the competency question was close, the manager had never participated in the inventory process and had not placed orders for all the types of goods that the store carried.
3/31/1994	*Hall v. National Freight, Inc.*, 264 Ill.App.3d 412	1st	Affirmed	Allowed	Medical testimony is not required to establish conscious pain and suffering where lay testimony describing a decedent's actions prior to death coupled with evidence concerning his injuries is sufficient to support a recovery on damages.
9/7/1993	*Zoernerv. Iwan, 250 Ill.App.3d 576*	2nd	Reversed and Remanded	Allowed	A lay witness may express an opinion based on his observations when it is difficult or impossible for him to convey to the jury the totality of the conditions perceived and the opinion is one that the people in general are capable of and accustomed to making and understanding. To be admissible, nonexpert testimony must be of assistance to the trier of fact, i.e. it must be (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.
3/28/1991	*Hopkinsin v. CTA, 211 Ill.App.3rd 825*	1st	Affirmed	Allowed	Trial court properly allowed police officer to give lay opinion as to whether certain wounds were fatal and whether decedent could have survived them. An error in the admission of opinion testimony of lay witness is not reversible error where it is superfluous testimony. The expert witness testified that the same wounds were fatal.

(10) PHOTOGRAPHS OF INJURY, DAY-IN-THE-LIFE-OF, SURVEILLANCE VIDEOS

In determining whether to allow certain types of photographic or video evidence, the trial court has broad discretion to consider the relevance, probative value, and possible prejudice.

DATE	CASE	DISTRICT	AFFIRMED/ REVERSED	ALLOWED / NOT ALLOWED	NOTES
6/19/2008	*Donnellan v. First Student, Inc.*, 383 Ill. App. 3d 1040	1st	Affirmed	"Day-in-the-Life" video allowed, surveillance video not allowed	(1) A plaintiff's day-in-the-life video, which was demonstrative evidence, was properly admitted since its danger of prejudice did not outweigh its probative value. These videos illustrate evidence regarding a party's life. (2) The defendant bus company's surveillance video was properly barred since it was not relevant because it only showed plaintiff performing activities he admitted being able to perform.
9/19/2005	*Foley v. Fletcher*, 361 Ill. App. 3d 39	1st	Affirmed	Not allowed	The trial court did not abuse its discretion in denying defense request to show a "day in the life" video to prospective jurors because defendants were allowed to effectively test potential jurors' views on plaintiff's disabilities for bias or prejudice.
6/9/2005	*Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App.3d 400	1st	Affirmed	Allowed	The trial court did not abuse its discretion in allowing morgue photographs into evidence. Determining whether or not a photograph is too gruesome to be admitted is a subjective decision, best left to the trial judge, to determine the possible prejudice. The probative value was not substantially outweighed by the risk of unfair prejudice. Gruesomeness is not itself sufficient to warrant exclusion of photographs.

11/8/2004	*Velarde v. Ill. Cent. R.R.*, 354 Ill. App. 3d 523	1st	Affirmed	Allowed	A "day-in-the-life" video of a daughter involved in a railroad accident, which showed her engaging in ordinary activities, was properly admitted. Although the daughter appeared easily confused and was frequently tearful, it was not an abuse of discretion for the trial court to admit the video because it conformed with trial testimony about her injuries and disabilities.
5/11/1995	*Luther v. Norfolk & W. Ry.*, 272 Ill. App. 3d 16	5th	Affirmed	Allowed	Plaintiff introduced videotapes of Defendant's surveillance of him. The videotapes were made to try to show physical activities inconsistent with plaintiff's asserted limitations, but the tapes failed to show any such activities. The tape was admissible because of its relevance to the extent of plaintiff's injury and the lack of prejudice to the defendant.
12/29/1992	*Carney v. Smith*, 240 Ill. App.3d 650	1st	Affirmed	Allowed	Plaintiff testified to persistent pain and disability, including dragging his foot. Surveillance videos of the plaintiff moving effortlessly were properly allowed since they rebutted the inference that plaintiff was in constant pain.
9/26/1991	*Cisarik v. Palos Community Hosp.*, 144 Ill. 2d 339	Ill. Sup. Ct.	Affirmed in part, reversed in part	Allowed	Defendant had no right to interfere with Plaintiff's making of a "day in the life" video. Since these videos are merely demonstrative, a "day in the life" film must first pass a two-prong test before it can become evidence at trial. First, someone having personal knowledge of the filmed object must testify that the film is an accurate portrayal of what it purports to show. Second, the probative value must not be substantially outweighed by unfair prejudice.
5/11/1990	*Roberts v. Sisters of St. Francis Health Services, Inc.*, 198 Ill. App. 3d 891	1st	Affirmed	Allowed	The venire was properly permitted to view a "day in the life" film to expose them to a potential source of bias and the film was not used to screen or indoctrinate jurors.

3/18/1986	*Barenbrugge v. Rich*, 141 Ill.App.3d 1046	1st	Affirmed	Allowed	Photographs may not be excluded solely because they may trigger emotions of sympathy and sorrow. The jury verdict was not tainted by photographs of the decedent since the jury was aware of the decedent's worsening health throughout jury selection and opening statements. Given the jury's awareness of the decedent's health, the probative value of the photographs substantially outweighed any danger of unfair prejudice and were therefore admissible.
6/29/1984	*Bullard v. Barnes*, 102 Ill.2d 505	Ill. Sup. Ct.	Affirmed	Allowed	Photographs should be admitted into evidence, even if gruesome, if their probative value outweighs the risk of unfair prejudice. This decision rests within the discretion of the trial court. On retrial in this case, the photographs should be admissible to demonstrate damages if sufficient foundation can be laid.
10/14/1968	*Hedrich v. Borden Co.*, 100 Ill. App.2d 237	1st	Affirmed	Allowed	There was no error in the admission of photographs of the pedestrian's gruesome injury because they were representative at the time they were taken, and did not exaggerate the seriousness of the injury or give false impressions of the disability.

(11) PUNITIVE DAMAGES

Punitive damages may not be awarded without leave of court, after a hearing. 735 ILCS 5/2-604.1. The motion to amend may not be made later than 30 days after the close of discovery. Punitive damages are not allowed in medical or legal malpractice cases. 735 ILCS 5/2-1115. They are not allowed in wrongful death cases. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 330 N.E.2d 509 (1975). The court reviews and may allocate awards of punitive damages. 735 ILCS 5/2-1207.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	ALLOWED / NOT ALLOWED	NOTES
6/20/2013	*Crittenden v. Cook County Commission on Human Rights*, 2013 IL 114876	Sup. Ct. IL	Affirmed	Not allowed	Punitive damages were not expressly authorized by the statute on which the cause of action was based. The punitive damage award was improper.
4/26/2011	*Tully v. McLean*, 409 Ill.App.3d 659	1st	Affirmed	Allowed	The ratio of punitive damages to compensatory damages must be sufficient to deter the defendant from future wrongdoing. In determining punitive damages, courts should look to: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.
3/24/2011	*Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill.2d 495	Sup. Ct. IL	Affirmed	Not allowed	When a statutory cause of action survives the death of an injured party, the right to pursue statutory punitive damages will survive as well. Here no statutory cause of action survived the death of the decedent. No punitive damages could be awarded.

12/27/2010	*Leyshon v. Diehl Controls North America, Inc.*, 407 Ill.App.3d 1	1st	Affirmed	Allowed	The appellate court held that the punitive damage award in a $6 million defamation case was not excessive. The three to one ration of punitive to compensatory damages was low. While the award was substantial, the defendant's conduct was significantly reprehensible and the high award of punitive damages did not violate the Due Process Clause.
10/23/2009	*Dubey v. Public Storage, Inc.*, 395 Ill.App.3d 342	1st	Affirmed	Allowed	In reviewing a trial court's decision to award punitive damages, appellate courts look at: (1) whether punitive damages are available for the particular cause of action, using a *de novo* standard; (2) whether, under a manifest weight of the evidence standard, the defendant acted fraudulently, maliciously, or in a manner that warrants punitive damages; and (3) whether the trial court abused its discretion in imposing punitive damages. In this case, the storage facility wrongfully auctioned off the renter's personal property so all three prongs of the test were satisfied.
10/6/2009	*Blount v. Stroud and Jovon Broadcasting*, 395 Ill.App.3d 8	1st	Affirmed	Allowed	Defendants appealed a $12.8 million punitive damage award in a § 1981 retaliatory discharge claim. The court held the punitive damage award was not excessive because it was not a result of passion, partiality, or corruption. A jury determination of punitive damages will not be reversed unless it is against the manifest weight of the evidence.

11/30/2006	*International Union of Operating Engineers v. Lowe Excavating Co.*, 225 Ill.2d 456	Sup. Ct. IL	Reversed	Allowed	Punitive damages were allowed, but reduced from $325,000 to $50,000 because the award was a due process violation. Punitive damages should only be awarded if, after awarding compensatory damages, the defendant's conduct is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. There must be a reasonable relationship between the punitive damage award and the potential and actual damages resulting from the defendant's conduct. Following the U.S Supreme Court decision of *State Farm v. Campbell*, 538 U.S. 408 (2003), Illinois has declined to establish a simple mathematic formula or "bright line" ratio which a punitive damage award may not exceed.
3/6/2006	*Turner v. Firstar Bank*, 363 Ill.App.3d 1150	5th	Affirmed	Allowed	The punitive damages award of $500,000 was reduced to $225,000 because the initial award violated defendant's due process rights. When analyzing for excessiveness, Illinois courts look to: (1) the nature and enormity of the wrong; (2) the financial status of the defendant; and (3) the potential liability of the defendant.
10/21/2004	*Franz v. Calaco Development Corp and Casalino*, 352 Ill.App.3d 1129	2nd	Affirmed	Not allowed	The determination of punitive damages is fact-sensitive and the amount rests largely within the province of the jury. Appellate courts should analyze a jury's punitive damage award through the manifest weight standard. Even if an appellate court believes that punitive damages may be appropriate, it will not disturb the trial court's decision to deny punitive damages unless the trial court abused its discretion.

(12) PLAINTIFF'S FINANCIAL CONDITION

A plaintiff's financial condition may be admissible when a defendant raises the argument that plaintiff prematurely ceased medical treatment. The courts have held that plaintiffs should not be barred from testifying that they did not seek medical treatment because it was cost prohibitive or they did not have insurance.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	ALLOWED/ NOT ALLOWED	NOTES
1/10/2013	*Klingelhoets v. Charlton-Perrin*, 2013 IL App (1st) 112412	1st	Affirmed	Allowed	Where the defendant driver but disputed damages, the court held that evidence the plaintiff could not afford to continue her physical therapy was relevant to the contested issue of whether she still needed it. The award was not excessive in light of the evidence of permanent injuries.
6/14/2012	*Vanoosting v. Sellars*, 2012 IL App (5th) 110365	5th	Reversed	Allowed	The trial court was reversed when it barred a plaintiff from testifying that her failure to seek treatment for three years was from a lack of medical insurance. She explained it in an offer of proof. The jury awarded her about one third the damages she requested and the trial court denied her motion for a new trial. The appellate court found that barring the testimony was error because it was relevant under Ill. R. Evid. 401, it was not unduly prejudicial under Ill. R. Evid. 403, and the trial court could give a limiting instruction under Ill. R. Evid. 105.

(2) MEDICAL RECORDS AS BUSINESS RECORDS

Medical records may be considered business records provided there is sufficient foundation. The moving party must establish that the medical records were made in the normal course of business. Even though admissible and relevant, their use may be limited by other rules, such as IRE 403.

DATE	CASE NAME	DISTRICT	AFFIRMED / REVERSED	ALLOWED / NOT ALLOWED	NOTES
10/1/2014	*Saginus v. Silver Cross Hospital and Medical Centers*, 2014 IL App (3d) 130365-U	3rd	Affirmed	Not allowed	Exceptions to hearsay recognize that some statements are inherently trustworthy. Medical records made in the regular course of business are generally trustworthy. Business records which indicate a lack of trustworthiness should not be admitted. Four factors are used to determine the trustworthiness of an out of court statement offered for the truth of the matter asserted: (1) the declarant has a motive to fabricate; (2) the statements are written or oral; (3) the statements are contradicted by direct evidence; and (4) the declarant is available to testify. Here, the court found that the statements were untrustworthy.
9/26/2011	*Garcia v. TNT Logistics North America*, 2011 IL App (1st) 092455-U	1st	Affirmed	Allowed	The Supreme Court amended Rule 236 to allow medical records to be treated as any other business records. Medical records are admissible when sufficient foundation establishes that they are business records. Statements made to a physician or other medical personnel are admissible as an exception to hearsay if they were made for the purposes of medical diagnosis or treatment. This exception is based on the assumption that patients state the true condition of their well-being and have no motive to provide false information to their doctors.

5-24-2010	*Jackson ex rel. Jackson v. Reid*, 402 Ill. App 3d 215	3rd	Affirmed	Not allowed	In 1992 the Illinois Supreme Court amended Supreme Court Rule 236 to allow medical records to be treated as business records. Medical records are admissible "as long as a sufficient foundation is laid to establish that they are business records. A moving party must establish that the records were made in the course of any business and that it was the regular course of the business to make such a [memorandum or] record."
9/9/2007	*Werner v. Nebal*, 377 Ill.App.3d 447	1st	Affirmed	Not allowed	Medical records are now treated as business records. The party tendering the record must establish the record was made in the regular course of business at or near the time of the event or the occurrence. The accuracy of such records is presumed. However, business records may be barred from admission where they are prejudicial. Furthermore, the admission or nonadmission of business records is subject to harmless error analysis. Here, the evidence was excluded because the record contained evidence of plaintiff's prior intoxication which was considered too prejudicial to admit.

9/29/2006	*Troyan v. Reyes*, 367 Ill.App.3d 729	3rd	Reversed	Allowed	Medical records are inherently reliable because they are made without reason to prevaricate and their accuracy must be relied upon. Diagnoses and opinions contained in the medical record are considered inherently reliable because, analogous to objective facts, diagnoses are the basis from which the physician draws his conclusion of proper treatment to be rendered. Because of their inherent reliability and trustworthiness, diagnoses and opinions contained in medical records should be admissible and published to the jury as a part of the business records exception to the hearsay rule.

(4) ADMISSIBILITY OF MEDICAL BILLS

A plaintiff may present the full amount billed even when there is a discount from an insurance payer. However, the plaintiff must show that the unpaid portion of the bill is fair, reasonable, and customary. The plaintiff must also show that the bills are related to treatment needed for the subject injury.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	NOTES
8/15/2011	*Hana v. Chams*, 2011 IL APP (1st) 100146-U	1st	Affirmed	The collateral source rule prohibited the defendant from introducing evidence that the patient's medical bills had been reduced by insurance or settled for a lower amount. The plaintiff was properly allowed to introduce evidence of the full amount, whether the treatment was paid in full or in part by a third party like an insurance company. The plaintiff was entitled to recover the "full reasonable value" for medical expenses.
1/31/2011	*Tower Automotive v. Illinois Worker's Compensation Commission*, 407 Ill.App.3d 427	1st	Affirmed	No abuse of discretion in ordering the employer to pay the full reasonable amount of the claimant's medical expenses.
6/19/2008	*Wills v. Foster*, 228 Ill.2d 393	Sup. Ct. IL	Reversed	Plaintiff was awarded the full amount of her medical bills. The appellate court reduced that award to the amount actually paid by Medicare and Medicaid. The Supreme Court held that, when a third party settles a medical bill, the collateral source rule dictates that a plaintiff is entitled to recover her full billed medical expenses. *Peterson* is overruled.
10/24/2007	*Nickon v. City of Princeton*, 376 Ill.App.3d 1095	3rd	Affirmed	The trial court did not abuse its direction by precluding reference to the reduced payments of medical bills, following *Arthur v. Catour*. Plaintiff is allowed to present the amount the healthcare provider billed, even if there is a discount from an insurance payer.

7 21 2005	*Arthur v. Catour*, 216 Ill.2d 72	Sup. Ct. Il.	Affirmed	Defendant moved to limit the medical expenses to the discounted amount paid by the health insurer. The court held that bills which exceeded the health insurer's payment in full were not admissible because the plaintiff could not testify that the full amount had been paid. The court set the standard that "where a hospital or medical bill is unpaid, the plaintiff has the burden of proving that the charges are reasonable, as well as that he/she has become liable to pay those charges. If no evidence as to a bill's reasonableness is introduced, the bill is not admissible into evidence." Actual payment of medical expenses is prima facie evidence of reasonableness.
8/20/2002	*Baker v. Hutson*, 333 Ill.App.3d 486	5th	Reversed	The appellate court held that payment of a bill is prima facie evidence it is reasonable. Admission of the bill into evidence simply allows the jury to consider whether to award none, part, or all of the bill as damages.
10/25/1989	*Wilson v. The Hoffman Group, Inc.*, 131 Ill.2d 308	Sup. Ct. IL	Affirmed	The collateral source rule applies when an injured plaintiff has been partly or wholly indemnified by insurance. Damages recovered by the plaintiff are not decreased by amounts received from insurance. The wrongdoer should not benefit from expenditures made by the injured party or take advantage of contracts or other relations that may exist between the injured plaintiff and third parties. Thus, the plaintiff's recovery should not be reduced solely because some of his medical bills were paid by an insurance company.

(5) CLAIMED DAMAGES

Although opinion witnesses may not base their testimony on conjecture or speculation, they may testify in terms of what "might or could" have caused the plaintiff's injury. It remains for the trier of fact to determine the facts and the inferences to be drawn therefrom.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	ALLOWED/ NOT ALLOWED	NOTES
2/24/2014	*Meridian Express v. Illinois Workers' Comp. Comm'n*, 2014 IL App (1st) 123433-U	1st	Reversed and remanded	Allowed	Trial court erred in barring medical damages that might or could be related to the issue at bar. There was no evidence presented of significant past medical history that would contradict the plaintiff's claim of damages.
2/15/2013	*Walter v. Somasundaram*, 2012 IL App (2d) 120800-U	2nd	Affirmed in part, reversed in part	Allowed	Trial court did not err in finding that the jury's award did not compensate the uncontested medical treatment and bills related to the injuries resulting from the collision. The amount did not cover the cost of the ambulance and the emergency room treatment, which clearly were related to the injuries resulting from the accident.
12/1/2008	*Polisczuk v. Winkler*, 387 Ill.App.3d 474	1st	Affirmed	Allowed	Plaintiff's claim for pain and suffering may have been related to a preexisting congenital condition that was exacerbated by a motor vehicle accident. Expert testimony was required to establish that the preexisting condition might or could be related to the current damages.
11/27/2007	*Bauer v. Memorial Hospital*, 377 Ill.App.3d 895	5th	Affirmed	Allowed	Expert testimony of six physicians found that Plaintiff's hypoglycemia occurring at birth might or could have been related to his permanent disability and onset of diabetes from failure to diagnose.
1-14-2000	*Fierke v. Industrial Commission Division*, 309 Ill.App.3d 1037	3rd	Reversed	Allowed	In a workman's compensation case, a expert testimony from a doctor is not required to establish the principle cause of the injury when the record contains medical evidence consistent with claimant's testimony and the findings of the treating doctor.
6/30/1997	*Branum v. Slezak Construction Co.*, 289 Ill.App.3d 948	3rd	Affirmed	Allowed	Trial court did not err in allowing the jury to reduce damages awarded on the basis that Plaintiff's past medical history, conditions, and treatments were more likely than not unrelated to the current injury; damages should thus be limited accordingly.

8-17-1993	*Butkewicz v. Chicago Transit Authority*, 252 Ill.App.3d 914	1st	Affirmed	Affirmed	The appellate court held that a verdict awarding pedestrian past medical expenses, lost wages, and pain and suffering, but failing to find that she was disabled as result of accident, was not inherently impermissibly inconsistent. This verdict was not against manifest weight of evidence.

(6) FUTURE DAMAGES

Future damages are permissible where the damages are reasonably certain to occur. Expert testimony may be needed to establish the likelihood of the damages occurring. Expert testimony may not be needed where the damages are clear and obviously occurring.

DATE	CASE	DISTRICT	ALLOWED / NOT ALLOWED	AFFIRMED / REVERSED	NOTES
11/2/2012	*Knollenberg v. Kincade*, 2012 IL App (4th) 120125-U	4th	Allowed	Reversed	Reasonably certain means more than a 50% chance of occurring (i.e. more certain than not). Plaintiff had continuing pain and suffering from the accident. The jury should have awarded damages for future medical expenses.
10/17/2008	*Mikolajczyk v. Ford Motor Company*, 231 Ill.2d 516	Ill. Sup. Ct.	Allowed	Reversed	The jury should consider the degree of risk of future harm occurring and adjust the damages proportionally. There must be more than a slight risk of the future injury/damages occurring.
11/10/2004	*Compton v. Ubilluz*, 353 Ill.App.3d 863	2nd	Allowed	Affirmed	Pursuant to IPI 30.01, a jury instruction for future damages and loss of a normal life experienced must include that the damages are reasonably certain to be experienced in the future.
7/2/2004	*Hess v. Espy*, 351 Ill.App.3d 490	2nd	Allowed	Reversed	The aggravation of a preexisting condition must be reasonably certain to occur in the future to award future damages. It is not a separate element of damages.
6/30/2003	*Busse v. Paul Revere Life Insurance Co.*, 341 Ill.App.3d 589	1st	Allowed	Question Answered and Cause Remanded	Damages for future medical expenses and breach of contract must be reasonably certain to occur in the future.
5/23/2002	*Dillon v. Evanston Hospital*, 199 Ill.2d 483	Ill. Sup. Ct.	Not allowed	Reversed	No evidence demonstrated that the plaintiff's future damages and injuries were reasonably certain to occur. Several expert physicians calculated the risk of future damages between 0% and 20% likely to occur, which was well below the more likely than not (50.01% or more) standard.

12 17 2001	*Turner v. Williams*, 326 Ill.App.3d 541	2nd	Not allowed	Reversed	The expert's testimony was more confusing than helpful and did not go toward establishing the "reasonably certain" standard for future damages set out in IPI 30.01.
2 22 2000	*Mikus v. Norfolk and Western Railway Co.*, 312 Ill.App.3d 11	1st	Allowed	Affirmed	Evidence of future damages must be "reliable and grounded in more than mere possibilities"; the evidence must be reasonably certain in order to meet plaintiff's burden of proof.
6 20/1991	*Drews v. Gobel Freight Lines, Inc.*, 144 Ill.2d 84	Ill. Sup. Ct.	Allowed	Affirmed	In determining damages, a jury may consider what the injured party earned or might be reasonably expected to earn in the future.
2/28/1991	*Rainey v. Salem*, 209 Ill. App. 3d 898	5th	Allowed	Affirmed	Evidence that future medical expenses will be incurred can be inferred from the nature of the disability. No expert testimony regarding a fixed amount is necessary.
6/11/1980	*Crabtree v. St. Louis San Francisco Railway Co.*, 89 Ill.App.3d 35	5th	Allowed	Reversed	The jury is to determine damages arising in the future by computing the present cash value of the damages reasonably certain to be lost in the future resulting from plaintiff's injury.

(7) MEDICAL EXPERTS RELYING ON NON-ADMISSIBLE MATERIAL

Since Illinois adopted Fed. R. Evid. 703 and 705, an expert may rely on inadmissible material where the information is of a type that is reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	ALLOWED / NOT ALLOWED	NOTES
2/27/2012	*Malak v. Advanced Pain & Anesthesia Consultants, P.C. Inc.*, 2012 IL App (1st) 102578-U	1st	Affirmed	Allowed	It was proper for a treating expert to rely upon an article which was not admitted into evidence. Specifically, the treating expert was able to refer to the article in explaining the basis of his expert opinion that he had not deviated from the standard of care.
3/1/2011	*Hye Ra Han v. Holloway*, 408 Ill. App. 3d 387	1st	Affirmed	Allowed	The defendant's medical expert's testimony that plaintiff did not report any injuries to the police, based upon the police report, was allowable under Ill. Pattern Jury Instructions Civ. No. 2.04 (2005). The trial court properly allowed defendant's expert to opine that, based in part on the photographs of the vehicles involved in the accident, the force of the impact was minimal and the likelihood of significant injury was therefore low.
6/10/1998	*Moran v. Erickson*, 297 Ill. App. 3d 342	1st	Affirmed	Allowed	In forming their opinions, medical professionals can reasonably rely upon information made known to them by their patients, by medical records, or by any other data where the information is of a type that is reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject. If the jury finds the patient to be incredible, it can correspondingly disregard the opinions of the medical professionals, which are based upon information supplied to them by the patient.

6/7/1988	*Beecher Wholesale Greenhouse, Inc. v. Industrial Com.*, 170 Ill. App. 3d 184	3rd	Affirmed	Allowed	Both the neurologist and the clinical psychologist who examined the claimant at length, properly considered inadmissible hospital records in forming their opinions that the claimant was totally and permanently disabled.
2/3/1981	*Wilson v. Clark*, 84 Ill. 2d 186	Ill. Sup. Ct.	Affirmed	Allowed	The Illinois Supreme Court affirmed the appellate court's holding that medical records could have been used by an expert witness in forming an opinion even though the reports were not admitted into evidence. They key element in applying Fed. R. Evid. 703 was whether the information upon which the expert based his opinion was a type that was reliable.

(8) ADMISSIBILITY OF PAST MEDICAL ISSUES AND INJURIES

Evidence of past medical issues is admissible when the past medical issue is related to the issue at hand. Expert testimony may be needed to establish that that the prior medical issue is more likely than not related to the current issue. Prior injuries may also be used as impeachment.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	ALLOWED / NOT ALLOWED	NOTES
3/29/2012	*Johnson v. Batley*, 2012 IL App (3d) 110016	3rd	Reversed	Not allowed	Trial court erred in allowing testimony of Plaintiff's preexisting back injury. Trial court failed to consider the distinction between Plaintiff's prior back injury and the back injury suffered in the instant case. Expert testimony was required to establish a causal connection between the two injuries. No expert opinion established such a connection. The trial court's error warranted a new trial.
2/17/2010	*Ford v. Grizzle*, 398 Ill. App. 3d 639	5th	Affirmed	Allowed	Plaintiff had been seeing a chiropractor for injuries from two earlier car accidents. The trial court did not abuse its discretion in denying Plaintiff's motion in limine. Plaintiffs prior back problems were relevant to Plaintiff's present injuries. The prior injuries exacerbated the present injury.
9/21/2009	*Thomas v. Koe., et.al.*, 395 Ill. App. 3d 570	4th	Reversed	Allowed	The trial court denied a motion to bar evidence of Plaintiff's existing injuries from diabetes, tonsillitis and alcoholism. The appellate court reversed because Defendant failed to demonstrate a causal connection between Plaintiff's prior injuries and the injuries sustained from dental malpractice case.

1/30/2004	*Felber v. London*, 346 Ill. App. 3d 188	2nd	Affirmed	Allowed	The appellate court affirmed the trial court's decision to allow evidence of Plaintiff's prior injuries. Defendants must introduce expert evidence linking a prior injury to causation, damages, or some other issue of consequence at the instant trial, unless the trial court determines that the nature of the prior and current injuries are such that a lay person can readily appraise the relationship, if any, between those injuries without expert testimony. The appellate court found no abuse of discretion in the trial court so finding here.
9/25/2003	*Janky v. Perry*, 343 Ill. App. 3d 230	3rd	Affirmed	Allowed	On appeal, Plaintiff argued the trial court should not have allowed evidence of Plaintiff's previous shoulder treatment. The appellate court affirmed, holding that permitting the testimony was proper because Plaintiff introduced her previously existing pain on direct examination, "opening the door" to questioning on the matter.
1/29/2003	*Hawkes v. Casino Queen, Inc.*, 336 Ill. App. 3d 994	5th	Affirmed	Not allowed	The appellate court affirmed the granting of a motion in limine to exclude evidence of Plaintiff's prior injuries. Expert testimony did not demonstrate the prior injury's relevance under the *Voykin* standard. Instead, it only suggested the possibility of a causal relationship, leaving the next step of assessing that relationship inappropriately to the jury.
4/23/2002	*Maffett v. Bliss*, 329 Ill. App. 3d 562	4th	Reversed	Not allowed	Plaintiff was injured in a car crash after being blinded by the high beam lights of an oncoming car. The trial court erred by admitting evidence of Plaintiff's prior vision problems because they did not restrict or impair her driving abilities. The probative value of her prior vision problems was minimal and should have been excluded. There was no causal relationship between the prior and present injuries.

3/8/2002	*Obszanski v. Foster Wheeler Construction, Inc.*, 328 Ill. App. 3d 550	1st	Reversed	Not Allowed	This case concerns the admissibility of *subsequent* medical issues and injuries. The appellate court applies *Voykin* to hold that Defendants should have laid appropriate foundation by a medical expert to show that the subsequent injury is a cause of Plaintiff's current complaint. If medical evidence can show enhanced or separate pain from the subsequent injury, then the jury should hear that; if not, then it should not come in at all.
5/11/2001	*Calihan v. Patel*, 322 Ill. App. 3d 251	3rd	Reversed	Not allowed	Evidence of a prior injury affecting the same part of the body has to be shown to be relevant to be admissible; such evidence is not automatically relevant. The appellate court reversed and remanded because evidence of prior and subsequent injuries is admissable only with sufficient expert testimony establishing its relevance.
7/6/2000	*Voykin v. Estate of Gordon DeBoer*, 192 Ill. 2d 49	Ill. Sup. Ct.	Appellate court decision affirmed	Not allowed	The same part of the body rule is too imprecise to be the test for relevance. Plaintiff sought to bar evidence of a back injury five years prior to the instant case. The trial court allowed the evidence, but the appellate court reversed. Evidence of a prior injury is relevant only if it tends to negate causation or injuries or is relevant for impeachment. If Defendant wishes to introduce evidence of a prior injury, expert testimony showing the relevance to causation, damages or some other issue of consequence is required.
6/30/1997	*Brannan v. Slezak Construction Co.*, 289 Ill.App.3d 948	3rd	Affirmed	Allowed	Trial court did not err in allowing the jury to reduce damages on the basis that Plaintiff's past medical history, conditions, and treatments were more likely than not unrelated to the current injury; damages should thus be limited accordingly.

10/30/1996	*Brown v. Baker*, 284 Ill. App. 3d 401	5th	Affirmed	Not allowed	Plaintiff's physician testified that he had treated Plaintiff for back injuries. Defendant moved to allow Defendant's inquiry into Plaintiff's prior back injury. The trial court granted Defendant's motion. The appellate court affirmed because Plaintiff failed to introduce a "reduction on integrity" (*i.e.*, a change in the way he lived his life) and thus failed to establish a causal connection between the prior and present injuries.
2/23/1960	*Caley v. Manicke*, 29 Ill. App. 2d 323	2nd	Affirmed	Not allowed	The trial court struck evidence attempting of Plaintiff's prior injury. The court held that the linkage was insufficient to establish a causal relationship to the car crash.

(9) RECENCY OF LAST EXAM TO OPINE ON PERMANENCY

In general, a trial court will consider: (1) the length of time since the last examination; (2) the length of time the patient was in treatment with the treating physician; and (3) the nature of the patient's injuries or conditions. Expert testimony may be required to opine on permanency of a medical issue, especially to establish complex elements of the permanency test which should not be left to lay person's understanding.

DATE	CASE	DISTRICT	AFFIRMED / REVERSED	NOTES
9/5/2014	*Roach v. Union Pacific Railroad*, 2014 IL App (1st) 132015	1st	Affirmed	When a party challenges the reliability of a treating physician's opinion about the permanency or prognosis of a condition based on the lack of a recent examination, the courts will consider: (1) the length of time since the last examination; (2) the length of time the patient was in treatment with the treating physician; and (3) the nature of the patient's injuries or conditions. Here, the decedent's primary care physician testified regarding the prognosis of a permanent condition and, despite a 3-year gap between the last visit and the decedent's death, the testimony regarding prognosis and permanency was admissible.
12/1/2008	*Poliszcuk v. Winkler*, 387 Ill.App.3d 474	1st	Affirmed	Medical expert testimony was required to opine on the permanency of plaintiff's abnormality in her L2 and L3 lumbar area. The expert opined that the plaintiff would not need future medical treatment because the injury itself was permanent.
8/16/2001	*Verbance v. Altman*, 324 Ill.App.3d 494	2nd	Affirmed	Plaintiff's primary care physician was not barred from testifying about the permanency of a medical condition even though the physician had not seen the plaintiff for several years. The trial court did not abuse its discretion by permitting this testimony even though the physician was not treating the plaintiff at the time that the medical condition arose.

4/25/2000	*Soto v. Gayton*, 313 Ill.App.3d 137	2nd	Affirmed	In considering the recency of a medical condition examination toward the issue of permanency, a trial court will consider: (1) the length of time since the last examination; (2) the length of time the patient was in treatment with the treater whose proposed testimony is at issue; (3) the nature of the patient's injuries or condition; (4) the type of treatment received by the patient; and (5) whether a substantial change in the patient's condition has occurred between the time of the last exam and the date of trial.
5/22/1997	*Zuder v. Gibson*, 288 Ill. App.3d 329	2nd	Affirmed	No expert testimony was given regarding permanency so the jury was free to accept or disregard the argument of permanency.
6/20/1996	*Snover v. McGraw*, 172 Ill.2d 438	Sup. Ct. IL	Affirmed	Evidence of a lengthy hospital stay coupled with expert testimony establishing permanency of an injury was sufficient to award compensation for permanent injuries.

Hot Topics in Damages

Hon. Michael R. Panter

2/24/2015

(1) Lay Witness Damage Testimony

(2) Medical Records as Business Records

(3) Photographs of Vehicle Damage as Evidence of Injury

(4) Admissibility of Medical Bills

(5) Claimed Past Damages

(6) Future Damages

(7) Medical Experts Relying on Non-Admissible Material

(8) Admissibility of Past Medical Issues and Injuries

(9) Recency of Last Exam to Opine on Permanency

(10) Photographs of Injury, Day-in-the-Life-of, Surveillance Videos

(11) Punitive Damages

(12) Plaintiff's Financial Condition

DAMAGES: WHAT, WHEN & HOW?

Judge Lynn M. Egan
Judge Michael R. Panter

February 24, 2015

WHERE TO BEGIN?

Illinois Pattern Jury Instructions (IPI):

- General measure of damages: IPI 30.01—30.23
- Wrongful death damages: IPI 31.01—31.13
- Damages to spouses & family members: IPI 32.01—32.06
- Future damages: IPI 34.01—34.05
- Punitive damages: IPI 35.01—35.02

DAMAGES MUST BE PROVED

(What does this mean?)

- This concept may have different meanings for different elements of damages.

- As a result, look to the case law in order to understand proper foundation for each element.

MEDICAL EXPENSES

In order to recover, plaintiff must prove:

1. Bills are paid or plaintiff is liable to pay them;
2. Charges are reasonable; AND
3. Bills were incurred as a result of defendant's negligence.

NOTE: It is NOT enough to show the bill was paid or that the charges are reasonable. This merely establishes part of the requisite foundation. Plaintiff must also establish #3. (*Fraser v. Jackson, 2014 IL App (2d) 130283)*

Also: Don't forget *Arthur v. Catour!!*

PAIN & SUFFERING

When is this element appropriate?

1. When there is evidence of physical injury. *Carter v. Azaran, 332 Ill.App.3d 948 (1st Dist., 2002);* AND

2. There is evidence that plaintiff was conscious of his pain & suffering. *Holston v. Sisters of the Third Order of St. Francis, 165 Ill.2d 150, 173 (1995).*

EXAMPLE

Improper catheter placement caused fluid accumulation around plaintiff's heart, necessitating emergency surgery. Plaintiff lapsed into unconsciousness prior to initial surgical incision, which was made without anesthetic. Plaintiff never regained consciousness & MD testified that plaintiff would not have felt pain during surgery. Is an award for pain & suffering proper?

A: Yes. Jury could rely on "reasonable inference" from evidence of plaintiff's rising pulse rate, declining BP & testimony that plaintiff sought reassurance from RN prior to surgery. *Holston*, *supra*.

WHAT TYPE OF EVIDENCE?

- Does not need to be medical evidence of consciousness. *Holston, supra.*
- Lay testimony describing plaintiff's actions may be enough, particularly if there is evidence about the injuries. *Drews v. Gobel Freight Lines, 144 Ill.2d 84 (1991).*
- Can photos of a crushed car be used to establish conscious pain & suffering?

PAIN & SUFFERING

(Misc. Points)

- An award for pain & suffering is not required merely because the jury awarded money for medical expenses. *Snover v. McGraw, 172 Ill.2d 438 (1996)("Reversal per se" approach has been abandoned.)*

- Per diem arguments that suggest jurors use a formula in order to reach award for pain & suffering are improper. *Caley v. Manicke, 24 Ill.2d 390 (1962).*

NOTE: There is no prohibition against per diem arguments in relation to medical expenses. *Lepore v. CTA, 2011 IL App (1st) 092576-U.*

PER DIEM QUESTIONS

Q: Is it OK to suggest to jury that it award $100/hr. for pain & suffering for first 2 yrs. after accident, $1,000/day for remaining time prior to trial & $100/day for future pain & suffering with understanding that plaintiff has a life expectancy of 24.52 yrs.?

A: No. *Coley v. Manicke*, *supra*. This type of argument creates an "illusion of certainty" that discourages "reasonable & practical consideration."

Q: Is it OK to tell jurors that when calculating pain & suffering they should remember that plaintiff takes pain medication 3x/day, has a life expectancy of 49 yrs., suggests $1,000/yr. and total award of $49,000?

A: Yes. "Counsel may properly suggest a lump sum figure...& may make reference to life expectancy in conjunction therewith. *Watson v. City of Chicago*, *124 Ill.App.3d 348*.

DISABILITY & LOSS OF NORMAL LIFE

- Disability = the absence of competent physical, intellectual or moral powers or an incapacity caused by physical defect or infirmity.

- Loss of Normal Life = change in lifestyle. Per IPI 30.04.02: the "temporary or permanent diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life."

CAUTION: Verdict form may only contain one or the other, not both. *Baker v. Hutson, 333 Ill.App.3d 486 (5th Dist., 2002).*

DISABILITY & LOSS OF NORMAL LIFE

Q: Given the fact that loss of normal life compensates for a "change in the plaintiff's lifestyle," is this element appropriate when the injury occurred prenatally or at birth? *See, Jones v. Chicago Osteopathic Hospital, 316 Ill.App.3d 1121, 1135 (1st Dist., 2000).*

A: Yes, because loss of normal life is considered interchangeable with disability, despite different definitions. *Burcham v. West Bend Mutual Insurance Company, 2011 IL App (2d) 101035.*

DISFIGUREMENT

- Disfigurement = "less complete, perfect or beautiful in appearance or character." *Kresin v. Sears, Roebuck & Company, 316 Ill.App.3d 433 (1st Dist., 2000).*

LOSS OF CONSORTIUM

- Loss of consortium is a separate & distinct element of damage from loss of society.
    a. Loss of consortium stems from the marital relationship & belongs exclusively to the injured spouse. Defined as interference with a healthy & happy marriage & injury to sexual relations.
    b. Terminates upon remarriage of surviving spouse, but cohabitation without marriage irrelevant.
    c. **NOTE**: WC lien does not attach. Not reduced to present cash value. Punitive damages not recoverable. Comparative negligence of surviving spouse no longer a complete bar.

CONSORTIUM QUESTIONS

Q: Can the post marital discovery of a premarital injury create a cause of action for loss of consortium?

A: No. *Monroe v. Trinity Hospital-Advocate, 345 Ill.App.3d 896, 899 (1st Dist., 2003).*

Q: Is separation or infidelity during marriage relevant to a loss of consortium claim?

A: Yes, as they may diminish the value of the claim. *Countryman v. County of Winnebago, 135 Ill.App.3d 384 (2d Dist., 1985).*

LOSS OF SOCIETY

- Loss of society can apply to parents, children & siblings. Defined as the deprivation of the companionship, guidance, comfort, love & affection of the deceased.

a. Parents enjoy a presumption of pecuniary injury for the loss of a child's society. *In re Estate of Finley, 151 Ill.2d 95 (1992)*. This means *prima facie* case even in the absence of direct evidence of the loss.

a. No presumption of injury for siblings' loss, but only need "some" evidence to support. Award not reduced to present cash value.

SOCIETY QUESTIONS

Q: Can parents recover for loss of society when the injury to their child is catastrophic, but non-fatal?

A: No. *Vitro v. Mihelcic, 209 Ill.2d 76 (2004)*. Similarly, a child cannot recover for loss of society when parent sustains a non-fatal injury. *Karagiannakos v. Gruber, 274 Ill.App.3d 155 (1st Dist., 1995)*.

Q: Can siblings recover for loss of society when catastrophic brain damage to sibling occurred during birth & sibling immediately transferred to Misericordia?

A: Yes. Testimony that family "tried" to maintain bond with baby, siblings occasionally visited & baby brought home on Thanksgiving & Christmas was sufficient. *Jones, supra*.

SOCIETY QUESTIONS
(Cont'd.)

Q: In a wrongful death case, should the verdict form contain separate lines for each of the next of kin?

A: No. Jurors are not allowed to apportion wrongful death damages among survivors. This is a judicial function per the Wrongful Death Act & Cook County Circuit Court Rule 6.5(1)(a). Court determines "degrees of dependency."

LOST WAGES/EARNING CAPACITY

- Although expert testimony is not necessary, the following foundational requirements apply:

a. Loss of future earnings must be reasonably certain to occur. "Ambition for advancement" not enough. *Carlson v. City Construction Company, 239 Ill.App.3d 211 (1st Dist., 1992)*. Plaintiff must establish the ability & opportunity to realize the ambition.

b. Must also present some evidence that the injury is permanent & prevented plaintiff from continuing employment. *LaFever v. Kemlite, 293 Ill.App.3d 260 (1st Dist., 1997)*.

FUTURE DAMAGES/INCREASED RISK OF HARM

- Future damages must be reasonably certain to occur. Claims for possible development of cancer or AIDS untenable unless proof of actual exposure to harmful agent. *Majca v. Beekil, 183 Ill.2d 407 (1998).*

- Increased risk of harm governed by *Dillon v. Evanston Hospital, 199 Ill.2d 483 (2002).* Absolute certainty unnecessary & can be less than 50% certain, but must be proven within a reasonable degree of certainty & must be proximately caused by defendant's negligence.

- Requisite calculation is contained in IPI 30.04.03 & 30.04.04. Must specify if more than 1 type of damage.

QUESTIONS

Q: May plaintiff recover for increased risk of future harm in birth injury case where expert testifies that child is at greater chance to develop scoliosis or hip dislocation in the future?

A: No. Although increased risk can be less than 50% & there need not be absolute certainty, the increased risk must be specifically quantified. *Foley v. Fletcher, 361 Ill.App.3d 39, 51 (1st Dist., 2005).*

Q: May jury be instructed about increased risk of future surgery where MD testifies it is more likely than not that plaintiff would have wrist fusion surgery?

A: No. More likely than not = greater than 50% & IPI 30.04.03 & 30.04.04 only appropriate when future damages LESS than 50% likely to occur. *Knollenberg v. Kincade, 2012 IL App (4th) 120125-U.*

WRONGFUL DEATH VS. SURVIVAL

- **Wrongful death:** covers time after death & compensates next of kin for their loss due to the death.
- **Survival:** allows recovery of damages personally sustained by decedent up to the time of death.

TOP REMINDERS:

- Effective May 31, 2007, Wrongful Death Act amended to allow bereavement damages to next of kin. Grief, sorrow & mental suffering now part of IPI 31.01-31.06.

- Don't forget to apportion settlement proceeds from co-defendant or risk losing post-verdict setoff. *Thornton v. Garcini, 237 Ill.2d 100 (2009).*

REDUCTION OF DAMAGES

- **Section 2-1205** - reduction of awards for medical expenses & lost wages in medical malpractice cases.

- **Section 2-1205.1** - reduction of awards for medical expenses (but not lost wages) in all other tort cases.

- **Section 2-1207** - reduction of excessive punitive damage awards.

REDUCTION OF DAMAGES

Sections 2-1205 & 2-1205.1 represent an exception to the collateral source rule & are intended to eliminate duplicative recoveries. They are subject to the following limitations:

1. Requests must be made within 30 days of judgment or time allowed by trial court.
2. Reductions do not apply to the extent of right of recoupment via subrogation, lien, trust agreement or otherwise. Does not apply to intentional torts.
3. Reductions shall not reduce total judgment by more than 50%.
4. Judgment increased by amount of insurance premiums paid by plaintiff in 2 years prior to injury or death.

ADDITIONAL CAVEATS

- **Section 2-1205** precludes reductions for medical expenses directly attributable to defendant's negligence. In other words, cannot reduce expenses for actual services involving negligence, only subsequent services made necessary by the negligence.
- **Section 2-1205.1** does NOT apply unless the medical expenses exceed $25,000.
- **Both sections** place the burden on defendant to prove that plaintiff's insurer does NOT have right to recoupment. Also, right does not need to be perfected.
- **General, non-itemized verdict** does not prevent application of these statutory sections. *DeCastris v. Gutta, 237 Ill.App.3d 168 (2d Dist., 1992).*

QUOTIENT VERDICTS

- They reflect advance agreement among jurors to reach a verdict by adding damages figures suggested by each juror & then reaching final verdict by averaging those figures. THIS IS IMPROPER, but....

Juror affidavits cannot be used to prove that the final award was the result of a quotient verdict. *Stone v. Mitek Industries, 2014 IL App (3d) 120122-U.*

BEWARE: *Department of Transportation v. J.W. Graham, 130 Ill.App.3d 589 (5th Dist., 1985) is not good law!!*

ADDITUR & REMITTITUR

- Courts have a duty to correct erroneous or excessive verdicts & these are both accepted means of doing so. *Best v. Taylor Machine Works, 179 Ill.2d 367, 412 (1997).*

- **Additur:** Used to correct an omission of an easily calculated element of damage or when the award bears no reasonable relationship to the loss. Usually involves liquidated damages. Defendant must consent. If not, new trial on damages only.

- **Remittitur:** Excessive portion of verdict is reduced to amount determined by court to be proper. Appropriate when verdict falls outside range of fair & reasonable compensation, results from passion or prejudice or is so large as to shock the judicial conscience. Plaintiff must consent. If not, new trial.

JUDGE MICHAEL R. PANTER

PUNITIVE DAMAGES

&

"HOT TOPICS"