GENERAL CAUTIONARY INSTRUCTIONS

INTRODUCTION

The instructions in the 1.00 through the 3.00 series are "cautionary" instructions. In 1999 these instructions were redrafted. The redrafted instructions combined, reordered, and condensed the instructions that previously appeared in these sections. The substance of the instructions is the same, except where noted.

The instructions in the 1.00 series are intended to be given before opening statements, along with any substantive instructions the Court deems appropriate. The instructions in the 2.00 series are intended for use during trial. The instructions in the 3.00 series are intended for use after closing arguments. The Court may also repeat instructions from the 1.00 and 2.00 series after closing arguments. Supreme Court Rule 239(d) should be consulted with regard to the time instructions are given.

Giving cautionary instructions is within the sound discretion of the trial court. *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 339; 18 N.E. 804, 808 (1888); *Martin v. Kralis Poultry Co.*, 12 Ill.App.3d 453, 464; 297 N.E.2d 610, 618 (5th Dist.1973); *Beiermann v. Edwards*, 193 Ill.App.3d 968, 981; 550 N.E.2d 587, 597; 140 Ill.Dec. 702, 712 (2d Dist.1990); *DeYoung v. Alpha Const. Co.*, 186 Ill.App.3d 758, 771; 542 N.E.2d 859, 867; 134 Ill.Dec. 513, 521 (1st Dist.1989); *Clay v. Brodsky*, 148 Ill.App.3d 63, 72; 499 N.E.2d 68, 74; 101 Ill.Dec. 701, 707 (4th Dist.1986); *Tuttle v. Fruehauf Div. of Fruehauf Corp*., 122 Ill.App.3d 835, 844; 462 N.E.2d 645, 653; 78 Ill.Dec. 526, 534 (1st Dist.1984). A trial court's refusal to give a certain instruction is not reversible error unless the complaining party has in some way been prejudiced by the court's denial. *Chloupek v. Jordan*, 49 Ill.App.3d 809, 816; 364 N.E.2d 650, 655; 7 Ill.Dec. 489, 494 (1st Dist.1977).

1.01 Preliminary Cautionary Instructions

[1] Now that the evidence has concluded, I will instruct you as to the law and your duties.

[2] The law regarding this case is contained in the instructions I will give to you. You must consider the Court's instructions as a whole, not picking out some instructions and disregarding others.

[3] It is your duty to resolve this case by determining the facts based on the evidence and following the law given in the instructions. Your verdict must not be based upon speculation, prejudice, or sympathy. [Each party, whether a [(i.e., corporation, partnership, etc.)] or an individual, should receive your same fair consideration.] My rulings, remarks or instructions do not indicate any opinion as to the facts.

[4] You will decide what facts have been proven. Facts may be proven by evidence or reasonable inferences drawn from the evidence. Evidence consists of the testimony of witnesses and of exhibits admitted by the court. You should consider all the evidence without regard to which party produced it. You may use common sense gained from your experiences in life, in evaluating what you see and hear during trial.

[5] You are the only judges of the credibility of the witnesses. You will decide the weight to be given to the testimony of each of them. In evaluating the credibility of a witness, you may consider that witness' ability and opportunity to observe, memory, manner, interest, bias, qualifications, experience, and any previous inconsistent statement or act by the witness concerning an issue important to the case.

[6] You should not do any independent investigation or research on any subject relating to the case. What you may have seen or heard outside the courtroom is not evidence. This includes any press, radio, or television programs and it also includes any information available on the Internet. Such programs, reports, and information are not evidence and your verdict must not be influenced in any way by such material.

[7] For example, you must not use the Internet, [including Google,] [Wikipedia,] [[(insert current examples)]], or any other sources that you might use every day, to search for any information about the case, or the law which applies to the case, or the people involved in the case, including the parties, witnesses, lawyers, and judge.

[8] During the course of the trial, do not discuss this case with anyone--not even your own families or friends, and also not even among yourselves--until at the end of the trial when you have retired to the jury room to deliberate on your verdict. Even though this is hard to do, it will be a violation of these instructions and your oath if you discuss the case with anyone else.

[9] You must not provide any information about the case to anyone by any means at all, and this includes posting information about the case, or your thoughts about it, on any device or Internet site, including [blogs,] [chat-rooms,] or [[(insert current examples)]], or any social-networking websites, such as [Twitter], [Facebook] or [[(insert current examples)]], or any other means.

[10] You cannot use any electronic devices or services to communicate about this case,

and this includes [cell-phones,] [smart-phones,] [lap-tops,] [the Internet,] [[(insert current examples)]] and any other tools of technology. The use of any such devices or services in connection with your duties is prohibited.

[11] The reason for these instructions is that your verdict must be based only on the evidence presented in this courtroom and the law I [will provide] [have provided] to you in my instructions. It would be unfair to the parties and a violation of your oath to base your decision on information from outside this courtroom. You should feel free to remind each other that your verdict is to be based only on the evidence admitted in court and that you cannot use information from any other sources. If you become aware of any violation of these instructions, it is your legal duty to report this to me immediately.

[12] Disobeying these instructions could cause a mistrial, meaning all of our efforts have been wasted and we would have to start over again with a new trial. If you violate these instructions you could be found in contempt of court.

[13] Pay close attention to the testimony as it is given. At the end of the trial you must make your decision based on what you recall of the evidence. You will not receive a written transcript of the testimony when you retire to the jury room.

[14] An opening statement is what an attorney expects the evidence will be. A closing argument is given at the conclusion of the case and is a summary of what an attorney contends the evidence has shown. If any statement or argument of an attorney is not supported by the law or the evidence, you should disregard that statement or argument.

[15] During this trial, you may be permitted to ask questions of [certain] witnesses, but you must follow the procedures that I describe:

If you have a question for a witness and you believe the answer would be helpful to you in understanding the case, then after the lawyers have completed their questions, but before that witness is excused, I will give you a chance to submit your question in writing.

I will have you write your question on a piece of paper and hand it to the bailiff. [*The court may now describe specific procedures to be used. See Comment for examples.*] You should not write your name or juror number with the question. Also, you should not discuss your questions with your fellow jurors at this time.

You may submit one or more questions or no question at all. It is up to you. Please keep in mind, though, that you should only ask a question if you think it is important to your ability to decide the issues in this case fairly. You should be sure you are asking a question and not making a comment. You should not use your questions to argue with a witness or to express opinions about a witness's testimony. Your role is to be an impartial fact-finder. The purpose of your question should be to clarify testimony that you have not understood or that has failed to address a factual question that you believe is important.

After the bailiff has collected the pieces of paper and given them to me, I will decide whether the law allows the question to be asked of the witness. Not all questions can be asked or asked using the wording that was submitted. The rules of evidence might not permit me to ask your question. You shall not concern yourself with the reason for the exclusion or modification

of any question submitted. If I cannot ask your question or if I rephrase it, please do not be offended and do not let it affect your judgment of the evidence or the witness in any way.

If the question is allowed, I will ask the question of the witness and the attorneys may then ask some follow-up questions. Please do not speak directly to me, the lawyers, or the witnesses.

Instruction, Notes on Use and Comment revised January 2011; [15]Instruction and Notes on Use on 1.01 [15] approved June 1, 2012;[15]Comment approved June 21, 2012.

Notes on Use

Some trial judges give cautionary instructions at the beginning of the trial; some give them at the close of the trial before the deliberations; and some give them throughout the trial. Although the trial judge has discretion as to when to give cautionary instructions, the committee suggests that cautionary instructions 1.01 [3]-~~[14]~~[15] should be given at the beginning of the trial, 1.01 [1]-[14] should be given at the end of trial, and that the instructions reminding jurors to refrain from doing outside research [1.01 [6] and [7]), from discussing the case with anyone (1.01 [8] and [9]), and from using electronic devices in connection with their duties as jurors (1.01 [10]) should be repeated throughout the trial.

For any of the cautionary instructions that refer to particular forms of technology, such as 1.01 [7], [9] and [10], judges should feel free to add new examples as they become available.

The numbers in the brackets preceding each paragraph refer to the Comments and Notes on Use following the instruction and should not be included when the instruction is given. The instruction, with brackets removed, should be given as a single instruction.

As to 1.01 [15], on April 3, 2012, the Illinois Supreme Court adopted Rule 243, which explicitly authorizes judges to allow jurors to submit written questions to certain or all witnesses in civil jury trials in Illinois. The rule outlines the procedures to be followed, *see* Supreme Court Rule 243, but makes clear that the trial judge has discretion whether to permit questions. *See* Committee Comments to Supreme Court Rule 243.

Although Rule 243 identifies certain procedures for the submission of juror questions to witnesses, it also indicates that trial judges are free to work out the details of the procedures on their own. *See id.* The Comment provides approaches that other judges have tried to ensure that jurors feel comfortable asking questions.

Rule 243 also makes clear that the judge will review the questions outside of the presence of the jury, read each question for the record, and hear objections, if any, from the lawyers. The judge will rule on whether the question can be asked, including any rephrasing of the question. If the question can be asked, then the judge will ask it and instruct the witness to answer only the question asked. The lawyers will have a chance to ask follow-up questions of the witness limited to the scope of the new testimony.

[1] Comment

This instruction incorporates former IPI 3.01.

[2] Comment

This instruction tells the jury that the source of the law it will apply to the case is the court's instructions. The instruction cautions the jury against capriciously selecting one of several statements of the law and using it in their deliberations out of context with the whole charge. *Henderson v. Shives*, 10 Ill.App.2d 475, 488; 135 N.E.2d 186, 192 (2d Dist. 1956).

[3] Comment

In conjunction with paragraph [1], the last sentence of paragraph [3] incorporates former IPI 3.01 and adds to the existing language of IPI 1.01.

Since the remarks and rulings of the trial judge may erroneously be interpreted by the jury as comments on the evidence, this instruction is proper. An instruction using similar language was approved in *North Chicago St. R. Co. v. Kaspers*, 186 Ill. 246, 250, 57 N.E. 849, 851 (1900).

The primary function of the jury is to apply the law to the facts of the case. *Guidani v. Cumerlat*o, 59 Ill.App.2d 13, 36-37, 207 N.E.2d 1, 12 (5th Dist. 1965); *Rikard v. Dover Elevator Co.*, 126 Ill.App.3d 438, 440, 81 Ill.Dec. 686, 687, 467 N.E.2d 386, 387 (5th Dist. 1984). Informing jurors that they are to find the facts from the evidence, and then to apply the law to those facts, has been held to be a very good statement of the law. *Eckels v. Hawkinson*, 138 Ill.App. 627, 633-34 (1st Dist.1908).

Verdicts should not be influenced by sympathy or prejudice. See *Garbell v. Fields*, 36 Ill.App.2d 399, 403-404, 184 N.E.2d 750, 752 (1st Dist.1962)), where this instruction was approved. The prohibition against sympathy or prejudice is equally applicable to both parties. Moreover, it is sufficient to caution the jury once against allowing sympathy and prejudice to enter into their consideration of the case. The practice of repeatedly warning the jury against sympathy or prejudice in connection with each facet of the case is not favored. A simple statement on the subject of sympathy, such as the one contained in this instruction, was suggested in *Keller v. Menconi*, 7 Ill.App.2d 250, 256, 129 N.E.2d 341, 344 (1st Dist.1955). As to the caution against deciding a case on the basis of speculation, see *Koris v. Norfolk & West. Rwy. Co.*, 30 Ill.App.3d 1055, 1060; 333 N.E.2d 217, 221 (1st Dist.1975).

A jury should be informed that a corporation is to be treated no differently from an individual. *Chicago Union Traction Co. v. Goulding*, 228 Ill. 164, 165, 81 N.E. 833, 833 (1907).

[4] Comment

This instruction states the familiar principle that once evidence is admitted, it is in the case for all purposes and every party is entitled to the benefit of the evidence whether produced by him or his adversary. *Morris v. Cent. W. Cas. Co.*, 351 Ill. 40, 47, 183 N.E. 595, 598 (1932); *Dudanas v. Plate*, 44 Ill.App.3d 901, 909, 3 Ill.Dec. 486, 492, 358 N.E.2d 1171, 1178 (1st

Dist.1976); *Dessen v. Jones*, 194 Ill.App.3d 869, 873, 141 Ill.Dec. 595, 597, 551 N.E.2d 782, 784 (4th Dist.1990); *Wagner v. Zboncak*, 111 Ill.App.3d 268, 272, 66 Ill.Dec. 922, 925, 443 N.E.2d 1085, 1088 (2d Dist.1982).

Because jurors have been told it is their duty to determine the facts from evidence produced in open court, it is also proper to inform them that they may rely on their experiences and observations. *Steinberg v. N. Ill. Tel. Co.*, 260 Ill.App. 538, 543 (2d Dist.1931); *Kerns v. Engelke*, 54 Ill.App.3d 323, 331, 369 N.E.2d 1284, 1290, 12 Ill.Dec. 270, 276 (5th Dist.1977), *aff'd in part and rev'd in part on other grounds,* 76 Ill.2d 154, 390 N.E.2d 859, 28 Ill.Dec. 500 (1979); *Baird v. Chi. B & Q R.R. Co.*, 63 Ill.2d 463, 473, 349 N.E.2d 413, 418 (1976); *Klen v. Asahi Pool, Inc.*, 268 Ill.App.3d 1031, 1044, 643 N.E.2d 1360, 1369, 205 Ill.Dec. 753, 762 (1st Dist.1994).

[5] Comment

The comprehensive instruction in former IPI 2.01, discussing factors to consider in judging the credibility of witnesses, was approved in *Lundquist v. Chi. Rys. Co.*, 305 Ill. 106, 112-13, 137 N.E. 92, 94 (1922); *People v. Goodrich*, 251 Ill. 558, 566, 96 N.E. 542 545-46 (1911). Use of the instruction was found to save a verdict from impeachment in *Waller v. Bagga*, 219 Ill.App.3d 542, 547-48, 579 N.E.2d 1073, 1076, 162 Ill.Dec. 259, 262 (1st Dist.1991). Use of the instruction in *Sobotta v. Carlson*, 65 Ill.App.3d 752, 754, 382 N.E.2d 855, 857, 22 Ill.Dec. 465, 467 (3d Dist.1978), helped sustain a verdict in which the jury rejected uncontradicted testimony of a witness the jury had apparently found not credible.

When there has been evidence of prior inconsistent statements by a witness or witnesses, an instruction concerning impeachment by such statements should be given. *Sommese v. Maling Bros. Inc.*, 36 Ill.2d 263, 269, 222 N.E.2d 468, 471 (1966); see also *Dep't of Conservation v. Strassheim*, 92 Ill.App.3d 689, 692-95, 415 N.E.2d 1346, 1348-49, 1352, 48 Ill.Dec. 62, 64-65, 68 (2d Dist.1981); *Hall v. Nw. Univ. Med. Clinics*, 152 Ill.App.3d 716, 504 N.E.2d 781, 786, 105 Ill.Dec. 496, 501 (1st Dist.1987). This instruction does not use personal pronouns and thereby avoids the error identified in *Wolf v. Chicago*, 78 Ill.App.2d 337, 341, 223 N.E.2d 231, 233 (1st Dist.1966).

[6] Comment

While the criminal precedents relating to publicity have their origins in the Sixth Amendment, see *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *U.S. v. Thomas*, 463 F.2d 1061, 1063-64 (7th Cir. 1972), parallel protection under the Seventh Amendment may be available to civil litigants. See *Gutierrez-Rodrigues v. Cartagena*, 882 F.2d 553, 570 (1st Cir. 1989) (implying that trial publicity can lead to a mistrial if it interferes with "the Seventh Amendment right to a civil trial by an impartial jury"); see generally *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535 (4th Cir. 1986), citing *McCoy v. Goldston*, 652 F.2d 654, 656 (6th Cir. 1981) ("The right to an impartial jury in civil cases is inherent in the Seventh Amendment's preservation of a 'right to trial by jury' and the Fifth Amendment's guarantee that 'no person shall be denied life, liberty or property without due process of law.'").

A jury or juror may not conduct experiments or view extraneous information not offered into evidence that will have the effect of putting them in possession of evidence not offered at trial. *People v. White*, 365 Ill. 499, 514, 6 N.E.2d 1015, 1022 (1937); *Gertz v. Bass*, 59 Ill.App.2d

180, 183, 208 N.E.2d 113, 115 (1st Dist. 1965). However, not every instance in which extraneous or unauthorized information reaches the jury results in error so prejudicial so as to require reversal. *People v. Holmes*, 69 Ill.2d 507, 519, 372 N.E.2d 656, 661, 14 Ill.Dec. 460, 465 (1978). The losing party need not prove actual prejudice from the juror's use of extraneous information, but only that the unauthorized information related directly to an issue in the case and may have improperly influenced the verdict. *Id*. The prevailing party then has the burden to demonstrate that no injury or prejudice resulted. Id. Because the actual effect of the extraneous information on the minds of the jury cannot be proved, the standard to be applied is whether the conduct involved such a probability that prejudice would result that it is to be deemed inherently lacking in due process. *People v. Holmes*, 69 Ill.2d 507, 514, 372 N.E.2d 656, 659, 14 Ill.Dec. 460, 465-66 (1978).

Improper experimentation or improper extraneous information obtained or accessed by jurors that resulted in a new trial includes: jury members attempting to perfectly trace signatures, where an almanac relating to a specific issue in the case was referenced by a juror and then discussed with the other jurors, where a bailiff gave jurors a copy of Webster's Dictionary that they requested in order to look up definitions of key elements in a case, where a juror visited the intersection where the accident in question had occurred, diagrammed the intersection and then brought the diagram back to the jury room to discuss with the other juror members, and where jurors went to a shoe store to inspect the various heels of shoes for the purpose of ascertaining trade design in a case where defendant's foot prints were at issue. *People v. White*, 365 Ill. 499, 514, 6 N.E.2d 1015, 1022 (1937); *Haight v. Aldridge Elec. Co.*, 215 Ill.App.3d 353, 368, 575 N.E.2d 243, 253, 159 Ill.Dec. 14, 17 (2d Dist. 1991); *Gertz v. Bass*, 59 Ill.App.2d 180, 182, 208 N.E.2d 113, 115 (1st Dist. 1965); *People v. Holmes*, 69 Ill.2d 507, 510, 372 N.E.2d 656, 657, 14 Ill.Dec. 460, 461 (1978).

[7] Comment

A growing number of states now have jury instructions that specifically inform jurors that they cannot use the Internet to conduct research about the trial or the people involved in the trial. If the instruction is not specific, jurors might mistakenly believe that they are permitted to conduct online research, as they would in their jobs or their private lives. *See* Tricia R. Deleon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, Advocate, Fall 2010, at 36, 38 (recognizing that one solution to stop jurors from using the Internet to do research about the trial is for judges to give more specific jury instructions).

[8] Comment

The practice of instructing jurors not to discuss the case until deliberation is widespread. *See, e.g.*, Cautionary and General Opening Remarks to Jury--Civil.

[9] Comment

The U.S. Judicial Conference published a very specific set of Model Jury Instructions prohibiting the use of electronic technology for researching or communicating about a case. The model instructions, designed for U.S. district court judges and available at www.uscourts.gov/newsroom/2010/DIR10-018.pdf, "precisely catalogue" what jurors must refrain from doing with the idea that this approach "'would help jurors better understand and adhere to the scope of the prohibition.'" The Third Branch, *Committee Suggests Guidelines for*

Juror Use of Electronic Communication Technologies, at http://www.uscourts.gov/ttb/2010-04/article05.cfm (quoting Judge Julie A. Robinson's letter of transmittal). Other judges are not only being specific and proactive in their instructions, but also they are "instructing the jurors early and often, including during orientation and *voir dire*." Judge Herbert B. Dixon, Jr., *Guarding Against the Dreaded Cyberspace Mistrial and Other Internet Trial Torpedoes*, Judges J., Winter 2010, at 37, 39.

[10] Comment

The use of Web search engines, wireless handheld devices, and Internet-connected multimedia smart-phones by jurors in any given case has the potential to cause a mistrial. It is critical to the administration of justice that these electronic devices not play any role in the decision making process of jurors. For a recent case in which the jury foreperson used a smart-phone to look up definitions of "prudent" and "prudence," see *Jose Tapenes v. State*, 43 So.3d 159, 2010 Fla.App.LEXIS 13390 (Sept. 8, 2010).

[11] Comment

Courts need to explain to jurors why it is so important that they decide the case based on the evidence admitted in court and not on information gleaned outside the courtroom. Jurors are more likely to follow the court's admonition if they understand the reasons for it. *See, e.g.*, Susan MacPherson & Beth Bonora, *The Wired Juror, Unplugged*, Trial, Nov. 2010, at 40, 42 ("Social science research on persuasion has demonstrated that compliance can be measurably increased by simply adding the word 'because' and some type of explanation.").

[12] Comment

There have been numerous examples in other states of jurors who conducted online research and the result was a mistrial and the need for a new trial. For example, in one case in South Dakota, a juror had used Google before voir dire to see if the defendant seatbelt manufacturer had been sued for the alleged defect in the past. *See Russo v. Takata Corp*., 2009 S.D. 83, 774 N.W.2d 441, 2009 S.D. LEXIS 155. The juror informed several other jurors during deliberations that he had conducted a Google search and had not found any prior lawsuits against the defendant. The jury found for defendant on plaintiff's claim. Plaintiff filed a motion for a new trial based on alleged juror misconduct. The trial court granted the motion, and it was affirmed on appeal. In a case from Maryland, a murder conviction was overturned because jurors had consulted Wikipedia for explanations of certain scientific terms. *See* Dixon, *supra*, at 37-38.

When jurors have shared their views online about an on-going trial, they have been removed from the jury and personally penalized. For example, one juror who offered her view on Facebook that the defendant was guilty even though the trial had not ended, was removed from the jury, fined, and required to write an essay. *See* Ed White, *Judge Punishes Michigan Juror for Facebook Post*, Associated Press, Sept. 2, 2010.

[13] Comment

In current trial practice, jurors occasionally request transcripts of the testimony during their deliberations and are disappointed to learn their requests may not be honored. Absent special circumstances, within the court's discretion, transcripts are not provided to jurors. In

order to facilitate responsible fact-finding, the committee recommends that the jury be instructed that they will not receive a transcript at the outset of the trial.

[14] Comment

Occasionally lawyers argue matters that are within their personal knowledge but are not of record, or, in the heat of forensic attack, will make statements not based on the evidence. Ordinarily this is objected to and request is made to instruct the jury to disregard the statement, but it is impossible or impractical to object to every such statement. It is therefore proper to inform the jury that arguments and statements of counsel not based on the evidence should be disregarded. *Rapacki v. Pabst*, 80 Ill.App.3d 517, 522, 400 N.E.2d 81, 85, 35 Ill.Dec. 944, 948 (1st Dist. 1910); *Randall v. Naum*, 102 Ill.App.3d 758, 760-61, 430 N.E.2d 323, 325, 58 Ill.Dec. 381, 383 (1st Dist. 1981).

[15] Comment

This instruction is based on Illinois Supreme Court Rule 243, which was adopted on April 3, 2012, and is effective as of July 1, 2012. Prior to this rule, there was no rule in Illinois that explicitly permitted or prohibited jurors from submitting written questions to witnesses. Early cases in Illinois held that juror questions were permissible. *See Chi. Hansom Cab Co. v. Havelick*, 22 N.E. 797, 797 (Ill. 1889); *Chi., Milwaukee & St. Paul R.R. Co. v. Krueger*, 23 Ill. App. 639, 643, 1887 Ill. App. LEXIS 74 (1st Dist. 1887). More recently, some judges in Illinois believed that courts had inherent power to permit such questions, *see* Hon. Warren D. Wolfson, *An Experiment in Juror Interrogation of Witnesses,* CBA REC., Feb. 1987, at 13, 14, but others were awaiting a rule. Accordingly, the Illinois Supreme Court adopted a rule that makes clear that judges can permit jurors to submit written questions to certain or all witnesses.

In doing so, Illinois joins a number of other states and federal courts that permit this practice. S*ee, e.g.*, Gregory E. Mize & Paula Hannaford-Agor, *Jury Trial Innovations Across America: How We Are Teaching and Learning from Each Other,* 1 J. COURT INNOVATION 189, 214 (2008) (noting that many states permit juror questions); Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions,* 89 JUDICATURE 16, 16 (2005) ("At least 30 states and the District of Columbia permit jurors to question witnesses. . . . Every federal circuit that has addressed the issue of juror questioning of witnesses agrees that it is a practice that should be left entirely within the court's discretion."); Bruce Pfaff, John L. Stalmack & Nancy S. Marder, *The Right to Submit Questions to Witnesses,* CBA REC., May 2009, at 36, 39 (providing a survey of state court decisions and federal courts of appeals decisions indicating jurisdictions that permit juror questions). As the Rules Committee recognized, *see* Committee Comments to Supreme Court Rule 243, courts in other jurisdictions have moved in this direction because jurors benefit from the opportunity to ask questions, and lawyers and judges who actually have experience with juror questions typically support the practice. Most importantly, juror questions help jurors to understand what they see and hear during the trial. They provide jurors with an opportunity to clarify testimony that might have caused them confusion, to stay engaged throughout the trial, and to enter the jury room having understood the trial and prepared to deliberate. *See generally* Nancy S. Marder, *Answering Jurors' Questions: Next Steps in Illinois*, 41 LOY. U. CHI. L.J. 727, 742-47 (2010).

Rule 243 provides the broad contours of the procedures for juror questions to witnesses. After a witness has completed his or her testimony, but before the witness is excused, the judge

who permits juror questions will have jurors submit their questions in writing. The judge will then review the questions and hear objections from the lawyers. The judge will ask those juror questions that can be asked of the witness and will permit the lawyers to ask follow-up questions of the witness. Juror questions, at least according to those judges who permit the practice, do not add very much time to the trial. *See, e.g.*, Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That is the Question,"* 78 CHI.-KENT L. REV. 1099, 1112-13 (2003). In addition, they leave jurors feeling grateful for the opportunity to ask questions, even if they do not always ask very many questions. *See* Marder, *supra*, at 740 n.63. As the Rules Committee Comments make clear, judges are free to work out the details of the procedures on their own and to determine what works best for them in their courtroom.

As to the procedure for where and how jurors write down their questions, different judges have taken different approaches. The Wyoming instruction suggests that judges instruct jurors as follows: "I will ask the bailiff to collect a piece of paper from each of you. If you have no question, please write 'no question' on the paper before folding it and giving it to the bailiff. If you have a question, write it down on the paper, fold it, and give it to the bailiff. The reason I will ask each of you to submit a piece of paper, even if you have no question, is to protect the privacy of jurors who may wish to ask a question without being identified in open court as the source of that question." CIV. JURY INSTRUCTIONS COMM., WYO. STATE BAR, 2011 WYOMING CIVIL PATTERN JURY INSTRUCTIONS 1.02G, at 9 (2011). This approach has several advantages: It protects the privacy of jurors, ensures that jurors will not feel inhibited about submitting questions, and prevents lawyers from knowing which juror submitted a question.

Another approach, adopted by the Seventh Circuit, is to have the judge ask jurors to raise their hand if they have a question after the witness has finished testifying, and then the clerk will give them a piece of paper to write down their question. *See* COMM. ON PATTERN CIV. INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 343-44 (2005 rev.) ("If you feel the answer to your question would be helpful in understanding this case, you should raise your hand after the lawyers have completed their examinations but before the witness is excused. I will have you write your question and hand it to the clerk."). One disadvantage of this approach is that those in the courtroom can see which juror has a question. Another disadvantage is that jurors might be reluctant to raise their hand. Yet, judges who tried this approach (or a variation, such as having jurors write down their questions and give them to the clerk during a recess) found it worked well for them during the Seventh Circuit's pilot program testing this and several other practices. *See, e.g.*, Rachel M. Zahorsky, *Legal Rebels: Remaking the Profession – James Holderman: Jury Duties,* A.B.A. J., Nov. 9, 2009, http://www.legalrebels.com/profiles/james_holderman_jury_duties.

Judge Warren Wolfson, who permitted jurors to ask questions in his courtroom in the Law Division of the Circuit Court of Cook County if both sides agreed to the practice, had the jurors go into the jury room after the lawyers were done questioning the witness but before the witness stepped down. He gave the jurors several minutes to write down their questions and submit them to the bailiff. An advantage of this procedure is that jurors are able to write down their questions outside of the presence of the lawyers and others in the courtroom. A disadvantage is that it could take a little more time than if the jurors remain in the courtroom. However, Judge Wolfson found that this practice worked well for him. *See* Wolfson, *supra,* at 14. The Supreme Court's Rule 243 allows judges to develop procedures for permitting juror questions that work well in their courtrooms.

1.02 Pre-Trial Judicial Determination In Favor of Plaintiff

The Court has found the defendant[s] [(insert name of defendant(s))], [is] [was] [were][negligent] [liable] [other finding], so that is not an issue you will need to decide. [The remaining defendants are not to be prejudiced by the fact that the (negligence) (liability) (other finding) of [(name of defendant(s) above)] is no longer at issue.]

Notes on Use

This instruction should be used when a defendant has been defaulted or summary judgment on an issue has been granted in favor of plaintiff. In the first sentence, the term "liable" should be used only when the court has found as a matter of law that all of the elements of the cause of action have been proved and the only issue remaining is damages. The second sentence should be used when there are two or more defendants. See *Wanner v. Keenan*, 22 Ill.App.3d 930, 936-937, 317 N.E.2d 114, 119-120 (2d Dist.1974).

1.03A Admitted Fault Only

The defendant, [(insert name)], has admitted [he] [she] [it] [was negligent] [produced an unreasonably dangerous product] [other fault admission]. There are other issues you will need to decide in this case.

1.03B Admitted Fault and Causation

The defendant, [(insert name)], has admitted [he] [she] [it] [was negligent] [produced an unreasonably dangerous product] [other fault admission]. The defendant [(insert name)] has also admitted that [his] [her] [its] [negligence] [unreasonably dangerous product] [other fault conduct] was a proximate cause of [injuries] [damages] to the plaintiff. There are other issues you will need to decide in this case.

Notes on Use

Permission to publish these granted in 2003.

The committee believes that one of these instructions should be given at the outset of the case as part of the cautionary and general series. These two instructions replace the former 1.03 which dealt with "admitted liability." That concept can mean different things to different people. 1.03A should be used where the defendant admits fault only, and disputes proximate cause and damages. 1.03B should be used where the defendant admits his fault caused damages, and the only issue is the amount of damages to be awarded.

In drafting the issues and burden instructions, the parties will need to distinguish between cases where fault is admitted and those where fault and causation is admitted. *Lawler v. MacDuff*, 335 Ill.App.3d 144, 779 N.E.2d 311, 268 Ill.Dec. 697 (2d Dist. 2002), is a cautionary case for jury instructions in admitted liability cases.

1.05 Deadlocked Jury

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Notes on Use

This instruction should not be given as part of the original series but only if, after reasonable deliberation, the jury reports an inability to agree or fails to return a verdict. In giving this instruction, the following procedure should be employed:

1. Before the trial judge attempts to ascertain whether the jury is deadlocked, counsel and the reporter should be present. At that time, the court should, on the record, state the facts concerning any communication from the jury on the record or, if there has been no communication, the length of time the jury has been deliberating and inform counsel that he proposes to give the instruction, giving them an opportunity to object if they so desire.

2. In the presence of counsel and the reporter, the jury should be returned to the box, and the court, after cautioning them not to reveal the numerical division in the voting or which side has the preponderance, should ask the foreman if they are able to reach a verdict. If they are not, he should then give this instruction and return them to the jury room to deliberate further.

It has not yet been determined whether this instruction should be given in writing. See generally 735 ILCS 5/2-1107 (1994).

Comment

The language of this instruction is mandated by *People v. Prim*, 53 Ill.2d 62, 289 N.E.2d 601 (1972), *cert. denied*, 412 U.S. 918, 93 S.Ct. 2731, 37 L.Ed.2d 144 (1973). *See also People v. Cowan*, 105 Ill.2d 324, 473 N.E.2d 1307, 85 Ill.Dec. 502 (1985); *People v. Robertson*, 92 Ill.App.3d 806, 416 N.E.2d 323, 48 Ill.Dec. 292 (1st Dist. 1981); *Trauscht v. Gunkel*, 58 Ill.App.3d 509, 374 N.E.2d 843, 16 Ill.Dec. 68 (1st Dist.1978).

1.06 Deadlocked Jury (Follow Up To 1.05)

In a large proportion of cases absolute certainty cannot be expected nor does the law require it.

If you fail to agree on a verdict the case must be retried. Any future jury must be selected in the same manner as you were chosen. There is no reason to believe that the case would ever be submitted to another jury more competent to decide it, or that the case can be tried any better or more exhaustively than it has been here, or that more or clearer evidence could be produced on behalf of any party.

You should now retire and reconsider the evidence in light of the court's instructions.

Instruction, Notes and Comment created October 2008.

Notes on Use

This instruction may be given in the trial court's discretion only after the jury has received the *IPI 1.05* instruction and remains deadlocked. If given, the Committee recommends the procedure set forth in Notes on Use for *IPI 1.05*.

Comment

This instruction states in more modern language the "*Allen* charge" approved in *Allen v. U.S.*, 164 U.S. 492, 501-502 (1896), the use of which was discussed in *People v. Iverson*, 9 Ill. App.3d 706, 709 (2nd Dist. 1973). This simple, neutral, and not coercive instruction is consistent with the opinion in *Preston v. Simmons, et al*., 321 Ill.App.3d 789, 747 N.E.2d 1059, 254 Ill. Dec. 647 (1st Dist. 2001).

Comment revised November 2008

2.00

INSTRUCTIONS DURING TRIAL

2.01 Evaluation of Deposition or Prior Testimony

The testimony of [(name) (several witnesses)] [is now going to be] [will be] [was] presented by [video tape] [and] [the reading of his/her testimony]. You should give this testimony the same consideration you would give it had the witness personally appeared in court.

Notes on Use

If only one evidence deposition or videotape is going to be used during trial, the court may want to give this instruction immediately before the presentation of this testimony and to identify this witness. When the testimony of more than one witness is to be presented in this manner, the court may elect to provide a more generic description of these witnesses in order to avoid repetition and the need to submit several similar written instructions to the jury. In such case, this instruction can be given before trial or before the first such witness is presented. When reading this instruction during trial, the court should use the parenthetical phrase "is now going to be." The written instruction submitted to the jury before deliberations should use the term "was."

Comment

This instruction replaces former IPI 2.11.

Informing the jury that evidence depositions are to receive no greater or lesser consideration than live testimony has been approved. *Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 545; 71 N.E. 1084, 1087 (1904); *Powell v. Myers Sherman Co.*, 309 Ill.App. 12, 22; 32 N.E.2d 663, 668 (2d Dist.1941); *Pozdro v. Dynowski*, 83 Ill.App.2d 79, 88; 226 N.E.2d 377, 381 (1st Dist.1967); *Brubaker v. Gould*, 34 Ill.App.2d 421, 443; 180 N.E.2d 873, 882-883 (1st Dist.1962).

Under certain circumstances, the former testimony of a witness who is now unavailable may be admitted. *George v. Moorhead*, 399 Ill. 497, 500; 78 N.E.2d 216, 218 (1948).

2.02 Evidence Admitted For a Limited Purpose

The [following] [preceding] evidence concerning [(describe evidence)] is to be considered by you [solely as it relates to [(limited subject matter)]] [only as to [(name the party or parties)]]. It should not be considered [for any other purpose] [as to any other party].

Notes on Use

This instruction formerly appeared as IPI 1.01[7]. The only difference is that it is designed for use contemporaneously with admission of the evidence to which it is applicable. The Committee realizes that limiting instructions are routinely given at the time the evidence is elicited and that this practice is encouraged by the Supreme Court. *See People v. Anderson*, 113 Ill.2d 1, 5; 495 N.E.2d 485, 486; 99 Ill.Dec. 104, 105 (1986). One court has indicated that the preferred practice is to repeat the instruction after closing argument. *Atwood v. CTA*, 253 Ill.App.3d 1, 14; 624 N.E.2d 1180, 1189; 191 Ill.Dec. 802, 811 (1st Dist.1993). If repeated, the instruction should be given in the form found in IPI 3.07.

Comment

Examples of evidence admitted for a limited purpose are found in *Eizerman v. Behn*, 9 Ill.App.2d 263, 279-280; 132 N.E.2d 788, 795-796 (1st Dist.1956) (use for impeachment but not as substantive evidence); *Dallas v. Granite City Steel Company*, 64 Ill.App.2d 409, 423-424; 211 N.E.2d 907, 913-914 (5th Dist.1965) (limited use of post-incident clean-up); and *Atwood v. CTA*, 253 Ill.App.3d 1, 624 N.E.2d 1180, 1185; 191 Ill.Dec. 802, 807 (1st Dist.1993) (driving record introduced only to show negligent entrustment by owner). Examples of evidence admitted only against one party are found in *Clark v. A. Bazzoni & Co.*, 7 Ill.App.2d 334, 338; 129 N.E.2d 435, 437 (1st Dist.1955); *Chapman v. Checker Taxi*, 43 Ill.App.3d 699, 713, 357 N.E.2d 111, 121, 2 Ill.Dec. 134, 144 (1st Dist.1976); *Fedt v. Oak Lawn Lodge*, 132 Ill.App.3d 1061, 1070-1071, 478 N.E.2d 469, 477-478, 88 Ill.Dec. 154, 162-163 (1st Dist.1985).

2.03 Dismissal of Party or Directed Verdict In Favor of a Defendant

[(Name of dismissed party)] is no longer a party to this case. [You should not speculate as to the reason nor may the remaining parties comment on why [(name of dismissed party)] is no longer a party.]

Notes on Use

The second sentence should be given unless the court determines that it is proper for the remaining parties to comment on the dismissal. The court should make a threshold determination as to whether a settlement agreement has the potential to bias a witness' testimony. *Garcez v. Michel*, 282 Ill.App.3d 346, 350; 668 N.E.2d 194, 197; 218 Ill.Dec. 31, 34 (1st Dist.1996). In many situations this danger can exist. *See Batteast v. Wyeth Laboratories*, 137 Ill.2d 175, 184-185; 560 N.E.2d 315, 319; 148 Ill.Dec. 13, 17 (1990) (court should allow evidence of settlement agreement which requires that the dismissed party testify in a certain manner); *Lam v. Lynch Machinery Division*, 178 Ill.App.3d 229, 230; 533 N.E.2d 37, 41; 127 Ill.Dec. 419, 423 (1st Dist.1988) (third-party defendant's settlement agreement with defendant/third-party plaintiff to pay 70% of plaintiff's verdict against defendant/third-party plaintiff is admissible to show bias against plaintiff); *Reese v. Chicago, Burlington and Quincy R.R. Co*., 55 Ill.2d 356, 363-364; 303 N.E.2d 382, 387 (1973) (evidence of loan-receipt agreement admissible if bias of witness in outcome of case is not otherwise apparent). *But see In re Guardianship of Babb*, 162 Ill.2d 153, 171; 642 N.E.2d 1195, 1204; 205 Ill.Dec. 78, 87 (1994) (loan-receipt agreements were held to violate the policies of the Contribution Act so as to preclude a finding that they may be considered a "good faith" settlement).

Comment

The Committee realizes that courts routinely comment on dismissals during trial and this instruction is intended to provide some uniformity to that practice. Dismissals may be due to settlement, directed verdict, voluntary dismissal, etc. The importance of informing the jury of directed findings was underscored in *Wille v. Navistar*, 222 Ill.App.3d 833, 839; 584 N.E.2d 425, 429; 165 Ill.Dec. 246, 250 (1st Dist.1991).

2.04 Limiting Instruction--Expert Testifies To Matters Not Admitted In Evidence

I am allowing the witness to testify in part to [books] [records] [articles] [statements] that have not been admitted in evidence. This testimony is allowed for a limited purpose. It is allowed so that the witness may tell you what he/she relied on to form his/her opinion[s]. The material being referred to is not evidence in this case and may not be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, you will give the opinions testified to by this witness.

Notes on Use

This instruction should be given when the facts or data underlying an expert's opinion have been revealed to the jury but are not admissible in evidence.

Comment

Under *Wilson v. Clark*, 84 Ill.2d 186, 192-194; 417 N.E.2d 1322, 1326; 49 Ill.Dec. 308, 312 (1981), an expert may base opinions on facts or data which are not admissible in evidence. The facts or data underlying an expert's opinion may be revealed to a jury in order to explain the basis of the expert's opinion. When facts or data which are not admissible in evidence are used to explain the basis of an expert's opinion, it is appropriate to give this instruction to advise the jury that the facts or data should be considered only to evaluate the basis of the expert's opinion and not as evidence in the case. *People v. Anderson*, 113 Ill.2d 1, 12; 495 N.E.2d 485, 490; 99 Ill.Dec. 104, 109 (1986). When an expert's opinion is based, in part, on facts or data which have been admitted into evidence, the instruction applies only to the facts or data which have not been admitted in evidence. *Lecroy v. Miller*, 272 Ill.App.3d 925, 934; 651 N.E.2d 617, 623; 209 Ill.Dec. 439, 445 (1st Dist.1995).

3.00

GENERAL INSTRUCTIONS

3.01 Rulings and Remarks of The Court

[WITHDRAWN]

IPI 3.01 is withdrawn. Use the current version of IPI 1.01 for general cautionary instructions.

Instruction withdrawn May 2010.

3.02 Witness Who Has Been Interviewed By Attorney

An attorney is allowed, if the witness agrees, to talk to a witness to learn what testimony will be given. Such an interview, by itself, does not affect the credibility of the witness.

Notes on Use

This instruction may only be given where the evidence shows, or the jury observed, that a witness or party has been interviewed by an attorney. This instruction replaces what was IPI 2.06. If appropriate, this instruction may be given during trial.

Comment

The purpose of this instruction is to attempt to offset the "ancient trick" in which a cross-examiner "questions a witness as to his interview with opposing counsel, often stated in a way to imply to the witness and jurors that this is an impropriety." *Dorf v. Egyptian Freightways*, Inc., 39 Ill.App.2d 2, 4; 188 N.E.2d 103, 104 (4th Dist.1962) (instruction properly refused because interviewing attorney misrepresented his client's identity). *Accord Petrillo v. Syntex Laboratories*, 148 Ill.App.3d 581, 602; 499 N.E.2d 952, 966; 102 Ill.Dec. 172, 186 (1st Dist.1986), *leave to appeal denied*, 113 Ill.2d 584, 505 N.E.2d 361, 106 Ill.Dec. 55 (1987), *cert. denied*, 483 U.S. 1007, 107 S.Ct. 3232, 97 L.Ed.2d 738 (1987); *People v. Simmons*, 138 Ill.App.3d 492, 496-498; 485 N.E.2d 1135, 1140; 92 Ill.Dec. 892, 897 (5th Dist.1985). This instruction also informs the jury that a witness has a right not to speak with an attorney.

A defense attorney in a personal injury case cannot interview the plaintiff's treating physician *ex parte.* Defense counsel can communicate with such a witness only through formal discovery. *Petrillo v. Syntex Laboratories*, Inc., 148 Ill.App.3d 581, 587; 499 N.E.2d 952, 956; 102 Ill.Dec. 172, 176 *Best v. Taylor Machine Works*, 179 Ill.2d 367, 433-459; 689 N.E.2d 1057, 1089-1101; 228 Ill.Dec. 636, 668-680 (1997); *Kunkel v. Walton*, 179 Ill.2d 519, 525-528; 689 N.E.2d 1047, 1049-1052; 228 Ill.Dec. 626, 628-631 (1997). However, it has been held error to add language to this instruction that a defense attorney cannot interview the plaintiff's treating physician or nurses. *Netto v. Goldenberg*, 266 Ill.App.3d 174, 184; 640 N.E.2d 948, 956; 203 Ill.Dec. 798, 806 (2d Dist.1994), overruled on other grounds, *Holton v. Memorial Hospital*, 176 Ill.2d 95, 117; 679 N.E.2d 1202, 1212; 223 Ill.Dec. 429, 439 (1997).

3.03 Insurance/Benefits

Whether a party is insured or not insured has no bearing on any issue that you must decide. You must refrain from any inference, speculation, or discussion about insurance.

If you find for the plaintiff, you shall not speculate about or consider any possible sources of benefits the plaintiff may have received or might receive. After you have returned your verdict, the court will make whatever adjustments are necessary in this regard.

Instruction, Notes and Comment revised October 2007.

Notes on Use

The Committee believes that this instruction should be given in all cases where insurance could play a role in the decision of the jury. With the wide prevalence of liability insurance, medical insurance or government benefits such as Medicaid or Medicare, many jurors question the role of insurance in contested accident, medical negligence or other cases. This phenomenon has been demonstrated by the Arizona Jury Project, and is well-known to judges and practitioners on an anecdotal basis. *See* Diamond et al., "Jury Ruminations on Forbidden Topics," 87 Va. L. Rev. 1857 (2001).

The failure to give the former 30.22 was held to be reversible error in *Baraniak v. Kurby*, 371 Ill.App.3d 310 (1st Dist. 2007).

Comment

This instruction combines the former 3.03 and 30.22. In a case where there is no mention of insurance throughout the trial, the giving of 3.03 was held not to be an abuse of discretion as the instruction accurately reflects Illinois law. See *Auten v. Franklin*, 404 Ill.App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010).

Comment revised December 2011.

3.04 Circumstantial Evidence

A fact or a group of facts, may, based on logic and common sense, lead you to a conclusion as to other facts. This is known as circumstantial evidence. A fact may be proved by circumstantial evidence. [For example, if you are in a building and a person enters who is wet and is holding an umbrella, you might conclude that it was raining outside.] Circumstantial evidence is entitled to the same consideration as any other type of evidence.

Instruction revised September 2009.

Notes on Use

Where any of the evidence in a case is circumstantial, a party is entitled to an instruction that a fact may be proved by circumstantial evidence. *Kane v. Northwest Special Recreation Association*, 155 Ill.App.3d 624, 508 N.E.2d 257, 108 Ill.Dec. 96 (1st Dist.1987). If there is only direct evidence in a case, this instruction should not be given. *Kaufman v. Firestone Tire & Rubber Co.*, 3 Ill.App.3d 628, 279 N.E.2d 498 (1st Dist.1972). *Whitehurst v. Bauer*, 45 Ill.App.3d 462, 359 N.E.2d 1176, 4 Ill.Dec. 224 (4th Dist.1977).

If there is circumstantial evidence in a case, this instruction may be given even though there is also direct eyewitness testimony. *Oudshoorn v. Warsaw Trucking Co.*, 38 Ill.App.3d 920, 349 N.E.2d 648 (1st Dist.1976). A party is entitled to instructions on his theory of the case, including the relevance of circumstantial evidence. *Babcock v. Chesapeake and Ohio Railway Company*, 83 Ill.App.3d 919, 404 N.E.2d 265, 38 Ill.Dec. 841 (1st Dist.1979).

Comment

"Circumstantial evidence is the proof of certain facts and circumstances from which the fact finder may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *Eskridge v. Farmers New World Life Insurance Co.*, 250 Ill.App.3d 603, 621 N.E.2d 164, 169; 190 Ill.Dec. 295, 300 (1st Dist.1993). Circumstantial evidence need not exclude all other possible inferences, but it must justify an inference of probability, not mere possibility. *McCullough v. Gallaher & Speck*, 254 Ill.App.3d 941, 627 N.E.2d 202, 208; 194 Ill.Dec. 86, 92 (1st Dist.1993).

3.05 Impeachment by Proof of Conviction of Crime

The credibility of a witness may be attacked by introducing evidence that the witness has been convicted of a crime. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

Comment

Proof of conviction for purposes of impeachment is no longer limited to proof of infamous crimes. In *People v. Montgomery*, 47 Ill.2d 510, 516, 268 N.E.2d 695, 698 (1971), the Illinois Supreme Court held that the provisions of the 1971 draft of Federal Rule of Evidence 609 (51 F.R.D. 315, 393 (1971)) would henceforth be the test for determining the admissibility of prior convictions used for impeachment.

After *Montgomery*, such crimes include those punishable by imprisonment for a term in excess of one year (felonies) and crimes involving dishonesty or false statement. Thus, impeachment is now proper with misdemeanors, such as theft, that have as their basis lying, cheating, deceiving, or stealing. *People v. Spates*, 77 Ill.2d 193, 201; 395 N.E.2d 563, 567-568; 32 Ill.Dec. 333, 337-338 (1979); *People v. McKibbins*, 96 Ill.2d 176, 187; 449 N.E.2d 821, 826; 70 Ill.Dec. 474, 479 (1983); *People v. Malone*, 78 Ill.2d 34, 38; 397 N.E.2d 1377, 1379; 34 Ill.Dec. 311, 313 (1979); *People v. Dalton*, 91 Ill.2d 22, 31-32; 434 N.E.2d 1127, 1132; 61 Ill.Dec. 530, 535 (1982); *People v. Poliquin*, 97 Ill.App.3d 122, 135; 421 N.E.2d 1362, 1372; 52 Ill.Dec. 290, 300 (1st Dist.1981); *People v. Elliot*, 274 Ill.App.3d 901, 909; 654 N.E.2d 636, 642; 211 Ill.Dec. 174, 182 (1st Dist.1995).

Montgomery limits the time which a conviction can be used for impeachment to a period within 10 years of the date of the conviction or the release from confinement, whichever is later. However, in each case, the judge must exercise his discretion as to whether or not to allow the impeachment by weighing the probative value of the evidence of the crime against the danger of unfair prejudice. *People v. Ramey*, 70 Ill.App.3d 327, 332; 388 N.E.2d 196, 199; 26 Ill.Dec. 572, 575 (1979); *People v. Tribett*, 98 Ill.App.3d 663, 675; 424 N.E.2d 688, 697; 53 Ill.Dec. 897, 906 (1st Dist.1981); *People v. Jones*, 155 Ill.App.3d 641, 647; 508 N.E.2d 357, 361; 108 Ill.Dec. 196, 200 (1st Dist.1987).

Impeachment by use of prior criminal convictions is proper in civil as well as criminal cases. *Knowles v. Panopoulos*, 66 Ill.2d 585, 589; 363 N.E.2d 805, 808; 6 Ill.Dec. 858, 861 (1977); *People v. Stover*, 89 Ill.2d 189, 194-195; 432 N.E.2d 262, 265; 59 Ill.Dec. 678, 681 (1982); *Taylor v. Village Commons Plaza, Inc.*, 164 Ill.App.3d 460, 464-465; 517 N.E.2d 1164, 1167; 115 Ill.Dec. 478, 481 (2d Dist.1987) (burglary and misdemeanor retail theft convictions properly used); *Ryan v. Mobil Oil Corp.*, 157 Ill.App.3d 1069, 1082; 510 N.E.2d 1162, 1170-1171; 110 Ill.Dec. 131, 139-140 (1st Dist.1987) (discretion properly exercised to exclude 9-year-old drug conviction).

A good review of the law concerning this subject is found in *People v. Kellas*, 72 Ill.App.3d 445, 449-452; 389 N.E.2d 1382, 1386-1389, 28 Ill.Dec. 9, 13-16 (1st Dist.1979); *People v. Stover*, 89 Ill.2d 189, 199-201; 432 N.E.2d 262, 268-269; 59 Ill.Dec. 678, 682-683 (1982); *People v. Williams*, 161 Ill.2d 1, 39, 45; 641 N.E.2d 296, 312; 204 Ill.Dec. 72 (1994); People v. Kunze, 193 Ill.App.3d 708, 728; 550 N.E.2d 284, 297; 140 Ill.Dec. 648, 661 (4th Dist.1990); *Housh v. Bowers*, 271 Ill.App.3d 1004, 1006-1007; 649 N.E.2d 505, 506-507; 208 Ill.Dec. 449, 450-451 (3d Dist.1995).

3.06 Directed Finding

The court has determined that [(name)] is [negligent] [liable] [other finding]. This is not an issue you will need to decide. [The remaining parties are not to be prejudiced by this finding.]

Notes on Use

The importance of informing the jury of directed findings was underscored in *Wille v. Navistar*, 222 Ill.App.3d 833, 839; 584 N.E.2d 425, 429; 165 Ill.Dec. 246, 250 (1st Dist.1991). If the finding in favor of the plaintiff is against one but not all defendants, it would be proper to use the second sentence and inform the jury that the court's finding should not affect those other defendants. *Wanner v. Keenan*, 22 Ill.App.3d 930, 936-937; 317 N.E.2d 114, 119-120 (2d Dist.1994).

3.07 General Limiting Instruction

Evidence that was [received for a limited purpose] [or] [limited to (one party) (some parties)] should not be considered for [any other purpose] [or] [as to any other (party) (parties)].

Notes on Use

The instruction in this form was formerly found at IPI 1.01[7]. It is meant for use at the end of closing arguments. See Notes on Use and Comments to IPI 2.02.

3.08 Opinion Testimony

You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way you judge the testimony from any other witness. The fact that such person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness's qualifications, and all of the other evidence in the case.

Instruction created October 2007. Notes revised April 2008.

Notes on Use

This instruction should be given in any case in which opinion testimony is admitted. In a professional negligence case, IPI 105.01 *(see* version adopted September 2011 as contained on the Illinois Supreme Court website) or 105.03.01 (2006) should also be given. See *Auten v. Franklin*, 404 Ill.App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010). The instruction mirrors the language of the 7th Circuit Approved Instruction 1.21.

Notes on Use revised December 2011.

4.00

INSTRUCTIONS RECOMMENDED NOT TO BE GIVEN

4.01 Flight From Accident As Evidence of Negligence

The committee recommends that no instruction on "flight from accident as evidence of negligence" be given.

Comment

The committee recommends that no instruction be given on the subject of flight from the scene of an accident. As in the case of admissions, this is peculiarly a subject of argument for the jury. Moreover, an instruction of this type would unduly single out particular evidence.

4.02 Witness Need Not Be Believed

The committee recommends that no instruction that the "witness need not be believed" be given.

Comment

This instruction was formerly IPI 2.02.

It has been common to instruct juries that "they are not bound to believe anything to be a fact simply because a witness has stated it to be so provided that they believe the witness is mistaken or has testified falsely."

Instructions informing a jury that certain witnesses need not be believed have been held harmless error by Illinois courts. *Village of Des Plaines v. Winkelman*, 270 Ill. 149, 110 N.E. 417 (1915); *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 95 N.E. 990 (1911); *Aldridge v. Morris*, 337 Ill.App. 369, 374; 86 N.E.2d 143, 145-146 (2d Dist.1949).

It is recommended that no instruction of this type be given. Determination of credibility of witnesses is solely within the province of the jury and it is superfluous to inform them that certain witnesses need not be believed. The standards for assessing credibility of witnesses are adequately set forth in IPI 1.01 [4]. In *Hackett v. Ashley*, 71 Ill.App.3d 179, 389 N.E.2d 246, 27 Ill.Dec. 434 (3d Dist.1979), the court noted that the IPI committee recommendation is persuasive.

4.03 Inherently Improbable Testimony

The committee recommends that no "inherently improbable testimony" instruction be given.

Comment

This instruction was formerly IPI 2.03.

It has been the practice of some trial attorneys to offer an instruction to the effect that the jury need not believe "inherently improbable testimony." This type of charge is somewhat argumentative and is quite unnecessary because the same proposition is necessarily implied in IPI 1.01[3] which tells the jurors that they are the triers of fact and that they have a right to consider the evidence in the light of their own observations and experiences.

The subject of improbable testimony can be most adequately covered by counsel in argument and should not be the subject of a charge to the jury.

4.04 Witness Willfully False

The committee recommends that no instruction on the willfully false witness be given.

Comment

This instruction was formerly IPI 2.04.

Instructions have been given which inform the jurors that the testimony of a witness who has knowingly and willfully sworn falsely on a material issue may be disregarded unless it has been corroborated by other credible evidence. Some courts have required that the witness' testimony be accompanied by an appropriate instruction defining matter material to the issue. *McManaman v. Johns-Manville Prods. Corp.*, 400 Ill. 423, 81 N.E.2d 137 (1948); *Schneiderman v. Interstate Transit Lines*, 401 Ill. 172, 81 N.E.2d 861 (1948); *McQuillen v. Evans*, 353 Ill. 239, 187 N.E. 320 (1933).

It is recommended that an instruction of this type not be given. The instruction is argumentative, invades the province of the jury, and suggests the court's belief that a witness has sworn falsely. It emphasizes the issue of false testimony, which is a matter solely within the province of the jury. Again, determination of a witness' credibility is the subject of standards outlined in IPI 1.01[4] on credibility of witnesses.

The matter of testimony which is knowingly or willfully false is not to be confused with impeachment by prior inconsistent or contradictory statements, which is adequately covered by IPI 1.01[4].

4.05 Party Competent As a Witness

The committee recommends that no instruction on the "party competent as a witness" be given.

Comment

This instruction was formerly IPI 2.05.

Instructions that the jury should consider the interest of a particular litigant in the outcome of the lawsuit in determining his credibility as a witness have been given.

It is error to single out the interest of a party when there are individuals on both sides of the case. *Hartshorn v. Hartshorn*, 179 Ill.App. 421, 423-425 (2d Dist.1913) (two individuals); *Engstrom v. Olson*, 248 Ill.App. 480, 487 (2d Dist.1928) (two individuals); *Gaffner v. Meier*, 336 Ill.App. 44, 48-49; 82 N.E.2d 818, 820 (4th Dist.1948) (individual and partnership); *Doellefield v. Travelers Ins. Co.*, 303 Ill.App. 123, 125-126; 24 N.E.2d 904, 904-906 (2d Dist.1940) (individual plaintiff, corporate and individual defendants). The court may properly refuse such an instruction. *Purgett v. Weinrank*, 219 Ill.App. 28, 32-33 (2d Dist.1920). However, the improper use of such an instruction may not be reversible error if the prevailing party's case is supported by the clear preponderance of the evidence. *Wicks v. Wheeler*, 157 Ill.App. 578, 582 (2d Dist.1910) (two individuals).

On the other hand, a defendant corporation may single out the plaintiff's interest. *Chicago & E.I.R. Co. v. Burridge*, 211 Ill. 9, 13-15; 71 N.E. 838, 839-840 (1904) (individual plaintiff, railroad defendant; error to refuse defendant's instruction as to plaintiff's interest in the outcome of the suit); *West Chicago Street Ry. Co. v. Dougherty*, 170 Ill. 379, 382; 48 N.E. 1000, 1001 (1897) (same). The court may modify such an instruction by appending a clause that this same test applies to all witnesses. *Dickerson v. Henrietta Coal Co.*, 158 Ill.App. 454, 457-558 (4th Dist.1910), *aff'd*, 251 Ill. 292, 96 N.E. 225 (1911), which relies on *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 470; 77 N.E. 902, 905 (1906) (not squarely in point). If it is used, the plaintiff may use a counter-balancing instruction. *Bower v. Chicago Consol. Traction Co*., 156 Ill.App. 452, 456 (1st Dist.1910); *Ellguth v. Blackstone Hotel*, 340 Ill.App. 587, 596; 92 N.E.2d 502, 506 (1st Dist.1950), *aff'd*, 408 Ill. 343, 97 N.E.2d 290 (1951).

It is recommended that no separate instruction be given on the subject of the credibility of a party, even when tendered by a corporate party. IPI 1.01[4], which adequately covers the interest of party witness, should be given. The varying emphases to be placed upon any particular witness' testimony are best explained by argument of counsel.

4.06 One Witness Against a Number

The committee recommends that no "one witness against a number" instruction be given.

Comment

This instruction was formerly IPI 2.08.

Juries have sometimes been told that preponderance is not determined simply by the number of witnesses and that the testimony of one credible witness may be entitled to more weight than the testimony of many others who may be less credible. Instructions of this type are often tendered by the party having a lesser number of witnesses.

The Illinois Supreme Court has held that it is for the jury to determine to what extent each witness is credible, and that it is error to give an instruction on that subject which is worded in such a way that, under the circumstances of the case, the jury might readily infer the court believed the witnesses for one side to be more credible than the witnesses for the other side. *Walsh v. Chicago Rys. Co.*, 294 Ill. 586, 595; 128 N.E. 647, 650 (1920).

It is recommended that an instruction covering this subject matter not be given, because it tends to emphasize, minimize, or single out the testimony of certain witnesses.

See *Walsh v. Chicago Rys. Co.*, 294 Ill. 586, 595; 128 N.E. 647, 650 (1920); *Lyons v. Joseph T. Ryerson & Son*, 242 Ill. 409, 90 N.E. 288 (1909); *Tri-City Ry. Co. v. Gould*, 217 Ill. 317, 75 N.E. 493 (1905); *Johnson v. Farrell*, 215 Ill. 542, 74 N.E. 760 (1905); *Keller v. Hansen*, 14 Ill.App. 640 (1st Dist.1884).

4.07 Credibility of Special Categories of Witnesses and Weight of Evidence

The committee recommends that no instructions on the credibility of special categories of witnesses be given.

Comment

This instruction was formerly IPI 2.09.

Although instructions of this type have been approved, the committee recommends that no instruction be given as to credibility of special categories of witnesses, such as employees, experts, and lawyers. See the Comment at 4.08 *infra*, as to expert witnesses. These seem to be simply matters of fact for the jury and do not involve legal rules. Unless we are to allow the judge to comment in detail on each witness, it seems wiser to leave these matters to be argued to the jury by counsel.

The court in *Department of Pub. Works & Bldgs. v. Tinsley*, 120 Ill.App.2d 95, 256 N.E.2d 124 (5th Dist.1970), stated that due to the IPI committee's recommendation that an instruction on this subject should not be given a tendered instruction on this subject was properly refused.

In *Stach v. Sears, Roebuck & Co.*, 102 Ill.App.3d 397, 429 N.E.2d 1242, 57 Ill.Dec. 879 (1st Dist.1981), the court cited with approval the committee's comments to this instruction in holding that the trial court properly refused to give an instruction to the effect that the testimony of an attorney on behalf of his own client is to be given little weight. In affirming the committee's position that instructions such as former IPI 2.09 should not be given, it stated that "unless we are to allow the judge to comment in detail on each witness, it seems wiser to leave these matters to be argued to the jury by counsel."

4.08 Weighing Expert Testimony

The committee recommends that no instruction on "weighing expert testimony" be given.

Comment

This instruction was formerly IPI 2.10.

Expert testimony is commonplace in modern jury trials. There is no good reason why the weight of expert testimony should be subject to criteria different from that for other witnesses. Accordingly, the committee recommends that no special instructions on the subject be given. *Neville v. Chicago*, 191 Ill.App. 372 (1st Dist.1915). IPI 1.01[4] is a sufficient guide to the jury in this respect. This is a subject which is peculiarly within the province of argument of counsel. Malpractice cases are an exception to this principle. In malpractice cases jurors must accept the standard supplied by expert witnesses. See IPI 105.01.

4.09 Hospital and Business Records

The committee recommends that no instruction be given concerning hospital and business records.

Comment

This instruction was formerly IPI 2.12.

The committee recommends that no instruction be given on this subject, because it singles out a portion of the evidence for improper emphasis.

4.10 Impeachment By Proof of Bad Reputation For Truth and Veracity

The committee recommends that no instruction on "impeachment by proof of bad reputation for truth and veracity" be given.

Comment

This instruction was formerly IPI 3.03.

Although a witness may be impeached by proof of his bad reputation for truth and veracity, *Frye v. President, etc., of Bank of Ill.*, 11 Ill. 367, 378-79 (1849), an instruction on the subject would result in undue emphasis upon this essentially collateral issue and, therefore, should not be given. The matter can best be treated by argument of counsel.

4.11 Standard of Conduct for Child--Violation of Statute or Ordinance

[Withdrawn]

Comment

Former IPI 10.06 is now the last paragraph of IPI 10.05.

4.12 Care Required For Safety of Child

The Committee recommends that no instruction on the care required for the safety of a child be given.

Comment

The law recognizes the lack of judgment, caution, and discretion of children and requires that an adult reasonably guard against these tendencies. *Johnson v. City of St. Charles*, 200 Ill.App. 184 (2d Dist.1916). The law requires that an adult use ordinary care to ascertain a child's evident purpose, for example, that a three-year old probably intends to cross a streetcar track if he approaches it. *Liska v. Chicago Rys. Co.*, 318 Ill. 570, 580; 149 N.E. 469, 474 (1925). However, to state, as some instructions do, that one must anticipate the ordinary behavior of children and exercise greater care for their protection and safety appears to be an argument about what constitutes ordinary care under the circumstances rather than a rule of law. Therefore, the Committee recommends that this type of instruction not be given.

4.13 Duty of One In Imminent Peril and Responsibility of The Person Causing the Perilous Situation

The Committee recommends that no instruction either on the duty of one in imminent peril or the responsibility of the person causing the perilous situation be given.

Comment

An instruction which states that the law does not require a person to act with deliberation and care in the face of an unexpected danger not caused by his own negligence should not be given for three reasons. First, it is argumentative. Second, it states a simple and obvious fact about human behavior. Third, except in the most obvious case when no juror would need to be reminded of the proposition, it will probably lead to reversible error. For example, the court has held in *Moore v. Daydif*, 7 Ill.App.2d 534, 536-37, 130 N.E.2d 119, 121 (2d Dist.1955), that a sudden emergency instruction was erroneous when the lead car swerved off to the right to avoid a pedestrian whom defendant, in a following car, then saw and hit with his right fender. *See also*: *Reese v. Buhle*, 16 Ill.App.2d 13, 20; 147 N.E.2d 431, 435 (1st Dist.1957) (error to give a sudden emergency instruction when plaintiff emerged from between two stopped trucks at crosswalk and was hit by defendant); *Minnis v. Friend*, 360 Ill. 328, 337; 196 N.E. 191, 195 (1935) (sudden appearance of a fire engine at an intersection must be anticipated; therefore, the court properly refused to give an unexpected danger instruction); *Andes v. Lauer*, 80 Ill.App.3d 411, 414; 399 N.E.2d 990, 992; 35 Ill.Dec. 701, 703 (3d Dist.1980).

A companion instruction that the person who negligently causes a sudden emergency is responsible for injury caused by reasonable attempts on the part of the imperiled person to extricate himself which caused injury should not be given. The subject is adequately covered by an ordinary instruction on proximate cause, and this type of instruction is argumentative, painfully obvious, and likely to be reversed.

See Comment to IPI 4.14 on the non-recommended "unavoidable accident" instruction.

4.14 Unavoidable Accident

The Committee recommends that no "unavoidable accident" instruction be given.

Comment

In Illinois when there is *any* evidence tending to prove that the plaintiff's injury was caused by negligence, it is reversible error to instruct on "unavoidable accident." *Wolpert v. Heidbreder*, 21 Ill.App.2d 486, 158 N.E.2d 421 (3d Dist.1959); Annotation, *Instructions on Unavoidable Accident, Or the Like, In Motor Vehicle Cases*, 65 A.L.R.2d 12 (1959); Cook v. Hoppin, 783 F.2d 684, 693 (7th Cir.1986).

The legal definition of "accident" was stated in *Cornwell v. Bloomington Business Men's Ass'n*, 163 Ill.App. 461 (3d Dist.1911), which held that it was improper to give this instruction in an action to recover for burns sustained when the plaintiff, while attending a Fourth of July fireworks demonstration, was struck by a misfired skyrocket. The issues were whether the plaintiff assumed the risk by attending the exhibition, whether he was contributorily negligent in crossing a rope to keep spectators away from the firing area, and whether the defendant was negligent in securing the rocket to the firing rack. The court defined "accident," as follows:

> "An accident, as defined by legal authorities, for which no liability exists is one which is the result of an unknown cause or is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen and that it was not the result of any negligence."

163 Ill.App. at 467.

Laymen do not have an understanding of this technical meaning of "accident" but understand it to mean any occurrence producing injury not implying deliberate or intentional fault. Used in this sense, a jury can only be misled when informed that a defendant is not responsible for the consequences of an "accident." This is true even though "accident" is ostensibly qualified by the term "unavoidable."

In view of the very limited area of factual situations in which this instruction is proper, and the possibilities of prejudice arising from the giving of this instruction where it is not proper, the criticism contained in *Williams v. Matlin*, 328 Ill.App. 645, 649, 66 N.E.2d 719, 721 (1st Dist.1946), is pertinent. There, the court said:

> "We agree with the statement of the Third Division of this Court in *Rzeszewski v. Barth*, 324 Ill.App. 345, 356; 58 N.E.2d 269, that the giving of this instruction should be discouraged. It is only when there is evidence tending to show that the plaintiff was injured through accident alone not coupled with negligence that the giving of such instruction is permissible. *Streeter v. Humrichouse*, 357 Ill. 234, 244; 191 N.E. 684. When proper, it merely tells the jury what should be known to the man on the street. Moreover, in practically every case, as here, the jury is instructed that it should find the defendant not guilty unless the plaintiff proves by the preponderance of the evidence, among other things, that the defendant was guilty of negligence proximately and directly causing the injuries complained of."

For these reasons, the Committee recommends that no instruction be given on this subject and that the matter be left to the argument of counsel.

4.15 Evenly Balanced Evidence

The committee recommends that no "evenly balanced evidence" instruction be given.

Comment

An instruction which discusses preponderance of the evidence with the jury in terms of "if the evidence is evenly balanced, then the jury shall find for the defendant," illustrates the type of instruction this work seeks to avoid. This is the typical slanted instruction, i.e., an instruction which, while acknowledging a principle of law, seeks to minimize or maximize its effects to the advantage of one side of the litigation.

The history of this instruction is an account of the development, in this State, of the practice of giving a slanted instruction on each side of a proposition and of its final abandonment by the courts. At one time, the courts approved an instruction on behalf of the plaintiff that, if the evidence preponderated in his favor "although but slightly," he was entitled to recover. *Hancheft v. Haas*, 219 Ill. 546, 548; 76 N.E. 845, 846 (1906); *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 48; 71 N.E. 28, 31 (1904). To counteract the thrust of this statement, there was the approved "evenly balanced" instruction. *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 14; 75 N.E. 800, 801 (1905); *Koshinski v. Illinois Steel Co.,* 231 Ill. 198, 203; 83 N.E. 149, 150-151 (1907).

Eventually, the courts began to recognize that instructions of this kind are argumentative and misleading, and therefore tend to confuse the jury, who look to the court for disinterested guidance. First, the "although but slightly" instruction was condemned. *Wolczek v. Public Serv. Co*., 342 Ill. 482, 496; 174 N.E. 577, 583 (1930); *Molloy v. Chicago Rapid Transit Co*., 335 Ill. 164, 166 N.E. 530 (1929). Then *Hughes v. Medendorp*, 294 Ill.App. 424, 431; 13 N.E.2d 1015, 1018 (3d Dist.1938), applied the censure against the "slight preponderance" instruction to the "evenly balanced" instruction. *See also Goertz v. Chicago & N.W. Ry. Co*., 19 Ill.App.2d 261, 153 N.E.2d 486 (1st Dist.1958) (instruction properly refused).

While it is true the plaintiff should recover if there is the slightest preponderance of the evidence in his favor, and that he should fail to recover if there is the slightest lack of preponderance, the answer to the question which a trial judge must continually ask himself, "Will stating the law in these terms aid the jury?" is an emphatic "No!" What the Illinois Supreme Court said in *Teter v. Spooner*, 305 Ill. 198, 211, 137 N.E. 129, 135 (1922), states the case against all slanted instructions. "If there is a perceptible preponderance of the evidence it is sufficient, but it would not be proper for the court to give an instruction to the jury that a perceptible preponderance of the evidence was sufficient, any more than that a clear preponderance of the evidence was required. The effect of the adjectives is merely to confuse the jury and invite them to minimize or maximize the weight of the evidence on one side or the other. Such instructions ought not to be given."

Moreover, the history of the "evenly balanced" instruction teaches us that this type of error dies hard, as witness the defense of the "evenly balanced" instruction in *Alexander v. Sullivan*, 334 Ill.App. 42, 48; 78 N.E.2d 333, 336 (3d Dist.1948).

5.00

FAILURE TO TESTIFY OF PRODUCE EVIDENCE

INTRODUCTION

This section covers the failure of a party to produce evidence under his control, the failure of a competent party to testify, and the situations which may arise under the "Dead Man's Act" (735 ILCS 5/8-201 (1994)).

Under the circumstances enumerated in IPI 5.01, a presumption arises that the evidence a party fails to produce would be unfavorable to him. The instructions explaining the application of the "Dead Man's Act" state the general rule that a party cannot testify on his own motion when the adverse party is suing or defending in one of the enumerated capacities, and the exceptions to the rule.

5.01 Failure To Produce Evidence or A Witness

If a party to this case has failed [to offer evidence] [to produce a witness] within his power to produce, you may infer that the [evidence] [testimony of the witness] would be adverse to that party if you believe each of the following elements:

1. The [evidence] [witness] was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The [evidence] [witness] was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] [produced the witness] if he believed [it to be] [the testimony would be] favorable to him.

4. No reasonable excuse for the failure has been shown.

Notes on Use

Before giving this instruction, the trial court must first determine that in all likelihood a party would have produced the witness/document under the existing facts and circumstances except for the fact that the testimony/contents would be unfavorable. *Tuttle v. Fruehauf Corp.*, 122 Ill.App.3d 835, 843; 462 N.E.2d 645, 652; 78 Ill.Dec. 526, 533 (1st Dist.1984). Whether to give IPI 5.01 is a matter within the sound discretion of the trial court. *Roeseke v. Pryor*, 152 Ill.App.3d 771, 504 N.E.2d 927, 105 Ill.Dec. 642 (1st Dist.1987); *Anderson v. Chesapeake & Ohio Ry. Co.*, 147 Ill.App.3d 960, 498 N.E.2d 586, 594-595; 101 Ill.Dec. 262, 270-271 (1st Dist.1986). The instruction is not warranted when the unproduced witness's testimony would be merely cumulative. *Chuhak v. Chicago Transit Auth.*, 152

Ill.App.3d 480, 504 N.E.2d 875, 881; 105 Ill.Dec. 590, 596 (1st Dist.1987).

Comment

The failure of a party to produce testimony or physical evidence within his control creates a presumption that the evidence if produced would have been adverse to him. *Beery v. Bre*ed, 311 Ill.App. 469, 474-478; 36 N.E.2d 591, 593-595 (2d Dist.1941) (failure to produce grandson of defendant who drove defendant's automobile at time of occurrence justified presumption that testimony of grandson would have been unfavorable). *See also Zegarski v. Ashland Sav. & Loan Ass'n*, 4 Ill.App.2d 118, 123; 123 N.E.2d 855, 857 (1st Dist.1954). The presumption does not apply if the evidence is "equally available" to either party. *Flynn v. Cusentino*, 59 Ill.App.3d 262, 375 N.E.2d 433, 16 Ill.Dec. 560 (3d Dist.1978); *Chapman v. Foggy*, 59 Ill.App.3d 552, 375 N.E.2d 865, 16 Ill.Dec. 758 (5th Dist.1978); *Wood v. Mobil Chem. Co.*, 50 Ill.App.3d 465, 365 N.E.2d 1087, 8 Ill.Dec. 701 (5th Dist.1977). A witness is not "equally available" to a party if there is a likelihood that the witness would be biased against him, as for example a relative or an employee of the other party. *United States v. Beekman*, 155 F.2d 580, 584 (2d Cir.1946); *Biehler v. White Metal Rolling & Stamping Corp.*, 65 Ill.App.3d 1001, 382 N.E.2d 1389, 22 Ill.Dec. 634 (3d Dist.1978); *Kerns v. Lenox Mach. Co.*, 74 Ill.App.3d 194, 392 N.E.2d 688, 30 Ill.Dec. 33 (3d Dist.1979). This is an evidentiary instruction dealing with failure to produce evidence. This instruction is not intended to be an issue or burden of proof instruction dealing with spoliation. *Dardeen v. Kuehling et al.*, 213 Ill.2d 329, 821 N.E.2d 227, 290 Ill.Dec. 176 (2004).

Giving this instruction to explain this presumption has been approved. *Shiner v. Friedman*, 161 Ill.App.3d 73, 513 N.E.2d 862, 867; 112 Ill.Dec. 253, 258 (1st Dist.1987) (defendant failed to call busboys who inspected washroom floor after plaintiff slipped and fell); *Ryan v. E.A.I. Const. Corp.*, 158 Ill.App.3d 449, 511 N.E.2d 1244, 1252-1253; 110 Ill.Dec. 924, 932-933 (1st Dist.1987) (defendants failed to call employee who had been listed as their expert and twice deposed); *DeBow v. City of E. St. Louis*, 158 Ill.App.3d 27, 510 N.E.2d 895, 902; 109 Ill.Dec. 827, 834 (5th Dist.1987) (defendant failed to produce photos of plaintiff taken by defendant and jail inspection log reports); *Kane v. Northwest Special Recreation Ass'n*, 155 Ill.App.3d 624, 508 N.E.2d 257, 261-262; 108 Ill.Dec. 96, 100-101 (1st Dist.1987) (plaintiff failed to produce underpants of alleged rape victim); *Roeseke v. Pryor*, 152 Ill.App.3d 771, 504 N.E.2d 927, 932-933; 105 Ill.Dec. 642, 647-648 (1st Dist.1987) (defendant hotel failed to produce night manager's report summarizing events in question); *Santiemmo v. Days Transfer, Inc.*, 9 Ill.App.2d 487, 499; 133 N.E.2d 539, 545 (1st Dist.1956) (defendant failed to produce doctor who examined plaintiff by court order secured by the defendant); *Petersen v. General Rug & Carpet Cleaners*, 333 Ill.App. 47, 65; 77 N.E.2d 58, 67 (1st Dist.1947) (defendant failed to call driver of his truck which struck and injured plaintiff).

The adverse presumption depends on the lack of a reasonable excuse for the nonproduction, or the wilful withholding of the evidence. *Coupon Redemption, Inc. v. Ramadan*, 164 Ill.App.3d 749, 518 N.E.2d 285, 290; 115 Ill.Dec. 760, 765 (1st Dist.1987); *Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 858-859; 117 Ill.Dec. 501, 507-508 (1st Dist.1988) (reasonable excuse shown for failure to produce all of decedent's W-2 forms). One "reasonable excuse" for not producing the witness was the witness's conviction of armed robbery. *Lee v. Grand Trunk Western R. Co.*, 143 Ill.App.3d 500, 513; 492 N.E.2d 1364, 97 Ill.Dec. 491, 501 (1st Dist.1986).

The trial court is not required to permit a party to re-open his case to produce the missing witness. *Hollembaek v. Dominick's Finer Foods, Inc.*, 137 Ill.App.3d 773, 778; 484 N.E.2d 1237, 92 Ill.Dec. 382, 386 (1st Dist.1985); *Blackwell v. City Nat'l Bank & Trust Co.*, 80 Ill.App.3d 188, 399 N.E.2d 326, 330; 35 Ill.Dec. 492, 496 (2d Dist.1980) (would have been preferable to allow party to re-open or refuse instruction, but not abuse of discretion).

5.02 Failure Of Party To Testify

The [plaintiff] [defendant] in this case is [suing] [sued] as [administrator] [executor] [guardian] for a [deceased person] [incompetent person]. Since the deceased cannot be here to testify [since the incompetent person is incapable of testifying], the law does not permit the [defendant] [plaintiff] [or any person directly interested in this action] to testify in his own behalf [to any conversation with the] [deceased] [incompetent person] [or] [to any event which took place in the presence of the] [deceased] [incompetent person]. The fact that the [defendant] [plaintiff] did not testify to those matters should not be considered by you for or against him.

[In this case, however, the (plaintiff)(defendant) called (a witness)(the defendant)(the plaintiff) to testify on his behalf (to conversations with the)(deceased)(incompetent person)(or)(to an event which took place in the presence of the)(deceased)(incompetent person), and therefore the (plaintiff)(defendant)(interested person) had the right to testify as to the same (conversation)(event).]

[In this case, however, since the deposition of the (deceased)(incompetent person) was admitted in evidence on behalf of the (plaintiff)(defendant), the (plaintiff)(defendant)(interested person) had the right to testify as to the same matters admitted in evidence.]

[In this case, however, the law does not prevent the testimony concerning any fact relating to the heirship of the decedent.]

Notes on Use

The "Dead Man's Act" is applicable and this instruction should be given only when: (1) the witness is a party or an interested person; (2) the witness is called in his own behalf; and (3) an adverse party is suing or defending in one of the enumerated representative capacities.

The instruction is intended to avoid confusion in the minds of the jury by reason of the fact that a party in the case sat silent throughout the trial.

If there is a full waiver of the "Dead Man's Act," no instruction on the subject is needed. If there is a partial waiver, paragraph two will be needed. If a party, due to the invoking of the rule, was incapable of testifying at all, there is no need to use the bracketed portion of the first paragraph.

This instruction is based on the evidence act, 735 ILCS 5/8-201 (1994), as amended effective October 1, 1973. Prior to that amendment, a protected party waived the protection of the act by calling the party or interested person but not by calling a non-party witness to the event. The amendment broadened the waiver to include such witnesses, and the instruction has been modified accordingly.

This instruction combines former IPI 5.02, 5.03, 5.04, 5.05, and 5.06, some of which were unnecessary and others rendered obsolete by the 1973 statutory amendments. Use only those paragraphs or parts of paragraphs that are applicable to the facts of the case.

Comment

This instruction deals with the competency of a party as a witness and not with the admissibility of testimony or the competency of witnesses who are not parties. *Creighton v. Elgin*, 387 Ill. 592, 604; 56 N.E.2d 825, 830, 162 A.L.R. 883 (1944).

The giving of an instruction explaining the statute was approved in *Aldridge v. Morris*, 337 Ill.App. 369, 374; 86 N.E.2d 143, 145-146 (2d Dist.1949).

The disability is procedural and is waived if not asserted. *Karlos v. Pappas*, 3 Ill.App.2d 281, 121 N.E.2d 611 (2d Dist.1954)(abstract). However, where the objection is made, counsel may not comment on that fact. *Crutchfield v. Meyer*, 414 Ill. 210, 111 N.E.2d 142 (1953).

NEGLIGENCE--RISK--MISCONDUCT--PROXIMATE CAUSE

10.00
NEGLIGENCE AND ORDINARY CARE

INTRODUCTION

This introduction is divided into three parts. The first part applies to cases based on causes of action accruing prior to November 25, 1986, the date P.A. 84-1431 became effective. This legislation modified the doctrine of comparative negligence and changed other aspects of negligence cases. The second part concerns the effect of P.A. 84-1431. The third part concerns willful and wanton conduct.

1. **Actions Accruing Prior to November 25, 1986**

Until June 1981, common law claims for damages based upon a negligence theory included the traditional elements, issues, and burden of proof. In *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the Illinois Supreme Court made a major change in these issues and burdens. The Court abolished contributory negligence as a bar to the plaintiff's right to recover in negligence cases and substituted comparative negligence in its place. A reading of that opinion is a necessary introduction to Illinois negligence instructions.

The Court adopted the "pure form" of comparative negligence as the law in Illinois. Any contributory negligence chargeable to a plaintiff diminishes proportionately the amount awarded as compensatory damages, but no longer entirely bars recovery. The plaintiff is entitled to recover his total damages reduced by the percentage of negligence attributable to him.

The Court left many aspects of the law of negligence actions unresolved in Alvis. No direction was given concerning the requirements for pleading and burden of proof on comparative negligence issues. This vacuum was filled by the legislature in an amendment to §2-613(d) of the Illinois Civil Practice Law (735 ILCS 5/2-613(d)). This amendment (H.B. 381), which became law on September 15, 1985, places on the defendant the burden of pleading the facts constituting the plaintiff's contributory negligence. The Court has ruled that defendant has the burden of proof on this issue. *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986).

The *Alvis* opinion made no statement concerning its effect on joint and several liability, the defense of assumption of risk, willful and wanton conduct, punitive damages, set off, and the like, leaving "the resolution of other collateral issues to future cases." 85 Ill.2d at 28, 421 N.E.2d at 898, 52 Ill.Dec. at 34. The *Alvis* opinion was also silent concerning any extension of the doctrine of comparative fault beyond common law negligence actions.

Since *Alvis*, the Illinois Supreme Court has found comparative fault applicable to strict products liability cases (*Coney v. J.L.G. Indus., Inc.*, 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983); *Simpson v. General Motors Corp.*, 108 Ill.2d 146, 483 N.E.2d 1, 90 Ill.Dec. 854 (1985)), but inapplicable under the *Structural Work Act. Simmons v. Union Elec. Co.*, 104 Ill.2d 444, 473 N.E.2d 946, 85 Ill.Dec. 347 (1984); *Prewein v. Caterpillar Tractor Co.*, 108 Ill.2d 141, 483 N.E.2d 224, 90 Ill.Dec. 906 (1985).

In *Coney*, the Court held that the principles of comparative fault are applicable to strict products liability cases on the issue of diminution of the plaintiff's damages. The Court said:

> Once defendant's liability is established, and where both the defective product and the plaintiff's misconduct contribute to cause the damages, the comparative fault principle will operate to reduce plaintiff's recovery by that amount which the trier of fact finds him at fault.

97 Ill.2d at 119, 454 N.E.2d at 204, 73 Ill.Dec. at 344. However, the type of misconduct by the plaintiff that will be compared in strict liability cases is narrower in scope than the traditional concept of contributory negligence:

> [T]he defenses of misuse and assumption of the risk will no longer bar recovery. Instead, such misconduct will be compared in the apportionment of damages . . . . We believe that a consumer's unobservant, inattentive, ignorant or awkward failure to discover or guard against a defect should not be compared as a damage-reducing factor.

Id. Coney was reaffirmed in *Simpson v. General Motors Corp.*, 108 Ill.2d 146, 483 N.E.2d 1, 90 Ill.Dec. 854 (1985).

Coney also reaffirmed the doctrine of joint and several liability. See also *Doyle v. Rhodes*, 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984) (joint and several liability applicable even where liability of one defendant is grounded upon special duties imposed by a safety statute).

Duffy v. Midlothian Country Club, 135 Ill.App.3d 429, 481 N.E.2d 1037, 90 Ill.Dec. 237 (1st Dist.1985), held that assumption of the risk, where applicable, is a damage reducing factor in a negligence case.

2. **Actions Accruing On and After November 25, 1986**

P.A. 84-1431 (and particularly 735 ILCS 5/2-1107.1 and 5/2-1116 through 2-1118), effective as to all causes of action accruing on and after November 25, 1986, abolished pure comparative fault. In its place, more than 50% contributory fault of the plaintiff requires a finding that the defendant is not liable and bars the plaintiff from recovering damages. Comparative fault of 50% or less results in a diminution of damages in proportion to the amount of fault attributable to the plaintiff.

With respect to joint and several liability, 735 ILCS 5/2-1117 provides for several liability for damages (other than "medical and medically related expenses") for "any defendant whose fault . . . 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 . . . ." For any defendant whose fault is 25% or greater, joint and several liability for all damages remains. This provision does not apply to certain pollution actions or medical malpractice actions. 735 ILCS 5/2-1118.

To enable users to identify instructions applicable only to causes of action accruing on and after November 25, 1986, these instructions are numbered beginning with the letter "B."

3. **Willful and Wanton Conduct**

Burke v. 12 Rothschild's Liquor Mart, 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992), held that a plaintiff's negligence cannot be compared to a defendant's willful and wanton conduct to reduce the amount of damages recoverable by the plaintiff. However, *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994), a contribution case, stated that the *Burke* court's analysis was limited to cases where the defendant's wrongful conduct was intentional.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), was a personal injury case where the plaintiff was shot by an on-duty city police officer. Plaintiff claimed, and the jury found, that the officer acted willfully and wantonly. Although the jury found the plaintiff contributorily negligent, plaintiff argued that damages based on willful and wanton conduct could not be reduced by mere contributory negligence. The trial court agreed and entered judgment for the full amount of plaintiff's damages without reduction. The appellate court affirmed, but the Supreme Court reversed and remanded for a new trial, holding that because it was unclear whether the defendant's willful and wanton conduct was committed "intentionally" or "recklessly," the trial court erred in reinstating the verdict.

Poole adopted the *Ziarko* plurality's analysis, holding that a plaintiff's contributory negligence will *not* be a damage-reducing factor if the defendant's willful and wanton conduct was "*intentional.*" On the other hand, if a defendant's willful and wanton conduct was "*reckless*," plaintiff's contributory negligence will reduce his or her damages. *Poole*, 656 N.E.2d at 771-72, 212 Ill.Dec. at 174-75.

10.01 Negligence--Adult--Definition

When I use the word "negligence" in these instructions, I mean the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

Comment

Pierson v. Lyon & Healy, 243 Ill. 370, 377; 90 N.E. 693, 696 (1909); *Wilcke v. Henrotin*, 241 Ill. 169, 172; 89 N.E. 329, 330 (1909); *Perryman v. Chicago City Ry. Co.*, 242 Ill. 269, 273; 89 N.E. 980, 982 (1909); *Rikard v. Dover Elevator Co.*, 126 Ill.App.3d 438, 467 N.E.2d 386, 81 Ill.Dec. 686 (5th Dist.1984).

10.02 Ordinary Care--Adult--Definition

When I use the words "ordinary care," I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

Notes on Use

If the plaintiff or defendant is under the age of 18, see IPI 10.05.

Comment

Pierson v. Lyon & Healy, 243 Ill. 370, 377; 90 N.E. 693, 696 (1909); *Wilcke v. Henrotin*, 241 Ill. 169, 172; 89 N.E. 329, 330 (1909); *Perryman v. Chicago City Ry. Co.*, 242 Ill. 269, 273; 89 N.E. 980, 982 (1909); *Larson v. Ward Corby Co.*, 198 Ill.App. 109, 111, 113 (1st Dist.1916); *Fugate v. Sears, Roebuck & Co.*, 12 Ill.App.3d 656, 299 N.E.2d 108 (1st Dist.1973).

B10.03 Duty To Use Ordinary Care--Adult--Plaintiff— Definitions of Contributory and Comparative Negligence--Negligence

[Under Count ____ (for negligence),] [I][i]t was the duty of the plaintiff, before and at the time of the occurrence, to use ordinary care for [his own safety] [and] [the safety of his property]. A plaintiff is contributorily negligent if (1) he fails to use ordinary care [for his own safety] [or] [for the safety of his property] and (2) his failure to use such ordinary care is a proximate cause of the [alleged] [injury] [death] [property damage].

The plaintiff's contributory negligence, if any, which is 50% or less of the total proximate cause of the injury or damage for which recovery is sought, does not bar his recovery. However, the total amount of damages to which he would otherwise be entitled is reduced in proportion to the amount of his negligence. This is known as comparative negligence.

If the plaintiff's contributory negligence is more than 50% of the total proximate cause of the injury or damage for which recovery is sought, the defendant[s] shall be found not liable.

[The term "plaintiff" includes a counterplaintiff.]

Notes on Use

This instruction incorporates IPI 11.01, and 11.01 should not be given if this instruction is given.

This instruction is appropriate for negligence cases only.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton conduct, this instruction should not be used. If plaintiff claims both intentional and reckless willful and wanton conduct, this instruction should be modified.

The last bracketed sentence should be used only if there is a counterclaim against the plaintiff or other defendants.

If there was either property damage or personal injury, but not both, omit the inapplicable bracketed material.

The instruction should be used in conjunction with IPI 10.02 defining "ordinary care" if the plaintiff is over the age of 18 or is a minor operating a motor vehicle or engaged in any other activity in which the minor is held to an adult standard of care. See Comment to IPI 10.05. If the plaintiff is a minor and is not subject to the adult standard of care, use IPI 10.05.

This instruction explains the relationship between the concepts of "ordinary care" and "contributory negligence" inasmuch as the latter term is frequently used by counsel in argument to the jury.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

10.04 Duty To Use Ordinary Care--Adult--Defendant

It was the duty of the defendant, before and at the time of the occurrence, to use ordinary care for the safety of [the plaintiff] [and] [the plaintiff's property]. That means it was the duty of the defendant to be free from negligence.

Notes on Use

The instruction should be used in conjunction with IPI 10.02 defining "ordinary care," if the defendant is over the age of 18 or is a minor engaged in certain activities. If the defendant is a minor (and is not engaged in one of those activities), use IPI 10.05 and 10.01 defining "negligence." As to the activities in which an adult standard will be applied, see Comment to IPI 10.05.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

This instruction is modified to conform with IPI B10.03 which defines the plaintiff's duty. Although "negligence" is defined in IPI 10.01, there is no other instruction which informs the jury that the defendant has a duty to be free from negligence.

10.05 Ordinary Care--Minor--Definition

A minor is not held to the same standard of conduct as an adult. When I use the words "ordinary care" with respect to the [plaintiff] [defendant] [decedent], I mean that degree of care which a reasonably careful [person] [minor] [child] of the age, mental capacity and experience of the [plaintiff] [defendant] [decedent] would use under circumstances similar to those shown by the evidence. The law does not say how such a [person] [minor] [child] would act under those circumstances. That is for you to decide.

[The rule I have just stated also applies when a (minor) (child) is charged with having violated (a statute) (or) (an ordinance).]

Notes on Use

This instruction should not be used when a minor is charged with negligence in the operation of a motor vehicle or any other activity in which the minor is held to an adult standard of care.

When a plaintiff is under the age of seven, use IPI 11.03.

If the minor's standard of care is applicable but the minor is charged with negligence in the violation of a statute, the last bracketed paragraph (formerly IPI 10.06) should be included. IPI 60.01 may also be given, but may need to be modified.

Comment

The degree of care to be exercised by a minor over the age of seven years is that which a reasonably careful person of the same age, capacity, and experience would exercise under the same or similar circumstances. *Wolf v. Budzyn*, 305 Ill.App. 603, 605; 27 N.E.2d 571, 572 (1st Dist.1940); *Hartnett v. Boston Store of Chicago*, 265 Ill. 331, 335; 106 N.E. 837, 839 (1914). Instructions to this effect have been upheld. *Wolczek v. Public Serv. Co.*, 342 Ill. 482, 497; 174 N.E. 577, 583-584 (1930); *Peterson v. Chicago Consol. Traction Co.*, 231 Ill. 324, 327; 83 N.E. 159, 160 (1907); *King v. Casad*, 122 Ill.App.3d 566, 461 N.E.2d 685, 78 Ill.Dec. 101 (4th Dist.1984) (reversible error to refuse).

This instruction should not be given in a case where the plaintiff or defendant was a minor and operating a motor vehicle. When so doing, a minor will usually be held to the same standard of care as an adult. *Betzold v. Erickson*, 35 Ill.App.2d 203, 209; 182 N.E.2d 342, 345 (3d Dist.1962); *Dawson v. Hoffmann*, 43 Ill.App.2d 17, 20; 192 N.E.2d 695, 696, 697 (2d Dist.1963); *Ryan v. C & D Motor Delivery Co.*, 38 Ill.App.2d 18, 186 N.E.2d 156 (3d Dist.1962) (abstract); *Turner v. Seyfert*, 44 Ill.App.2d 281, 289; 194 N.E.2d 529, 534 (3d Dist.1963); *Fishel v. Givens*, 47 Ill.App.3d 512, 517; 362 N.E.2d 97, 101; 5 Ill.Dec. 784, 788 (4th Dist.1977) (good review of the law).

This instruction has been held applicable to a minor driving a farm tractor, *Mack v. Davis*, 76 Ill.App.2d 88, 221 N.E.2d 121 (2d Dist.1966), and a minor riding a bicycle, *Conway v. Tamborini*, 68 Ill.App.2d 190, 215 N.E.2d 303 (3d Dist.1966). However, a minor operating a mini-bike, motorcycle, powerboat, airplane, or the like is held to an adult standard of care (*Baumgartner v. Ziessow*, 169 Ill.App.3d 647, 523 N.E.2d 1010, 120 Ill.Dec. 99 (1st Dist.1988); *Fishel v. Givens*, 47 Ill.App.3d 512, 362 N.E.2d 97, 5 Ill.Dec. 784 (4th Dist.1977)), in which case this instruction would not be given. There may be other activities in which a minor will be held to an adult standard. *See* Annotation, *Modern Trends As To Contributory Negligence of Children*, 32 A.L.R.4th 56, §10 (1984); Prosser & Keeton, *The Law of Torts* §32 at 181-182 (5th ed. 1984).

Violation of a penal statute may be considered by the jury even though the minor involved is below the age of criminal responsibility. *Kronenberger v. Husky*, 38 Ill.2d 376, 231 N.E.2d 385 (1967); *Krause v. Henker*, 5 Ill.App.3d 736, 741; 284 N.E.2d 300, 303 (1st Dist.1972).

10.08 Careful Habits As Proof of Ordinary Care

If you decide there is evidence tending to show that the [decedent] [plaintiff] [defendant] was a person of careful habits, you may infer that he was in the exercise of ordinary care for his own safety [and for the safety of others] at and before the time of the occurrence, unless the inference is overcome by other evidence. In deciding the issue of the exercise of ordinary care by the [decedent] [plaintiff] [defendant] you may consider this inference and any other evidence upon the subject of the [decedent's] [plaintiff's] [defendant's] care.

Notes on Use

This instruction can be given in a negligence or willful and wanton action based on the Wrongful Death Act when there are no witnesses to the occurrence, other than the defendant, covering the entire period in which the decedent must be in the exercise of ordinary care.

With modifications this instruction will cover cases of incompetents, and of persons suffering from retrograde amnesia as a result of which they have no recollection of the occurrence; or to cases in which the only eyewitness is barred by the Dead Man's Act.

Comment

Prior habits of carefulness are ordinarily not admissible in negligence actions, the test being whether the respective parties were in the exercise of ordinary care at the time of the occurrence. An exception, however, to this general rule exists in a cause of action based on the Wrongful Death Act, 740 ILCS 180/1 (1994), where there are no eyewitnesses other than the defendant concerning the occurrence. Under such circumstances, in this type of action where the administrator has the burden of proving due care on the part of the decedent, that the deceased was in the exercise of due care may be inferred from testimony indicating careful habits on the part of the deceased. *Hughes v. Wabash R. Co.*, 342 Ill.App. 159, 95 N.E.2d 735 (3d Dist.1950). The fact that the deceased was sober, industrious and possessed of all his faculties is admissible as tending to prove due care. *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29, 35 N.E. 358 (1893).

The "eyewitness" rule, however, has been interpreted to mean that unless there are eyewitnesses to the entire occurrence, due care may be shown by prior habits. In *Hawbaker v. Danner*, 226 F.2d 843, 847-849 (7th Cir.1955), there were two witnesses who observed decedent's car just before the collision. The court nevertheless held that evidence of habits of due care was admissible because the witnesses did not see the car during the entire occurrence. The court said:

> "In both of these cases [*Parthie v. Cummings*, 323 Ill.App. 296, 55 N.E.2d 402 (1st Dist.1944) (abstract); *Noonan v. Maus*, 197 Ill.App. 103 (4th Dist.1915) (abstract)], the Illinois Appellate Court thoroughly recognized that the eyewitness rule should be given a practical construction to permit proof of reasonable care during the whole transaction and particularly to the material moments thereof depending upon the circumstances in each case."

In *McElroy v. Force*, 38 Ill.2d 528, 232 N.E.2d 708 (1967), evidence of the plaintiff's careful habits was properly admissible where the plaintiff was the only surviving eyewitness and his testimony was barred by the Dead Man's Act.

See also *Bradfield v. Illinois Cent. Gulf R. Co.*, 137 Ill.App.3d 19, 484 N.E.2d 365, 91 Ill.Dec. 806 (5th Dist.1985), *aff'd on other grounds*, 115 Ill.2d 471, 505 N.E.2d 331, 106 Ill.Dec. 25 (1987),

adopting Federal Rule of Evidence 406 and holding that in a wrongful death case evidence of decedent's habits is admissible to show due care, regardless of whether eyewitness testimony was available; *Gasiorowski v. Homer*, 47 Ill.App.3d 989, 365 N.E.2d 43, 7 Ill.Dec. 758 (1st Dist.1977) (where only eyewitnesses are silenced by Dead Man's Act, amnesia, mental incompetency, or death, no eyewitnesses will be deemed available).

11.00

CONTRIBUTORY NEGLIGENCE

11.01 Contributory Negligence--Adult--Definition

When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that proximately contributed to cause the [alleged] [injury] [death] [property damage].

Notes on Use

This instruction should be used whenever "contributory negligence" is a jury issue and IPI B10.03 is not given. If IPI B10.03 is given, this instruction should not be used, since it is incorporated into IPI B10.03.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

It is reversible error to omit the element of proximate cause in an instruction defining contributory negligence. *Schmidt v. Anderson*, 301 Ill.App. 28, 42, 49-50; 21 N.E.2d 825, 831, 834-835 (1st Dist.1939); *Wilkerson v. Cummings*, 324 Ill.App. 331, 340; 58 N.E.2d 280, 283 (1st Dist.1944); *Alexander v. Sullivan*, 334 Ill.App. 42, 78 N.E.2d 333 (3d Dist.1948); *Buehler v. White*, 337 Ill.App. 18, 24; 85 N.E.2d 203, 206 (3d Dist.1949); *Barenbrugge v. Rich*, 141 Ill.App.3d 1046, 490 N.E.2d 1368, 1373; 96 Ill.Dec. 163, 168 (1st Dist.1986).

This instruction was approved in *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 478 N.E.2d 546, 88 Ill.Dec. 231 (1st Dist.1985).

11.02 Contributory Negligence As To Fewer Than All Plaintiffs

The issue of contributory negligence does not apply to the plaintiff[s] [name(s) of such plaintiff(s)].

Notes on Use

This instruction should be given when there is evidence raising an issue of fact as to the contributory negligence of one or more but fewer than all of the plaintiffs.

11.03 Presumption That Child Under Seven Years is Incapable of Contributory Negligence

You must not consider the question of whether there was contributory negligence [on the part of [name]], because, under the law, a child of the age of [the plaintiff] [name]] is incapable of contributory negligence.

Notes on Use

The name of the plaintiff may be used if desired.

This instruction may be used only when the plaintiff or decedent was a minor under the age of seven at the time of the occurrence.

Comment

A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983).

11.04 Parent's Negligence Not an Issue

Contributory negligence of the parent(s) is not an issue in this case.

Notes on Use

This instruction may be given where the parent is not a party in interest other than as next friend or guardian, but there is evidence from which the jury might conclude that the parents of the child were guilty of negligence which contributed to the child's injury. It should not be given, e.g., if there is a contribution claim against the parent(s), or the trial court determines that the conduct of the parent(s) is properly an issue in the case.

This instruction may not be appropriate in a wrongful death action because negligence of the parents will bar their recovery. This brief instruction is designed to state the rule without calling undue attention to the parents' negligence. For a stronger statement of the rule, which may be more useful in cases where the negligence of the parents is so obvious that the jury may already be considering its significance, see IPI 11.05. These two instructions are alternatives, and it is not necessary to give both of them.

11.05 Negligence of Parents Not Imputed

If you find that the [mother] [father] [parents] of [child's name] [was] [were] negligent, that negligence shall not be charged against [child's name], and it does not prevent or reduce a recovery by [child's name] if he is otherwise entitled to recover.

Notes on Use

The instruction may be given where the parent is not a party in interest, other than as next friend or guardian, and there is evidence from which the jury might conclude that the parents of the child were guilty of negligence which contributed to the child's injury. *Brownell v. Village of Antioch*, 215 Ill.App. 404, 411 (2d Dist.1919); *Duffy v. Cortesi*, 2 Ill.2d 511, 516-517; 119 N.E.2d 241, 244-245 (1954); *Sheley v. Guy*, 29 Ill.App.3d 361, 366; 330 N.E.2d 567, 571 (4th Dist.1975), *aff'd*, 63 Ill.2d 544, 348 N.E.2d 835 (1976).

Where the parents are both real parties in interest and nominal plaintiffs suing on behalf of a minor, use IPI B11.06.

This instruction is an alternative to IPI 11.04. For an explanation of the difference, *see* Notes on Use to IPI 11.04.

B11.06 Contributory Negligence Claimed--Parents, Child Seven or Over, Parent's Cause of Action Not Assigned To Child

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for his injuries. The second claim is brought by his [father] [mother] who seeks compensation for money spent or amounts for which [he] [she] has become liable for reasonably necessary [expenses] [and for loss of earnings of the child during his minority].

Child's Claim

If you should find that the child was contributorily negligent and if the contributory negligence of the child was 50% or less of the total proximate cause of the child's injury, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child. If the contributory negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The (father's) (mother's) negligence, if any, does not affect the amount, if any, to which the child is entitled on his own claim.]

Parent's Claim

As to the [father's] [mother's] claim, the [father's] [mother's] damages must [first] [also] be reduced by the percentage of contributory negligence of the child, if any. [If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the (father's) (mother's) negligence proportionately further reduces the damages to which the (father) (mother) would have been entitled. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the (father's) (mother's) claim.]

Notes on Use

This instruction is appropriate for negligence cases only.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton conduct, this instruction should not be used. If plaintiff claims both intentional and reckless willful and wanton conduct, this instruction should be modified.

If the parent's claim has been assigned to the child, use IPI B11.06.01.

This instruction should be used only where the child and his parents are suing in the same lawsuit for their respective damages arising from the same occurrence. *Meece v. Holland Furnace Co.*, 269 Ill.App. 164, 178 (3d Dist.1933).

If the child is under the age of seven, this instruction must be modified. A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 404; 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983). See IPI 11.03.

If there are other legally recognized elements of damages claimed by the parents, and if those damages are reducible by the parent's contributory negligence, then those elements should be added at the end of the first paragraph of this instruction.

If there is no issue as to the parents' contributory negligence, either (1) omit the bracketed portion of the last paragraph or (2) omit this entire instruction. Separate verdict forms for the child's claim and the parent's claim, each showing the damages reduced by the child's contributory negligence, if any, may be sufficient to apprise the jury that the child's contributory negligence reduces both claims and thereby obviate the need for this instruction. The choice between these options is discretionary in each case.

Comment

When a minor is tortiously injured, his parent can recover his medical and hospital expenses, since the parent is liable for those expenses under the Family Expense Act (750 ILCS 65/15). *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 429-430; 104 Ill.Dec. 165, 166-167 (1st Dist.1986); *Curtis v. County of Cook*, 109 Ill.App.3d 400, 440 N.E.2d 942, 947; 65 Ill.Dec. 87, 92 (1st Dist.1982). Similarly, a parent is entitled to the earnings of his minor child (*Ferreira v. Diller*, 176 Ill.App. 447 (3d Dist.1912); *Barrett v. Riley*, 42 Ill.App. 258 (2d Dist.1891)), and therefore can recover the child's lost earnings during the child's minority (*Stafford v. Rubens*, 115 Ill. 196, 3 N.E. 568 (1885)).

Since the parent's action is derivative, it is subject to any defenses available against the child. *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 430; 104 Ill.Dec. 165, 167 (1st Dist.1986); *Jones v. Schmidt*, 349 Ill.App. 336, 110 N.E.2d 688 (4th Dist.1953).

The parent's negligence is not imputed to the child (*Rahn v. Beurskens*, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966); *Romine v. City of Watseka*, 341 Ill.App. 370, 91 N.E.2d 76, 80 (2d Dist.1950)), but it is a defense with respect to the parent's claim (*Payne v. Kingsley*, 59 Ill.App.2d 245, 207 N.E.2d 177, 180 (2d Dist.1965); *City of Pekin v. McMahon*, 154 Ill. 141, 39 N.E. 484 (1895)). This is true even if the parent's claim has been assigned to the child. *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 430; 104 Ill.Dec. 165, 167 (1st Dist.1986); *Kennedy v. Kiss*, 89 Ill.App.3d 890, 412 N.E.2d 624, 628; 45 Ill.Dec. 273, 277 (1st Dist.1980); *Rahn v. Beurskens*, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966).

The child's contributory negligence operates as a defense to the parent's claim. *Kennedy v. Kiss*, 273 Ill.App. 133 (2d Dist.1933).

As yet, there are no reported decisions in Illinois as to the effect of contributory negligence by both the parent and child after the adoption of comparative fault. The method reflected in this instruction, successive reductions, is consistent with the theory of the previous decisions and with the method adopted in other jurisdictions. *See*, *e.g.*, *White v. Lunder*, 66 Wis.2d 563, 225 N.W.2d 442, 449-450 (1975).

B11.06.01 Contributory Negligence Claimed--Parents, Child Seven or Over, Parent's Cause of Action Assigned To Child

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for his injuries. The second claim originally belonged to the child's [father] [mother] but it has been assigned to the child for recovery by the child in this lawsuit. This second claim, called the parent's claim, is also brought by the child and seeks compensation for money spent or amounts for which the [father] [mother] has become liable for reasonably necessary [expenses] [and for loss of earnings of the child during his minority].

Child's Claim

As to the child's claim for damages, if you should find that the child was contributorily negligent and if the contributory negligence of the child was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child. If you should find that the contributory negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The (father's) (mother's) negligence, if any, does not affect the amount, if any, to which the child is entitled on his own claim.]

Parent's Claim

As to the parent's claim brought by the child in this case, those damages must first be reduced by the percentage of contributory negligence of the child, if any. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the (father's) (mother's) negligence proportionately further reduces the damages, if any, to which the parent would have been entitled, and thus the parent's claim must be reduced accordingly. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the (father's) (mother's) claim.

Notes on Use

This instruction is appropriate for negligence cases only.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton conduct, this instruction should not be used. If plaintiff claims both intentional and reckless willful and wanton conduct, this instruction should be modified.

If there is no issue as to the parents' contributory negligence, this instruction is unnecessary and may be omitted.

This instruction should be used only where the parent has assigned to his child the right to recover those elements of damages which were, in the first instance, recoverable by the parents. If such an assignment has not been made, and if a parent is bringing such a claim in the same lawsuit, then use IPI B11.06.

If the child is under the age of seven, this instruction must be modified. A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 404; 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983). See IPI 11.03.

If there are other legally recognized elements of damages claimed by the parents, and if those damages are reducible by the parent's contributory negligence, then those elements should be added at the end of the first paragraph of this instruction.

Comment

See Comment to IPI B11.06.

This instruction was drafted to accommodate the common practice of the parents assigning their right to recover these elements to their child. In the case of such an assignment, the defenses originally available against a parent remain as issues in the case. The contributory negligence of both the child and the parents must be considered by the jury. In order to increase the logical clarity of the instruction in that regard, the term “parent's claim” has been adopted to describe those assigned elements of damages. The jury will already have been informed of the origin of the claim, and the description of the necessary operation of the potential negligence of both the child and the parents is rendered less prolix by the use of this term.

12.00

SPECIFIC FACTORS AFFECTING NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

12.01 Intoxication

Intoxication is no excuse for failure to act as a reasonably careful person would act. An intoxicated person is held to the same standard of care as a sober person. If you find that [insert allegedly intoxicated person] was intoxicated at the time of the occurrence, you may consider that fact, together with other facts and circumstances in evidence, in determining whether [insert allegedly intoxicated person] conduct was [negligent] [willful and wanton] [or] [contributorily negligent].

Instruction, Notes on Use and Comment revised May 2009.

Notes on Use

If there is evidence of intoxication on the part of multiple persons, separate instructions should be submitted for each person to avoid confusion. The use of the instruction is not limited to cases in which the intoxicated party was operating a motor vehicle. *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 454, 605 N.E.2d 493, 502, 178 Ill.Dec. 699, 708 (1992) (intoxicated pedestrian electrocuted by electrified railway track); *Marshall v. Osborn*, 213 Ill.App.3d 134, 140, 571 N.E.2d 492, 497, 156 Ill.Dec. 708, 713 (3rd Dist. 1991) (intoxicated pedestrian struck by vehicle).

Comment

Intoxication neither bars recovery nor relieves the intoxicated party of the duty to exercise the same degree of care as a sober person. *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 454, 605 N.E.2d 493, 502, 178 Ill.Dec. 699, 708 (1992) (plaintiff's intoxication relevant to his contributory negligence); *Wilcke v. Henrotin*, 241 Ill. 169, 173, 89 N.E. 329, 330 (1909); *Petraski v. Thedos*, 382 Ill.App.3d 22, 28, 887 N.E.2d 24, 31, 320 Ill.Dec.244, 251 (1st Dist. 2008) (plaintiff's intoxication relevant to her contributory negligence); *Biel v City of Bridgeview*, 335 Ill.App. 3d 526, 534-35, 781 N.E.2d 555, 562, 269 Ill.Dec. 758, 765 (1st Dist. 2002) (plaintiff's intoxication was irrelevant to defendant's duty); *Countryman v. Winnebago County*, 135 Ill.App. 384, 393, 481 N.E.2d 1255, 1262, 90 Ill.Dec. 344, 351 (2d Dist. 1985); *Brown v. Decatur Memorial Hosp.*, 74 Ill.App.3d 436, 443, 393 N.E.2d 84, 89, 30 Ill.Dec. 429, 434 (4th Dist. 1979), aff'd, 83 Ill.2d 344, 415 N.E.2d 337, 47 Ill.Dec. 332 (1980).

A party's intoxication is not, in and of itself, proof of fault. Evidence of a party's intoxication is relevant to the extent that it affects his exercise of due care and is therefore admissible as a circumstance to be weighed by the trier of fact in its determination of the issue of due care. See *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 454, 605 N.E.2d 493, 502, 178 Ill.Dec. 699, 708 (1992) (plaintiff's contributory negligence); *Petraski v. Thedos*, 382 Ill.App.3d 22, 28, 887 N.E.2d 24, 31, 320 Ill.Dec. 244, 251 (1st Dist. 2008); *Marshall v. Osborn*, 213 Ill.App.3d 134, 140, 571 N.E.2d 492, 496-97, 156 Ill.Dec. 708, 712-13 (3rd Dist. 1991).

Evidence of alcohol consumption is inadmissible unless accompanied by proof of a resulting diminution in the ability to think and act with ordinary care. *Bielaga v. Mozdzeniak*, 328 Ill.App.3d 291, 296, 765 N.E.2d 1131, 1135-36, 262 Ill.Dec. 523, 527-28 (1st Dist. 2002); *Sandburg-Schiller v. Rosello*,

119 Ill.App.3d 318, 331, 456 N.E.2d 192, 202, 74 Ill.Dec. 690, 700 (1st Dist. 1983); *Clay v. McCarthy*, 73 Ill.App.3d 462, 466, 392 N.E.2d 693, 696, 30 Ill.Dec. 38, 41 (3rd Dist. 1979). The degree of impairment required to be deemed intoxicated is that which affects intellect and self-control. *See Osborn v. Leuffgen* 381 Ill. 295, 298-99, 45 N.E.2d 622, 624 (1942); *People v. Schneider*, 362 Ill. 478, 484-85, 200 N.E. 321, 323-24 (1936); *Wade v. City of Chicago Heights*, 295 Ill.App.3d 873, 885-86, 693 N.E.2d 426, 434, 230 Ill.Dec. 297, 305 (1st Dist. 1998).

12.04 Concurrent Negligence Other Than Defendant's

More than one person may be to blame for causing an injury. If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that some third person who is not a party to the suit may also have been to blame.

[However, if you decide that the sole proximate cause of injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant.]

Notes on Use

This instruction should be used only where negligence of a person who is not a party to the suit may have concurred or contributed to cause the occurrence. This instruction may not be used where the third person was acting as the agent of the defendant or the plaintiff. Where two or more defendants are sued and one or more may be liable and others not liable, use IPI 41.03.

The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was the conduct of a third person.

See also IPI 12.05 (outside agency); IPI 60.01 (statutory violation).

Comment

"Where a person is guilty of the negligence charged against him, it is no defense that some other person, or thing, contributed to bring about the results for which the damages are claimed." *Romine v. City of Watseka*, 341 Ill.App. 370, 377; 91 N.E.2d 76, 79 (2d Dist.1950); *Manion v. Chicago, R.I. & P. Ry. Co.*, 12 Ill.App.2d 1, 18; 138 N.E.2d 98, 106-107 (2d Dist.1956); *Liby v. Town Club*, 5 Ill.App.2d 559, 565; 126 N.E.2d 153, 156 (1st Dist.1955). This form of instruction was approved in *Dickeson v. Baltimore & O.C.T.R.R. Co.*, 73 Ill.App.2d 5, 34; 220 N.E.2d 43, 56 (1st Dist.1965), *aff'd*, 42 Ill.2d 103, 245 N.E.2d 762 (1969); *Ballweg v. City of Springfield*, 114 Ill.2d 107, 120; 499 N.E.2d 1373, 1379; 102 Ill.Dec. 360, 366 (1986); *Berry v. American Commercial Barge Lines*, 114 Ill.App.3d 354, 373; 450 N.E.2d 436, 449; 71 Ill.Dec. 1, 14 (5th Dist.1983), *cert. denied*, 465 U.S. 1029, 104 S.Ct. 1290, 79 L.Ed.2d 692 (1984).

In *Frank Parmelee Co. v. Wheelock*, 224 Ill. 194, 79 N.E. 652 (1906), and West Chicago St. R. Co. v. Horne, 100 Ill.App. 259 (1st Dist.1902), *aff'd*, 197 Ill. 250, 64 N.E. 331 (1902), the courts approved use of the word "blame."

12.05 Negligence--Intervention of Outside Agency

If you decide that a [the] defendant[s] was [were] negligent and that his [their] negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

[However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant.]

Notes on Use

The second paragraph should be used only where there is evidence tending to show that the sole proximate cause of the occurrence was something other than the conduct of the defendant.

See also IPI 12.04 (negligence of third person); IPI 60.01 (statutory violation).

Comment

See Comment to IPI 12.04.

13.00

ASSUMPTION OF RISK

INTRODUCTION

Assumption of risk is one of the traditional defenses in a tort action based on negligence or willful and wanton misconduct. See W. Prosser & W. Keeton, *The Law of Torts* §68 (5th ed. 1984). In Illinois, it is also a damage-reducing factor in actions based on strict tort liability for defective products. In this state, these two branches of the doctrine are separate and distinct. Assumption of risk in strict product liability cases is governed by its own set of rules and the applicable instructions may be found in the product liability series (IPI 400.00); see IPI B400.03.

Classification: Express and Implied

There are two main categories of assumption of risk: express and implied.

Express Assumption of Risk

> Under express assumption of risk, plaintiff and defendant explicitly agree, in advance, that defendant owes no legal duty to plaintiff and therefore, that plaintiff cannot recover for injuries caused either by risks inherent in the situation or by dangers created by defendant's negligence.

Duffy v. Midlothian Country Club, 135 Ill.App.3d 429, 433; 481 N.E.2d 1037, 1041; 90 Ill.Dec. 237, 241 (1st Dist.1985) (hereafter cited as "*Duffy II*"). This form of the defense is closely related to consent in the area of intentional torts, which is based on the theory that the plaintiff has agreed in advance to be exposed to the defendant's culpable conduct and to hold the defendant harmless for any injury that might result from that conduct. It is commonly found in written releases, waivers, or exculpatory clauses in lease agreements and other contracts between the parties. *See*, *e.g.*, *Harris v. Walker*, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988) (horseback rider).

Issues involving express assumption of the risk will usually be decided by the court as a matter of law. In those cases in which jury issues are presented--*e.g.*, whether the release was procured by fraud or involuntarily, or under a mutual mistake of fact--the instructions to the jury will involve narrow fact issues and must be specifically tailored to the particular case. Therefore, this chapter does not include any instructions concerning express assumption of the risk.

Implied Assumption of Risk

Implied assumption of the risk is that which is unspoken but inferred from the plaintiff's conduct. It may also be subdivided into two categories: primary and secondary.

Primary assumption of risk is where "the risk of harm is not created by the defendant but is inherent in the activity which the plaintiff has agreed to undertake. The plaintiff is regarded as

tacitly or impliedly agreeing to take his own chances such as where he accepts employment knowing that he is expected to work with a dangerous horse." *Clark v. Rogers*, 137 Ill.App.3d 591, 594; 484 N.E.2d 867, 869; 92 Ill.Dec. 136, 138 (4th Dist.1985). *Accord*: *Duffy II*, 135 Ill.App.3d at 433, 481 N.E.2d at 1041, 90 Ill.Dec. at 241. At one time the courts referred to these as the "ordinary risks" of the employment. *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972).

In this sense, primary assumption of risk is not really a defense to the defendant's negligence. Instead, it acts to negate liability on the ground that the defendant has no legal duty to protect the plaintiff from certain hazards. Therefore, like express assumption of risk, this form of the doctrine acts as a complete bar to recovery by the plaintiff. In Illinois, primary assumption of risk is recognized only in situations in which (1) the plaintiff is the defendant's employee or (2) there is some other contractual relationship between the parties under which the plaintiff's duties involve exposure to an inherent hazard. *Barrett v. Fritz*, 42 Ill.2d 529, 533-534, 248 N.E.2d 111, 115 (1969); *O'Rourke v. Sproul*, 241 Ill. 576, 89 N.E. 663 (1909); *Conrad v. Springfield Consol. Ry. Co.*, 240 Ill. 12, 88 N.E. 180 (1909); *B. Shoninger Co. v. Mann*, 219 Ill. 242, 76 N.E. 354 (1905); *Hensley v. Hensley*, 62 Ill.App.2d 252, 210 N.E.2d 568 (5th Dist.1965). It applies only to "ordinary" risks *not* created by the defendant's negligence. *See Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972). (For convenience, we will refer to the defendant in these cases as the "employer." This term is usually applicable in the contractual relationship cases, as well as in the employer-employee cases, because the plaintiff has been hired as an independent contractor to perform certain work for the defendant.)

Secondary assumption of risk refers to the situation where the plaintiff is aware of and appreciates a danger that has been created by the defendant's negligence or other fault, but the plaintiff nevertheless voluntarily proceeds to encounter it. *Duffy II*, *supra*. Functionally, it is similar to contributory negligence; it is fault-based. *Id.*; *see* Kionka, *Implied Assumption of Risk: Does It Survive Comparative Fault?*, 1982 S.I.U.L.J. 371.

Prior to the adoption of comparative negligence in Illinois, risks created by the employer's negligence were referred to as "extraordinary risks." *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972). There was some confusion in the case law as to whether an employee or contracting party could assume such risks and therefore whether this defense was available as to those risks. *Compare Stone v. Guthrie*, 14 Ill.App.2d 137, 148-150; 144 N.E.2d 165, 170 (3d Dist.1957), and *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972), with *Mack v. Davis*, 76 Ill.App.2d 88, 98; 221 N.E.2d 121, 126 (2d Dist.1966). As a practical matter, however, it made little difference, since the same conduct by the plaintiff was also contributory negligence, which (like assumption of risk) was also a complete bar to plaintiff's recovery.

After the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), it became important to distinguish clearly between primary and secondary assumption of risk (or "ordinary" and "extraordinary" risks). *Duffy II*, *supra*. The distinction is that primary assumption of risk--which excuses an employer from any duty to the plaintiff with respect to certain risks--appears to remain a complete defense. *Id*. Secondary assumption of risk, however, is merely another form of plaintiff's negligence. With the adoption

of comparative negligence, to the extent that secondary assumption of risk has any vitality, it becomes merely another form of comparative (damage-reducing) fault. *Id*. Therefore, no separate instructions are necessary if the defense asserted is that the plaintiff voluntarily encountered defendant's negligently-created risk. The IPI instructions on contributory negligence, issues, burden of proof, damages, and forms of verdict can either be adapted or used as is, depending on whether the trial court rules that the term "assumption of risk" should be used or not. The instructions in this chapter should not be used in such cases. The instructions in this chapter are applicable only if there is a claim that the plaintiff assumed an inherent risk, not created by the defendant's fault, in an employment or contractual undertaking.

Primary Assumption of Risk

Primary assumption of the risk is an affirmative defense. *Perschall v. Raney*, 137 Ill.App.3d 978, 985; 484 N.E.2d 1286, 1290; 92 Ill.Dec. 431, 435 (4th Dist.1985). The defendant has the burden of proof on each of four elements: (1) that the danger was not created by the defendant's negligence, but is normally incident to, or inherent in, the employment or contractual activity; (2) that the plaintiff voluntarily encountered the danger; (3) that the plaintiff was fully aware of, understood, and appreciated the danger; and (4) that the danger was the cause of the plaintiff's injury. *Stone v. Guthrie*, 14 Ill.App.2d 137, 148-150; 144 N.E.2d 165, 170 (3d Dist.1957); *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).

Inherent Danger. The law does not recognize the master's negligence as being an ordinary and usual risk incident to the employment. *Stone v. Guthrie*, 14 Ill.App.2d 137, 148; 144 N.E.2d 165, 170 (3d Dist.1957). Nor does an employee assume the risk of injury arising from the incompetence of a fellow servant. *Burnett v. Caho*, 7 Ill.App.3d 266, 275; 285 N.E.2d 619, 626 (3d Dist.1972).

Voluntary Exposure. The doctrine is available only against a plaintiff who "voluntarily exposes himself to a '*specific*, known risk.' Thus the doctrine ... is 'not a preclusion of recovery against a plaintiff whose occupation inherently involves *general* risks of injury.' " *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979), citing *Court v. Grzelinski*, 72 Ill.2d 141, 379 N.E.2d 281, 19 Ill.Dec. 617 (1978). Thus, the risks of falling after stepping on a dog's toy left lying on the floor was not a specific, known risk of a housekeeper's job. *Chaplin v. Geiser*, *supra*. But the doctrine was applied to a housekeeper who fell down a flight of stairs after tripping on a rug on the landing. In that case, the court said that the plaintiff knew of the danger from the rug and the risk involved in the use of the landing and stairs were normally incident to her employment. *Coselman v. Schleifer*, 97 Ill.App.2d 123, 239 N.E.2d 687 (2d Dist.1968).

Ordinarily, an employee who enters into an employment situation with knowledge of an inherent danger is presumed to have encountered that hazard voluntarily. *Chicago & E.I.R. Co. v. Heerey*, 203 Ill. 492, 495; 68 N.E. 74, 75 (1903). Mere economic duress does not vitiate the voluntariness. However, the voluntary character of the plaintiff's actions may be negated by a showing that the plaintiff "was induced by his employer to believe that a change would be made." *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417, 420 (1874).

Subjective Knowledge and Appreciation of Danger. The plaintiff must not only have actual knowledge of the danger, he must also *appreciate* the danger and the risks connected with it. *Fox v. Beall*, 314 Ill.App. 144, 147; 41 N.E.2d 126, 128 (2d Dist.1942). The test is a subjective one; not what plaintiff should have known, but what he *in fact* did know and appreciate. *Russo v. The Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill.Dec. 63, 66-67 (1st Dist.1979); *Maytnier v. Rush*, 80 Ill.App.2d 336, 349; 225 N.E.2d 83, 90 (1st Dist.1967). However, a plaintiff cannot elude application of the doctrine with "protestations of ignorance in the face of obvious danger." *Russo v. The Range, Inc.*, 76 Ill.App.3d 236, 238-239; 395 N.E.2d 10, 13-14; 32 Ill.Dec. 63, 66-67 (1st Dist.1979). "A person of sufficient age and experience is chargeable with knowledge of the ordinary risks and hazards of his employment, and will be presumed to have notice of and to have assumed such risks which, to a person of his age and experience, are, or ought to be, obvious." *Mack v. Davis*, 76 Ill.App.2d 88, 98; 221 N.E.2d 121, 126 (2d Dist.1966). Ordinarily, this is a fact issue for the jury unless the facts are so clear that reasonable persons could not differ as to whether the plaintiff appreciated the danger. *Fox v. Beall*, 314 Ill.App. 144, 147;, 41 N.E.2d 126, 128 (2d Dist.1942); *Hinrichs v. Gummow*, 41 Ill.App.2d 428, 434-435; 190 N.E.2d 610, 612-613 (2d Dist.1963).

Causation. The defense is only applicable if the plaintiff's injury was caused by the danger the risk of which the plaintiff is claimed to have assumed. Therefore, it is important that the danger be clearly identified, since there may be other risks as to which the defense would not apply.

Violation of Statute. Assumption of risk cannot be used as a defense to a limited group of statutes that are intended to protect a certain class of persons from dangers against which they are deemed less able to protect themselves. In such cases, it is the policy of the law to impose upon the defendant a nondelegable duty to comply with the statute.

It is often proper to instruct the jury that assumption of the risk is not a defense to such claims, even though the defendant did not make assumption of the risk an issue in the case. *Gilmore v. Toledo, P. & W. R. Co.*, 64 Ill.App.2d 218, 212 N.E.2d 117, 120 (3d Dist.1965), *aff'd*, 36 Ill.2d 510, 224 N.E.2d 228 (1967) (F.E.L.A.); *Vandaveer v. Norfolk & W. Ry. Co.*, 78 Ill.App.2d 186, 222 N.E.2d 897 (5th Dist.1966) (same). Such an instruction should be given "when the issue of assumption of risk is expressly or implicitly before the jury, even though not explicitly raised at trial . . . . The issue of assumption of the risk is before the jury whenever there is any evidence from which it could be inferred that the employee had assumed the risk." *Hamrock v. Consolidated Rail Corp.*, 151 Ill.App.3d 55, 501 N.E.2d 1274, 1279; 103 Ill.Dec. 736, 741 (1st Dist.1986).

For an example of such instructions, see IPI 160.09 (FELA).

Instructions on Primary Assumption of Risk

In order for primary assumption of the risk to become an issue, the defendant must assert it as an affirmative defense. The risk must be an inherent danger associated with the employment or activity which is the subject of the contract between the parties, and it cannot be a risk created

by the defendant's negligence. Thus, when the plaintiff claims negligence in that the defendant (employer) negligently failed to protect him against an inherent risk, not created by the defendant's negligence, the defendant may invoke the assumption of risk defense. If, after presentation of the evidence, fact issues remain concerning this defense, then IPI 13.01 or 13.02 may be appropriate.

On the other hand, when the plaintiff alleges that the defendant (whether an employer or not) is negligent with respect to a risk created by the defendant's negligence, the proper defense is contributory/comparative fault. In that case, the instructions in this chapter do not apply.

13.01 Assumption of Risk--Contractual Relationship--Burden of Proof

[As to Count ____,] The defendant has raised the affirmative defense that the plaintiff assumed the risk of injury from the danger which the plaintiff claims caused his injury. To prove this defense, the defendant has the burden of proving each of the following propositions:

First, that the defendant and the plaintiff had [an agreement] [a contract] under which the plaintiff was to participate in activities which exposed him to the danger that resulted in the injury of which he complains[,] [namely, describe danger].

Second, that the danger was one that ordinarily accompanies the activities contemplated in the [agreement] [contract].

Third, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;

Fourth, that the plaintiff voluntarily subjected himself to this danger; and

Fifth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

If you decide that each of these propositions has been proved, then your verdict should be for the defendant [as to Count ____]. If, on the other hand, you decide that any of these propositions has not been proved, then the defendant has not proved the affirmative defense of assumption of the risk.

Notes on Use

This instruction may be used only when a defendant has affirmatively raised the issue of assumption of risk by his pleadings.

This instruction is proper only when the specific danger in question was inherent in the employment or activity and was *not* created by the defendant's negligence. *See* Introduction (IPI 13.00). If the danger allegedly was created by the defendant's negligence, then the contributory/comparative negligence instructions should be used.

If the plaintiff has other allegations of negligence (or other fault) besides the charge that the defendant failed to protect him against the danger which is the subject of this defense, then it will be necessary to include the bracketed phrase naming the particular danger of which the plaintiff allegedly assumed the risk, so that the jury does not use this defense against claims to which it does not apply. In such a case, this claim should be identified as a separate count to keep it distinct from such other claims.

Optionally, the bracketed phrase identifying the specific danger may also be used in any case, even one involving a single risk, to insure that the jury is focused on the *specific* danger in issue and not on *general* risks inherent in the activity. The doctrine does not apply to the latter. *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).

If the court rules that one or more propositions are undisputed or are established as a matter of law, those propositions can be omitted from the instruction and the remaining paragraphs renumbered.

This instruction does not apply to the defense of assumption of the risk in strict product liability cases. See IPI Chapter 400.

Comment

See Introduction (IPI 13.00), *supra*, for a discussion of this defense.

13.02 Assumption of Risk--Employer-Employee Relationship--Burden of Proof

[As to Count ____,] The defendant has raised the affirmative defense that the plaintiff assumed the risk of injury from the danger which the plaintiff claims caused his injury. To prove this defense, the defendant has the burden of proving each of the following propositions:

First, that at the time of the occurrence in question, the plaintiff was the defendant's employee;

Second, that performing the duties of his employment exposed the plaintiff to the danger that resulted in the injury of which he complains[,] [namely, describe danger];

Third, that the danger was one that ordinarily accompanies the employment;

Fourth, that the plaintiff had actual knowledge of this danger and understood and appreciated the nature and extent of the risk;

Fifth, that the plaintiff voluntarily subjected himself to this danger; and

Sixth, that this danger was the cause of the plaintiff's [alleged] [injuries] [damages].

If you decide that each of these propositions has been proved, then your verdict should be for the defendant [as to Count ____]. If, on the other hand, you decide that any of these propositions has not been proved, then the defendant has not proved the affirmative defense of assumption of the risk.

Notes on Use

This instruction may be used only when a defendant has affirmatively raised the issue of assumption of risk by his pleadings.

This instruction is proper only when the specific danger in question was inherent in the employment or activity and was *not* created by the defendant's negligence. *See* Introduction (IPI 13.00). If the danger allegedly was created by the defendant's negligence, then the contributory/comparative negligence instructions should be used.

If the plaintiff has other allegations of negligence (or other fault) besides the charge that the defendant failed to protect him against the danger which is the subject of this defense, then it will be necessary to include the bracketed phrase naming the particular danger of which the plaintiff allegedly assumed the risk, so that the jury does not use this defense against claims to which it does not apply. In such a case, this claim should be identified as a separate count to keep it distinct from such other claims.

Optionally, the bracketed phrase identifying the specific danger may also be used in any case, even one involving a single risk, to insure that the jury is focused on the *specific* danger in issue and not on *general* risks inherent in the activity. The doctrine does not apply to the latter. *Chaplin v. Geiser*, 79 Ill.App.3d 435, 398 N.E.2d 628, 631; 34 Ill.Dec. 805, 808 (2d Dist.1979).

If the court rules that one or more propositions are undisputed or are established as a matter of law, those propositions can be omitted from the instruction and the remaining paragraphs renumbered.

This instruction does not apply to the defense of assumption of the risk in strict product liability cases. See IPI Chapter 400.

Comment

See Introduction (IPI 13.00), *supra*, for a discussion of this defense.

14.00

Willful and Wanton Conduct

14.01 Willful and Wanton Conduct--Definition

When I use the expression "willful and wanton conduct" I mean a course of action which [shows actual or deliberate intention to harm] [or which, if not intentional,] [shows an utter indifference to or conscious disregard for (a person's own safety) (and) (the safety of others)].

Notes on Use

This instruction is to be given when an accompanying instruction has indicated the consequences of a finding of willful and wanton conduct in the given case. The first bracketed phrase should be used only when a deliberate intention to harm is alleged and is supported by evidence sufficient to make a submissible case. As to the distinction between willful and wanton conduct involving a deliberate intent to harm and "reckless" willful and wanton conduct, see *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994) (contribution case) and *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995).

If there is no issue as to the plaintiff's contributory fault, then there may be no need for a jury to determine which form of willful and wanton conduct was committed by the defendant. However, as the Poole decision emphasizes, if there is a submissible claim concerning the plaintiff's contributory fault, and if the jury finds the defendant's conduct to have been willful and wanton, there may need to be a jury finding (either on the verdict form or in a special interrogatory) as to whether the defendant's willful and wanton conduct was the "intentional" kind or the "reckless" kind.

Comment

This definition of willful and wanton conduct was approved in *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill.2d 429, 593 N.E.2d 522, 170 Ill.Dec. 633 (1992), in *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994) (contribution case) and in *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995). A similar definition of willful and wanton conduct is found in §1-210 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-210).

Prior to the adoption of comparative negligence, defendant's willful and wanton conduct negated the defense of contributory negligence. *Green v. Keenan*, 10 Ill.App.2d 53, 60; 134 N.E.2d 115, 118 (2d Dist.1956). *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's negligence cannot be compared to a defendant's "intentional" willful and wanton conduct to reduce the amount of damages recoverable by the plaintiff, but it can be a damage-reducing factor if the defendant's willful and wanton conduct is "reckless." Although an intentional tortfeasor cannot obtain contribution (*Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill.2d 179, 206; 538 N.E.2d 530, 542; 131 Ill.Dec. 155, 167 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989)), *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994), held that a tortfeasor whose willful and wanton conduct is "reckless" but not "intentional" may seek contribution.

In addition to its importance in the determination of comparative fault, the doctrine of willful and wanton conduct is also important with respect to other legal issues:

1. As a basis for punitive damages. *Loitz v. Remington Arms Co.*, 138 Ill.2d 404, 563 N.E.2d 397, 150 Ill.Dec. 510 (1990); *Dunn v. Illinois Central Gulf R. Co.*, 215 Ill.App.3d 190, 574 N.E.2d 902, 158 Ill.Dec. 789 (4th Dist.1991).

2. When the plaintiff is a guest passenger in the defendant's automobile, 625 ILCS 5/10-201 (now limited to illegal hitchhikers).

3. When the plaintiff is a trespasser and the defendant is the owner or occupier of the premises. *Rodriguez v. Norfolk & W. Ry. Co.*, 228 Ill.App.3d 1024, 593 N.E.2d 597, 170 Ill.Dec. 708 (1st Dist.1992); *Miller v. General Motors Corp.*, 207 Ill.App.3d 148, 565 N.E.2d 687, 152 Ill.Dec. 154 (4th Dist.1990); *Eaton v. Baltimore & Ohio R. Co.*, 198 Ill.App.3d 137, 555 N.E.2d 790, 144 Ill.Dec. 431 (4th Dist.1990); *Harkins v. System Parking, Inc.*, 186 Ill.App.3d 869, 542 N.E.2d 921, 923; 134 Ill.Dec. 575, 577 (1st Dist.1989); *Sumner v. Hebenstreit*, 167 Ill.App.3d 881, 522 N.E.2d 343, 118 Ill.Dec. 888 (5th Dist.1988). See also *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 605 N.E.2d 493, 498; 178 Ill.Dec. 699, 704 (1992) (dictum, stating rule); 740 ILCS 130/3.

4. When the defendant's liability is limited by statute to cases where defendant's conduct is willful and wanton. See, e.g., 50 ILCS 750/15.1; 70 ILCS 605/4-40; 70 ILCS 3605/45; 210 ILCS 50/17; 225 ILCS 25/53, 25/54, 65/5, 90/35, 100/4, 115/21; 415 ILCS 5/4(r), 5/22.2(j) (3); 625 ILCS 5/10-201; 740 ILCS 75/1; 745 ILCS 10/2-202, 10/3-106, 109, 10/4-105, 10/5-103, 106, 20/1, 50/3, 50/4, 55/3, 75/2; 805 ILCS 105/108.70; 815 ILCS 645/14; 820 ILCS 225/5.1.

14.02 Contributory Willful And Wanton Conduct--Definition

When I use the expression "contributory willful and wanton conduct," I mean willful and wanton conduct on the part of the plaintiff that proximately contributed to cause the [alleged] [injury] [death] [property damage].

Notes on Use

This instruction should be given only when IPI B14.03 is not used. If IPI B14.03 is given, do not use this instruction; it is incorporated in IPI B14.03.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

B14.03 Duty To Refrain From Willful And Wanton Conduct--Plaintiff

[1]. It was the duty of the plaintiff [under Count __ of the complaint], before and at the time of the occurrence, to refrain from willful and wanton conduct that would endanger [his person] [and] [his property]. A plaintiff is contributorily willful and wanton if (1) his conduct is willful and wanton, and (2) such willful and wanton conduct is a proximate cause of the [alleged] [injury] [death] [property damage].

[Alternative 1]

[2]. [The plaintiff's contributory willful and wanton conduct, if any, which is 50% or less of the total proximate cause of the injury or damages for which recovery is sought, does not bar his recovery. However, the total amount of damages to which he would otherwise be entitled is reduced in proportion to the amount of his willful and wanton conduct. This is known as comparative fault.]

[3]. [If the plaintiff's contributory willful and wanton conduct is more than 50% of the total proximate cause of the injury or damages for which recovery is sought, it bars plaintiff's recovery and your verdict shall be for the defendant(s).]

[Alternative 2]

[4]. [The plaintiff's contributory willful and wanton conduct, if any, bars his recovery, and your verdict shall be for the defendant(s).]

Notes on Use

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Since the adoption of comparative fault, no Illinois case has yet decided the effect of a plaintiff's contributory willful and wanton conduct. If the trial court rules that the plaintiff's contributory willful and wanton conduct may be a damage reducing factor, paragraph [2] of this instruction should be used. If the trial court determines that the plaintiff's contributory willful and wanton conduct may be a complete bar to the plaintiff's recovery, paragraph [3] of this instruction should be used.

If there was either property damage or personal injury, but not both, omit the inapplicable bracketed material.

If this instruction is given, also give IPI 14.01 defining "willful and wanton conduct."

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

14.04 Duty To Refrain From Willful And Wanton Conduct--Defendant

It was the duty of the defendant [under Count _____ of the complaint], before and at the time of the occurrence, to refrain from willful and wanton conduct which would endanger the safety of the [plaintiff] [decedent] [and] [his property].

Notes on Use

If there are counts in the complaint charging both willful and wanton conduct and ordinary negligence, the number of the count charging willful and wanton conduct should be indicated by use of the first bracketed phrase.

If there was either property damage or personal injury, but not both, omit the inapplicable bracketed material.

The instruction should be used in conjunction with IPI 14.01 defining "willful and wanton conduct."

Comment

A similar instruction was approved in *Kitten v. Stodden*, 76 Ill.App.2d 177, 185; 221 N.E.2d 511, 515 (5th Dist.1966).

15.00

PROXIMATE CAUSE

15.01 Proximate Cause--Definition

When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.]

Instruction and Comment revised September 2009.

Notes on Use

This instruction in its entirety should be used when there is evidence of a concurring or contributing cause to the injury or death. In cases where there is no evidence that the conduct of any person other than a single defendant was a concurring or contributing cause, the short version without the bracketed material may be used.

Comment

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The Committee modified this instruction in 2007 with the intent of making it more comprehensible and conversational. That modification used the word "and" in the first sentence instead of "or." "Or" is a more accurate statement of the law and more consistent with the predecessor instruction and case law. "That" is preferred usage in place of "which."

In negligence actions and in other cases which involve the violation of statutes and ordinances, the injuries, death or loss of support must have been caused by the negligence or particular statutory violation alleged in the complaint. The jury is informed that one of the elements of the plaintiff's case is that the conduct of the defendant is a proximate cause of the plaintiff's damages or injuries. See IPI B21.02. This instruction, defining proximate cause, should accompany those in which the phrase "proximate cause" is used, e.g., IPI 11.01 and IPI B21.02.

An instruction encompassing the bracketed material is proper where there is evidence that something or the acts of someone other than the negligence of the defendant, or intoxication of a person who has been sold or given intoxicants, was a proximate cause of the injury or death. *James v. Checker Taxi Co.*, 22 Ill.App.2d 22, 159 N.E.2d 12 (1st Dist.1959); *Harrold v. Clinton Gas & Elec. Co.*, 205 Ill.App. 12 (3d Dist.1917); *St. Clair v. Douvas*, 21 Ill.App.2d 444, 158 N.E.2d 642 (1st Dist.1959); *Heitz v. Hogan*, 134 Ill.App.3d 352, 480 N.E.2d 185, 191-192; 89 Ill.Dec. 299, 305-306 (4th Dist.1985). However, some courts have determined that if the only possible cause of the occurrence is the conduct of a single defendant, the use of the long form might be confusing to the jury. *Willson v. Pepich*, 119 Ill.App.3d 552, 456 N.E.2d 882, 886; 75 Ill.Dec. 61, 65 (2d Dist.1983).

Prior to the Illinois Supreme Court's decision in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), adopting comparative negligence, some cases held that when the only possible causes of the occurrence were the conduct of the plaintiff and the defendant, the material in the brackets would be improper because it would prejudice the defendant's defense of contributory negligence. *Borowski v. Von Solbrig*, 60 Ill.2d 418, 431; 328 N.E.2d 301, 308 (1975); *Budovic v. Eschbach*, 349 Ill.App. 163, 167-168; 110 N.E.2d 477, 479 (2d Dist.1953) (court properly refused an instruction containing the

bracketed material in a case involving a pedestrian injured by an automobile). Cases have also held that the long form should not be given when the only other possible cause of the harm in question was the plaintiff's predisposition to the injury. These cases interpret the bracketed phrase to refer only to the conduct of third persons and not mere "conditions." *Lounsbury v. Yorro*, 124 Ill.App.3d 745, 464 N.E.2d 866, 870-871, 80 Ill.Dec. 1, 5-6 (2d Dist.1984).

Some cases have held that it is not necessarily error to give the short form, even when multiple concurring or contributing causes are possible. *See*, *e.g.*, *Curry v. Summer*, 136 Ill.App.3d 468, 474; 483 N.E.2d 711, 715-717, 91 Ill.Dec. 365, 369-371 (4th Dist.1985) (although long form would have been preferable, short form not error even though there were multiple defendants); *Webb v. Angell*, 155 Ill.App.3d 848, 508 N.E.2d 508, 514-515; 108 Ill.Dec. 347, 353-354 (2d Dist.1987) (short form proper on facts; use of term "any" in short form permits argument that injury had multiple causes); *Greene v. Rogers*, 147 Ill.App.3d 1009, 498 N.E.2d 867, 874-875; 101 Ill.Dec. 543, 550-551 (3d Dist.1986) (same; short not error, although long form would have been preferable); *Mazur v. Lutheran Gen. Hosp*., 143 Ill.App.3d 528, 493 N.E.2d 62, 69; 97 Ill.Dec. 580, 587 (1st Dist.1986) (short form not error where other instructions sufficiently conveyed idea that more than one defendant could be liable). Conversely, it has been held error to refuse to give the long form when the evidence shows that the injury complained of could have been caused by the conduct of two or more persons other than the plaintiff or decedent. *Heitz v. Hogan*, 134 Ill.App.3d 352, 480 N.E.2d 185, 191-192; 89 Ill.Dec. 299, 305-306 (4th Dist.1985).

After the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the Illinois Supreme Court in *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 7; 95 Ill.Dec. 531, 534 (1986), held that the long form was properly given in a motor vehicle accident case involving only one plaintiff and one defendant:

> While it is possible that the long form of the instruction could, in remote circumstances, prove confusing to a jury when only two parties are involved in an accident, we do not think this is such a case. Other instructions did not allude to the possible acts of third parties; they clearly instructed the jury on how to apportion damages if it found that both parties were negligent and advised the jurors to calculate the comparative negligence of the parties assuming that "100% represents [their] total combined negligence." Viewed in their entirety, the instructions fully and fairly apprised the jury of the relevant principles . . . relating to treatment of the plaintiff's fault.

Other recent decisions have demonstrated a similar reluctance to hold that the long form of the instruction prejudiced a party. *See*, *e.g.*, *Chambers v. Rush-Presbyterian-St. Luke's Medical Center*, 155 Ill.App.3d 458, 508 N.E.2d 426, 431-432; 108 Ill.Dec. 265, 270-271 (1st Dist.1987); *Drake v. Harrison*, 151 Ill.App.3d 1082, 503 N.E.2d 1072, 105 Ill.Dec. 66 (5th Dist.1987); Shiner v. Friedman, 161 Ill.App.3d 73, 513 N.E.2d 862, 869; 112 Ill.Dec. 253, 260 (1st Dist.1987); *Johanek v. Ringsby Truck Lines, Inc.*, 157 Ill.App.3d 140, 509 N.E.2d 1295, 1305; 109 Ill.Dec. 283, 293 (1st Dist.1987); *Lee v. Grand Trunk Western R. Co.*, 143 Ill.App.3d 500, 492 N.E.2d 1364, 1375; 97 Ill.Dec. 491, 502 (1st Dist.1986); *Roman v. City of Chicago*, 134 Ill.App.3d 14, 479 N.E.2d 1064, 1067-1068; 89 Ill.Dec. 58, 61-62 (1st Dist.1985).

In *Willson v. Pepich*, 119 Ill.App.3d 552, 456 N.E.2d 882, 886; 75 Ill.Dec. 61, 65 (2d Dist.1983), the court stated:

> We agree that the principal reason for not permitting the inclusion of the bracketed material in IPI Civil No. 15.01 is no longer present under the doctrine of comparative negligence. So long as the doctrine of contributory negligence was a viable doctrine in this State, the negligence of the defendant had to be the sole cause of the injury to the plaintiff when the only other possible contributing cause was the conduct of the plaintiff herself, and it was for this reason that the bracketed material was held to be improper in such cases.

From these authorities, it may be concluded that (1) it will rarely be error to give the long form of the instruction, and (2) the short form may now be restricted to those cases where the evidence shows that the sole cause of the plaintiff's injury (other than the plaintiff's predisposition) was the conduct of a single defendant and there is no evidence that the plaintiff's conduct was a contributing cause.

ISSUES--BURDEN OF PROOF

20.00
ISSUES IN THE CASE

INTRODUCTION

An issue instruction tells the jury what points are in controversy between the parties and thereby simplifies their task of applying the law to the facts--a task made more difficult in many instances after jurors have participated in several types of cases.

The committee recommends that such an instruction be given; if tendered, the court has the duty to give it. *Goertz v. Chicago & N.W. Ry. Co.*, 19 Ill.App.2d 261, 270, 153 N.E.2d 486, 491 (1st Dist.1958).

The practice of informing the jury as to the respective contentions of the parties has developed gradually.

Some of the early cases indicate that the jury could take pleadings to the jury room and find the issues by referring to the pleadings. *West Chicago St. R. Co. v. Buckley*, 200 Ill. 260, 65 N.E. 708 (1902); *City of East Dubuque v. Burhyte*, 173 Ill. 553, 50 N.E. 1077 (1898). Later cases held that it was error to refer the jury to charges in the complaint in the absence of further instructions pointing out what was charged. *E.g.*, *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544, 90 N.E. 266 (1909).

It then became common to have a lengthy commentary read to the jury which elaborately informed them of the plaintiff's allegations of negligence, proximate cause and whatever other legal verbiage may have been placed in the complaint. These lengthy quotes from the complaint lent the office of the trial judge to the plaintiff to state his case to the jury. Frequent warnings by the appellate court went unheeded by lawyers representing plaintiffs until 1953, when the Appellate Court for the First District reversed a case in which an almost 800-word summary of the complaint had been given to the jury. *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953).

Signa held that the court should inform the jury of the issues raised by the pleadings in a clear and concise manner, and that this could be accomplished by a summary of the pleadings succinctly stated without repetition and without undue emphasis. This method has been approved in later cases. *Smith v. Illinois Valley Ice Cream Co.*, 20 Ill.App.2d 312, 156 N.E.2d 361 (2d Dist.1959); *Asplund v. Pavlik*, 1 Ill.App.2d 220, 117 N.E.2d 408 (1st Dist.1953) (abstract). Consistent with this view is the conclusion that an instruction which omits reference to a defendant's affirmative defenses is reversible error. *Walton v. Greenberg Mercantile Corp.*, 1 Ill.App.2d 99, 116 N.E.2d 197 (4th Dist.1953). Similarly, issue instructions which include charges not found in the complaint or supported by the evidence constitute error. *Fraider v. Hannah*, 338 Ill.App. 440, 451-52, 87 N.E.2d 795, 800-01 (2d Dist.1949); *Burns v. Stouffer*, 344

Ill.App. 105, 111, 100 N.E.2d 507, 510 (2d Dist.1951).

20.01 Issues Made By The Pleadings--Negligence--One Or More Defendants

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:*

"Defendant C, in [e.g., failing to keep a proper lookout."

"Defendant D, in _____."]

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.*]

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defense[s]:

Defendant [Defendant C] claims

> [*here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or*

ruled out by the court and are supported by the evidence].

[8] The plaintiff denies that [summarize affirmative defense[s]].

[9] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

Notes on Use

This instruction may also be used in this form for multiple plaintiffs if the allegations of negligence of all plaintiffs are the same. Where multiple plaintiffs allege different acts of negligence, the instruction must be modified to set forth separately the allegations by each plaintiff. If there is a counterclaim, use IPI 20.02.

This instruction must be modified to fit the allegations of the complaint and answer. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used if they fit the particular case. Additional innovations consistent with the pleadings should, of course, be used whenever required.

All "special defenses" which must be pleaded under the notice requirements of &p;2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (1994)) are not necessarily "affirmative defenses" in the sense that they bar recovery. Although &p;2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an "affirmative defense," it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [4] and not in paragraph [7]. Only affirmative defenses that bar recovery should be set forth under paragraph [7] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff's denials in a following paragraph.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

An issue instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953), that the issues made by the pleadings be concisely stated without characterization and undue emphasis.

Two cases pre-dating the 1985 amendment to &p;2-613(d) held that the defendant does not have to specify the contributory negligence relied upon, and if specific acts of contributory negligence are not alleged, they need not be specified in the issues instructions. *Marcin v. Kipfer*, 117 Ill.App.3d 1065, 454 N.E.2d 370, 73 Ill.Dec. 510 (4th Dist.1983); *Witherell v. Weimer*, 118 Ill.2d 321, 515 N.E.2d 68, 77; 113 Ill.Dec. 259, 268 (1987).

Under *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the plaintiff no longer has the burden of pleading and proving freedom from contributory negligence. *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986), held that defendant has the burden of proving the plaintiff's contributory negligence. The present instruction includes not only affirmative defenses which may defeat the claim, but also contributory negligence which may only diminish damages.

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).

20.01.01 Issues Made By the Pleadings--Negligence and Willful and Wanton Counts

[1] The plaintiff's complaint consists of two counts. The issues to be decided by you under Count I of the complaint are as follows:

[2] The plaintiff claims that he was injured and sustained damage and that the defendant was negligent in one or more of the following respects:

> [Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[4] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[5] The defendant claims that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[6] The defendant further claims that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[7] The plaintiff [denies that he did any of the things claimed by defendant,] denies that he was negligent [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[8] [The defendant also sets up the following affirmative defense(s):

Defendant (Defendant C) claims

> (here set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence).]

[9] The plaintiff denies that [summarize affirmative defense(s)].

[10] [The defendant further denies that the plaintiff was injured or sustained damages (to the extent claimed).]

[11] Turning now to Count II of the complaint the issues to be decided by you under that Count are as follows:

[12] The plaintiff claims that he was injured and sustained damage and that the conduct of the defendant was willful and wanton in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[13] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[14] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was willful and wanton [in doing any of the things claimed by the plaintiff,] [denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[15] [The defendant claims that the plaintiff was contributorily willful and wanton (in one or more of the following respects):

> (*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence*.)]

[16] [The defendant further claims that one or more of the foregoing was (a) (the sole) proximate cause of the plaintiff's injuries.]

[17] The plaintiff [denies that he did any of the things claimed by defendant,] [denies that he was willful and wanton] [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[18] [The defendant also sets up the following affirmative defense(s):

> (*Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by evidence*).]

[19] [The plaintiff denies that (summarize affirmative defense(s)).]

[20] The defendant further denies that the plaintiff was injured or sustained damages [to

the extent claimed].

Notes on Use

This instruction should be used where the case is submitted to the jury on charges of negligence in one or more counts, and on charges of willful and wanton conduct in another count or counts.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Whether a plaintiff's contributory willful and wanton conduct bars the plaintiff's recovery or reduces the total amount of damages to which the plaintiff would otherwise be entitled was a question left open by the court in Poole. This instruction, with modifications, can be used whichever way the court rules on this issue.

All "special defenses" which must be pleaded under the notice requirements of §2-613(d) of the Illinois Civil Practice Law (735 ILCS 5/2-613(d)) are not necessarily "affirmative defenses" in the sense that they bar recovery. Although §2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an "affirmative defense," it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [5] and not in paragraph [8].

Only affirmative defenses that bar recovery should be set forth under paragraphs [8] and [18] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff's denials in a following paragraph.

20.02 Issues Made By the Pleadings--Negligence--One or More Defendants--Counterclaim

Each party to this suit claims to be entitled to damages from the other: the plaintiff, under his complaint, and the defendant [Defendant C] under his counterclaim.

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:*

"Defendant C, in [e.g., failing to keep a proper lookout]."

"Defendant D, in _____."]

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the sole] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defense[s]:

Defendant [Defendant C] claims

> [*here set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence*].

[8] The plaintiff denies that [summarize affirmative defense[s]].

[9] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

[10] The defendant [Defendant C] counterclaims that he was injured and sustained damage, [and that the plaintiff was negligent in one or more of the ways previously mentioned] [and that Defendant D was negligent in one or more of the following ways]:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim against Defendant D which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[11] The plaintiff [denies] [and Defendant D each deny] [that he (they) did any of the things claimed in the counterclaim] [that he was (they were) negligent] [in doing or omitting to do any of the things claimed in the counterclaim,] [to the extent claimed] [and] claims that [defendant's] [Defendant C's] injury or damage was proximately caused [solely] by the negligence of [defendant] [Defendant C].

[12] The plaintiff claims that defendant [Defendant C] was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to defendant's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[13] The plaintiff further claims that one or more of the foregoing was [a] [the sole] proximate cause of defendant's [Defendant C's] injuries.

[14] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff,] [to the extent claimed by the plaintiff,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[15] [(The plaintiff) (and) (Defendant D) further set(s) up the following affirmative defense(s):

The plaintiff (and) (Defendant D) claim(s)

(*Summarize in simple form and without undue emphasis or repetition any affirmative defenses alleged in the answer to the counterclaim that are supported by the evidence*).]

[16] [The defendant(s) (Defendant C) (denies) (deny) that (summarize affirmative defense[s]).]

[17] The plaintiff [denies] [and Defendant D each deny] that [Defendant C] was injured or sustained damages [to the extent claimed].

Notes on Use

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

See Notes on Use and Comment to IPI 20.01.

21.00

BURDEN OF PROOF

INTRODUCTION

This series of instructions deals with burden of proof. IPI 21.01 defines burden of proof in terms of what is more probably true than not true. This is considered preferable to a statement requiring proof by a "preponderance" or "greater weight" of evidence.

IPI 21.02 and B21.02 enumerates the elements which a plaintiff must prove in a personal injury case.

Expressions such as "evenly balanced," "if you are in doubt and unable to say," and "not required to prove any fact beyond a reasonable doubt" were abandoned because they distort rather than clarify the true meaning of the principle involved, as explained in the Comment under IPI 21.06.

21.01 Meaning Of Burden Of Proof

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

Notes on Use

This instruction should be given with any instruction involving burden of proof.

Comment

This instruction embodies the standard definition of "burden of proof." *Reivitz v. Chicago Rapid Transit Co.*, 327 Ill. 207, 158 N.E. 380 (1927); *Molloy v. Chicago Rapid Transit Co.*, 335 Ill. 164, 166 N.E. 530 (1929); *Pierson v. Lyon & Healy*, 243 Ill. 370, 90 N.E. 693 (1909); *Sharp v. Brown*, 349 Ill.App. 269, 110 N.E.2d 541 (3d Dist.1953); *Slovinski v. Beasley*, 316 Ill.App. 273, 45 N.E.2d 42 (4th Dist.1942). While the admonition that "proof beyond a reasonable doubt is *not* required" has often been given in the past, that admonition relates to an effort to differentiate between the burdens of proof in criminal and civil cases. It has no place in civil actions.

See Rikard v. Dover Elevator Co., 126 Ill.App.3d 438, 467 N.E.2d 386, 81 Ill.Dec. 686 (5th Dist.1984) (reversible error to refuse this instruction).

21.02 Burden of Proof on the Issues--Negligence—One Plaintiff and One Defendant--No Contributory Negligence

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Notes on Use

This instruction should be given with IPI 21.01, which defines the phrase "burden of proof" when there is no issue of comparative negligence.

If the case involves an affirmative defense (other than contributory negligence), a counterclaim, or third-party complaint, use either IPI 21.03 or 21.04 instead of this instruction. If the case involves not only an affirmative defense, but also a counterclaim, these basic instructions will have to be modified to fit the particular case.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

See Comment to IPI 20.01.

B21.02 Burden of Proof on the Issues--Negligence— One Plaintiff and One Defendant— Contributory Negligence an Issue

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant. On the other hand, if you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving both of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved both of the propositions required of the defendant, then your verdict shall be for the plaintiff and you shall not reduce plaintiff's damages.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

Notes on Use

This instruction is appropriate for negligence cases only.

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

If the case involves an affirmative defense (other than contributory negligence), a counterclaim, or third-party complaint, use IPI B21.03, B21.04, or B21.05 instead of this instruction. If the case involves not only an affirmative defense, but also a counterclaim, these basic instructions will have to be modified to fit the particular case.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

See Comment to IPI 20.01.

B21.02.01 Burden of Proof on The Issues— Negligence--One Plaintiff and Two or More Defendants

The plaintiff has the burden of proving each of the following propositions as to each defendant:

First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

You are to consider these propositions as to each defendant separately.

If you find from your consideration of all the evidence that any of these propositions has not been proved as to [any one] [or more] [or all] of the defendant[s], then your verdict shall be for [that] [those] defendant[s]. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved as to [any one] [or more] [or all] of the defendant[s], then you must consider [that] [those] defendant['s] [s'] claim[s] that the plaintiff was contributorily negligent.

As to [that] [those] claim[s], [that] [those] defendant[s] [has] [have] the burden of proving each of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant[s] as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B: That plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that plaintiff has proved all the propositions required of the plaintiff and that [the] [those] defendant[s] [has] [have] not proved both of the propositions required of the defendant[s], then your verdict shall be for the plaintiff as to [that] [those] defendant[s] and you shall not reduce plaintiff's damages.

If you find from your consideration of all the evidence that [the] [those] defendant[s] [has] [have] proved both of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for [that] [those] defendant[s].

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that [the] [those] defendant[s] [has] [have] proved both of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff as to [that] [those] defendant[s] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

Notes on Use

This instruction is appropriate for negligence cases only.

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

If the case involves an affirmative defense (other than contributory negligence), a counterclaim, or third-party complaint, use IPI B21.03, B21.04, or B21.05 instead of this instruction. If the case involves not only an affirmative defense, but also a counterclaim, these basic instructions will have to be modified to fit the particular case.

Comment

See Comment to IPI 20.01.

B21.02.02 Burden of Proof on the Issues--One Plaintiff and One Defendant— Negligence and Willful and Wanton Counts

[1] The plaintiff has the burden of proving each of the following propositions in Count I of his complaint:

[2] First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

[3] Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

[4] Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

[5] In order to recover in this action on Count I, the plaintiff must prove all of the above propositions. If you find from your consideration of all the evidence that all of the propositions (First, Second, and Third) in Count I have been proved, then you must next consider the defendant's claim that the plaintiff was contributorily negligent as to Count I.

[6] As to that claim, the defendant has the burden of proving each of the following propositions:

[7] A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

[8] B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

[9] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you find from your consideration of all the evidence that either of the propositions required of the defendant (A or B) has not been proved, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

[10] If you find from your consideration of all the evidence that one or more of the above propositions required of the plaintiff (First, Second, or Third) has not been proved, then your verdict shall be for the defendant.

[11] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's negligence was greater

than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

[12] If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count I, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce plaintiff's damages in the manner stated to you in these instructions.

[13] The plaintiff has the burden of proving each of the following propositions in Count II of his complaint:

[14] First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was willful and wanton;

[15] Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

[16] Third, that the willful and wanton conduct of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

[17] If you find from your consideration of all the evidence that any of these propositions (First, Second, and Third) has not been proved, then your verdict shall be for the defendant as to Count II. But if, on the other hand, you find from your consideration of all the evidence that all the propositions (First, Second, and Third) in Count II have been proved, then you must next consider the defendant's claim that the plaintiff was contributorily willful and wanton as to Count II.

[18] As to that claim, defendant has the burden of proving each of the following propositions:

[19] A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was willful and wanton;

[20] B: That the plaintiff's willful and wanton conduct was a proximate cause of [his injury] [and] [the damage to his property].

[21] If you find from your consideration of all the evidence that plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you find from your consideration of all the evidence that either of the propositions required of the defendant (A or B) has not been proved, then your verdict shall be for the plaintiff [and you shall not reduce the plaintiff's damages].

[Alternative A]

[22]. [If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's willful and wanton conduct was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.]

[23]. [If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of the plaintiff (First, Second, and Third) in Count II, and if you further find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B) and that the plaintiff's willful and wanton conduct was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce plaintiff's damages in the manner stated to you in these instructions.]

[Alternative B]

[24] [If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant (A and B), then your verdict shall be for the defendant on Count II.]

Notes on Use

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should not be given when this instruction is used.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Since the adoption of comparative fault, no Illinois case has yet decided the effect of a plaintiff's contributory willful and wanton conduct. If the trial court rules that the plaintiff's contributory willful and wanton conduct may be a damage reducing factor, then use Alternative A (paragraphs [22] and [23]). If the trial court determines that the plaintiff's contributory willful and wanton conduct may be a complete bar to the plaintiff's recovery, then use Alternative B (paragraph [24]).

If the case involves an affirmative defense (other than contributory negligence), a counterclaim, or third-party complaint, use IPI B21.03, B21.04, or B21.05 instead of this instruction. If the case involves not only an affirmative defense, but also a counterclaim, these basic instructions will have to be modified to fit the particular case.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

B21.03 Burden of Proof on the Issues--Affirmative Defenses

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was negligent;

Second, that [the plaintiff was injured] [and] [the plaintiff's property was damaged];

Third, that the negligence of the defendant was a proximate cause of [the injury to the plaintiff] [and] [the damage to the plaintiff's property].

In this case defendant has asserted [the affirmative defense that] [certain affirmative defenses that]:

[*Concisely state affirmative defenses.*]

The defendant has the burden of proving [this] [these] affirmative defense[s].

If you find from your consideration of all the evidence, that any one of the propositions the plaintiff is required to prove has not been proved, [or that (any one of) the defendant's affirmative defense(s) has been proved,] then your verdict shall be for the defendant. If, on the other hand, you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved and that [none of] the defendant's affirmative defense[s] has [not] been proved, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

As to that claim, defendant has the burden of proving each of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of him and that the defendant has not proved both of the propositions required of him, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of him and that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your

verdict shall be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of him and that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

Notes on Use

See Notes on Use to IPI B21.02.

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

See Comment to IPI 20.01.

B21.04. Burden of Proof--Counterclaim--Negligence Only— One Plaintiff and One Defendant

[1] In this suit, there is not only the complaint of the plaintiff but also a counterclaim by the defendant.

[2] Because there is a counterclaim in this case you shall reach one of four results.

[3] First, you may find for the plaintiff on his complaint and against the defendant on his counterclaim.

[4] Second, you may find for the defendant on his counterclaim and against the plaintiff on his complaint.

[5] Third, you may find against both, the plaintiff on his complaint and the defendant on his counterclaim.

[6] Fourth, you may find for both, the plaintiff on his complaint and the defendant on his counterclaim.

[7] In order for the plaintiff to recover, he has the burden of proving each of the following propositions:

[*Insert here points "First" through "Third" of IPI B21.02*.]

[8] If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant as to plaintiff's complaint. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved, then you must consider defendant's claim that plaintiff was contributorily negligent.

[9] As to that claim, defendant has the burden of proving each of the following propositions:

[10] A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was contributorily negligent;

[11] B That plaintiff's contributory negligence was a proximate cause of [his injury] [and] [the damage to his property].

[12] If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that defendant has not proved both of the propositions required of the defendant, then your verdict should be for the plaintiff and you shall not reduce the plaintiff's damages.

[13] If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

[14] Finally, if you find from your consideration of all the evidence that plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

[15] In order for the defendant to recover on his counterclaim, the defendant has the burden of proving each of the following propositions:

> [*Here adapt points "First" through "Third" of IPI B21.02 to the allegations in the defendant's counterclaim.*]

[16] If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the plaintiff as to the defendant's counterclaim. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved, then you must consider the plaintiff's claim that the defendant was contributorily negligent.

[17] As to that claim, the plaintiff has the burden of proving each of the following propositions:

[18] A: That the defendant acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, the defendant was contributorily negligent;

[19] B: That defendant's contributory negligence was a proximate cause of [his injury] [and] [the damage to his property].

[20] If you find from your consideration of all the evidence that the defendant has proved all the propositions required of the defendant and that the plaintiff has not proved both of the propositions required of the plaintiff, then your verdict should be for the defendant on the counterclaim and you will not reduce the defendant's damages.

[21] If you find from your consideration of all the evidence that the defendant has proved all the propositions required of the defendant and that the plaintiff has proved both of the propositions required of the plaintiff, and if you find that the defendant's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff on the defendant's counterclaim.

[22] Finally, if you find from your consideration of all the evidence that the defendant has proved all the propositions required of the defendant and that the plaintiff has proved both of the propositions required of the plaintiff, and if you find that the defendant's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant on the counterclaim and you shall reduce the defendant's damages in the manner stated to you in these instructions.

Notes on Use

This instruction applies only to a negligence complaint. It does not apply if there is any willful and wanton allegation. If there is a willful and wanton claim, the instruction must be modified along the lines of B21.02.02.

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should not be given when this instruction is used.

If the complaint is no longer in the case and only the counterclaim is submitted to the jury, then the instruction should not be used and IPI B21.02 should be given with appropriate modifications, accompanied by IPI 21.01 defining "burden of proof."

With the adoption of comparative negligence, it is now possible that both the plaintiff and the defendant may recover.

Consideration should be given to using the parties' names or other description instead of the terms "plaintiff" and "defendant." *See* Introduction.

If the case involves not only a counterclaim but also an affirmative defense other than contributory negligence, this basic instruction will have to be modified.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

A plaintiff's burden of proving the issues raised by the complaint cannot be distinguished from a defendant's burden of proving the issues made by the counterclaim. The two pleadings are of equal dignity in that they embody separate causes of action and must be resolved by verdicts. It is necessary, therefore, to instruct separately as to the complaint and the counterclaim. The form of this instruction has frequently been approved. *North Chicago St. R.R. v. Boyd*, 156 Ill. 416, 419; 40 N.E. 955, 956 (1895); *Paulissen v. Jonas*, 311 Ill.App. 346, 348; 35 N.E.2d 958, 959 (2d Dist.1941).

See Comment to IPI 20.01.

B21.05 Burden of Proof--Third-Party Complaint— Negligence Only

[1] In this suit there is not only the complaint of [plaintiff's name] but also the complaint of [name of third-party plaintiff].

[2] In order for [plaintiff's name] to recover, he has the burden of proving each of the following propositions:

[*Insert here points "First" through "Third" of IPI B21.02.*]

[3] If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for [defendant's name] as to [plaintiff's name]'s complaint. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved, then you must consider [defendant's name]'s claim that [plaintiff's name] was contributorily negligent.

[4] As to that claim, [defendant's name] has the burden of proving both of the following propositions:

[5]A: That [plaintiff's name] acted or failed to act in one or more of the ways claimed by [defendant's name] as stated to you in these instructions, and that in so acting, or failing to act, [plaintiff's name] was contributorily negligent;

[6]B: That [plaintiff's name]'s contributory negligence was a proximate cause of [his injury] [and] [the damage to his property].

[7] If you find from your consideration of all the evidence that [plaintiff's name] has proved all the propositions required of him and that [defendant's name] has not proved both of the propositions required of him, then your verdict shall be for [plaintiff's name] and you shall not reduce [plaintiff's name]'s damages.

[8] If you find from your consideration of all the evidence that [plaintiff's name] has proved all the propositions required of him and that [defendant's name] has proved both of the propositions required of him, and if you find that [plaintiff's name]'s contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for [defendant's name] as to [plaintiff's name]'s complaint.

[9] If you find from your consideration of all the evidence that [plaintiff's name] has proved all the propositions required of him and that [defendant's name] has proved both of the propositions required of him, and if you find that [plaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for [plaintiff's name] as to [plaintiff's name]'s complaint, and you shall reduce [plaintiff's name]'s damages in the manner stated to you in these instructions.

[10] In order for [third party plaintiff's name] to recover on his complaint, he has the burden of proving each of the following propositions:

[*Here adapt points "First" through "Third" of IPI B21.02.*]

[11] If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for [third party defendant's name] as to [third party plaintiff's name]'s complaint. On the other hand, if you find from your consideration of all the evidence that all of these propositions have been proved, then you must consider [third party defendant's name]'s claim that [third party plaintiff's name] was contributorily negligent.

[12] As to that claim, [third party defendant's name] has the burden of proving both of the following propositions:

[13]A: That [third party plaintiff's name] acted or failed to act in one of the ways claimed by [third party defendant's name] as stated to you in these instructions and that in so acting, or failing to act, [third party plaintiff's name] was contributorily negligent;

[14]B: That [third party plaintiff's name]'s contributory negligence was a proximate cause of [his injury] [and] [the damages to his property].

[15] If you find from your consideration of all the evidence that [third party plaintiff's name] has proved all of the propositions required of him and that [third party defendant's name] has not proved both of the propositions required of him, then your verdict shall be for [third party plaintiff's name] and you shall not reduce [third party plaintiff's name]'s damages.

[16] If you find from your consideration of all the evidence that [third party plaintiff's name] has proved all the propositions required of him and that [third party defendant's name] has proved both of the propositions required of him, and if you find that [third party plaintiff's name]'s contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for [third party defendant's name] as to [third party plaintiff's name]'s complaint.

[17] If you find from your consideration of all the evidence that [third party plaintiff's name] has proved all the propositions required of him and that [third party defendant's name] has proved both of the propositions required of him, and if you find that [third party plaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for [third party plaintiff's name] as to [third party plaintiff's name]'s complaint, and you shall reduce [third party plaintiff's name]'s damages in the manner stated to you in these instructions.

Notes on Use

This instruction applies only to a negligence complaint. It does not apply if there is any willful and wanton allegation. If there is a willful and wanton claim, this instruction must be modified. *See* IPI B21.02.02.

This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI

B21.07 has been combined with this instruction, and therefore B21.07 should not be given when this instruction is used.

If the case involves not only a complaint and third party complaint, but also affirmative defenses or a counterclaim, this basic instruction must be modified.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

B21.07 Burden of Proof on the Issue of Contributory Negligence

If you find in favor of the plaintiff and against [the defendant] [one or more defendants], you must then consider defendant's claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving both of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B:. That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of him and that the defendant has not proved both of the propositions required of him, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of him and that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of him and that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

Notes on Use

This instruction applies only to a negligence complaint. It does not apply if there is any willful and wanton allegation. In that case, use IPI B21.02.02.

This instruction has been carried forward from the previous edition and modified as required by P.A. 84-1431 effective for causes of action accruing on and after November 25, 1986. *See* 735 ILCS 5/2-1107.1 (1994). However, this instruction will rarely be necessary, since it has been incorporated into the other burden of proof instructions above. It is included here for two reasons. First, it supersedes IPI 21.07, which is no longer accurate for cases based on causes of action accruing on and after November 25, 1986. In such cases IPI 21.07 should not be used. Second, it may be used in conjunction with a burden of proof instruction other than those suggested in this chapter in cases where such an instruction is proper. However, in those cases this instruction ordinarily should be incorporated into the burden of proof instruction to which it relates.

This language is appropriate in cases in which defendant, in his answer or other appropriate pleading (735 ILCS 5/2-610(d) (1994)), has raised the issue of the plaintiff's contributory negligence and where there is sufficient evidence of the plaintiff's contributory negligence to make a submissible issue for the jury. *Casey v. Baseden*, 111 Ill.2d 341, 344; 490 N.E.2d 4, 5; 95 Ill.Dec. 531, 532 (1986) (in a comparative negligence action, an instruction requiring defendant to prove plaintiff's negligence is proper).

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

22.00

BURDEN OF PROOF--*RES IPSA LOQUITUR*

22.01 ***Res Ipsa Loquitur*--**Burden Of Proof--No Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [the plaintiff was injured] [or] [the plaintiff's property was damaged.]

Second: That the [injury [damage] was received from a [name of instrumentality, e.g., a folding chair] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, the [injury] [damage] would not have occurred if the defendant had used ordinary care while the [instrumentality] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality] while it was under his control or management.

If you do draw such an inference, and if you further find that the plaintiff's injury was proximately caused by that negligence, your verdict shall be for the plaintiff under this Count. On the other hand, if you find that any of these propositions has not been proved, or if you find that the defendant used ordinary care for the safety of the plaintiff in his [control] [management] of the [instrumentality], or if you find that the defendant's negligence, if any, was not a proximate cause of the plaintiff's [injury] [damages], then your verdict shall be for the defendant under this Count.

Notes on Use

"Highest degree of care consistent with the type of vehicle used and the practical operation of its business as common carrier by (rail)" rather than "ordinary care" should be used when the case is one involving a common carrier. *See* IPI 100.02.

Fill in the blanks with the name of the instrumentality under the defendant's management.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

In professional negligence cases, use IPI 105.09.

Comment

The elements now necessary to establish a *res ipsa loquitur* case are:

1. The result must be caused by an agency or instrumentality which was within the defendant's control or management at the time of the injury or when the negligence, if any, occurred.

2. The result must be one which normally does not occur without negligence in the control or management of the agency or instrumentality.

The former requirement of proving the plaintiff's due care has been eliminated with the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981); *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986); *Daniels v. Standard Oil Realty Corp.*, 145 Ill.App.3d 363, 495 N.E.2d 1019, 99 Ill.Dec. 284 (1st Dist.1986); *Mileur v. Briggerman*, 110 Ill.App.3d 721, 442 N.E.2d 1356, 66 Ill.Dec. 443 (5th Dist.1982).

The agency or instrumentality which causes the injury need not be in the control or management of the defendant at the time the injury occurs. It is sufficient if the instrumentality has been in the control of the defendant at a time prior to the injury and there is insufficient evidence of an intervening cause to explain the occurrence since the instrumentality left the defendant's control. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959).

The element "Second" uses the terms "control" and "management" rather than "exclusive control." The Illinois Supreme Court recognizes that it is not always necessary that the instrumentality have been in the "exclusive" control of the defendant at the relevant time. *Lynch v. Precision Mach. Shop, Ltd*., 93 Ill.2d 266, 443 N.E.2d 569, 66 Ill.Dec. 643 (1982). The standard of control is a flexible one--sufficient control, under the facts of each case, to infer that it was defendant who was responsible for the negligence, if any, that caused the injury. *Douglas v. Board of Education*, 127 Ill.App.3d 79, 468 N.E.2d 473, 82 Ill.Dec. 211 (1st Dist.1984). It is not necessary that the defendant have had actual physical control if the defendant at all relevant times had a duty to maintain or supervise the instrumentality in question. Lynch, *supra*; *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill.2d 446, 207 N.E.2d 305 (1965).

Whether the maxim, *res ipsa loquitur*, may be applied in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); *Roberts v. Economy Cabs*, 285 Ill.App. 424, 2 N.E.2d 128 (4th Dist.1936).

The presumption of negligence is not a true presumption. It is an instructed inference of fact and is circumstantial evidence to be considered by the jury. It does not vanish when defendant introduces evidence of his due care in managing the injuring instrumentality, but remains in the case. The jury must weigh the circumstantial evidence of the plaintiff against the direct evidence of the defendant. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959); *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263, 270; 139 A.2d 404, 409 (1958); *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); *McCormick's Handbook of the Law of Evidence*, §§309, 311 (E. Cleary, ed., 3d ed. 1984). In *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986), the Court stated:

> A plaintiff need not conclusively prove all the elements of *res ipsa loquitur* in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence. [Citation.] The inference that there was negligence does not disappear if the defendant simply presents direct evidence to the contrary, but the defendant's evidence will be considered with all of the other evidence in the case.

The application of the doctrine has been extended to medical malpractice and hospital negligence

cases. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill.2d 298, 312 N.E.2d 259 (1974); *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980); *McMillen v. Carlinville Area Hosp.*, 114 Ill.App.3d 732, 450 N.E.2d 5, 70 Ill.Dec. 792 (4th Dist.1983). In such cases, however, a different form of the instruction is proper. *See* IPI 105.09.

B22.01 ***Res Ipsa Loquitur***--Burden Of Proof--Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [the plaintiff was injured] [or] [the plaintiff's property was damaged.]

Second: That the [injury] [damage] was received from a [name of instrumentality, e.g., a folding chair] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, the [injury] [damage] would not have occurred if the defendant had used ordinary care while the [instrumentality] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality] while it was under his control or management.

If you do draw such an inference, and if you further find that the plaintiff's injury was proximately caused by that negligence, you must next consider the defendant's claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

B: That the plaintiff's negligence was a proximate cause of [his injury] [and] [the damage to his property].

If you find from your consideration of all the evidence that the defendant has not proved both of the propositions required of him, then your verdict shall be for the plaintiff and you shall not reduce the plaintiff's damages.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of him, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

On the other hand, if you find that any of the propositions required of the plaintiff has not been proved, or if you find that the defendant used ordinary care for the safety of the plaintiff in his [control] [management] of the [instrumentality], or if you find that the defendant's negligence, if any, was not a proximate cause of the plaintiff's [injury] [damages], then your verdict shall be for the defendant under this Count.

Notes on Use

This instruction has been modified to meet the requirements of P.A. 84-1431 effective for causes of action accruing on and after November 25, 1986. *See* 735 ILCS 5/2-1107.1 (1994). For causes of action accruing prior to November 25, 1986, use IPI 22.01 in lieu of this instruction. IPI 22.01 may be used if there is no issue as to the plaintiff's contributory negligence.

Unlike the old version of IPI 22.01, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

"Highest degree of care consistent with the type of vehicle used and the practical operation of its business as common carrier by (rail)" rather than "ordinary care" should be used when the case is one involving a common carrier. *See* IPI 100.02.

Fill in the blanks with the name of the instrumentality under the defendant's management.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

In professional negligence cases, use IPI 105.09.

Comment

The elements now necessary to establish a *res ipsa loquitur* case are:

1. The result must be caused by an agency or instrumentality which was within the control or management of the defendant at the time of the injury or when the negligence, if any, occurred.

2. The result must be one which normally does not occur without negligence in the control or management of the agency or instrumentality.

The former requirement of proving the plaintiff's due care has been eliminated with the adoption of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981); *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986); *Daniels v. Standard Oil Realty Corp.*, 145 Ill.App.3d 363, 495 N.E.2d 1019, 99 Ill.Dec. 284 (1st Dist.1986); *Mileur v. Briggerman*, 110 Ill.App.3d 721, 442 N.E.2d 1356, 66 Ill.Dec. 443 (5th Dist.1982).

The agency or instrumentality which causes the injury need not be in the control or management of the defendant at the time the injury occurs. It is sufficient if the instrumentality has been in the control of the defendant at a time prior to the injury and there is insufficient evidence of an intervening cause to explain the occurrence since the instrumentality left the defendant's control. *Cobb v. Marshall Field &*

Co., 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959).

The element "Second" uses the terms "control" and "management" rather than "exclusive control." The Illinois Supreme Court recognizes that it is not always necessary that the instrumentality have been in the "exclusive" control of the defendant at the relevant time. *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill.2d 266, 443 N.E.2d 569, 66 Ill.Dec. 643 (1982). The standard of control is a flexible one--sufficient control, under the facts of each case, to infer that it was defendant who was responsible for the negligence, if any, that caused the injury. *Douglas v. Board of Education*, 127 Ill.App.3d 79, 468 N.E.2d 473, 82 Ill.Dec. 211 (1st Dist.1984). It is not necessary that the defendant have had actual physical control if the defendant at all relevant times had a duty to maintain or supervise the instrumentality in question. Lynch, *supra*; *Metz v. Central Ill. Elec. & Gas Co.*, 32 Ill.2d 446, 207 N.E.2d 305 (1965).

Whether the maxim, *res ipsa loquitur*, may be applied in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); Roberts v. Economy Cabs, 285 Ill.App. 424, 2 N.E.2d 128 (4th Dist.1936).

The presumption of negligence is not a true presumption. It is an instructed inference of fact and is circumstantial evidence to be considered by the jury. It does not vanish when defendant introduces evidence of his due care in managing the injuring instrumentality, but remains in the case. The jury must weigh the circumstantial evidence of the plaintiff against the direct evidence of the defendant. *Cobb v. Marshall Field & Co.*, 22 Ill.App.2d 143, 152; 159 N.E.2d 520, 524 (1st Dist.1959); *Bornstein v. Metropolitan Bottling Co.*, 26 N.J. 263, 269-270; 139 A.2d 404, 409 (1958); *McCleod v. Nel-Co Corp.*, 350 Ill.App. 216, 112 N.E.2d 501 (2d Dist.1953); McCormick, Evidence, §§342, 344 (3d ed. 1984). In *Dyback v. Weber*, 114 Ill.2d 232, 500 N.E.2d 8, 102 Ill.Dec. 386 (1986), the Court stated:

> A plaintiff need not conclusively prove all the elements of *res ipsa loquitur* in order to invoke the doctrine. He need only present evidence reasonably showing that elements exist that allow an inference that the occurrence is one that ordinarily does not occur without negligence. [Citation.] The inference that there was negligence does not disappear if the defendant simply presents direct evidence to the contrary, but the defendant's evidence will be considered with all of the other evidence in the case.

The application of the doctrine has been extended to medical malpractice and hospital negligence cases. *Edgar County Bank & Trust Co. v. Paris Hosp., Inc.*, 57 Ill.2d 298, 312 N.E.2d 259 (1974); *Spidle v. Steward*, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980); *McMillen v. Carlinville Area Hosp.*, 114 Ill.App.3d 732, 450 N.E.2d 5, 70 Ill.Dec. 792 (4th Dist.1983). In such cases, however, a different form of the instruction is proper. *See* IPI 105.09.

22.02 *Res Ipsa Loquitur* and Specific Negligence As Alternative Theories of Recovery

Under our law [a plaintiff] [[plaintiff's name]] may attempt to prove in either of two ways that [a defendant] [[defendant's name]] was negligent. He may prove either what [a defendant] [defendant's name] actually did or did not do, or, on the other hand, he may attempt to prove the following propositions: [[complete this instruction by using IPI B22.01, omitting the first sentence of that instruction.]]

Notes on Use

If the court allows both specific negligence and *res ipsa loquitur* to go to the jury, this instruction should be used in lieu of IPI B22.01.

Comment

"If there is an inference of general negligence and proof of specific negligence, but reasonable men may differ as to the effect of this evidence, it should then be for a jury to determine under which theory, if any, the plaintiff should prevail." *Erckman v. Northern Ill. Gas Co.*, 61 Ill.App.2d 137, 149-150; 210 N.E.2d 42, 47, 48 (2d Dist.1965). *Accord*: *Coffey v. Brodsky*, 165 Ill.App.3d 14, 518 N.E.2d 638, 116 Ill.Dec. 16 (4th Dist.1987); *Smith v. General Paving Co.*, 24 Ill.App.3d 858, 321 N.E.2d 689 (3d Dist.1974); *Freer v. Rowden*, 108 Ill.App.2d 335, 341-342; 247 N.E.2d 635, 638-639 (4th Dist.1969); *Decatur & Macon County Hosp. Ass'n v. Erie City Iron Works*, 75 Ill.App.2d 144, 160; 220 N.E.2d 590, 598 (4th Dist.1966); *Turner v. Wallace*, 71 Ill.App.2d 160, 167-168; 217 N.E.2d 11, 14 (3d Dist.1966).

23.00

ADMITTED LIABILITY

23.01A Admitted Fault Only

The defendant admits that [he] [she] [it] [was negligent] [produced an unreasonably dangerous product] [other fault conduct]. You need only decide whether that [negligence] [unreasonably dangerous product] [fault conduct] was a proximate cause of [injuries] [damages] to the plaintiff, and, if so, what amount *of* money will reasonably and fairly compensate the plaintiff for those [injuries] [damages].

23.01B Admitted Fault and Causation

The defendant admits that [he] [she] [it] [was negligent] [produced an unreasonably dangerous product] [other fault conduct]. The defendant also admits that [his] [her] [its] [negligence] [unreasonably dangerous product] [other fault conduct] was a proximate cause of [injuries] [damage] to the plaintiff. You need only decide what amount of money will reasonably and fairly compensate the plaintiff for those [injuries] [damages].

Notes on Use

Permission to publish granted in 2003.

These two instructions replace the former 23.01 titled "Admitted Liability." That concept can mean different things to different people. Unless the instructions clearly state what is admitted and what must be proved, there is a potential for confusion. *Cf. Lawler v. MacDuff*, 335 Ill.App.3d 144, 268 Ill.Dec. 697, 779 N.E.2d 311 (2d Dist.2002).

The general and cautionary instruction, 1.03A or 1.03B, should not be repeated at the end of the case. Either 23.01A or 23.01B should be used, depending on the scope of the admission of fault.

If a directed verdict has been entered on one or more claims, use 3.06.

30.00

DAMAGE INSTRUCTIONS

INTRODUCTION

The following sets of instructions relate to damages for injury to person or property, wrongful death, and injury to a spouse. Each series consists of a basic instruction stating that if the defendant is found liable the jury is to award damages as proved by the evidence. Following the basic instruction is a number of phrases setting out the various elements of damages. These elements are to be inserted in the basic instruction when the evidence justifies their use. *Panepinto v. Morrison Hotel, Inc.,* 71 Ill.App.2d 319, 338; 218 N.E.2d 880, 890 (1st Dist.1966). The omission of an element means the element is not to be considered by the jury. A separate instruction to disregard that element is not required. *Buckler v. Sinclair Ref. Co.,* 68 Ill.App.2d 283, 292-293; 216 N.E.2d 14, 19 (5th Dist.1966).

These instructions contemplate a case involving a single plaintiff and defendant.

This type of instruction eliminates any need for reiteration of the words, "if any," following each element of damages. No less than ten "if anys" appeared in a typical instruction used before IPI in *Krichbaum v. Chicago City Ry. Co.,* 207 Ill.App. 44 (1st Dist.1918). The origin of the phrase is probably *Martin v. Johnson,* 89 Ill. 537, 538 (1878), in which the jurors were instructed that they were the sole judges of the amount of damages which the plaintiff should recover without being told that the damages should be determined from the evidence introduced at the trial. The Court specifically held that it "was the province of the jury to determine the damages plaintiff should recover, if any." The general phraseology of the instruction suggested in the Krichbaum decision requires that the "if any" ending be repeated throughout the body of the charge.

The first paragraph of IPI 30.01, however, specifically informs the jurors that they may compensate the plaintiff only for "any" of the elements of damages proved, and the concluding paragraph of this instruction specifically tells the triers of the facts that whether "any" of the elements of damages has been proved is for the jury to decide. This is sufficient safeguard that the amount of damages will be based on the evidence.

30.01 Measure of Damages--Personal and Property

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the [negligence] [wrongful conduct] [of the defendant], [taking into consideration (the nature, extent and duration of the injury) (and) (the aggravation of any pre-existing ailment or condition)].

[Here insert the elements of damages which have a basis in the evidence]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Notes on Use

This instruction cannot be given in the form shown on this page. It must be completed by selecting the appropriate elements of damages from among phrases IPI 30.04 through IPI 30.20. The phrases so selected should reflect the relevant items of damage and be inserted between the two paragraphs of IPI 30.01.

The bracketed words "taking into consideration the nature, extent and duration of the injury" are to be used only in cases involving an injury to the person. *See comment to* IPI 30.02.

The bracketed words "the aggravation of any pre-existing ailment or condition" are to be used only in those cases where there is a claim that the plaintiff's injuries arose in whole or in part from an aggravation of a pre-existing ailment or condition. *See comment to* IPI 30.03.

The bracketed words "wrongful conduct" in the first paragraph may be used instead of "negligence" when the misconduct alleged includes a charge such as willful and wanton conduct or other fault.

Other phrases may be substituted for the bracketed terms "negligence" or "wrongful conduct" or "wrongful conduct of the defendant" where appropriate, such as "unreasonably dangerous condition of the product."

If the plaintiff sustained no impact to his body and his injury or illness resulted entirely from emotional distress under circumstances where his injury or illness is compensable, insert at the end of the first paragraph of the instruction the phrase "resulting from emotional distress."

Comment

A bystander present in a zone of physical danger who, because of the defendant's negligence, has a reasonable fear for his own safety is given a right of action for physical injury or illness resulting from emotional distress caused by that fear. *Rickey v. Chicago Transit Auth.,* 98 Ill.2d 546, 457 N.E.2d 1, 75 Ill.Dec. 211 (1983). This decision abrogated the former "impact

rule" which required a bystander to have suffered a contemporaneous physical injury or impact to permit recovery.

A cause of action is also available for the intentional infliction of emotional distress. *Knierim v. Izzo,* 22 Ill.2d 73, 174 N.E.2d 157 (1961).

The "aggravation of any pre-existing ailment or condition" is a factor but not an element of damage. *Luye v. Schopper,* 348 Ill.App.3d 767, 284 Ill.Dec. 34, 809 N.E.2d 156 (1st Dist.2004); *Hess v. Espy,* 351 Ill.App.3d 490, 286 Ill.Dec. 213, 813 N.E.2d 270 (2nd Dist.2004); *Smith v. City of Evanston,* 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1984).

30.02 Measure of Damages--Nature and Extent of Injury

[Withdrawn]

Comment

IPI 30.02 formerly read, "The nature, extent and duration of the injury." *Powers v. Illinois Cent. Gulf R. Co.,* 91 Ill.2d 375, 438 N.E.2d 152, 63 Ill.Dec. 414 (1982), held that this is not a separate element of damages. IPI 30.02 has therefore been deleted. However, in determining damages the jury may consider the nature, extent and duration of the injury. *See* IPI 30.01.

30.03 Measure of Damages--Aggravation of Pre-Existing Ailment or Condition

[Withdrawn]

Permission to withdraw granted in 2004.

Comment

IPI 30.03 formerly read, "The aggravation of any pre-existing ailment or condition." It has been deleted as a separate element of damage in light of *Luye v. Schopper,* 348 Ill.App.3d 767, 284 Ill.Dec. 34, 809 N.E.2d 156 (1st Dist.2004) and *Hess v. Espy,* 351 Ill.App.3d 490, 286 Ill.Dec. 213, 813 N.E.2d 270 (2nd Dist.2004). However, in determining damages the jury may consider the aggravation of any pre-existing ailment or condition. *See* IPI 30.01.

30.04 Measure of Damages--Disfigurement

The disfigurement resulting from the injury.

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

Comment

Disfigurement is recognized as a separate element of compensable damages in Illinois. *Holston v. Sisters of the Third Order of St. Francis,* 165 Ill.2d 150, 175; 650 N.E.2d 985, 997; 209 Ill.Dec. 12, 24 (1995); *Simon v. Kaplan,* 321 Ill.App. 203, 52 N.E.2d 832 (1st Dist.1944).

30.04.01 Measure of Damages--Disability/Loss of a Normal Life

[The disability experienced (and reasonably certain to be experienced in the future).]

[Loss of a normal life experienced (and reasonably certain to be experienced in the future).]

Notes on Use

These are alternatives. One of these elements may be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

Smith v. City of Evanston, 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1994), disapproved of the term "disability," holding that the phrase "loss of a normal life" more accurately described this element of damages and would be less confusing to the jury. If the trial court rules that the Smith case is applicable, then the phrase "loss of a normal life" may be substituted for the term "disability" and the Committee recommends that IPI 30.04.02 also be given.

Torres v. Irving Press, Inc., 303 Ill.App.3d 151, 707 N.E.2d 248, 236 Ill.Dec. 403 (1st Dist.1999), [leave to appeal denied] disapproved of the term "loss of a normal life," holding that "disability" was the appropriate element of damages on which the jury should be instructed.

If "disability" is chosen, do not give IPI 30.04.02.

Comment

Disability is recognized as a separate element of compensable damages in Illinois. *Holston v. Sisters of the Third Order of St. Francis,* 165 Ill.2d 150, 175; 650 N.E.2d 985, 997; 209 Ill.Dec. 12, 24 (1995), *Krichbaum v. Chicago City Ry. Co.,* 207 Ill.App. 44 (1st Dist.1917); *and Torres v. Irving Press, Inc.,* 303 Ill.App.3d 151, 707 N.E.2d 248, 236 Ill.Dec. 403 (1st Dist.1999), [leave to appeal denied].

Loss of a normal life is recognized as a separate element of compensable damages in Illinois. *Smith v. City of Evanston,* 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1994); *Zuder v. Gibson,* 288 Ill.App.3d 329, 680 N.E.2d 483, 223 Ill.Dec. 750 (2d Dist.1997), *Abbinante v. O'Connell,* 277 Ill.App.3d 1046, 662 N.E.2d 126, 214 Ill.Dec. 772 (3d Dist.1996); *Knight v. Lord,* 271 Ill.App.3d 581, 648 N.E.2d 617, 207 Ill.Dec. 917 (4th Dist.1995); and *VanHolt v. National Railroad Passenger Corp.,* 283 Ill.App.3d 62, 669 N.E.2d 1288, 218 Ill.Dec. 762 (1st Dist.1996).

The Committee recommends that either "disability" or "loss of a normal life" be used, but not both.

30.04.02 Loss of a Normal Life--Definition

When I use the expression "loss of a normal life", I mean the temporary or permanent diminished ability to enjoy life. This includes a person's inability to pursue the pleasurable aspects of life.

Notes on Use

The Committee recommends that this instruction be used if the option in IPI 30.04.01 concerning loss of a normal life is given.

Comment

This definition is derived from *Smith v. City of Evanston,* 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1994). Defining loss of a normal life in this manner when it is given as an element of compensable damages was approved in *Zuder v. Gibson,* 288 Ill.App.3d 329, 680 N.E.2d 483, 223 Ill.Dec. 750 (2d Dist.1997); *Abbinante v. O'Connell,* 277 Ill.App.3d 1046, 662 N.E.2d 126, 214 Ill.Dec. 772 (3d Dist.1996); and *VanHolt v. National Railroad Passenger Corp.,* 283 Ill.App.3d 62, 669 N.E.2d 1288, 218 Ill.Dec. 762 (1st Dist.1996).

No holding requiring the use of a definition of loss of a normal life exists. Decisions approving the use of a definition of this element are *Abbinante v. O'Connell,* 277 Ill.App.3d 1046, 662 N.E.2d 126, 214 Ill.Dec. 772 (3d Dist.1996) and *Knight v. Lord,* 271 Ill.App.3d 581, 648 N.E.2d 617, 207 Ill.Dec. 917 (4th Dist.1995). Decisions considering this element where no definition was given are *Slavin v. Saltzman,* 268 Ill.App.3d 392, 643 N.E.2d 1383, 205 Ill.Dec. 776 (2d Dist.1994) [*overruled on other grounds* in *Zuder v. Gibson,* 288 Ill.App.3d 329, 680 N.E.2d 483, 223 Ill.Dec. 750 (2d Dist.1997)]; White v. Lueth, 283 Ill.App.3d 714, 670 N.E.2d 1143, 219 Ill.Dec. 255 (3d Dist.1996); *Smith v. City of Evanston,* 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1994); *Sands v. Glass,* 267 Ill.App.3d 45, 640 N.E.2d 996, 203 Ill.Dec. 846 (2d Dist.1994); and *Martin v. Cain,* 219 Ill.App.3d 110, 578 N.E.2d 1161, 161 Ill.Dec. 515 (5th Dist.1991).

30.04.03 Increased Risk of Harm--Measure of Damages

The increased risk of future [specific condition] [harm] resulting from the [injury] [injuries] [condition] [conditions].

Permission to publish 30.04.03, 30.04.04 granted in 2004.

Notes on Use

This instruction should be inserted into the 30.01 instruction in a case where the damages claimed are within the scope of the ruling in *Dillon v. Evanston Hospital,* 199 Ill.2d 483, 264 Ill.Dec. 653, 771 N.E.2d 357 (2002). When this instruction is used, IPI 30.04.04 must also be used.

Comment

Dillon v. Evanston Hospital, 199 Ill.2d 483, 264 Ill.Dec. 653, 771 N.E.2d 357 (2002) established that a plaintiff could obtain an instruction seeking damages for future harm in some circumstances where the harm is less than 50% likely to occur. In those cases, damages for future harm can be obtained but only to the percentage extent that such harm is likely to occur. The Court established a formula multiplying the value of the future harm if certain to occur by the percentage likelihood that the future harm will occur. *Dillon v. Evanston Hospital, supra* at 506. That formula is set forth in IPI 30.04.04.

See the discussion in *Lewis v. Lead Industries,* 342 Ill.App.3d 95, 101, 109; 793 N.E.2d 869; 276 Ill.Dec. 110 (1st Dist.2003), about whether a "present injury" distinct from the future harm is required under Dillon to warrant this instruction. Cf. *Dillon, supra* at 498, 501, 506.

30.04.04 Increased Risk of Harm--Calculation

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

[You do not reduce future damages by this formula if those damages are more [likely than not] [probably true than not true] to occur.]

Notes on Use

This instruction should be given whenever IPI 30.04.03 is given.

Neither this instruction nor IPI 30.04.03 should be given unless the plaintiff claims damages that are less than 50% certain to occur.

A plaintiff is entitled to all future damages proven more likely than not to occur. It has never been plaintiff's burden to establish future damages with 100% certainty to recover full compensation for those damages. Reducing damages for future losses, where the likelihood of occurrence is greater than 50%, is not permissible, and these two instructions should not be used in such a case. If the plaintiff seeks compensation for future damages established by less than a 50% certainty, then IPI 30.04.03 and IPI 30.04.04 should be given.

Care must be used in drafting instructions where some of the future damages are established by greater than a 50% likelihood of occurrence, and some by less than a 50% likelihood of occurrence. Identifying conditions for which future damages are sought in IPI 30.04.04 should obviate any potential jury confusion. Future damages which are more than 50% likely to occur should not be reduced by this formula.

The second paragraph should only be used when the plaintiff is seeking both Dillon type future damages and future damages that are more likely than not to occur. See Notes on Use at IPI 30.04.03 concerning the verdict.

The committee envisions the itemized verdict form to appear something like the following sample (with other elements of damages also listed if appropriate).

VERDICT

We, the jury, find for ([plaintiff's name]) and against ([defendant's name]). We assess the damages in the sum of $_____, itemized as follows:

The increased risk of future [condition] [harm] resulting from the [injury] [injuries] [condition] [conditions] is itemized as follows:

[Medical expenses:] $_____
[Disfigurement:] $_____

[Disability:] $_____
[Loss of normal life:] $_____
[Pain and suffering:] $_____
[Time] [Earnings] [Profits] [Salaries]
[Benefits] lost: $_____
[Risk of future harm:]

Medical expenses	$_____
Disfigurement	$_____
Loss of normal life	$_____
Pain and suffering	$_____
TOTAL	$_____

The LIKELIHOOD that the future [condition] [harm] will occur is ____%

The TOTAL DAMAGES multiplied by the LIKELIHOOD that they are going to occur is _____ [TOTAL DAMAGES] x ____% [LIKELIHOOD] = _____

TOTAL DAMAGES $_____

30.04.05 Measure of Damages--Shortened Life Expectancy

Shortened life expectancy.

Instruction, Notes on Use and Comment approved May 2008.

Notes on Use

This instruction is appropriate if there is evidence that plaintiff's life expectancy has been shortened by the tort. It should appear as a separate element of damages on the verdict form.

This element of damages may be used in cases where the court also instructs on disability or loss of a normal life, where such evidence is present. *IPI 34.01* should be given with this instruction.

Comment

The element "shortened life expectancy" can arise when the tort causes a plaintiff to be likely to die prematurely. *Dillon v. Evanston Hosp.,* 199 Ill.2d 483, 500 (2002) supports this element of damages. *See DePass v. United States,* 721 F.2d 203, 208 (7th Cir. 1983) (Posner, J. dissenting) citing out of state cases to support the conclusion that Illinois law does not permit a tortfeasor to get off scot-free because, instead of killing the victim, he inflicts an injury that is likely to shorten the victim's life. Shortened life expectancy is recognized as a separate element of compensable damages in *Bauer ex rel. Bauer v. Memorial Hosp.,* 377 Ill.App.3d 895, 920-921 (5th Dist. 2007).

30.05 Measure of Damages--Pain and Suffering--Past and Future

The pain and suffering experienced [and reasonably certain to be experienced in the future] as a result of the injuries.

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use. To warrant inclusion of the bracketed material relating to future pain and suffering, there must be evidence that such pain and suffering is reasonably certain to occur in the future.

Comment

Pain and suffering are compensable elements of damages. *Donk Bros. Coal & Coke Co. v. Thil,* 228 Ill. 233, 241; 81 N.E. 857, 860 (1907); *Krichbaum v. Chicago City Ry. Co.,* 207 Ill.App. 44 (1st Dist.1917); *McDaniels v. Terminal R.R. Ass'n,* 302 Ill.App. 332, 350; 23 N.E.2d 785, 793 (4th Dist.1939). These elements are not included in "disability." *Wood v. Mobil Chem. Co.,* 50 Ill.App.3d 465, 476; 365 N.E.2d 1087, 1095; 8 Ill.Dec. 701, 709 (5th Dist.1977).

30.05.01 Measure of Damages--Emotional Distress--Past and Future

The emotional distress experienced [and reasonably certain to be experienced in the future].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use and when the court rules that damages for emotional distress can be claimed.

Comment

Under certain circumstances, a plaintiff can recover damages for negligent infliction of emotional distress even in the absence of a physical impact. *Rickey v. Chicago Transit Auth.,* 98 Ill.2d 546, 457 N.E.2d 1, 75 Ill.Dec. 211 (1983); *Corgan v. Muehling,* 143 Ill.2d 296, 574 N.E.2d 602, 158 Ill.Dec. 489 (1991); *Lewis v. Westinghouse Electric Corp.,* 139 Ill.App.3d 634, 487 N.E.2d 1071, 94 Ill.Dec. 194 (1st Dist.1985); *Courtney v. St. Joseph Hosp.,* 149 Ill.App.3d 397, 500 N.E.2d 703, 102 Ill.Dec. 810 (1st Dist.1986); *Robbins v. Kass,* 163 Ill.App.3d 927, 516 N.E.2d 1023, 114 Ill.Dec. 868 (2d Dist.1987); *Koeller v. Cook County,* 180 Ill.App.3d 425, 535 N.E.2d 1118, 129 Ill.Dec. 353 (1st Dist.1989); *Seef v. Sutkus,* 205 Ill.App.3d 312, 562 N.E.2d 606, 150 Ill.Dec. 76 (1st Dist.1990), *aff'd on other grounds*, 145 Ill.2d 336, 583 N.E.2d 510, 164 Ill.Dec. 594 (1991); *Allen v. Otis Elevator Co.,* 206 Ill.App.3d 173, 563 N.E.2d 826, 150 Ill.Dec. 699 (1st Dist.1990); *Hayes v. Illinois Power Co.,* 225 Ill.App.3d 819, 587 N.E.2d 559, 167 Ill.Dec. 290 (4th Dist.1992); *Leonard v. Kurtz,* 234 Ill.App.3d 553, 600 N.E.2d 896, 175 Ill.Dec. 653 (3d Dist.1992); *Jarka v. Yellow Cab Co.,* 265 Ill.App.3d 366, 637 N.E.2d 1096, 202 Ill.Dec. 360 (1st Dist.1994). *See also Kapoulas v. Williams Ins. Agency, Inc.,* 11 F.3d 1380 (7th Cir.1993).

The United States Supreme Court has recognized a cause of action for negligent infliction of emotional distress under the Federal Employers' Liability Act. *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994). *See* Chapter 160, *infra*.

30.06 Measure of Damages--Medical Expense--Past and Future--Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Assigned Claim to Minor

The reasonable expense of necessary medical care, treatment, and services received [and the present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use. To warrant inclusion of the bracketed material relating to future medical expenses, there must be evidence that such expenses are reasonably certain to be incurred.

If the plaintiff is a minor or minor's representative and the right to recover these expenses during minority has not been assigned to the minor, use IPI 30.08.

Comment

The reasonable expense of necessary medical care is an element of damages. *Donk Bros. Coal & Coke Co. v. Thil,* 228 Ill. 233, 241; 81 N.E. 857, 860 (1907).

In actions for damages arising out of an injury to an unemancipated minor, the items of damage listed in this element are recoverable by the parents. *Reimers v. Honda Motor Co.,* 150 Ill.App.3d 840, 502 N.E.2d 428, 429-430; 104 Ill.Dec. 165, 166-167 (1st Dist.1986); *Curtis v. County of Cook,* 109 Ill.App.3d 400, 440 N.E.2d 942, 947; 65 Ill.Dec. 87, 92 (1st Dist.1982), *judgment aff'd in part, rev'd in part, on other grounds*, 98 Ill.2d 158, 456 N.E.2d 116, 74 Ill.Dec. 614 (1983). However, the usual practice in Illinois is to sue for those damages in the minor's action. This is accomplished by alleging an assignment, or waiver or relinquishment by the parents of their right to recover these damages. *Curtis v. Lowe,* 338 Ill.App. 463, 87 N.E.2d 865 (2d Dist.1949).

A derivative action for medical expenses arising under § 15 of the Husband and Wife Act (750 ILCS 65/15) tolls during the child's infancy and must be filed within two years of the child reaching eighteen years of age. 735 ILCS 5/13-203, 5/13-211.

An individual is not entitled to recover for the value of free hospital, nursing and medical services that he has obtained without expense, obligation, or liability. *Peterson v. Lou Bachrodt Chevrolet,* 76 Ill.2d 353, 392 N.E.2d 1, 5; 29 Ill.Dec. 444, 448 (1979).

On the issue of present cash value, *see* the 34.00 series.

30.07 Measure of Damages--Loss of Earnings or Profits--Past and Future--Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Assigned Claim to Minor

[The value of (time) (earnings) (profits) (salaries) (benefits) lost] [.] [and] [(T)he present cash value of the (time) (earnings) (profits) (salaries) (benefits) reasonably certain to be lost in the future].

Notes on Use

One or more of these elements is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

If the plaintiff is a minor or minor's representative and the right to recover these expenses during minority has not been assigned to the minor, use IPI 30.08.

Comment

The first phrase of this instruction concerns earnings and profits lost prior to trial.

With reference to past lost time, an injured party may recover for the time lost even though he was paid his regular wage during incapacitation. *Hoobler v. Voelpel,* 246 Ill.App. 69 (2d Dist.1927); *Cooney v. Hughes,* 310 Ill.App. 371, 34 N.E.2d 566 (1st Dist.1941) (loss incurred by unemployed plaintiff who provided services in the home); *Jerrell v. Harrisburg Fair & Park Ass'n,* 215 Ill.App. 273, 280 (4th Dist.1919) (plaintiff must present evidence of lost earnings, time or wages); *Wever v. Staggs,* 264 Ill.App. 556, 564 (3d Dist.1932) (homemaker's lost services are a proper element of damages if value of lost services is established); *McManus v. Feist,* 76 Ill.App.2d 99, 106-107; 221 N.E.2d 418, 421-422 (4th Dist.1966).

The second portion of this instruction includes diminution of the plaintiff's capacity to earn. It may be based upon inability to earn in occupations or fields of endeavor like or unlike his past earning experience, so long as his lost capacity to earn is established by the evidence. Consequently, damages incurred as a result of impaired earning capacity are not necessarily measured by proof of past lost wages. *Buckler v. Sinclair Ref. Co.,* 68 Ill.App.2d 283, 216 N.E.2d 14 (5th Dist.1966). The element of damages for future lost earnings does not depend on whether the injured party was employed on the date of the occurrence. *Casey v. Baseden,* 131 Ill.App.3d 716, 475 N.E.2d 1375, 86 Ill.Dec. 808 (5th Dist.1985), *aff'd*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986). The instruction may also be proper even though he was employed at the time of trial and earning more than at the time of his injury. *Jackson v. Illinois Cent. Gulf R. Co.,* 18 Ill.App.3d 680, 309 N.E.2d 680, 688 (1st Dist.1974).

In actions for damages arising out of an injury to an unemancipated minor, the loss of earnings during minority are recoverable by the parents. *Ferreira v. Diller,* 176 Ill.App. 447 (3d Dist.1912); *Barrett v. Riley,* 42 Ill.App. 258 (2d Dist.1891). However, the usual practice in Illinois is to sue for these damages in the minor's action. This is accomplished by alleging an assignment, or waiver or relinquishment by the parents of their right to recover these damages. *Curtis v. Lowe,* 338 Ill.App. 463, 87 N.E.2d 865 (2d Dist.1949).

735 ILCS 5/13-203 (1994) provides that a derivative claim (i.e., a right of action arising out of an injury to the person of another) is governed by the same limitation period as is the action for damages for injury to such other person.

On the issue of present cash value, *see* the 34.00 series.

30.08 Measure of Damages--Loss of Future Earnings--Future Medical Expenses--Minor Plaintiff

The present cash value of (time) (earnings) (profits) (salaries) (benefits) [(medical) care, treatment, and services] (caretaking expense) reasonably certain to be lost (or incurred) in the future after the plaintiff has reached the age of eighteen.

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

The legal age of majority is 18 years. 755 ILCS 5/11-1 (1994). Before age 18, the parents are entitled to the earnings if the minor is unemancipated.

If the parents' right to recover medical expenses during the child's minority has been assigned to the child, then the child can recover all such expenses, not merely those commencing with his majority. In such cases, therefore, do not include the bracketed material concerning medical expenses in this instruction; use IPI 30.06 instead. If the assignment includes caretaking expenses, and there is evidence of such expenses, omit the bracketed reference to caretaking expenses and use IPI 30.09.

Similarly, if the parents have assigned to the child their right to recover for any earnings he may have during his minority, and there is evidence to support such earnings, use IPI 30.07 in lieu of this instruction.

Comment

In actions for damages arising out of an injury to an unemancipated minor, the loss of earnings, medical and caretaking expense during the child's minority are recoverable by the parents. The child, therefore, is limited to the loss of earnings, medical or caretaking expense he would have incurred after reaching his majority. *Wolczek v. Public Service Co. of N. Ill.,* 342 Ill. 482, 496; 174 N.E. 577, 583 (1930). The usual practice in Illinois, however, is to sue for all damages in the minor's action. This is accomplished by alleging an assignment, or waiver or relinquishment by the parents of their right to recover these damages. *Curtis v. Lowe,* 338 Ill.App. 463, 87 N.E.2d 865 (2d Dist.1949). *See* Comment to IPI B11.06.01.

On the issue of present cash value, *see* the 34.00 series.

30.09 Measure of Damages--Caretaking Expenses, Necessary Help--Past and Future--Adult Plaintiff, Emancipated Minor, or Minor Whose Parent Has Assigned Claim to Minor

The reasonable expense of necessary help [and the present cash value of such expense reasonably certain to be required in the future].

Instruction and Comment revised January 2010.

Notes on Use

This element is to be inserted between the paragraphs of IPI 30.01 when the evidence justifies its use.

To include the bracketed material relating to future caretaking expense, there must be evidence that such expense is reasonably certain to be incurred in the future.

If the plaintiff is a minor or minor's representative and the right to recover these expenses during minority has not been assigned to the minor, use IPI 30.08.

Comment

Plaintiff is entitled to recover all damages that naturally and proximately flow from the tort. *Horan v. Klein's-Sheridan, Inc.,* 62 Ill.App.2d 455, 459, 211 N.E.2d 116, 118 (3d Dist. 1965). Incidental caretaker expenses resulting from personal injuries are therefore appropriate elements of damages. *Hoobler v. Voelpel,* 246 Ill.App. 69 (2d Dist. 1927) (court allowed recovery of expense of hiring help in plaintiff's home during convalescence). Recovery is not limited to caretaking expenses incurred in the home, however, and extends to all necessary help reasonably incurred as a result of the injury suffered. In *North Chicago St. R. Co. v. Zeiger,* 182 Ill. 9, 54 N.E. 1006 (1899), the Illinois Supreme Court approved the use of this instruction where plaintiff, a butcher employing 25 workers, had to pay a substitute superintendent to perform plaintiff's duties for a period of five months after his accident. *Worley v. Barger,* 347 Ill.App.3d 492, 807 N.E.2d 1222, 283 Ill. Dec. 381(5th Dist. 2004) (the court noted plaintiff should be permitted to seek recovery for the reasonable value of caretaking services that would have been allowed had someone been employed to care for her child).

On the issue of present cash value, see the 34.00 series.

30.10 Measure of Damages--Damage to Personal Property--Repairs and Depreciation or Difference in Value Before and After Damage

The damage to property, determined by the lesser of two figures which are calculated as follows:

One figure is the reasonable expense of necessary repair of the property plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after the property is repaired.

The other figure is the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.

You may award as damages the lesser of these two figures only.

Notes on Use

This instruction is not to be used alone, but it is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

If there is no claim that the repaired property has depreciated in value, use IPI 30.11.

If the cost of repairs plus depreciation will be less than the difference in value between the damaged and undamaged property, use IPI 30.12.

If only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage, use IPI 30.13.

If the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs, use IPI 30.14.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

Since compensatory damages are only to make a party whole, and not to enable him to make a profit on the transaction, a party may recover the reasonable expense of necessary repairs plus any difference between the value of the property immediately before the occurrence and after it has been repaired, provided that these amounts do not exceed the difference between the value of the undamaged and damaged property. *Santiemmo v. Days Transfer, Inc.,* 9 Ill.App.2d 487, 502; 133 N.E.2d 539, 546 (1st Dist.1956) (a verdict of $4,417.16, representing the costs of repairs, was reduced by $717.76 to equal highest estimate of the value of the truck before it was

damaged); *McDonell v. Lake Erie & W. Ry. Co.,* 208 Ill.App. 442, 454 (2d Dist.1917) ("Sometimes, after the repairs, the property is still not as good as it was before, and then the difference between the value of the property after it has been repaired and the value of the property before the injury should be added to make up the loss."); *Welter v. Schell,* 252 Ill.App. 586, 589-590 (1st Dist.1929) (plaintiff recovered $423.25 for repairs and $475 for depreciation after repair on his automobile which was worth $2,200 immediately before being damaged). *See generally* Fowler, Loss of Earnings and Property Damage, 1956 U. Ill. L.F. 453, 462-465.

30.11 Measure of Damages--Damage to Personal Property--Repairs or Difference In Value Before and After Damage

The damage to property, determined by the lesser of (1) the reasonable expense of necessary repairs to the property or (2) the difference between the fair market value of the property immediately before the occurrence and its fair market value immediately after the occurrence.

Notes on Use

This instruction is to be used as an alternative to IPI 30.10 if there is no claim that the property after repairs has suffered reduction in fair market value. The instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction is to be used when there is an issue as to whether the cost of repairs or the difference in value of the property before and after it is damaged is the lesser amount. When the cost of repairs is admittedly the lesser amount, use IPI 30.13; when the converse is true, use IPI 30.14.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

See Comment to IPI 30.10.

30.12 Measure of Damages--Damage to Personal Property--Cost of Repairs and Depreciation of Repaired Property

The reasonable expense of necessary repairs to the property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired.

Notes on Use

The instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction is to be used as an alternative to IPI 30.10 where the costs of repairs plus depreciation is less than the difference in value between the damaged and undamaged property.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

McDonell v. Lake Erie & W. Ry. Co., 208 Ill.App. 442, 452 (2d Dist.1917) ("Sometimes, after the repairs, the property is still not as good as it was before, and then the difference between the value of the property after it has been repaired and the value of the property before the injury should be added to make up the loss."); *Welter v. Schell,* 252 Ill.App. 586, 589-590 (1st Dist.1929) (plaintiff recovered $423.25 for repairs and $475 for depreciation for damage to his automobile which was worth $2,200 immediately before being damaged).

30.13 Measure of Damages--Damage to Personal Property--Repairs

The damage to property, determined by the reasonable expense of necessary repairs to the property which was damaged.

Notes on Use

The instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction is to be used as an alternative to IPI 30.10 if only the reasonable expense of necessary repairs is claimed and that is less than the difference in value of the property before and after the damage.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

Repairs to damaged property are recognized as a compensable element of damages. McDonell v. Lake Erie & W. Ry. Co., 208 Ill.App. 442, 450 (2d Dist.1917).

30.14 Measure of Damages--Damage to Personal Property--Difference in Value Before and After Damage

The damage to property, determined by the difference between its fair market value immediately before the occurrence and its fair market value immediately after the occurrence.

Notes on Use

This instruction is to be used as an alternative to IPI 30.10 if the difference in the value of property before and after it was damaged is less than the reasonable cost of repairs. The instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction is appropriate only where the property, though destroyed or damaged beyond repair, is still in existence and has salvage value. If the property is not in existence or if it lacks salvage value, IPI 30.15 is appropriate.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

The difference in values immediately before and after the occurrence is recognized as a compensable element of damages in Illinois, where the property is destroyed beyond repair or the cost of repair exceeds the difference in value. *Crossen v. Chicago & Joliet Elec. Ry. Co.,* 158 Ill.App. 42, 44 (2d Dist.1910); *Latham v. Cleveland, C., C. & St. L. Ry. Co.,* 164 Ill.App. 559, 563 (2d Dist.1911); *Albee v. Emrath,* 53 Ill.App.3d 910, 916; 369 N.E.2d 62, 67; 11 Ill.Dec. 608, 613 (1st Dist.1977); *Collgood, Inc. v. Sands Drug Co.,* 5 Ill.App.3d 910, 917; 284 N.E.2d 406, 410 (5th Dist.1972).

30.15 Measure of Damages--Damage to Personal Property--Value Before Damage--No Salvage

The damage to property, determined by the fair market value of the property immediately before the occurrence.

Notes on Use

This instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction may be used (1) where the property is damaged beyond repair and has no salvage value or (2) where there is no evidence as to the salvage value. *New York, Chicago & St. L.R. Co. v. American Transit Lines,* 408 Ill. 336, 339-342; 97 N.E.2d 264, 266-268 (1951). Where the property admittedly has salvage value, use IPI 30.14.

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

30.16 Measure of Damages--Damage to Personal Property--Loss of Value

The reasonable rental value of similar property for the time reasonably required for the [repair] [replacement] of the property damaged.

Notes on Use

This instruction is not to be used alone, but is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

If the property has been replaced, the bracketed material should be used in lieu of the word "repair."

This instruction should not be used for damages to real estate or improvements thereon. *See* IPI 30.17 to 30.20. Where real and personal property claims occur together, use instructions for both where appropriate, and substitute the name of the personal property item instead of "property" in the introductory clause.

Comment

Reasonable rental value is a recognized element of compensable damages in Illinois. *Lawndale Steam Dye Works v. Chicago Daily News Co.,* 189 Ill.App. 565, 566 (1st Dist.1914); *Berry v. Campbell,* 118 Ill.App. 646 (2d Dist.1905); *McDonell v. Lake Erie & W. Ry. Co.,* 208 Ill.App. 442, 450 (2d Dist.1917).

It is not necessary that similar property be actually rented during the period of time reasonably required for repair. Damages are available for loss of use of the damaged property during the period required for repair, even though rental of similar property is not undertaken by the impaired party. *Trailmobile Div. of Pullman, Inc. v. Higgs,* 12 Ill.App.3d 323, 325; 297 N.E.2d 598, 600 (5th Dist.1973). Proof as to the value of the loss of use must be present, such as the cost of renting a replacement vehicle. *Plesniak v. Wiegand,* 31 Ill.App.3d 923, 335 N.E.2d 131 (1st Dist.1975).

In *National Contract Purchase Corp. v. McCormick,* 264 Ill.App. 63 (1st Dist.1931), the court valued the loss of use of the plaintiff's vehicle by computing the cost of renting a replacement, even though the plaintiff did not rent a replacement.

30.17 Measure of Damages--Damage to Real Property--Repairable Damage

The damage to real property, determined by the reasonable expense of necessary repairs to the property which was damaged [and the value of loss of the use of the (building) (improvements) for the time reasonably required for the repair] [and the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the repairs].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use. This instruction must be used, in general, where the damages to real estate are not permanent.

The first bracketed clause should be inserted where the evidence shows that the property was unable to be occupied, or used, during the period of repair. Proof as to the value of the loss of the use must be presented.

The second bracketed portion should be used in those situations where the evidence reflects that, after the repairs are performed to the real property, there is still a decrease in the fair market value of the property.

This instruction is appropriate in a nuisance case where the nuisance can be abated.

Comment

Where damages to real property are not permanent, then the measure of damages is the cost of restoration. If the damages are permanent, the measure of damages is the diminution in market value of the realty. *Arras v. Columbia Quarry Co.,* 52 Ill.App.3d 560, 367 N.E.2d 580, 10 Ill.Dec. 192 (5th Dist.1977).

In characterizing an injury to realty as permanent or temporary, a court must necessarily look to the nature of the thing injured (*Arras v. Columbia Quarry Co., supra*) and the exact interest harmed. *Myers v. Arnold,* 83 Ill.App.3d 1, 403 N.E.2d 316, 38 Ill.Dec. 228 (4th Dist.1980); *Zosky v. Couri,* 77 Ill.App.3d 1033, 397 N.E.2d 170, 33 Ill.Dec. 837 (3d Dist.1979) (tire ruts not permanent and required repair, rather than diminution in fair market value).

In *Arras,* damage to a well was held not permanent, because the injury was abatable by the drilling of a new well. *Myers* approved an award of damages in excess of diminution of market value because the property was a family residence, not an investment, and the interest harmed could be corrected with a reasonable expenditure, even though the cost exceeded the diminution in value of the land.

Cost of repair or restoration is the proper measure of damages in mine subsidence cases (*Donk Bros. Coal & Coke Co. v. Novero,* 135 Ill.App. 633 (4th Dist.1907)), and in blasting cases. *Fitzsimons & Connell Co. v. Braun & Fitts,* 199 Ill. 390, 65 N.E. 249 (1902); *Peet v.*

Dolese & Shepard Co., 41 Ill.App.2d 358, 190 N.E.2d 613 (2d Dist.1963).

Costs of repair can include the expense necessary to conform those repairs to existing building codes. *Peluso v. Singer General Precision, Inc.,* 47 Ill.App.3d 842, 365 N.E.2d 390, 8 Ill.Dec. 152 (1st Dist.1977).

For a case involving damages for mining coal after expiration of a lease, *see Dethloff v. Zeigler Coal Co.,* 82 Ill.2d 393, 412 N.E.2d 526, 45 Ill.Dec. 175 (1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 299 (1981).

30.18 Measure of Damages--Damage to Real Property--Permanent or Continuing Damage

The damage to real property, determined by the difference between the fair market value of the real property immediately before the occurrence and its fair market value immediately after the occurrence.

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

This instruction is appropriate in a nuisance case, where the nuisance cannot be abated. For repairable damage, *see* IPI 30.17.

Comment

For permanent damage to land or buildings, the usual measure of damages is the decrease in the value of the property. *Illinois Cent. Ry. Co. v. Ferrell,* 108 Ill.App. 659 (4th Dist.1902); *Clark v. Public Service Co. of N. Ill.,* 278 Ill.App. 426 (2d Dist.1934); *Stirs, Inc. v. City of Chicago,* 24 Ill.App.3d 118, 320 N.E.2d 216 (1st Dist.1974). An exception to this general rule is damage to property as a result of mine subsidence, where the cost of repair or restoration is the proper measure. *Donk Bros. Coal & Coke Co. v. Novero,* 135 Ill.App. 633 (4th Dist.1907). Blasting is another exception requiring repair. *Fitzsimons & Connell Co. v. Braun,* 199 Ill. 390, 65 N.E. 249 (1902); *Peet v. Dolese & Shepard Co.,* 41 Ill.App.2d 358, 190 N.E.2d 613 (2d Dist.1963).

In characterizing an injury to realty as permanent or temporary, a court must necessarily look to the nature of the thing injured, and the exact interest harmed. *Arras v. Columbia Quarry Co.,* 52 Ill.App.3d 560, 367 N.E.2d 580, 10 Ill.Dec. 192 (5th Dist.1977); *Myers v. Arnold,* 83 Ill.App.3d 1, 403 N.E.2d 316, 38 Ill.Dec. 228 (4th Dist.1980). *See* comment to IPI 30.17.

The measure of damages for the destruction of trees and land is the difference in value of the land immediately before and immediately after the damage. This rule has been applied to ornamental or shade trees (*First Nat'l Bank v. Amco Engineering Co.,* 32 Ill.App.3d 451, 335 N.E.2d 591 (2d Dist.1975); *Rogers v. Enzinger,* 339 Ill.App. 376, 89 N.E.2d 853 (2d Dist.1950)), and to orchard or fruit trees. *Collins v. Illinois Cent. R.R.,* 161 Ill.App. 95 (4th Dist.1911). Damage for the destruction of forest trees is the value of the trees, rather than the difference in value of the land before and after the destruction. *Citizens Nat'l Bank v. Joseph Kesl & Sons Co.,* 378 Ill. 428, 38 N.E.2d 734 (1941); *Jones v. Sanitary Dist. of Chicago,* 252 Ill. 591, 97 N.E. 210 (1911).

30.19 Measure of Damages--Damage to Real Property--Mature Crops

The market value of the crop as it was at the time of the loss [less the cost of harvesting and marketing, including all care and preparation for marketing, and transportation to market].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

For growing crops, or immature crops, where the market value of the products cannot be fairly determined, *see* IPI 30.20.

The bracketed clause should be inserted only in those situations where the crop is fully matured and ready to be harvested, and the tort is not willful.

Comment

Where the crop is more or less matured so that the yield can be fairly determined, the value of the crop at the time of the loss is the measure of damages. *Baltimore & Ohio Southwestern R. Co. v. Stewart,* 128 Ill.App. 270 (4th Dist.1906). This includes the value of the right which the owner had to mature the crops and harvest or gather them at the proper time. *St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz,* 226 Ill. 409, 80 N.E. 879 (1907).

The value of the right which the owner had to mature the crops and harvest or gather them at the proper time is generally the amount someone would pay for an immature crop in its condition before the loss. This value depends upon a number of factors, including the quality of the soil, the nature of the crop, and the hazard of maturity. *Zuidema v. Sanitary Dist. of Chicago,* 223 Ill.App. 138 (1st Dist.1921).

The measure of damage to mature crops is the market value of those crops, less the costs which would have been incurred in harvesting the damaged portion of the crop, and marketing said damaged portion, including transportation of the damaged portion to market. *Baltimore & Ohio Southwestern R. Co. v. Stewart, supra*. Where crops are converted at harvest, the measure of damages is the market value at that time and place. *Agrinetics, Inc. v. Stob,* 90 Ill.App.3d 107, 412 N.E.2d 714, 45 Ill.Dec. 363 (2d Dist.1980).

Cf. Dethloff v. Zeigler Coal Co., 82 Ill.2d 393, 412 N.E.2d 526, 45 Ill.Dec. 175 (1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1980, 68 L.Ed.2d 299 (1981) (discussing measure of damages for willful trespass and conversion of coal).

30.20 Measure of Damages--Damage to Real Property--Growing Crops

The value of the crop at the time it was damaged, which includes the annual rental value of the land in question, the cost of seed, the value of labor and expenses incurred in preparing the ground and planting the crop [, and the value of labor and the expenses incurred after planting].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 30.01 when the evidence justifies its use.

The instruction should be used when the crop is not yet up. Where the crop is up, but not so far mature that the yield can be fairly determined, then the bracketed clause should be included in the instruction. Where the crop is so grown, or nearly matured, as to be fairly determined, or where the crop is matured, IPI 30.19 should be used.

This instruction may not be appropriate in landlord-tenant situations with respect to rental value, depending on the terms of the lease agreement, and this instruction may need to be modified accordingly.

Comment

The rule in Illinois for measuring damages to immature crops was stated in *Baltimore & Ohio Southwestern R. Co. v. Stewart,* 128 Ill.App. 270, 274-275 (4th Dist.1906):

> The general rule is: "where the crop is not up, the damage should be estimated upon the basis of the rental value and the cost of seed and labor, preparing the ground and planting the crops; where the crop is up, but not so far mature that the product can be fairly determined, the injured party can recover, in addition to the above, the cost of any labor bestowed after the planting; where the crop is more or less matured so that the product can be fairly determined, the value of the crop at the time of the loss is the measure of damages, and it is only where the crop is fully matured and ready to be harvested, that the damage can be determined by the market value of the crop, less the cost of harvesting and marketing, which must include all care and preparation for marketing, such as packing, crating and baling, threshing and the like, according to the nature of the crop."

This test was used in *Young v. West,* 130 Ill.App. 216 (3d Dist.1906), and *Enright v. Toledo, P. & W. Ry. Co.,* 158 Ill.App. 323 (3d Dist.1910).

Growing crops are difficult to evaluate because of the uncertainty of their value at maturity, and the measure of damages is the value of the crops as they were when destroyed, with the right of the owner to mature and harvest them at the proper time. Opinion evidence tending to show what the crops in question would yield if allowed to mature, or what the market value was at the time of maturity, is not admissible in proof of damages. *Zuidema v. Sanitary Dist. of Chicago,* 223 Ill.App. 138 (1st Dist.1921).

30.21 Measure of Damages--Personal Injury--Aggravation of Pre-Existing Condition--No Limitations

If you decide for the plaintiff on the question of liability, you may not deny or limit the plaintiff's right to damages resulting from this occurrence because any injury resulted from [an aggravation of a pre-existing condition] [or] [a pre-existing condition which rendered the plaintiff more susceptible to injury].

Notes on Use

In FELA cases, IPI 160.27 should be used.

Comment

See IPI 30.03.

In *Balestri v. Terminal Freight Co-op. Ass'n,* 76 Ill.2d 451, 394 N.E.2d 391, 31 Ill.Dec. 189 (1979), *cert. denied*, 444 U.S. 1018, 100 S.Ct. 671, 62 L.Ed.2d 648 (1980), the court held it was reversible error to refuse an instruction that the plaintiff's right to recover damages for his or her injuries and disability is not barred or limited by the fact that they arose out of an aggravation of a pre-existing condition which made the plaintiff more susceptible to injury. *See also Pozzie v. Mike Smith, Inc.,* 33 Ill.App.3d 343, 337 N.E.2d 450 (1st Dist.1975).

Other courts have approved giving this instruction. *See Ficken v. Alton & Southern Ry. Co.,* 255 Ill.App.3d 1047, 625 N.E.2d 1172, 1176-1178; 193 Ill.Dec. 51, 55-57 (5th Dist.1993); *Worthy v. Norfolk & W. Ry. Co.,* 249 Ill.App.3d 1096, 619 N.E.2d 1371, 189 Ill.Dec. 322 (5th Dist.1993); *Dabros v. Wang,* 243 Ill.App.3d 259, 611 N.E.2d 1113, 183 Ill.Dec. 465 (1st Dist.1993) (refusal was error, but harmless in view of verdict for defendant); *Grimming v. Alton & Southern Ry. Co.,* 204 Ill.App.3d 961, 562 N.E.2d 1086, 1098-1100; 150 Ill.Dec. 283, 295-297 (5th Dist.1990) (similar instruction); *Wheeler v. Roselawn Memory Gardens,* 188 Ill.App.3d 193, 543 N.E.2d 1328, 1335; 135 Ill.Dec. 581, 588 (5th Dist.1989) (similar instruction). *But see Smith v. City of Evanston,* 260 Ill.App.3d 925, 631 N.E.2d 1269, 197 Ill.Dec. 810 (1st Dist.1994).

30.22 Collateral Source--Damages

[Withdrawn; former content is combined into 3.03]

Instruction withdrawn October 2007.

30.23 Injury from Subsequent Treatment

If [a defendant] [defendants] negligently cause[s] [injury to] [a condition of] the plaintiff, then the defendant[s] [is] [are] liable not only for the plaintiff's damages resulting from that [injury] [or] [condition], but [is] [are] also liable for any damages sustained by the plaintiff arising from the efforts of health care providers to treat the [injury] [or] [condition] caused by the defendant[s] [even if (that) (those) health care provider(s) (was) (were) negligent.]

Notes on Use

Permission to publish granted in 2003.

This instruction is intended to be used when there is evidence that a subsequent health care provider caused or aggravated the injury. The last bracketed material should be used when there is a claim that the subsequent health care provider was negligent. *See Kolakowski v. Voris,* 94 Ill.App.3d 404, 418 N.E.2d 1003, 50 Ill.Dec. 9 (1st Dist.1981).

Comments

If the issue of the subsequent medical provider having caused or aggravated an injury is injected into the case, there is a likelihood the jury may be confused as to the applicable law. The jury might perceive the subsequent provider as the wrongdoer and "acquit the defendants on that basis." *Kolakowski v. Voris, supra*. This proposition is not necessarily obvious and should be told to the jury. *See Daly v. Carmean,* 210 Ill.App.3d 19, 30; 568 N.E.2d 955, 154 Ill.Dec. 734 (4th Dist.1991) citing *Gertz v. Campbell,* 55 Ill.2d 84, 302 N.E.2d 40 (1973). No other instruction tells the jury that the defendant, if culpable, is liable for damages caused by the subsequent health care provider's conduct.

31.00

DAMAGES--WRONGFUL DEATH

INTRODUCTION

Previously at common law, actions for personal injuries were abated if, before a verdict was returned, the plaintiff died from the injuries for which he sued. *Susemiehl v. Red River Lumber Co.,* 376 Ill. 138, 33 N.E.2d 211 (1941). This was true in spite of the Survival Statute. 755 ILCS 5/27-6. The law was changed by the Illinois Supreme Court in *Murphy v. Martin Oil Co.,* 56 Ill.2d 423, 308 N.E.2d 583 (1974). The Survival Statute now has the same application to all cases resulting in death that it has always had in cases where death resulted from a cause other than the initial tortious injury.

If death results from the initial tortious injury, the Wrongful Death Act creates a cause of action in the name of the personal representative for the benefit of the widow and next-of-kin for their "pecuniary injuries." 740 ILCS 180/1, 180/2. The term "pecuniary injuries" has been interpreted to include benefits of a pecuniary value, which includes money, goods, and services received by the next of kin of the deceased. When there are surviving children, it also includes the instruction, moral training, and superintendence of education that the children would have received from the deceased parent. "Pecuniary injuries" has also been held to include the loss of consortium by the surviving spouse, *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982); the loss of a minor child's society by the parents, *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984); the loss of an unmarried adult child's society by the parents, *Prendergast v. Cox,* 128 Ill.App.3d 84, 470 N.E.2d 34, 83 Ill.Dec. 279 (1st Dist. 1984); the loss of a parent's society by an adult child, *In re Estate of Keeling,* 133 Ill.App.3d 226, 478 N.E.2d 871, 88 Ill.Dec. 380 (3d Dist. 1985); and the proven loss of a sibling's society, *In re Estate of Finley,* 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992).

If there is both a survival action and a wrongful death action, pecuniary injuries, such as those for loss of support, should be carefully confined to the period after death. This helps avoid duplication of those damages allowable under the survival action for lost wages during the lifetime of the injured party.

Where the decedent leaves direct lineal kin, or a widow or widower, there is a presumption that they have suffered some substantial pecuniary loss by reason of the death. *Ferraro v. Augustine,* 45 Ill.App.2d 295, 196 N.E.2d 16 (1st Dist. 1964); *Hall v. Gillins,* 13 Ill.2d 26, 147 N.E.2d 352 (1958); *Dukeman v. Cleveland, C., C. & St. L. Ry.,* 237 Ill. 104, 86 N.E. 712 (1908); *Dodson v. Richter,* 34 Ill.App.2d 22, 180 N.E.2d 505 (3d Dist. 1962). This presumption applies even where the decedent was an adult and the next of kin are also adults. *Ferraro, supra*; *Dukeman, supra*. The presumption of some substantial pecuniary loss will be an element which the jury must consider with other evidence, if there is other evidence, or alone, if there is no other evidence, to determine what they will award if they decide in favor of the plaintiff. The power of the jury to determine the weight that should be given to this presumption was upheld in *Flynn v. Vancil,* 41 Ill.2d 236, 239; 242 N.E.2d 237, 240 (1968), the court cites these instructions with approval.

Bullard, supra, held there is no longer a presumption of loss of earnings upon the death of a minor child, but there is a presumption of pecuniary injury to the parents in the loss of a minor child's society. *Ballweg v. City of Springfield*, 114 Ill.2d 107, 499 N.E.2d 1373, 102 Ill.Dec. 360 (1986), and *Prendergast v. Cox, supra*, extended this presumption to include the loss of an adult child's society by the parents. No such presumption attaches in the case of siblings. *In re Estate of Finley, supra*.

It is now also possible to recover for the wrongful death of an unborn child if the fetus was viable at the time of the tortious act. *Green v. Smith,* 71 Ill.2d 501, 377 N.E.2d 37, 17 Ill.Dec. 847 (1978). The presumption of the parents' loss of society injury extends to a stillborn child. *Seef v. Sutkus,* 145 Ill.2d 336, 583 N.E.2d 510, 164 Ill.Dec. 594 (1991). Of course, there can be no cause of action against a physician for the wrongful death of a fetus caused by an abortion which was permitted by law and where the requisite consent was given. 740 ILCS 180/2.2.

Punitive damages may not be recovered in an action under the Wrongful Death Act. *Mattyasovszky v. West Towns Bus Co.,* 61 Ill.2d 31, 330 N.E.2d 509 (1975). Nor may a common law action for punitive damages survive under the Survival Act. *Froud v. Celotex Corp.,* 98 Ill.2d 324, 456 N.E.2d 131, 74 Ill.Dec. 629 (1983). However, a statutory right to punitive damages, such as that provided for under the Public Utilities Act, may pass unabated to decedent's estate under the Survival Act. *National Bank of Bloomington v. Norfolk & W. Ry.,* 73 Ill.2d 160, 383 N.E.2d 919, 23 Ill.Dec. 48 (1978); *Churchill v. Norfolk & W. Ry.,* 73 Ill.2d 127, 383 N.E.2d 929, 23 Ill.Dec. 58 (1978). (Effective January 1, 1986, the Public Utilities Act was amended to exclude railroads and certain other entities from its coverage. 220 ILCS 5/3-105.)

Under the "Family Expense Statute" (750 ILCS 65/15), a spouse or parent may be liable for medical and funeral expenses. Therefore, an independent cause of action may be maintained by a surviving spouse for any of these expenses not recoverable under the Survival Statute. *Thompson v. City of Bushnell,* 346 Ill.App. 352, 105 N.E.2d 311 (3d Dist. 1952) (spouse); *Saunders v. Schultz,* 20 Ill.2d 301, 170 N.E.2d 163 (1960) (spouse); *Graul v. Adrian,* 32 Ill.2d 345, 205 N.E.2d 444 (1965) (spouse); *Ragan v. Protko,* 66 Ill.App.3d 257, 383 N.E.2d 745, 22 Ill.Dec. 937 (5th Dist. 1978) (parent); *Rodgers v. Consolidated Railroad Corp.,* 136 Ill.App.3d 191, 482 N.E.2d 1080, 90 Ill.Dec. 797 (4th Dist. 1985) (parent). Alternatively, the administrator of an estate can bring an independent action for medical and funeral expenses. *Eggimann v. Wise,* 56 Ill.App.2d 385, 206 N.E.2d 472 (3d Dist. 1964).

31.01 Measure of Damages--Wrongful Death--Minor Child Decedent--Lineal Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g. parent] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin] from the death of the decedent.

"Pecuniary loss" may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] has sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [next of kin];]

[10. The relationship between [lineal next of kin] and the decedent.]

[The pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

Instruction, Notes and Comment revised October 2007.

Notes on Use

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Comment

In *Bullard v. Barnes,* 102 Ill.2d 505, 517, 468 N.E.2d 1228, 1234, 82 Ill.Dec. 448, 454 (1984), the Illinois Supreme Court abolished the former presumption of loss of earnings and created a presumption for loss of the minor child's society. The Court held:

> [T]here can be no presumption of loss of earnings upon the death of a child since such a presumption represents an aberration from, rather than a reflection of, the typical family experience. However, we have concluded that parents are entitled to a presumption of pecuniary injury in the loss of a child's society, based on the holding expressed earlier in this opinion that the pecuniary injury for which parents may recover under the wrongful death statute includes this form of loss.

31.01(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Lineal Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g., parent] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin, e.g., parent] from the death of the decedent.
"Pecuniary loss" may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin, e.g., parent], the law recognizes a presumption that the [lineal next of kin, e.g., parent] has sustained some substantial pecuniary loss by reason of the loss of the [decedent's] society. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [lineal next of kin e.g. parent] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

Instruction, Notes and Comment created October 2007.

Notes on Use

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining "society."

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship the family may have enjoyed with the decedent. *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover

damages for their grief, sorrow and mental suffering.

Comments

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v. Sutkus,* 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.,* 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); Illinois Wrongful Death Act, 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

31.02 Measure of Damages--Wrongful Death--Minor Child Decedent--Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin, e.g., brother] of the decedent for the pecuniary loss proved by the evidence to have resulted to [collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, and society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [collateral next of kin];]

[10. The relationship between [collateral next of kin] and [decedent].]

Whether pecuniary loss has been proved by the evidence is for you to determine.

Instruction, Notes and Comment revised October 2007.

Notes on Use

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Comment

Resolving a conflict in the decisions of the appellate court, the Illinois Supreme Court has ruled that proven loss of a sibling's society is a "pecuniary injury" for which the other siblings can recover. *In re Estate of Finley,* 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992). Unlike surviving spouses and lineal heirs, however, siblings are not entitled to any presumption of loss of society damages. *Id.*

Since there is no presumption of loss of a sibling's society, and there never has been any presumption of any loss of support or other damages in the case of siblings or other collateral heirs (*Rhoads v. Chicago & A. R.R.*, 227 Ill. 328, 335, 81 N.E. 371, 373 (1907); *Wilcox v. Bierd,* 330 Ill. 571, 580, 162 N.E. 170, 174, 175 (1928); *Howlett v. Doglio,* 402 Ill. 311, 316, 83 N.E.2d 708, 711 (1949); *Shehy v. Bober,* 78 Ill.App.3d 1061, 398 N.E.2d 80, 34 Ill.Dec. 405 (1st Dist. 1979); *Dodson v. Richter,* 34 Ill.App.2d 22, 25, 180 N.E.2d 505, 507 (3d Dist. 1962)), it follows that only proven wrongful death damages are recoverable by collateral heirs.

31.02(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin, e.g., brother] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [collateral next of kin, e.g., brother] from the death of the decedent.
"Pecuniary loss" may include loss of money, benefits, goods, services, and society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [collateral next of kin, e.g., brother] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

Whether pecuniary loss has been proved by the evidence is for you to determine.

Instruction, Notes and Comment created October 2007.

Notes on Use

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining "society."

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship the family may have enjoyed with the decedent. *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover damages for their grief, sorrow and mental suffering.

Comments

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v.*

Sutkus, 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.,* 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); *Illinois Wrongful Death Act,* 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

31.03 Measure of Damages--Wrongful Death--Minor Child Decedent--Lineal and Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin, e.g. brother, parent, etc.] of the decedent for the pecuniary loss proved by the evidence to have resulted to [the lineal and collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] have sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

There is no presumption of pecuniary loss to the [collateral next of kin] of the decedent.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. His age;]

[4. His sex;]

[5. His health;]

[6. His physical and mental characteristics;]

[7. His habits of (industry,) (sobriety,) (and) (thrift);]

[8. His occupational abilities;]

[9. The grief, sorrow, and mental suffering of [next of kin];]

[10. The relationship between [lineal and collateral next of kin] and [decedent].]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

Instruction, Notes and Comment revised October 2007.

Notes on Use

Item 9 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-10 which are applicable to the facts of the case.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Comment

See Comments to IPI 31.01 and 31.02.

31.03(a) Measure of Damages--Wrongful Death--Stillborn or Infant Decedent--Lineal and Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin, e.g., parent, brother, etc.] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal and collateral next of kin, e.g., parent, brother, etc.] from the death of the decedent.

"Pecuniary loss" may include loss of money, benefits, goods, services, and society.

Where a decedent leaves [lineal next of kin, e.g., parent], the law recognizes a presumption that the [lineal next of kin, e.g., parent] has sustained some substantial pecuniary loss by reason of the loss of the child's society. The weight to be given this presumption is for you to decide from the evidence in this case.

There is no presumption of pecuniary loss to a [collateral next of kin, e.g., brother] of the decedent.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What the decedent's health and physical and mental characteristics would have been;]

[2. What the relationship between [collateral next of kin, e.g., brother] and [decedent] would have been;]

[3. The grief, sorrow and mental suffering of the next of kin.]

[Pecuniary loss must be reduced by the expenditures that you find the parent(s) would have been likely to incur for the child had the child lived.]

Instruction, Notes and Comment created October 2007.

Notes on Use

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased and with IPI 31.11 defining "society."

This instruction should be used when the decedent was stillborn or when there had been insufficient time between the decedent's birth and his death for family members to establish a relationship with the child.

Any instruction given to the jury with respect to a family's loss of a child's society should clearly indicate that the determination of the loss is not dependent upon the family having enjoyed a past relationship with the decedent, but is a consideration of the future companionship

the family may have enjoyed with the decedent. *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

For causes of action that accrue before May 31, 2007, paragraph 3 should be deleted from this instruction. Under P.A. 95-2, effective May 31, 2007, lineal next of kin may recover damages for their grief, sorrow and mental suffering.

Comments

Regardless of the state of gestation, an unborn fetus is recognized as a person and the next of kin may recover damages for pecuniary loss resulting from the death of the fetus. *Seef v. Sutkus,* 145 Ill.2d 336, 164 Ill.Dec. 594, 583 N.E.2d 510 (1991); *Smith v. Mercy Hosp. & Medical Ctr.,* 203 Ill.App.3d 465, 148 Ill.Dec. 567, 560 N.E.2d 1164 (1st Dist. 1990); Illinois Wrongful Death Act, 740 ILCS 180/2.2. The next of kin's right to recover for loss of society does not depend upon whether there has been some exchange of society in the past, but whether but for the defendant's negligence, society would have been exchanged. *Seef*, 145 Ill.2d at 342, 164 Ill.Dec. 594, 583 N.E.2d at 513. Although consideration of the length, intensity, and quality of the relationship may in some cases be useful in measuring the magnitude of the next of kin's loss, it does not determine whether a loss occurred. *Seef*, 145 Ill.2d at 344, 164 Ill.Dec. 594, 583 N.E.2d at 514; *Thornton v. Garcini,* 364 Ill.App.3d 612, 301 Ill.Dec. 386, 846 N.E.2d 989 (3rd Dist. 2006).

31.04 Measure of Damages--Wrongful Death--Adult Decedent--Widow and/or Lineal Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, e.g., widow] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin] of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] have sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his child had he lived;]

[5. His age;]

[6. His sex;]

[7. His health;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [next of kin];]

[11. The relationship between [lineal next of kin, e.g. son] and [decedent].]

[12. The marital relationship that existed between [widow/widower] and [decedent].]

[Widow/widower] is not entitled to damages for loss of [decedent's] society and sexual relations after [date of remarriage].

Instruction, Notes and Comment revised October 2007.

Notes on Use

Use only those factors 1-12 which are applicable to the facts of this case. If the surviving spouse has remarried, the bracketed paragraph should be utilized to insert the date of the remarriage. *See Carter v. Chicago & Ill. Midland Ry. Co.,* 130 Ill.App.3d 431, 474 N.E.2d 458, 85 Ill.Dec. 730 (4th Dist. 1985).

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Comment

Various factors in addition to loss of support or monetary contributions are proper in determining pecuniary damages. *Rasmussen v. Clark,* 346 Ill.App. 181, 104 N.E.2d 325 (2d Dist. 1952) (decedent's payment of utility bills and personal services at home); *Hudnut v. Schmidt,* 324 Ill.App. 548, 58 N.E.2d 929 (3d Dist. 1944) (mental and physical capacity, habits of industry and sobriety, usual earnings and probability of future earnings); *O'Brien v. Chicago & N.W. Ry. Co.,* 329 Ill.App. 382, 68 N.E.2d 638 (2d Dist. 1946) (prospects of increased earnings from inflation and rise of cost of living); *Hall v. Gillins,* 13 Ill.2d 26, 147 N.E.2d 352 (1958) (loss of father's instruction and moral training); *Flynn v. Fogarty,* 106 Ill. 263 (1883) (net income); *Kaiserman v. Bright,* 61 Ill.App.3d 67, 377 N.E.2d 261, 18 Ill.Dec. 108 (1st Dist. 1978) (future support and attention, care, superintendence, and education); *Illinois Cent. R. Co. v. Baches,* 55 Ill. 379 (1870) (prospective pecuniary benefits); *Graul v. Adrian,* 32 Ill.2d 345, 205 N.E.2d 444 (1965) (value of decedent's contributions to family unit); *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982) (loss of consortium, consisting of society, companionship, and sexual relations, by the surviving spouse); *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984) (loss of a minor child's society by the parent); *Prendergast v. Cox,* 128 Ill.App.3d 84, 470 N.E.2d 34, 83 Ill.Dec. 279 (1st Dist. 1984) (loss of unmarried adult child's society by parents); *In re Estate of Keeling,* 133 Ill.App.3d 226, 478 N.E.2d 871, 88 Ill.Dec. 380 (3d Dist. 1985) (loss of parent's society by an adult child).

"Other deductions" do not include income taxes. *See Klawonn v. Mitchell,* 105 Ill.2d 450, 475 N.E.2d 857, 86 Ill.Dec. 478 (1985); *cf. McCann v. Lisle--Woodridge Fire Protection Dist.,* 115 Ill.App.3d 702, 450 N.E.2d 1311, 71 Ill.Dec. 432 (2d Dist. 1983).

In *Carter v. Chicago & Ill. Midland Ry. Co.,* 130 Ill.App.3d 431, 474 N.E.2d 458, 85

Ill.Dec. 730 (4th Dist. 1985), it was held that there can be no claim for loss of consortium by a spouse for the period of time after his or her remarriage.

31.05 Measure of Damages--Wrongful Death--Adult Decedent--Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [collateral next of kin] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [collateral next of kin] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services, [and] society.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. His age;]

[5. His sex;]

[6. His health;]

[7. His physical and mental characteristics;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [collateral next of kin];]

[11. The relationship between [collateral next of kin] and [decedent].]

Whether pecuniary loss has been proved by the evidence is for you to determine.

Instruction, Notes and Comment revised October 2007.

Notes on Use

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-11 which have a basis in the evidence.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Comment

See Comments to IPI 31.02 and 31.04.

31.06 Measure of Damages--Wrongful Death--Unmarried Adult Decedent--Lineal and Collateral Next of Kin Surviving

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal and collateral next of kin] of the decedent for the pecuniary loss proved by the evidence to have resulted to [the next of kin] from the death of the decedent.

"Pecuniary loss" may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] has sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. His age;]

[5. His sex;]

[6. His health;]

[7. His physical and mental characteristics;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities;]

[10. The grief, sorrow, and mental suffering of [next of kin];]

[11. The relationship between [next of kin] and [decedent].]

Instruction, Notes and Comment revised October 2007.

Notes on Use

Item 10 is a new addition to the instruction. Its inclusion is based on the 2007 amendment to the Wrongful Death Act, 740 ILCS 180/2. That amendment (P.A. 95-3) permits the recovery of damages for grief, sorrow and mental suffering of the next of kin and applies to causes of action accruing on and after its effective date, May 31, 2007.

Use only those factors 1-11 which have a basis in the evidence.

This instruction should be used with IPI 31.09 which explains why the suit is brought in the name of the personal representative of the deceased.

This instruction should be used with IPI 31.11 defining "society" whenever loss of society is claimed.

Comment

See Comments to IPI 31.02 and 31.04.

31.07 Measure of Damages--Wrongful Death--Factors Excluded

[Under Count ____,] In determining "pecuniary loss" you may not consider the following:

[1. The pain and suffering of the decedent;]

[2. The grief or sorrow of the next of kin;] [or]

[3. The poverty or wealth of the next of kin.]

Instruction, Notes and Comment revised October 2007.

Notes on Use

For causes of action that accrue after May 31, 2007, paragraph 2 should be deleted from this instruction. Under P.A. 95-3, effective May 31, 2007, next of kin may recover damages for their grief, sorrow and mental suffering.

This instruction is designed to prevent the jury from considering factors which are not elements of damage in a cause of action based on pecuniary injury. If used, it should follow IPI 31.01, 31.04, or 31.06.

Ordinarily evidence is not admitted as to wealth or poverty of the widow or next of kin. Item 3 may be used only when such evidence has been admitted.

In cases brought under the Survival Act, the decedent's pain and suffering may be compensable. Where a trial involves concurrent claims under the Survival Act and the Wrongful Death Act, paragraph 1 should be deleted from this instruction because of the possibility of confusing the jury.

Comment

The emotional aspects of a death are not compensable to the next of kin. *Chicago & A.R. Co. v. Shannon,* 43 Ill. 338 (1867); Chicago & N.W.R. Co. v. Swett, 45 Ill. 197 (1867) (pain and suffering of bereavement); *Wilcox v. Bierd,* 330 Ill. 571, 162 N.E. 170 (1928), *aff'g* 235 Ill. App. 126 (3d Dist. 1924) (wealth or poverty of beneficiary); *Illinois Cent. R. Co. v. Baches,* 55 Ill. 379 (1870) (helplessness of beneficiary).

The Legislature has modified the Wrongful Death Act to permit recovery of damages for grief, sorrow and mental suffering of the lineal next of kin. This amendment applies to all causes of action accruing on and after May 31, 2007. 740 ILCS 180/2.

31.08 Damages--Wrongful Death--Contributory Negligence--More Than One Beneficiary

[Withdrawn]

Comment

IPI 31.08 formerly read, "If you find that [surviving spouse] [or] [next of kin] negligently contributed to cause the death of the decedent, the negligence of that person does not bar recovery by the plaintiff, but in any award you make you may not include damages for any pecuniary injuries suffered by that person." It has been withdrawn due to the amendment of section 2 of the Wrongful Death Act (740 ILCS 180/2).

Instruction withdrawn March 2007.

B31.08 Damages--Wrongful Death--Contributory Fault--Decedent

If you find that decedent contributed to the total proximate cause of the death of the decedent you shall determine the percentage of contributory (fault) (negligence) of decedent.

If you find that the contributory (fault) (negligence) of the decedent was more than 50% of the total proximate cause of the death of the decedent, then you shall enter a verdict in favor of the defendant(s). If you find that the contributory (fault) (negligence) of the decedent was 50% or less of the total proximate cause of the death of the decedent, then your verdict should be for the plaintiff and you will reduce damages in the manner stated in the instructions.

Instruction, Notes and Comment revised May 2014.

Notes on Use

This instruction should be used whenever there is an issue of contributory fault of the decedent. If there is an issue of the beneficiaries' contributory fault, then also use either IPI B31.08.01 (several beneficiaries) or IPI B31.08.02 (sole beneficiary).

31.08.01B Damages--Wrongful Death--Contributory Fault –More Than One Beneficiary

If you find that [any] beneficiary contributed to the total proximate cause of the death of the decedent you shall determine the percentage of contributory (fault) (negligence) of [that] beneficiary.

The contributory (fault) (negligence) of a beneficiary affects his/her right to recover damages.

If you find that the contributory (fault) (negligence) of [any] beneficiary was more than 50% of the total proximate cause of the death of the decedent, then [that] beneficiary shall not recover damages from this suit. However, you are not to consider this fact in arriving at the total amount of damages, if any, in this case.

If you find that the contributory (fault) (negligence) of [any] beneficiary was 50% or less of the total proximate cause of the death of the decedent, his/her damages shall be reduced in that proportion and the Court shall make the adjustments required by law with respect to the recovery of [that] beneficiary.

Instruction, Notes and Comment revised May 2014.

Notes on Use

This instruction should be used whenever there is an issue of contributory fault as to two or more of the beneficiaries on behalf of whom the suit is brought. If there is an issue of contributory fault of a sole beneficiary, use IPI B31.08.02.

Comment

Contributory fault of a beneficiary no longer bars recovery, but will only reduce that beneficiary's recovery if no greater than 50% of the total fault. 740 ILCS 180/2. The jury's verdict will be adjusted by the Court after a hearing on the issue of dependency. See provisions of 740 ILCS 180/2 for the proper procedure. If the contributory fault of the beneficiary is more than 50% of the total fault, that beneficiary takes nothing and the percentage of dependency the trial judge finds for that beneficiary will inure to the benefit of the defendant. If the contributory fault of the beneficiary is not more than 50% of the total fault, the damages he would recover based on the percentage of dependency are reduced by his fault, thus reducing the total judgment amount payable by the defendant.

B31.08.02 Damages--Wrongful Death--Contributory Fault -- Sole Beneficiary

If you find that the beneficiary contributed to cause the death of the decedent, then you must determine the percentage of the contributory (fault) (negligence) of the beneficiary.

The contributory (fault) (negligence) of the beneficiary affects his/her right to recover damages.

If you find that the contributory (fault) (negligence) of the beneficiary was more than 50% of the total proximate cause of the death of the decedent, then your verdict should be for the defendant(s).

If you find that the contributory (fault) (negligence) of the beneficiary was 50% or less of the total proximate cause of the death of the decedent, then your verdict should be for the plaintiff and the beneficiary's damages shall be reduced in that proportion and the Court shall make the adjustments required by law with respect to the recovery of the beneficiary.

Instruction, Notes and Comment approved May 2014.

Notes on Use

This instruction should be used whenever there is an issue of contributory fault by the sole beneficiary on whose behalf the suit is brought. If there is an issue of contributory fault as to two or more of the beneficiaries on behalf of whom the suit is brought, use IPI B31.08.01.

Comment

Contributory fault of a beneficiary no longer bars recovery, but will only reduce that beneficiary's recovery if no greater than 50% of the total fault. 740 ILCS 180/2. The jury's verdict will be adjusted by the Court after a hearing on the issue of dependency. See provisions of 740 ILCS 180/2 for the proper procedure. If the contributory fault of the sole beneficiary is more than 50% of the total fault, the beneficiary takes nothing and the verdict should be for the defendant(s). If the contributory fault of the sole beneficiary is not more than 50% of the total fault, the damages he or she would recover based on the percentage of dependency are reduced by his or her fault, thus reducing the total judgment amount payable by the defendant(s).

31.09 Action for Wrongful Death and Survival Action Brought by Personal Representative

The plaintiff [administrator's or executor's name] brings this action in a representative capacity by reason of his being [administrator] [executor] of the estate of [deceased's name], deceased. He represents [names of widow and/or next of kin], the [widow] [and] [next of kin] of the deceased [, and the estate of the deceased]. They are the real parties in interest in this lawsuit, and in that sense are the real plaintiffs whose damages you are to determine if you decide for the [administrator] [executor] of the estate of [deceased's name].

Notes on Use

This instruction should be given in cases based on the Wrongful Death Act (740 ILCS 180/1 (1994)) and the Survival Statute (755 ILCS 5/27-6 (1994)), and should be accompanied by the appropriate charges enumerated in IPI 31.01 through 31.10.

If there is a survival action, the bracketed phrase "[and the estate of the deceased]" may be used after naming the widow and next of kin.

Comment

The Wrongful Death Act provides that "every such action shall be brought by and in the names of the personal representatives of" the deceased. 740 ILCS 180/1 (1994). This instruction properly informs the jury of the role the nominal plaintiff has assumed and that the administrator is merely representing the interests of the next of kin.

In the usual case, the widow and next of kin would be the only parties in interest, and there would be no need to mention the estate of the deceased. Under some circumstances, however, it may well be necessary to maintain a clear distinction between the wrongful death count and the survival count throughout the trial, even to the point of separate verdict forms. As is clearly pointed out in the dissent to *National Bank of Bloomington v. Norfolk & W. Ry. Co.,* 73 Ill.2d 160, 383 N.E.2d 919, 23 Ill.Dec. 48 (1978), the estate may include persons other than the widow and next of kin; or even if only the widow and next of kin are included, they may well take the money in significantly different proportions under each count.

31.10 Damages--Survival Action

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the estate for any of the following elements of damages proved by the evidence to have resulted from the [negligence] [wrongful conduct] of the defendant during the period between the time of the decedent's injuries and the time of his death, taking into consideration the nature, extent, and duration of the injury:
[Here insert the elements of damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Notes on Use

If there is both a wrongful death count and a survival count the specific count involved should be designated at the beginning of this instruction.

The bracketed words "wrongful conduct" in the first paragraph may be used instead of "negligence" when the misconduct alleged includes a charge such as wilful and wanton conduct or other fault.

Other phrases may be substituted for the bracketed terms "negligence" or "wrongful conduct" or "wrongful conduct of the defendant" where appropriate, such as "unreasonably dangerous condition of the product."

Comment

The phrase "nature, extent, and duration of the injury" is no longer a separate element of damages; rather, it is a factor to be considered in evaluating the other elements. *See* Comment to IPI 30.02.

Murphy v. Martin Oil Co., 56 Ill.2d 423, 308 N.E.2d 583 (1974), specifically referred to survival-action damages of conscious pain and suffering, loss of earnings, medical expenses, physical disability, and property damage.

The fact that a decedent has suffered for only a short period of time is not a bar to a claim for conscious pain and suffering. The duration of the pain and suffering affects the amount of damages to be awarded, not the right to recover damages. *Glover v. City of Chicago,* 106 Ill.App.3d 1066, 436 N.E.2d 623, 62 Ill.Dec. 597 (1st Dist. 1982).

31.11 Damages--Loss of Society--Definition

When I use the term "society" in these instructions, I mean the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection.

Notes on Use

This instruction should be given whenever any other instruction includes the term "society."

Comment

See Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 585; 94 S.Ct. 806, 815; 39 L.Ed.2d 9 (1974) ("embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort and protection") (cited in *McDonald v. Federal Barge Lines, Inc.,* 496 F.2d 1376 (5th Cir. 1974)); *Bullard v. Barnes,* 102 Ill.2d 505, 514; 468 N.E.2d 1228, 1232; 82 Ill.Dec. 448, 452 (1984) ("companionship, guidance, advice, love, and affection"); Vernon's Ann.Mo. Stat. § 537.090 ("companionship, comfort, instruction, guidance, counsel, training, and support"); California Jury Instructions Civil (BAJI) No. 14.50 ("love, companionship, comfort, affection, society, solace or moral support"); Washington Pattern Jury Instructions Civil No. 31.02 ("love, care, guidance, training, instruction, and protection").

A similar instruction was approved in *Singh v. Air Illinois, Inc.*, 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988), and *Drake v. Harrison,* 151 Ill.App.3d 1082, 503 N.E.2d 1072, 1076; 105 Ill.Dec. 66, 70 (5th Dist. 1987). *See also Lorenz v. Air Illinois, Inc.,* 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988) (similar instruction not error).

31.12 Wrongful Death Case--Discount of Future Damages

If you find for the plaintiff, then in assessing damages you may consider how long the [names of widow and/or next of kin] will be likely to sustain pecuniary losses as a result of [decedent's name]'s death, considering how long [decedent's name] was likely to have lived and how long [names of widow and/or next of kin] [is] [are] likely to live.

In calculating the amount of these pecuniary losses consisting of money, benefits, goods or services, you must determine their present cash value. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those pecuniary losses at the times in the future when they will be sustained.

Damages for [loss of sexual relations] [loss of society] are not reduced to present cash value.

Notes on Use

If mortality tables are in evidence use IPI 31.13 instead.

Comment

This instruction was formerly IPI 34.03.

See Comments to IPI 34.02 and 34.04.

This instruction is intended to satisfy the requirement that the jury be informed that they must reduce to present cash value any award for future pecuniary damages suffered by next of kin. *Allendorf v. Elgin, J. & E. Ry. Co.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956), *cert. denied,* 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956).

See 59 Ill. B.J. 581, 60 Ill. B.J. 97, and 60 Ill. B.J. 520.

This instruction and IPI 31.13 (formerly IPI 34.03 and 34.05) were approved in *Baird v. Chicago, B. & Q.R. Co.,* 32 Ill.App.3d 1, 7, 334 N.E.2d 920, 925 (4th Dist. 1975), *aff'd*, 63 Ill.2d 463, 349 N.E.2d 413 (1976).

The appellate court has held that damages for loss of a decedent's consortium or society are not reduced to present cash value. *Lorenz v. Air Illinois, Inc.,* 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988); *Exchanges Nat'l Bank of Chicago v. Air Illinois, Inc.,* 167 Ill.App.3d 1081, 522 N.E.2d 146, 118 Ill.Dec. 691 (1st Dist. 1988). *See also Singh v. Air Illinois, Inc.,* 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988) (issue waived, but would not have been error even absent waiver).

For a discussion of a stipulated calculation of future damages from date of death rather than from date of trial, *see In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979,*

644 F.2d 633 (7th Cir. 1981) (court construes the requirement of this instruction and IPI 31.13 (formerly IPI 34.03 and 34.05) as requiring discounting of future earnings from date of trial).

31.13 Mortality Tables as Evidence of Damages--Wrongful Death Case

If you find for the plaintiff, then in assessing damages you may consider how long the [names of widow and/or next of kin] will be likely to sustain pecuniary losses as a result of [decedent's name]'s death, considering how long [decedent's name] was likely to have lived and how long [names of widow and/or next of kin] [is] [are] likely to live.

According to a table of mortality in evidence, the life expectancy of a [male] person aged ____ years is ____ years. That of a [female] person aged ____ years is ____ years [and that of a (male) person aged ____ years is ____ years]. These figures are not conclusive. They are the average life expectancies of persons who have reached those ages. They may be considered by you in connection with other evidence relating to the probable life expectancies of the decedent and [his widow] [and] [his next of kin] including evidence of the decedent's occupation, health, habits and activities, bearing in mind that some persons live longer and some persons live less than the average.

In calculating the amount of these pecuniary losses consisting of money, benefits, goods or services, you must determine their present cash value. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of those pecuniary losses at the times in the future when they will be sustained.

Damages for [loss of sexual relations] [loss of society] are not reduced to present cash value.

Notes on Use

If mortality tables are not in evidence, use IPI 31.12 instead.

The age of the deceased at the time of his death and his life expectancy and the ages of the widow and respective next of kin and their life expectancies should be placed in the appropriate blanks in this instruction. The bracketed material should be used when the evidence requires it.

Comment

This instruction was formerly 34.05.

See Comments to IPI 34.02 and 34.04.

This instruction (as IPI 34.05) was approved by the Illinois Supreme Court. *Baird v. Chicago, B. & Q. R. Co.,* 63 Ill.2d 463, 471, 349 N.E.2d 413, 417 (1976).

The appellate court has held that damages for loss of a decedent's consortium or society are not reduced to present cash value. *Lorenz v. Air Illinois, Inc.*, 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist. 1988); *Exchange Nat'l Bank v. Air Illinois, Inc.,* 167

Ill.App.3d 1081, 522 N.E.2d 146, 118 Ill.Dec. 691 (1st Dist. 1988). *See also Singh v. Air Illinois, Inc.,* 165 Ill.App.3d 923, 520 N.E.2d 852, 117 Ill.Dec. 501 (1st Dist. 1988) (issue waived, but would not have been error even absent waiver).

32.00

INJURY TO SPOUSE AND FAMILY MEMBERS

INTRODUCTION

The instructions in this chapter apply to the recovery of consequential damages by a spouse and other family members in other than wrongful death cases. For instructions on wrongful death damages, *see* Chapter 31.

In Illinois both husband and wife may recover for loss of consortium. *Dini v. Naiditch,* 20 Ill.2d 406, 170 N.E.2d 881 (1960). The loss of consortium action must be joined with the principal action. *Brown v. Metzger,* 104 Ill.2d 30, 470 N.E.2d 302, 83 Ill.Dec. 344 (1984).

However, punitive damages are not allowed in an action for loss of consortium. *Hammond v. North Am. Asbestos Corp.,* 97 Ill.2d 195, 454 N.E.2d 210, 73 Ill.Dec. 350 (1983).

The "Family Expense Statute," 750 ILCS 65/15 (1994), makes a spouse liable for medical and funeral expenses. Therefore, an independent cause of action may be maintained by a spouse for these expenses. *Saunders v. Schultz,* 20 Ill.2d 301, 170 N.E.2d 163 (1960); *Thompson v. City of Bushnell,* 346 Ill.App. 352, 105 N.E.2d 311 (3d Dist.1952).

A parent does not have a cause of action for loss of a child's society resulting from a negligently-caused non-fatal injury to the child. *Dralle v. Ruder,* 124 Ill.2d 61, 529 N.E.2d 209, 124 Ill.Dec. 389 (1988). Likewise, a child does not have a cause of action for loss of a parent's society resulting from a negligently-caused non-fatal injury to the parent. *Karagiannakos v. Gruber,* 274 Ill.App.3d 155, 653 N.E.2d 932, 210 Ill.Dec. 737 (1st Dist.1995).

32.01 Measure of Damages--Injury to Spouse or Family Member

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages arising out of injuries to [his wife] [his child] [his parent] proved by the evidence to have resulted from the [negligence] [wrongful conduct] [of the defendant].

[Here insert the elements of damage which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Notes on Use

The instruction cannot be given in the form set out above. It must be completed by selecting the elements of damages shown by evidence from among IPI 32.02, 32.03, 32.04, 32.05, and 32.06. The relevant elements of damage should be inserted between the two paragraphs of IPI 32.01.

The bracketed words "wrongful conduct" in the first paragraph may be used instead of "negligence" when the misconduct alleged includes a charge such as willful and wanton conduct or other fault.

Other phrases may be substituted for the bracketed terms "negligence" or "wrongful conduct" or "wrongful conduct of the defendant" where appropriate, such as "unreasonably dangerous condition of the product."

32.02 Measure of Damages--Injury to Spouse--Medical Expense--Past and Future

The reasonable expense of necessary medical care, treatment and services received by his wife [and the present cash value of the reasonable expense of necessary medical care, treatment and services reasonably certain to be received in the future.]

Notes on Use

This element is to be inserted between the two paragraphs of IPI 32.01 when the evidence justifies its use. To include the bracketed material which relates to future medical expenses, there must be evidence that such expenses are reasonably certain to be incurred.

Comment

Common law and statutory provisions allow each spouse to recover for medical expenses for which he is obligated resulting from injury to the other spouse. *Brown Metzger,* 104 Ill.2d 30, 470 N.E.2d 302, 83 Ill.Dec. 344 (1984).

On the issue of present cash value, *see* the IPI 34.00 series.

32.03 Measure of Damages--Injury to Spouse--Loss of Services--Past and Future

The reasonable value of the services of his wife of which he has been deprived [and the present cash value of the services of his wife of which he is reasonably certain to be deprived in the future].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 32.01 when the evidence justifies its use. To include the bracketed material which relates to the loss of future services, there must be evidence that such loss is reasonably certain to occur.

Comment

Damages to the husband for loss of services of his wife and for a wife suing to recover for her loss of services where a husband has suffered bodily injury are compensable in Illinois. *Manders v. Pulice,* 102 Ill.App.2d 468, 242 N.E.2d 617 (2d Dist.1968), *aff'd*, 44 Ill.2d 511, 256 N.E.2d 330 (1970); *Dini v. Naiditch,* 20 Ill.2d 406, 170 N.E.2d 881 (1960).

Testimony that the husband no longer shared in the family decision making, in the rearing and disciplining of children, or in the household repairs and chores as he had before the injury supported giving IPI 32.03. *Wood v. Mobil Chem. Co.,* 50 Ill.App.3d 465, 365 N.E.2d 1087, 1096; 8 Ill.Dec. 701, 710 (5th Dist.1977).

On the issue of present cash value, *see* the IPI 34.00 series.

32.04 Measure of Damages--Injury to Spouse--Loss of Consortium

The reasonable value of the society, companionship and sexual relationship with his wife of which he has been deprived [and the society, companionship and sexual relationship with his wife of which he is reasonably certain to be deprived in the future].

Notes on Use

This element is to be inserted between the two paragraphs of IPI 32.01 when the evidence justifies its use. To include the bracketed material which relates to the loss of consortium in the future, there must be evidence that such loss is reasonably certain to occur.

Comment

Society, companionship and sexual relations between husband and wife, oftentimes referred to as consortium, are elements of compensable damages in Illinois in actions brought either by a husband or wife. *Brown v. Metzger,* 104 Ill.2d 30, 470 N.E.2d 302, 83 Ill.Dec. 344 (1984).

On the issue of present cash value, *see* the IPI 34.00 series, and particularly the Comment to IPI 34.02.

32.05 Measure of Damages--Injury to a Child--Medical Expenses--Past and Future

The reasonable expense of necessary medical care, treatment and services received by the child [and the present cash value of the reasonable expenses of necessary medical care, treatment and services reasonably certain to be received in the future until the child reaches age 18.]

Notes on Use

This element is to be inserted between the two paragraphs of IPI 32.01 when the evidence justifies its use. To include the bracketed material which relates to future medical expenses, there must be evidence that such expenses are reasonably certain to be incurred.

If the parent remains liable for future medical expenses after the child reaches age 18, such as where the child is incompetent or disabled, the phrase "until the child reaches age 18" may be deleted.

Comment

Parents may recover for medical expenses for which they are obligated resulting from injury to their minor children. 750 ILCS 65/15 (1994); *Graul v. Adrian,* 32 Ill.2d 345, 205 N.E.2d 444 (1965). The usual practice in Illinois is to sue for all damages in the minor's action. This is accomplished by alleging an assignment, or waiver or relinquishment by the parents of their right to recover these damages. *Curtis v. Lowe,* 338 Ill.App. 463, 87 N.E.2d 865 (2d Dist.1949). Any defenses to the parents' action remain defenses to this assigned action. *Kennedy v. Kiss,* 89 Ill.App.3d 890, 412 N.E.2d 624, 45 Ill.Dec. 273 (1st Dist.1980).

Parents are not generally liable for medical expenses incurred by adult children. *Ragan v. Protko,* 66 Ill.App.3d 257, 383 N.E.2d 745, 22 Ill.Dec. 937 (5th Dist.1978); *Sapp v. Johnston,* 15 Ill.App.3d 119, 303 N.E.2d 429 (3d Dist.1973). However, support obligations for a mentally or physically disabled child have been imposed upon the husband and wife after the child attains majority. *Strom v. Strom,* 13 Ill.App.2d 354, 142 N.E.2d 172 (1st Dist.1957); *Freestate v. Freestate,* 244 Ill.App. 166 (1st Dist.1927). *See also* 750 ILCS 5/513 (1994); 755 ILCS 5/11A-1 et seq. (1994).

While the parents of a minor child are always responsible for the child's medical expenses, the child is not responsible unless the medical care has been rendered on the child's own credit and not on the credit of a parent. *Kennedy v. Kiss,* 89 Ill.App.3d 890, 412 N.E.2d 624, 45 Ill.Dec. 273 (1st Dist.1980).

On the issue of present cash value, *see* the IPI 34.00 series.

32.06 Measure of Damages--Loss of Services of Child--Past and Future

The reasonable value of the services of the minor child of which the parent has been deprived [and the present cash value of the services of the minor child of which the parent is reasonably certain to be deprived in the future until the child reaches age 18.]

Notes on Use

This element is to be inserted between the two paragraphs of IPI 32.01 when the evidence justifies its use. To include the bracketed material which relates to loss of future services or income, there must be evidence that such loss is reasonably certain to occur.

Comment

In actions for damages arising out of an injury to an unemancipated minor, the loss of earnings during the child's minority are recoverable by the parents. The child is limited to the loss of earnings he would have received after reaching his majority. *Wolczek v. Public Serv. Co. of N. Ill.,* 342 Ill. 482, 496; 174 N.E. 577, 583 (1930).

A parent has the right to the services and earnings of an unemancipated minor child. *See Zozaski v. Mather Stock Car Co.,* 312 Ill.App. 585, 38 N.E.2d 825 (1st Dist.1942); 59 Am. Jur. 2d, *Parent & Child* § 46, pp. 131-33.

See Comment to IPI 32.05 regarding the potential assignment by the parent to the child of this element of damages.

On the issue of present cash value, *see* the IPI 34.00 series.

33.00

DAMAGES—MITIGATION

33.01 Mitigation of Damages--Personal Injury

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that an injured person must exercise ordinary care to obtain medical treatment. Damages proximately caused by a failure to exercise such care cannot be recovered.

Notes on Use

This instruction should never be given unless (1) there is evidence creating an issue of fact as to the plaintiff's negligence in securing medical attention, and (2) the damages resulting to the plaintiff from the failure to exercise due care in obtaining medical care are separable from his other injuries. *Kennedy v. Busse,* 60 Ill.App. 440 (1st Dist.1895); *Chicago & E. R. Co. v. Meech,* 163 Ill. 305, 45 N.E. 290 (1896); *Wong v. Richards,* 10 Ill.App.3d 514, 294 N.E.2d 784 (4th Dist.1973); *Bartimus v. Paxton Community Hosp.,* 120 Ill.App.3d 1060, 1071; 458 N.E.2d 1072, 1080; 76 Ill.Dec. 418, 426 (4th Dist.1983).

A doctor's failure to exercise ordinary care is not a basis for giving of this instruction if the plaintiff has used ordinary care in the selection of the doctor. *Chicago City Ry. Co. v. Saxby,* 213 Ill. 274, 72 N.E. 755, 68 L.R.A. 164, 104 Am.St.Rep. 218 (1904); *Pullman Palace Car Co. v. Bluhm,* 109 Ill. 20 (1884). See IPI 30.23.

Comment

This instruction recognizes the proposition that an injured person must mitigate his damages by using ordinary care in obtaining medical treatment. *Chicago Union Traction Co. v. Mee,* 136 Ill.App. 98 (1st Dist.1907).

No instruction should be given with reference to the plaintiff's duty to submit to major surgical operations. Whether the plaintiff is to undergo a serious operation is a matter for him to decide. *Howard v. Gulf M. & O. R. Co.,* 13 Ill.App.2d 482, 142 N.E.2d 825 (4th Dist.1957); *Morris v. Despain,* 104 Ill.App. 452 (2d Dist.1902); *Lapidus v. Hahn,* 115 Ill.App.3d 795, 450 N.E.2d 824, 71 Ill.Dec. 136 (1st Dist.1983); *Montgomery v. Terminal R.R. Ass'n,* 73 Ill.App.3d 650, 392 N.E.2d 77, 29 Ill.Dec. 520 (5th Dist.1979) (trial court properly refused evidence that surgery was recommended to improve plaintiff's condition, and the reasons for plaintiff's rejection of that recommendation).

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul,* 43 Ill.2d 54, 250 N.E.2d 656 (1969).

33.02 Mitigation of Damages--Property

In fixing the amount of money which will reasonably and fairly compensate the plaintiff, you are to consider that a person whose [property] [business] is damaged must exercise ordinary care to minimize existing damages and to prevent further damage. Damages proximately caused by a failure to exercise such care cannot be recovered.

Comment

This instruction recognizes the proposition that a plaintiff must use ordinary care to mitigate damage to his property. *Hartford Deposit Co. v. Calkins,* 186 Ill. 104, 57 N.E. 863 (1900).

See also Behrens v. W. S. Bills & Sons, Inc., 5 Ill.App.3d 567, 283 N.E.2d 1 (3d Dist.1972) (plaintiff's instruction providing that "while reasonable efforts to avoid loss are required," plaintiff was not required to take action which he was financially unable to take, correctly stated applicable law).

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul,* 43 Ill.2d 54, 250 N.E.2d 656 (1969).

34.00

DAMAGES--FUTURE DAMAGES--LENGTH OF TIME DAMAGES WILL CONTINUE--DISCOUNT OF DAMAGES--MORTALITY TABLES

34.01 Damages Arising in the Future--Extent and Amount

If you find that [a] [the] plaintiff is entitled to damages arising in the future [because of injuries] [or] [because of future (medical) (caretaking) expenses] [or] [because of loss of earnings] [or] [loss of the services of [name of minor child]] [or] [because of (loss of society) (or) (loss of companionship and sexual relations)], you must determine the amount of these damages which will arise in the future.

[If these damages are of a continuing nature, you may consider how long they will continue.] [If these damages are permanent in nature, then in computing these damages you may consider how long the plaintiff (and his spouse) (is) (are) likely to live.]

[With respect to a loss of future earnings, you may consider that some persons work all their lives and others do not; that a person's earnings may remain the same or may increase or decrease in the future.]

Notes on Use

The elements of damages used in the first paragraph of this instruction must be consistent with the elements of damages used in other damages instructions, *e.g.*, IPI 30.06-30.09, 31.13, and 32.02-32.04.

This instruction is intended to inform the jury that they should consider the length of time the various elements of damage will continue, point out that earnings may not equal life expectancy and may vary, and lay the basis for the instruction on discounting particular elements of damages to present cash value. *See* IPI 34.02.

The instruction is drawn to cover both temporary and permanent future damages. If there is evidence to support a finding that future damages are continuing but not permanent, use the first sentence of the second paragraph. If there is evidence sufficient to support a finding that future damages are permanent, use the second sentence of the second paragraph. *Buskirk v. Burlington N., Inc.,* 103 Ill.App.3d 414, 431 N.E.2d 410, 412, 59 Ill.Dec. 125, 127 (5th Dist.1982), *cert. denied*, 459 U.S. 910, 103 S.Ct. 217, 74 L.Ed.2d 173 (1982). If the evidence would support both findings, both sentences should be used.

The last paragraph will be used only when there is evidence of a loss of future earnings.

If mortality tables are in evidence, also use IPI 34.04.

Comment

See Comment to IPI 32.06 concerning the parent's right to recover for the loss of the services of an unemancipated minor child.

34.02 Damages Arising in the Future--Discount to Present Cash Value

In computing the damages arising in the future [because of future (medical) (caretaking) expenses] [or] [because of the loss of (future earnings) (benefits) (or) (services)] you must determine their present cash value. "Present cash value" means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of the [expenses] [and] [earnings] [benefits] at the time in the future when [the expenses must be paid] [or] [the earnings (benefits) would have been received].

Damages for [pain and suffering] [disability] [loss of a normal life] [and] [disfigurement] [loss of (society) (companionship) (and) (sexual relations)] are not reduced to present cash value.

Notes on Use

This instruction may be used with IPI 34.01. If mortality tables are in evidence, also use IPI 34.04.

Comment

This instruction has been modified from earlier versions. Prior 34.02 included the phrase "... you must not [simply multiply the (expenses) (earnings) (benefits) (by the length of time you have found they will continue) (or) (by the number of years you have found that the plaintiff is likely to live)]."

Inclusion of this phrase requires the court to favor one method of determining present cash value over another. There is a sound economic basis (though certainly not the only one) that permits present cash value to be determined in exactly the manner prohibited by the former instruction. This is known as the "total offset method." See *Beaubien v. Elliot,* 434 P.2d 665 (Alaska 1967) and *Kaczkawski v. Bolubasz,* 461 Pa. 561, 421 A.2d 1027 (1980), wherein two state supreme courts have judicially adopted this method. Also see 104 Dick. L. Rev. 679 (Summer 2000). The Illinois Supreme Court in *Richardson v. Chapman,* 175 Ill.2d 98, 676 N.E.2d 621, 221 Ill.Dec. 818 (1997) approved of this method of determining present cash value in the "upper bound" figures used by plaintiff's expert. However, the Court did not adopt this method or indicate it was preferred over other methods. Therefore, the committee makes no recommendation as to which of several methods may be used to determine present cash value.

Future damages except for pain and suffering, disfigurement, disability, loss of normal life, and loss of society and consortium are to be reduced to present cash value. *Allendorf v. Elgin, J. & E. Ry. Co.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *Avance v. Thompson,* 387 Ill. 77, 55 N.E.2d 57 (1944), *cert. denied*, 323 U.S. 753, 65 S.Ct. 82, 89 L.Ed. 603 (1944); *Howard v. Gulf, M. & O.R.Co.,* 13 Ill.App.2d 482, 142 N.E.2d 825 (4th Dist.1957). *Cf. Lorenz v. Air Illinois, Inc.,* 168 Ill.App.3d 1060, 522 N.E.2d 1352, 119 Ill.Dec. 493 (1st Dist.1988), and *Exchange Nat'l Bank v. Air Illinois, Inc.,* 167 Ill.App.3d 1081, 522 N.E.2d 146, 118 Ill.Dec. 691 (1st Dist.1988) and *Drews v. Globel Freight Lines, Inc.,* 144 Ill.2d 84, 161 Ill.Dec. 324, 578 N.E.2d 970 (1991) (damages for loss of consortium and society not reduced to present cash value in a wrongful death case).

There is no requirement that actuarial or statistical evidence be present to guide the jury in its determination of present cash value when this instruction is given. *Robinson v. Greeley & Hansen,* 114 Ill.App.3d 720, 449 N.E.2d 250, 253; 70 Ill.Dec. 376, 379 (2d Dist.1983); *Crabtree v. St. L.-S.F. Ry. Co.,* 89 Ill.App.3d 35, 411 N.E.2d 19, 44 Ill.Dec. 113 (5th Dist.1980); *Kirk v. Walter E. Deuchler Associates, Inc.,* 79 Ill.App.3d 416, 426-427; 398 N.E.2d 603, 610; 34 Ill.Dec. 780, 787 (2d Dist.1979).

See also Schaffner v. Chicago & North Western. Transportation Company, 129 Ill.2d 1, 541 N.E.2d 643, 133 Ill.Dec. 432 (1989) (improper for defendant to argue that any sum awarded Plaintiff could be invested to produce a "stream of income"); *Lorenz v. Air Illinois, Inc.,* 168 Ill.App.3d 1060, 522 N.E.2d 1352, 1356; 119 Ill.Dec. 493, 497 (1st Dist.1988) (expert testimony as to cost of annuity properly excluded on issue of present cash value); *Singh v. Air Illinois, Inc.,* 165 Ill.App.3d 923, 520 N.E.2d 852, 856-857; 117 Ill.Dec. 501, 505-506 (1st Dist.1988) (same); *Exchange Nat'l Bank v. Air Illinois, Inc.,* 167 Ill.App.3d 1081, 522 N.E.2d 146, 150-151; 118 Ill.Dec. 691, 695-696 (1st Dist.1988) (same; reference to "inflation" in closing argument not prejudicial error).

34.03 Death Case--Discount of Future Damages

Comment

This instruction is now IPI 31.12.

34.04 Damages Arising in the Future--Mortality Tables as Evidence of Damages--Injury Case

According to a table of mortality in evidence, the life expectancy of a person aged ____ years is ____ years. This figure is not conclusive. It is the average life expectancy of persons who have reached the age of ____. It may be considered by you in connection with other evidence relating to the probable life expectancy of the plaintiff in this case, including evidence of his occupation, health, habits, and other activities, bearing in mind that some persons live longer and some persons less than the average.

Notes on Use

The age of the injured person at the time of the trial and the expectancy of a person of his age as shown by the mortality tables in evidence should be inserted in the blank spaces in this instruction.

If mortality tables are in evidence, this instruction should be given in addition to any other instructions on the calculation of damages, such as IPI 34.01 or 34.02.

Comment

Mortality tables are admissible in evidence in personal injury cases where there is evidence that the injuries are of a permanent nature. *Avance v. Thompson,* 387 Ill. 77, 55 N.E.2d 57 (1944), *cert. denied*, 323 U.S. 753, 65 S.Ct. 82, 89 L.Ed. 603 (1944); *Howard v. Gulf, M. & O.R. Co.,* 13 Ill.App.2d 482, 142 N.E.2d 825 (4th Dist.1957).

In *Avance v. Thompson, supra*, the Illinois Supreme Court held that: "The jury should be carefully instructed as to the purposes for which such tables may be considered in fixing pecuniary damages." The court indicated that it was the responsibility of the party offering the tables to accompany the offer with a proper instruction to the jury. In *Nickell v. Baltimore & O.R. Co.,* 347 Ill.App. 202, 210; 106 N.E.2d 738, 741-742 (4th Dist.1952), the defendant contended that the court committed reversible error when it failed to instruct the jury on the application of mortality tables which had been introduced into evidence by the plaintiff. The court held it was incumbent upon the defendant to make a request for an instruction relative to the application of mortality tables and that it was not reversible error for the court to fail to instruct on this subject in the absence of tender of such an instruction. Illinois Supreme Court Rule 366(b) (2) (i) states, "No party may raise on appeal the failure to give an instruction unless he shall have tendered it."

In *Crabtree v. St. Louis-San Francisco Ry. Co.,* 89 Ill.App.3d 35, 39; 411 N.E.2d 19, 22; 44 Ill.Dec. 113, 116 (5th Dist.1980), the court, in rejecting an objection to IPI 34.04, noted that there is no requirement in Illinois that plaintiff introduce actuarial or statistical evidence to guide the jury in determining the present cash value of future lost earnings, although such evidence is

"often helpful to juries in reducing damages to monetary figures and could have been presented by defendant had it felt the necessity therefor."

This instruction has been approved in various cases. *Jurney v. Lubeznik,* 72 Ill.App.2d 117, 218 N.E.2d 799, 806 (1st Dist.1966); *Sherman v. City of Springfield,* 111 Ill.App.2d 391, 401; 250 N.E.2d 537, 546 (4th Dist.1969); *Avery v. Moews Seed Corn Co.,* 131 Ill.App.2d 842, 268 N.E.2d 561 (3d Dist.1971); *Canales v. Dominick's Finer Foods, Inc.,* 92 Ill.App.3d 773, 416 N.E.2d 303, 48 Ill.Dec. 272 (1st Dist.1981); *Ciborowski v. Philip Dressler & Associates,* 110 Ill.App.3d 981, 443 N.E.2d 618, 66 Ill.Dec. 692 (1st Dist.1982); *Martin v. Kralis Poultry Co.,* 12 Ill.App.3d 453, 465; 297 N.E.2d 610, 619 (5th Dist.1973).

This instruction was previously an alternative to IPI 34.01 or 34.02 but is now given in addition to those instructions or any other instructions referring to mortality tables.

34.05 Mortality Tables as Evidence of Damages--Death Case
Comment

This instruction is now IPI 31.13.

35.00

PUNITIVE DAMAGES

35.01 Punitive/Exemplary Damages--Willful and Wanton Conduct

In addition to compensatory damages, the law permits you under certain circumstances to award punitive damages. If you find that [(Defendant's name)] conduct was [fraudulent] [intentional] [willful and wanton] and proximately caused [injury] [damage] to the plaintiff, and if you believe that justice and the public good require it, you may award an amount of money which will punish [(Defendant's name)] and discourage [it/him/her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was [(defendant's name)] conduct?

On this subject, you should consider the following:

a) The facts and circumstances of defendant's conduct;

b) The [financial] vulnerability of the plaintiff;

c) The duration of the misconduct;

d) The frequency of defendant's misconduct;

e) Whether the harm was physical as opposed to economic;

f) Whether defendant tried to conceal the misconduct;

g) [other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed.]

The amount of punitive damages must be reasonable [and in proportion to the actual and potential harm suffered by the plaintiff.]

Instruction, Notes and Comment revised January 2007.

Notes on Use

This instruction should be given in conjunction with IPI 14.01 when punitive damages could be awarded. The U.S. Supreme Court has provided direction to courts for instructing a jury on punitive damages in cases, culminating with *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

The phrase "financial vulnerability" comes from *State Farm* and *BMW of North America v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). By context, it appears that the jury should also be permitted to consider other vulnerabilities if such evidence is in the record.

In identifying factors to consider concerning defendant's reprehensibility, the U.S. Supreme Court did not limit other factors the jury may consider. If appropriate, and if additional factors are present in the evidence, the court may instruct the jury to consider them.

"Financial condition" is bracketed because it is not necessary for a defendant's financial condition to be in evidence for a jury to award punitive damages. *Deal v. Byford,* 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *Ford v. Herman,* 316 Ill.App.3d 726, 734-735, 249 Ill.Dec. 942, 737 N.E.2d 332 (5th Dist. 2000).

The next to last paragraph should be used only in those cases like *State Farm* where conduct that may give rise to punitive damages in the forum state may be lawful in other states. There must be a basis in the evidence of such extra-jurisdictional conduct and its lawfulness to warrant the inclusion of this bracketed paragraph.

The idea of proportionality of the punitive award to the compensatory award is expressed in *State Farm v. Campbell* and *BMW v. Gore*. The Court did not specify what "in proportion" means. The Court refused to approve a punitive award that was 145 times the compensatory award. *State Farm, supra* at 429. The Court included language favoring a single digit multiplier. ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 ... or, in this case, 145 to 1," *State Farm, supra* at 425.) *See Mathias v. Accor Economy Lodging,* 347 F.3d 672 (7th Cir. 2003); *Philip Morris USA v. Williams,* 340 Or. 35 (2005), *cert. granted*, 126 S.Ct. 2329 (2006), *judgment vacated*, 127 S.Ct. 1057 (2007). Instructing a jury concerning "proportionality" was not mandated or prohibited by *State Farm* or by Illinois case law. Whether the bracketed language concerning "proportionality" should be included in the instruction should be decided on a case by case basis.

Comment

Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future. *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 186, 23 Ill.Dec. 559, 384 N.E.2d 353 (1978); *Loitz v. Remington Arms Co.,* 138 Ill.2d 404, 415-416, 563 N.E.2d 397 (1990); *Mattyasovszky v.*

West Towns Bus Co., 61 Ill.2d 31, 35, 330 N.E.2d 509 (1975).

The Illinois Supreme Court established that a reviewing court would "not disturb an award of punitive damages on grounds that an amount is excessive unless it is apparent that the award is a result of passion, partiality or corruption." *Deal v. Byford,* 127 Ill.2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). There were no clear guidelines in Illinois for determining when a punitive damages award was excessive. *Hazelwood v. Illinois Central Gulf R.R.,* 114 Ill.App.3d 703, 711, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983). Relevant circumstances that a reviewing court should consider in determining whether a punitive damage award is excessive are to include the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Deal v. Byford, supra* at 204, citing *Hazelwood v. Ill. Cent. Gulf R.R., supra* at 712-713.

In a series of cases beginning in 1989, the U.S. Supreme Court squarely faced the question of what constituted an excessive punitive damage award. *Browning-Ferris Indus. of Vermont, Inc., v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.,* 509 U.S. 443 (1993); *Honda Motor Co. v. Oberg,* 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); *BMW of North America v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Cooper Indus. v. Leatherman Tool Group, Inc.,* 532 U.S. 424 (2001); *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

In *BMW v. Gore*, *supra,* the Court declared that constitutional principles embodied in the due process clause of the 14th Amendment required that reviewing courts use three "guideposts" to determine whether a punitive damage award is excessive:

(1) the degree of reprehensibility;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award;

(3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases.

BMW v. Gore, *supra*; *State Farm v Campbell*, *supra*; *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.,* 327 Ill. App. 3d 711, 765 N.E.2d 21, 262 Ill. Dec. 195 (2002) and cited in *Turner v. Firstar Bank, N.A.,* 363 Ill.App.3d 1150, 1163, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006). Of these guideposts, "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." *BMW v. Gore, supra* at 575. "Reprehensibility" is a quality the Supreme Court asks reviewing courts to recognize through careful consideration of the following factors:

(1) Whether the harm caused was physical as opposed to economic;

(2) Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;

(3) Whether the target of the conduct had financial vulnerability;

(4) Whether the conduct involved repeated actions or was an isolated incident; and

(5) Whether the harm was the result of intentional malice, trickery, deceit or mere accident. *International Union of Operating Engineers, Local 150 v. Lowe*, *supra.*

While any punitive damages imposed should reflect the enormity of the tortfeasor's offense, *BMW,* 517 U.S. at 525, the second guidepost--the disparity between the actual or potential harm suffered and the punitive award--reminds the reviewing court that the award should not be "grossly out of proportion to the severity of the offense," *Id*. citing *Pacific Mutual Life Insurance Co. v. Haslip,* 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). The Court has indicated its reluctance "to identify concrete constitutional limits on the ratio between the harm, or potential harm, to the plaintiff and the punitive damage award," *State Farm*, 538 U.S. at 424, citing *BMW*, 517 U.S. at 582. While refusing a "bright line ratio" above which punitive damages cannot exceed, the Court did suggest that "few awards exceeding single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 338 U.S. at 425.

In translating this concept of proportionality, the Seventh Circuit of the U.S. Court of Appeals in *Mathias v. Accor Economy Lodging, Inc.,* 347 F.3d 672, 676 (7th Cir. 2003) held not only that "punitive damages should be proportional to the wrongfulness of the defendant's actions," but also that "the punishment should fit the crime." Still, the Seventh Circuit avoided any semblance of rigid measurement by embracing the challenges that extreme examples of bad acts might pose to a jury. In other words, proportionality may be "modified when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs)." *Id*.

Before *State Farm v. Campbell*, (2003), the Illinois Supreme Court last addressed the concept of proportionality in a 1989 decision, *Deal v. Byford,* 127 Ill. 2d 192, 204, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989), where it said "There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory recovery." No subsequent pronouncement has been made by the Court. Nevertheless, the concept of proportionality as expressed by the U.S. Supreme Court has surfaced, relatively intact, in Illinois appellate decisions, such as *Turner v. Firstar Bank, N.A.,* 363 Ill.App.3d 1150, 300 Ill.Dec. 927, 845 N.E.2d 816 (5th Dist. 2006) (reducing punitive damages to an amount that would be less than the double-digit ratio between punitive and compensatory damages against which the *State Farm* Court cautioned); *Franz v. Calaco Development,* 352 Ill.App.3d 1129, 288 Ill.Dec. 669, 818 N.E.2d 357 (2nd Dist. 2004) ("While the amount to be awarded in punitive damages rests largely within the province of the jury, that "discretion" is not arbitrary or unlimited"); and *Hazelwood v. Illinois Central Gulf Railroad,* 114 Ill.App.3d 703, 713, 71 Ill.Dec. 320, 450 N.E.2d 1199 (4th Dist. 1983) ("recognizing that punitive damages are in the nature of a criminal sanction, we are simply saying that the punishment should fit the crime. An award which is disproportionate to the wrong serves none of the purposes of punitive damages and is excessive.").

The Illinois Supreme Court recently reduced a punitive damages award to a ratio of 11:1 from an Appellate Court remittitur of 75:1 in *International Union of Operating Engineers, Local 150 v. Lowe*, *supra.* The Court discussed the idea of proportionality and the *Mathias v. Accor Economy Lodging, Inc.*, *supra,* decision.

Cognizant of the fact that its admonishments were directed to reviewing courts, the U.S. Supreme Court has also indicated that vague instructions that merely inform the jury to avoid "passion or prejudice" do little to aid the decision maker in its task of assigning appropriate weight to evidence that is tangential or only inflammatory. *State Farm v. Campbell, supra* at 418. The Committee, in revising the jury instructions addressing punitive damages, sought to honor the three constitutional "guideposts" established by U.S. Supreme Court while simultaneously emphasizing that the ultimate determination as to the size of the penalty imposed must be dictated by the circumstances of each particular case. *Deal v. Byford*, 127 Ill.2d 192, 205, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989). "Even though the assessment of punitive damages is not a purely factual finding, it is a 'fact sensitive' undertaking." *Franz*, 352 Ill.App.3d at 1143, citing *Cooper Industries, Inc.,* 532 U.S. at 437. Room is to be left for relatively high punitive damage awards in situations where particularly loathsome acts resulted in but small amounts of measurable economic damages. *Turner*, 363 Ill.App.3d 1150, 1164, citing *State Farm*, 538 U.S. at 425.

The Committee formulated an instruction that incorporated the distinguishing factors of reprehensibility. Precisely which factor must be included in an instruction submitted to a jury is case specific and to be carefully weighed. For instance, the *State Farm* opinion suggests that the jury consider whether the harm was physical rather than economic, yet, experience allows that under certain circumstances an economic loss willfully created can be equally as devastating to a plaintiff. Regardless, in any punitive assessment, the degree of reprehensibility of the defendant's conduct must be the pivotal consideration.

The Committee is also of the opinion that current definitions of the term "willful and wanton" (14.01) and "proximate cause" (15.01) are plainly stated, well settled under current Illinois law and not inconsistent with the U.S. Supreme Court decisions. The instructions were designed to provide guidance to a jury that must determine whether punitive damages should be awarded at all; and if so, how to go about the process of evaluating the defendant's misconduct in light of their own experience and the facts of the case.

The Committee also considered the following cases: *Home Savings & Loan Ass'n v. Schneider,* 108 Ill.2d 277, 91 Ill.Dec. 590, 483 N.E.2d 1225 (1985); *Proctor v. Davis,* 291 Ill.App.3d 265 (1st Dist. 1997); *Heldenbrand v. Roadmaster Corp.,* 277 Ill.App.3d 664 (5th Dist. 1996).

35.02 Punitive/Exemplary Damages--Willful and Wanton Conduct--Corporate Defendant's Liability

[(Defendant's name)] is a corporation and can act only through its officers and employees. As to plaintiff's claim for compensatory damages against [(Defendant's name)], any act or omission of an officer or employee within the scope of his employment is the act or omission of the defendant corporation.

As to plaintiff's claim for punitive damages against [(Defendant's name)], a different rule applies. Punitive damages may be awarded against [(Defendant's name)] only (1) if you find in favor of plaintiff(s) and against [(Defendant's name)] under Count __ of the complaint, and (2) if you find that, as to the act(s) or omission(s) giving rise to liability under Count __, [[State condition (a), (b), (c) or (d)].] [one or (more) (both) of the following conditions (is) (are) proved:]

[(a)] [The corporation, through its management, authorized the doing and the manner of the act or omission] [; or]

[(b)] [The employee responsible for the act or omission was unfit, and the corporation was reckless in employing him] [; or]

[(c)] [The act or omission was that of a managerial employee who was acting in the scope of his employment] [; or]

[(d)] [The corporation, through its management or a managerial employee, ratified or approved the act or omission].

Instruction, Notes and Comment approved January 2007.

Notes on Use

This instruction should be given with IPI 35.01 in any case in which a submissible case for punitive damages has been made and such damages are sought against a corporate defendant.

Use the appropriate subparagraphs (a)-(d), depending on the facts of the case.

Additional agency instructions may be used as appropriate. *See* Chapter 50.

Comment

This instruction is based on the requirements of *Restatement (Second) of Torts,* Section 909 and the *Restatement (Second) of Agency*, Section 217C. Those sections have been cited in *Mattyasovszky v. West Towns Bus Co.,* 61 Ill.2d 31 (1975); *Deal v. Byford,* 127 Ill.2d 192, 130 Ill.Dec. 200, 537 N.E.2d 267 (1989); *Kennan v. Checker Taxi Co.,* 250 Ill.App.3d 155 (1st Dist. 1993); *Kemner v. Monsanto Co.,* 217 Ill.App.3d 188, 207, 160 Ill.Dec. 192, 576 N.E.2d 1146 (5th Dist. 1991); *Bryant v. Livigni,* 250 Ill.App.3d 303, 311, 188 Ill.Dec. 925, 619 N.E.2d 550

(5th Dist. 1993); *Abshire v. Stoller*, 235 Ill.App.3d 849, 857-859, 176 Ill.Dec. 559, 601 N.E.2d 1257 (1st Dist. 1992).

This instruction embodies the "corporate complicity" concept which is necessary for an award of punitive damages against a corporation. Mere proof of scope and course conduct of an agent is insufficient to impose punitive damages against a corporation. *Kemner v. Monsanto Co., supra* at 208, discussed the error of giving a simple agency instruction (*IPI* 50.11) when corporate liability for punitive damages is at issue. *See also Kochan v. Owens-Corning Fiberglass Corp.,* 242 Ill.App.3d 781, 797-798, 182 Ill.Dec. 814, 610 N.E.2d 683 (5th Dist. 1993).

36.00

NO LIABILITY--NO DAMAGES

36.01 In Absence of Liability--No Occasion to Consider Damages

If you decide for [a] [the] defendant on the question of liability, you will have no occasion to consider the question of damages [as to that defendant].

Comment

This instruction was approved in *Malpica v. Sebastian,* 99 Ill.App.3d 346, 350; 425 N.E.2d 1029, 1032; 54 Ill.Dec. 812, 815 (1st Dist.1981), and in *Misch v. Meadows Mennonite Home,* 114 Ill.App.3d 792, 799; 449 N.E.2d 1358, 1363; 70 Ill.Dec. 754, 759 (4th Dist.1983) (liability still has a place under comparative negligence as established by *Alvis,* "If a defendant is guilty of no negligence, i.e., not liable, there is nothing to compare."). *See also Bednar v. Commonwealth Edison,* 156 Ill.App.3d 568, 575; 509 N.E.2d 687, 692; 109 Ill.Dec. 26, 31 (3d Dist.1987). *But see Mileur v. Briggerman,* 110 Ill.App.3d 721, 728; 442 N.E.2d 1356, 1361; 66 Ill.Dec. 443, 448 (5th Dist.1982) (liability determined as a matter of law).

MULTIPLE PARTIES AND PLEADINGS--VERDICT FORMS

41.00
MULTIPLE PARTIES AND PLEADINGS

41.01 Two or More Plaintiffs

The rights of the plaintiffs [plaintiffs' names] are separate and distinct. Each is entitled to a fair consideration of his own case and you will decide each plaintiff's case as if it were a separate lawsuit. Each plaintiff's case must be governed by the instructions applicable to that case.

Notes on Use

The use of this instruction avoids the practice of giving separate instructions on behalf of two or more plaintiffs in cases where the same issues and questions of law are applicable to each plaintiff.

Comment

Although *Meng v. Lucash*, 329 Ill.App. 512, 69 N.E.2d 367 (4th Dist.1946) (abstract), held it was not error to give separate burden of proof instructions for each of two plaintiffs, *Triolo v. Frisella*, 3 Ill.App.2d 200, 205; 121 N.E.2d 49, 51 (2d Dist.1954), rejected the use of separate sets of similar instructions for each of four defendants. The court stated that counsel have "a duty to assist the court in settling on a set of instructions which fully and yet concisely state the law as it affects all parties to the case."

41.02 Assess Plaintiffs' Damages Separately

If you find that [both] [two or more] plaintiffs are entitled to recover, you will assess the damages of each separately and return a verdict in a separate amount for each.

Comment

In an action by several plaintiffs each of whom has made a separate claim for damages in a different amount, the jury must be required to return a verdict in a separate amount as to each plaintiff. *Caton v. Flig*, 343 Ill.App. 99, 101; 98 N.E.2d 162, 163 (1st Dist.1951); 735 ILCS 5/2-1201 (1994) (formerly §68(3) of the Civil Practice Act).

41.03 Two or More Defendants

The rights of the defendants [defendants' names] are separate and distinct. Each is entitled to a fair consideration of his own defense and you will decide each defendant's case separately as if it were a separate lawsuit. Each defendant's case must be governed by the instructions applicable to that case.

Notes on Use

The use of this instruction avoids the practice of giving separate iterative instructions on behalf of two or more defendants in cases where the same issues and questions of law are applicable to each defendant.

This instruction should not be used where the relationship between multiple defendants is based solely on vicarious liability. *See* IPI 50.01 et seq.

The defendants' names may be inserted in the instruction if that will make the references clearer.

Comment

A previous version of this instruction, as modified, was approved in *Wanner v. Keenan*, 22 Ill.App.3d 930, 317 N.E.2d 114 (2d Dist.1974).

See Comment to IPI 41.01.

41.05 Counterclaim--Third Party Complaint

In this action a [counterclaim] [third-party complaint] has been filed. As to the issues raised by the [counterclaim] [third-party complaint] and the answer to it, the parties therein named stand in the same relation to one another as do a plaintiff and a defendant. Therefore, the instructions given to you which apply to the plaintiff[s] [plaintiffs' names] and the defendant[s] [defendants' name(s)] apply with the same effect to the [counter-plaintiff [counter-plaintiff's name] and counter-defendant [counter-defendant's name] [third-party plaintiff [third-party plaintiff's name] and third-party defendant [third-party defendant's name], respectively.

Notes on Use

Use of this instruction may not be necessary if other instructions (i.e. issues and burden of proof) and verdict forms using parties' names rather than terms such as "third party plaintiff" are properly drafted.

This instruction is not to be used in indemnity or contribution cases. In those cases, *see* IPI 500.00 and 600.00.

45.00

FORMS OF VERDICTS

INTRODUCTION

The following instructions and related verdict forms are for illustrative purposes only. In drawing verdict forms, care must be taken to ensure that they cover every possible finding the jury may make.

Additional verdict forms specific to particular topics are to be found in other chapters.

SPECIAL NOTE ON USE

The following notes and instructions were drafted prior to the amendment of 735 ILCS 5/2-1117, which became effective 6/4/03. This amendment should be considered when utilizing the following instructions and notes.

B45.01 Instruction on Use of Verdict Forms— Negligence Only--Single Plaintiff and Defendant

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for [plaintiff's name] and against [defendant's name] and if you further find that [plaintiff's name] was not contributorily negligent, then you should use Verdict Form A.

If you find for [plaintiff's name] and against [defendant's name] and if you further find that [plaintiff's name]'s injury was proximately caused by a combination of [defendant's name]'s negligence and [plaintiff's name]'s contributory negligence and that [plaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form B.

If you find for [defendant's name] and against [plaintiff's name], or if you find that plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form C.

Notes on Use

This instruction has been drafted for a negligence case. It must be modified if there are willful and wanton allegations.

This instruction, or a variation of it, should be used in cases where there is one plaintiff and one defendant and no counterclaim. If the claim involves multiple counts, the operative paragraphs may need to be repeated for each count with the count identified, e.g., "under Count _____."

If there are multiple plaintiffs and a single defendant, separate instructions regarding verdict forms and separate verdict forms must be submitted for each plaintiff.

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

The letters used to designate the verdict forms and their corresponding references in the instruction (A, B, C, etc.) should begin with "A" and be consecutive.

See IPI B45.02 and B45.03, and their Notes on Use.

B45.01.A Verdict Form A--Single Plaintiff and Defendant--No Contributory Negligence Pleaded

VERDICT FORM A

We, the jury, find for [plaintiff's name] and against [defendant's name]. We assess the damages in the sum of _____$, [itemized as follows:]

[Signature Lines]

B45.01.B Verdict Form B--Single Plaintiff and Defendant--Contributory Negligence—Less Than 50%

VERDICT FORM B

We, the jury, find for [plaintiff's name] and against [defendant's name] and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of [plaintiff's name], we find that the total amount of damages suffered by [plaintiff's name] as a proximate result of the occurrence in question is ____$, [itemized as follows:]

Second: Assuming that 100% represents the total combined negligence of all persons whose negligence proximately contributed to the plaintiff's [injuries] [damages], including [plaintiff's name] and [defendant's name] [and all other persons], we find that the percentage of such negligence attributable solely to [plaintiff's name] is ____ percent (%).

Third: After reducing the total damages sustained by [plaintiff's name] by the percentage of negligence attributable solely to [plaintiff's name], we assess [plaintiff's name]'s recoverable damages in the sum of ____$.

[*Signature Lines*]

B45.01.C Verdict Form C--Single Plaintiff and Defendant--Contributory Negligence—More Than 50%

VERDICT FORM C

We, the jury, find for [defendant's name] and against [plaintiff's name].

[*Signature Lines*]

B45.02 Instruction on Use of Verdict Forms— Negligence Only--Single Plaintiff and Defendant--Counterclaim

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdicts must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdicts, fill in and sign the appropriate forms and return them to the court. You must return one verdict as to the [complaint] [claim of [plaintiff's name] against [defendant's name]], and one verdict as to the [counterclaim] [claim of [defendant's name] against [plaintiff's name]]. [Since there is more than one plaintiff in this action, you must return one verdict as to each plaintiff's complaint and a second verdict as to any claim of a defendant against any plaintiff.]

Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for [plaintiff's name] and against [defendant's name] on [plaintiff's name]'s complaint, and if you further find that [plaintiff's name] was not contributorily negligent, then you should use Verdict Form A.

If you find for [plaintiff's name] and against [defendant's name] on [plaintiff's name]'s complaint, and if you further find that [plaintiff's name]'s injury was proximately caused by a combination of [defendant's name]'s negligence and [plaintiff's name]'s contributory negligence and that [plaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form B.

If you find for [defendant's name] and against [plaintiff's name] on [plaintiff's name]'s complaint, or if you find that plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form C.

If you find for [counterplaintiff's name] and against [counterdefendant's name] on [counterplaintiff's name]'s counterclaim, and if you further find that [counterplaintiff's name] was not contributorily negligent, then you should use Verdict Form D.

If you find for [counterplaintiff's name] and against [counterdefendant's name] on [counterplaintiff's name]'s counterclaim, and if you further find that [counterplaintiff's name]'s injury was proximately caused by a combination of [counterdefendant's name]'s negligence and [counterplaintiff's name]'s contributory negligence, and that [counterplaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form E.

If you find for [counterdefendant's name] and against [counterplaintiff's name] on [counterplaintiff's name]'s counterclaim or if you find that [counterplaintiff's name]'s contributory negligence was more than 50% of the total proximate cause of the injury or damage for which

recovery is sought, then you should use Verdict Form F.

Notes on Use

This instruction has been drafted for a negligence case. It must be modified if there are willful and wanton allegations.

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

If there are multiple plaintiffs and multiple defendants, a separate set of verdict forms should be given for each plaintiff (B45.02 and Verdict Forms A-F inclusive, modified to reflect the plurality of defendants and naming each plaintiff).

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

The letters used to designate the verdict forms and their corresponding references in the instruction (A, B, C, etc.) should begin with "A" and be consecutive.

B45.02.A Verdict Form A--Single Plaintiff and Defendant--No Contributory Negligence Pleaded

VERDICT FORM A

We, the jury, find for [plaintiff's name] and against [defendant's name]. We assess the damages in the sum of $____, [itemized as follows:]

[*Signature Line*s]

B45.02.B Verdict Form B--Single Plaintiff and Defendant--Contributory Negligence Alleged--Less Than 50%

VERDICT FORM B

We, the jury, find for [plaintiff's name] and against [defendant's[s'] name[s]] and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of [plaintiff's name], we find that the total amount of damages suffered by [plaintiff's name] as a proximate result of the occurrence in question is $_____ .

Second: Assuming that 100% represents the total combined negligence of [plaintiff's name] and of [defendant's[s'] name[s]] [and all other persons], we find that the percentage of negligence attributable solely to [plaintiff's name] is ____ percent (%).

Third: After reducing the total damages sustained by [plaintiff's name] by the percentage of negligence attributable solely to [plaintiff's name], we assess [plaintiff's name]'s recoverable damages in the sum of $_____, [itemized as follows:]

[*Signature Line*]

B45.02.C Verdict Form C--Single Plaintiff and Defendant--Contributory Negligence Alleged--More Than 50%

VERDICT FORM C

We, the jury, find for [defendant's name] and against [plaintiff's name].

[*Signature Lines*]

B45.02.D Verdict Form D--Single Plaintiff and Defendant--Counterclaim--No Contributory Negligence Pleaded

VERDICT FORM D

We, the jury, find against [plaintiff's name] and for [defendant's name] on [plaintiff's name]'s complaint.

We further find for [defendant's name] and against [plaintiff's name] on [defendant's name]'s counterclaim. We assess [defendant's name]'s damages on his counterclaim in the sum of $_____, [itemized as follows:]

[*Signature Lines*]

B45.02.E Verdict Form E--Single Plaintiff and Defendant--Counterclaim--Contributory Negligence Alleged--Less Than 50%

VERDICT FORM E

We, the jury, find for [counterplaintiff's name] and against [counterdefendant's name] and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of [counterplaintiff's name], if any, we find that the total amount of damages suffered by [counterplaintiff's name] as a proximate result of the occurrence in question is $_____

Second: Assuming that 100% represents the total combined negligence of [counterplaintiff's name] and of [counterdefendant's name] [and of all other persons], we find that the percentage of negligence that was a proximate cause of [counterplaintiff's name]'s [injury] [or] [damage] attributable solely to [counterplaintiff's name] is ____ percent (%).

Third: After reducing the total damages sustained by [counterplaintiff's name] by the percentage of negligence attributable to [counterplaintiff's name], we assess [counterplaintiff's name]'s recoverable damages in the sum of $_____, [itemized as follows:]

[*Signature Lines*]

B45.02.F Verdict Form F--Single Plaintiff and Defendant--Counterclaim--Contributory Negligence Alleged--More Than 50%

VERDICT FORM F

We, the jury, find for [counterdefendant's name] and against [counterplaintiff's name].

[*Signature Lines*]

B45.03 Instruction on Use Of Verdict Forms— Negligence Only--Single Plaintiff and Multiple Defendants

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict[s] must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict[s], fill in and sign the appropriate form[s] and return [it] [them] to the court. Your verdict[s] must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

The parties in this case are:

Plaintiff: **[name of plaintiff]**

Defendants: **[names of defendants]**

_____

If you find for the plaintiff and against any of the defendants and if you further find that plaintiff was not contributorily negligent, then you should use Verdict Form A, writing in "0%" on Line "(a)" of Paragraph "Second" of Verdict Form A.

If you find for [plaintiff's name] and against one or more of the defendants, and if you further find that [plaintiff's name]'s injury was proximately caused by a combination of the negligence of that defendant or defendants and [plaintiff's name]'s contributory negligence, and that [plaintiff's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form A, writing in the percentage of the plaintiff's contributory negligence on Line "(a)" of Paragraph "Second" of Verdict Form A.

If you find in favor of all defendants or that [plaintiff's name]'s contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then you should use Verdict Form B.

Notes on Use

This instruction has been drafted for a negligence case. It may need to be modified if there are willful and wanton allegations or other theories of liability.

This instruction, or a variation of it, should be used in cases where there is one plaintiff and more than one claimed tortfeasor. 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.

The letters used to designate the verdict forms and their corresponding references in the instruction (A, B, etc.) should begin with “A” and be consecutive.

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

VERDICT FORM A

We, the jury, find for [plaintiff's name] and against the following defendant or defendants:

Name of defendant 1	Yes _____	No _____
Name of defendant 2	Yes _____	No _____
Name of defendant 3	Yes _____	No _____

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the [negligence] [other damage reducing defense] of [plaintiff's name], if any, we find that the total amount of damages suffered by [plaintiff's name] as a proximate result of the occurrence in question is $_____, itemized as follows:

The reasonable expense of past medical and medically related expenses:	$_____
(Other damages, insert from IPI 30 series)	$_____
PLAINTIFF'S TOTAL DAMAGES:	$_____

Second: Assuming that 100% represents the total combined legal responsibility of all [persons] [or] [entities] who [that] proximately caused [plaintiff's name] injury, we find the percentage of legal responsibility attributable to each as follows:

a) Plaintiff's name	_____%
b) Defendant #1's name	_____%
c) Defendant #2's name	_____%
d) Other[1]	_____%
TOTAL	100%

1 Under *Bofman v. Material Service Corporation*, 125 Ill.App.3d 1053, 1064 (1st Dist. 1984) and *Smith v. Central Illinois Public Service Company*, 176 Ill.App.3d 482 (4th Dist. 1988), in a case where there is a potential finding of contributory fault by the plaintiff, the jury should evaluate the fault of non-parties because "it is essential for determining liability commensurate with

degree of total fault." The fault of the settling parties, however, should be disregarded for purposes of the 2-1117 calculation. *Ready v. United/Goedecke Services, Inc.*, 232 Ill.2d 369, 385 (2008)

(*Instructions to Jury: If you find that plaintiff was not [contributorily negligent] [other damage reducing defense], or if you find any other party listed on the verdict form was not legally responsible in a way that proximately caused plaintiff's injury, you should enter a zero (0)% as to that party.*)

Third: After reducing the plaintiff's total damages [(from paragraph First)] by the percentage of [negligence] [other damage reducing defense], if any, of ____ [(from line (a) in paragraph Second)], we award [plaintiff's name] recoverable damages in the amount of $_____

[*Signature lines*]

Verdict Form, Notes and Comment revised January 2010. Notes revised June 1, 2012.

Notes on Use

This instruction should be used when there is a claim of contributory fault of the plaintiff. However, if the plaintiff suffers multiple, separable injuries and not all of the defendants are alleged to have caused each of the separable injuries then a modified verdict form may be necessary. *See Auten v. Franklin*, 404 Ill.App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010). If there is no claim of contributory fault, use IPI Civil B45.03A2. If contribution is sought against third-party defendants, use IPI 600.14 or 600.14A.

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. Also, if requested, each element of damages should be further itemized to provide separate lines for past and future loss pursuant to 735 ILCS 5/2-1109 (economic loss) and *Maddox v. Rozek*, 265 Ill. App. 3d 1007, 1011, 639 N.E.2d 164, 167, 203 Ill. Dec. 125, 128 (1st Dist. 1994) (non-economic loss). *See also Doering v. Janssen*, 76 Ill. App. 3d 62, 67, 394 N.E.2d 721, 725, 31 Ill. Dec. 519, 523 (3d Dist. 1979) where the court held it was not error to submit an itemized verdict form for both economic and noneconomic loss with separate lines for past and future damages.

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.

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."

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).

The committee believes that the italicized language could be helpful to explain the verdict form to the jury.

Comment

This computational verdict form is 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, and 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.

Four verdict forms (IPI B45.03A, B45.03A2, 600.14 and 600.14A) are intended to reflect the jury's findings as to damages and fault, which provide the data for the calculations necessary to the entry of a judgment or judgments.

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 (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 Serv. Corp*., 125 Ill.App.3d 1053 (1st Dist. 1984). 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 Ill. Pub. Serv. Co.*, 176 Ill.App.3d 482 (4th Dist. 1988). *See also American Motorcycle Ass'n v. Superior Court*, 20 Cal.3d 578, 146 Cal.Rptr. 182, 190, 578 P.2d 899, 906 (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. While Ready v. United/Goedecke Services, Inc., 232 Ill.2d 369 (2008) held that the percentage fault of a defendant who settled is not part of the calculation under 735 ILCS 5/2-1117, that case did not reduce the vitality of Bofman or Smith. If the jury hears evidence to suggest fault on the part of settled parties and if contributory negligence is claimed, the settled parties should be listed on the verdict form to correctly determine the percentage contributory fault of the plaintiff. The fault of the settling parties, however, should be disregarded for purposes of the 2-1117 calculation. Ready, supra at 385 ("We hold that section 2-1117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit."). See also, Heupel v. Jenkins, _ N.E.2d _, 2009 WL 3762941 (1st Dist. 2009).

Persons or entities that were never sued are not part of the 2-1117 calculation either. *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill.App.3d 18, 31-32, 885 N.E.2d 330 (1st Dist. 2008).

Before this form of verdict was adopted, two separate forms were used, which permitted inconsistent calculations by the jury of plaintiff's fault and the 2-1117 calculation. That inconsistency led to a reversal in *Hackett v. Equip. Specialists, Inc.*, 201 Ill.App.3d 186 (1st Dist. 1990). In *Hackett*, the jury found the defendant to be 55% 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. This form of verdict should prevent similar problems.

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.

Burke v. 12 Rothschild's Liquor Mart, 148 Ill.2d 429 (1992), holds that a willful and wanton tortfeasor cannot use the plaintiff's comparative negligence to reduce damages. *Ziarko v. Soo Line R.R.*, 161 Ill.2d 267 (1994), holds that "a defendant found guilty of willful and wanton conduct may seek contribution from a defendant found guilty of ordinary negligence if the willful 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 willful 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 willful 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 that 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 committee recommends that a non-party 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. Assuming sufficient evidence is presented and if the jury will need to decide whether plaintiff was contributorily negligent, then the non-party should be listed on the verdict form based on *Bofman, supra,* and *Smith, supra*. If there is no issue of contributory negligence, the Committee recommends against including non-parties on the verdict form. *Ready, supra* at 385; *Jones, supra* at 31.

B45.03A2 Verdict Form A--Single Plaintiff and Claimed Multiple Tortfeasors--No Comparative Negligence--Verdict for Plaintiff Against Some But Not All Defendants

VERDICT FORM A

We, the jury, find for [plaintiff's name] and against the following defendant or defendants:

Name of defendant 1	Yes _____	No _____
Name of defendant 2	Yes _____	No _____
Name of defendant 3	Yes _____	No _____

We further find the following:

First: We find that the total amount of damages suffered by [plaintiff's name] as a proximate result of the occurrence in question is $_____, itemized as follows:

The reasonable expense of past medical and medically related expenses:	$_____
(Other damages, insert from IPI 30 series)	$_____
PLAINTIFF'S TOTAL DAMAGES:	$_____

Second: Assuming that 100% represents the total combined legal responsibility of all [persons] [or] [entities] who [that] proximately caused [plaintiff's name] injury, we find the percentage of legal responsibility attributable to each as follows:

a) Defendant #1's name	_____%
b) Defendant #2's name	_____%
c) Defendant #3's name	_____%
TOTAL	100%

(*Instructions to Jury: If you find that any party listed on the verdict form was not legally responsible in a way that proximately caused plaintiff's injury, you should enter a zero (0)% as to that party.)*

[*Signature lines*]

Verdict Form, Notes and Comment adopted January 2010. Notes revised June 1, 2012.

Notes on Use

This verdict form should be used when there is no claim of contributory fault of the plaintiff. However, if the plaintiff suffers multiple, separable injuries and not all of the defendants are alleged to have caused each of the separable injuries then a modified verdict form may be necessary. *See Auten v. Franklin*, 404 Ill.App.3d 1130, 942 N.Ed.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010). If there is a claim of contributory fault, use B45.03A. If there is a contribution claim pending against a third party, use IPI 600.14 or 600.14A.

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. Also, if requested, each element of damages should be further itemized to provide separate lines for past and future loss pursuant to 735 ILCS 5/2-1109 (economic loss) and *Maddox v. Rozek*, 265 Ill. App. 3d 1007, 1011, 639 N.E.2d 164, 167, 203 Ill. Dec. 125, 128 (1st Dist. 1994) (non-economic loss). *See also Doering v. Janssen*, 76 Ill. App. 3d 62, 67, 394 N.E.2d 721, 725, 31 Ill. Dec. 519, 523 (3d Dist. 1979) where the court held it was not error to submit an itemized verdict form for both economic and noneconomic loss with separate lines for past and future damages.

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.

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."

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).

The committee believes that the italicized language could be helpful to explain the verdict form to the jury.

Comment

See Comment to B45.03A.

B45.03.B Verdict Form B--Single Plaintiff and Multiple Defendants

VERDICT FORM B

We, the jury, find for all of the defendants and against the plaintiff.

[*Signature Lines*]

45.04A Wrongful Death Act--Survival Act--Verdict Form A—No Contributory Fault

We, the jury, find for the Estate of ____, deceased, and against the following defendants:

_____
Defendant 1 Yes _____ No _____

_____
Defendant 2 Yes _____ No _____

We further find the following:

First: We find that the total amount of damages suffered by the Estate of _____, deceased, is $_____, itemized as follows:

[Loss of money, benefits, goods and services]: $_____$

[Grief, sorrow and mental suffering]: $_____

[Loss of society] and [loss of sexual relations]: $_____

[(Other damages: insert from 30.04, 30.04.01, 30.05, 30.05.01, 30.06, 30.07, 30.09 or as applicable)] $_____

PLAINTIFF'S TOTAL DAMAGES $_____

_____ _____
Foreperson
_____ _____

Add additional lines for juror signatures

Verdict Form, Notes and Comment revised May 2014.

Notes on Use

Use "other damages" if there is a Survival Act count. If there is an issue of contributory fault of decedent only, also use verdict form IPI 45.04B. If there is an issue of contributory fault of a beneficiary alone or a beneficiary and a decedent, also use verdict form IPI 45.04C. Add additional lines on the damage itemization as appropriate if a Family Expense Act claim is part of the plaintiff's case.

Comment

The Survival Act is not a statutory cause of action, but rather a statute that allows for the continued existence of a cause of action that arose during the lifetime of the decedent. *Myers v. Heritage Enters., Inc.*, 332 Ill.App.3d 514, 773 N.E.2d 787, 266 Ill. Dec. 32 (4th Dist. 2002).

45.04B Wrongful Death Act--Survival Act--Verdict
Form B--Contributory Fault of Decedent Only

We, the jury, find for the Estate of ____, deceased, and against the following defendants:

_____
Defendant 1 Yes _____ No _____

_____
Defendant 2 Yes _____ No _____

We further find the following:

First: We find that the total amount of damages suffered by the Estate of ____, deceased, is $_____, itemized as follows:

[Loss of money, benefits, goods and services]: $_____$

[Grief, sorrow and mental suffering]: $_____

[Loss of society] and [loss of sexual relations]: $_____

[(Other damages: insert from 30.04, 30.04.01, 30.05, 30.05.01, 30.06, 30.07, 30.09 or as applicable)] $_____

PLAINTIFF'S TOTAL DAMAGES $_____

Second: Assuming that 100% represents the total combined [negligence][fault][responsibility] of all [persons] [or entities] whose [negligence][fault][responsibility] proximately caused the death of [decedent], we find the percentage of [negligence][fault][responsibility] attributable to each as follows:

a) _____ _____%
Decedent
b) _____ _____%
Defendant 1
c) _____ _____%
Defendant 2

Third: After reducing the plaintiff's total damages from paragraph "First" by the percentage of [negligence] [[(other damage reducing defense)]] if any, of [decedent] from line (a) in paragraph "Second," we award [plaintiff] recoverable damages in the amount of $_____.

_____ _____
Foreperson
_____ _____

Add additional lines for juror signatures.

Verdict Form, Notes and Comment revised May 2014.

Notes on Use

Use "other damages" if there is a Survival Act count. Use this verdict form in conjunction with IPI B31.08 when the contributory fault of only the decedent is an issue for the jury. If there is no issue as to contributory fault, use verdict form IPI 45.04A. If there is an issue of contributory fault of a beneficiary alone or a beneficiary and a decedent, use verdict form IPI 45.04C. Add additional lines on the damage itemization as appropriate if a Family Expense Act claim is part of the plaintiff's case.

Comment

The contributory fault of the decedent is a defense in a wrongful death action, which was created by statute in Illinois. 740 ILCS 180/2.

The Survival Act is not a statutory cause of action, but rather a statute that allows for the continued existence of a cause of action that arose during the lifetime of the decedent. *Myers v. Heritage Enters., Inc.,* 332 Ill.App.3d 514, 773 N.E.2d 787, 266 Ill. Dec. 32 (4th Dist. 2002). The decedent's contributory fault is a defense to a claim brought under the Survival Act.

45.04C Wrongful Death Act--Survival Act--Verdict Form C--Contributory Fault of Beneficiary and Decedent or Beneficiary Only

We, the jury, find for the Estate of ____, deceased, and against the following defendants:

_____ Yes _____ No _____
Defendant 1

_____ Yes _____ No _____
Defendant 2

We further find the following:

First: We find that the total amount of damages suffered by the Estate of _____, deceased, is $_____, itemized as follows:

[Loss of money, benefits, goods and services]: $_____

[Grief, sorrow and mental suffering]: $_____

[Loss of society] and [loss of sexual relations]: $_____

[(Other damages: insert from 30.04, 30.04.01, 30.05, 30.05.01, 30.06, 30.07, 30.09 or as applicable)] $_____

PLAINTIFF'S TOTAL DAMAGES $_____

Second: Assuming that 100% represents the total combined [negligence] [fault] [responsibility] of all [persons] [or entities] whose [negligence] [fault] [responsibility] proximately caused the death of [decedent], we find the percentage of [negligence] [fault] [responsibility] attributable to each as follows:

a) _____ _____%
Decedent

b) _____ _____%
Beneficiary

c) _____ _____%
Defendant 1

d) _____ _____%
Defendant 2

_____ _____
Foreperson

_____ _____

Add additional lines for juror signatures.

Verdict Form, Notes and Comment approved May 2014.

Notes on Use

Use "other damages" if there is a Survival Act count. Use this verdict form in conjunction with IPI B31.08 or B31.08.01 when the contributory fault of one or more of several beneficiaries and the decedent is at issue. Use this verdict form in conjunction with IPI B31.08 and B31.08.02 when the contributory fault of the sole beneficiary and the decedent is at issue. Use this verdict form in conjunction with IPI B31.08.01 when the contributory fault of only one or more of several beneficiaries is at issue. Use this verdict form in conjunction with IPI B31.08.02 when the contributory fault of only the sole beneficiary is at issue. If there is no issue as to contributory fault, use verdict form IPI 45.04A. If there is only an issue as to the decedent's contributory fault, use verdict form IPI 45.04B. Add additional lines on the damage itemization as appropriate if a Family Expense Act claim is part of the plaintiff's case.

Comment

The contributory fault of a beneficiary is a potential defense to that beneficiary's right to recover damages in a wrongful death action created by statute in Illinois. 740 ILCS 180/2. The trial court makes the findings of dependency post verdict, and any adjustments to the amount of the judgment that may be occasioned by findings of a beneficiary's contributory fault are made after the assessment of dependency. 740 ILCS 180/2.

The Survival Act is not a statutory cause of action, but rather a statute that allows for the continued existence of a cause of action that arose during the lifetime of the decedent. *Myers v. Heritage Enters., Inc.,* 332 Ill.App.3d 514, 773 N.E.2d 787, 266 Ill. Dec. 32 (4th Dist. 2002). The decedent's contributory fault is a defense to a claim brought under the Survival Act, but the Committee found no authority for allowing the contributory fault of a beneficiary under the decedent's estate to reduce the judgment or award to that person in a Survival Act claim.

AGENCY

50.00
AGENCY

INTRODUCTION

This set of agency instructions has been drafted for use in tort cases in which there is an issue of vicarious liability based on principles of agency. It is equally applicable in cases involving *respondeat superior* liability based on an employer-employee ("master-servant") relationship. *Warren v. LeMay*, 142 Ill.App.3d 550, 575-76, 491 N.E.2d 464, 480; 96 Ill.Dec. 418, 434 (5th Dist.1986). The Committee has not attempted, however, to determine whether and to what extent these instructions may be accurate in cases based on other theories of liability, such as contract. They should be used outside the tort area only with great caution.

50.01 Both Principal And Agent Sued--No Issue As To Agency

The defendants are sued as principal and agent. The defendant [principal's name] is the principal and the defendant [agent's name] is [his] [its] agent. If you find that the defendant [agent's name] is liable, then you must find that the defendant [principal's name] is also liable. However, if you find that [agent's name] is not liable, then you must find that [principal's name] is not liable.

Notes on Use

This instruction should not be given where there is an issue of fact as to agency or where there is an independent basis of liability of the principal apart from the agency. It is proper when agency is not an issue. *Baikie v. Luther High School South*, 51 Ill.App.3d 405, 409-410; 366 N.E.2d 542, 545-546; 9 Ill.Dec. 285, 288-289 (1st Dist.1977) (agency admitted in pleadings and proved by agent's own testimony); *Casey v. Baseden*, 131 Ill.App.3d 716, 721; 475 N.E.2d 1375, 1378; 86 Ill.Dec. 808, 811 (5th Dist.1985), *aff'd*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986).

If either the existence of the agency, or the scope of the agency at the particular time, is in dispute as an issue of fact and both principal and agent are sued, then IPI 50.03 should be used, but if the principal is sued alone, then IPI 50.04 should be used.

If by the pleadings and evidence there is an issue of fact as to the liability of the principal for his own acts independent of acts of the agent, then a separate instruction appropriate to such independent basis of liability should also be used and the last sentence of this instruction should be modified or stricken accordingly.

Comment

A principal is bound by the acts of his agent committed or performed within the course and scope of the agency. The use of the instruction is not limited to tort cases but may also be used in various contract situations as appropriate. *Hogan v. City of Chicago*, 319 Ill.App. 531, 536; 49 N.E.2d 861, 863 (1st Dist.1943) (action for personal injuries); *Fox River Distilling Co. v. Andrichik*, 175 Ill.App. 305, 307 (2d Dist.1912) (action for balance due for goods sold).

50.02 Principal Sued But Not Agent--No Issue As To Agency

[agent's name] was the agent of the defendant [principal's name] at [and before] the time of this occurrence. Therefore, any act or omission of the agent at that time was in law the act or omission of the defendant [principal's name].

Notes on Use

This instruction should not be given where there is an issue of fact as to agency. This instruction may be used where the principal is sued alone. *See* Notes on Use to IPI 50.01.

If negligence rests on acts or omissions before the time of the occurrence, the bracketed words should be used.

If either the existence of the agency or the scope of the agency at the particular time is in dispute as an issue of fact and both principal and agent are sued, then IPI 50.03 should be used, but if the principal is sued alone, then IPI 50.04 should be used.

If the agent is the officer of the defendant corporation, IPI 50.11 may be given in lieu of this instruction. *Schmidt v. Blackwell*, 15 Ill.App.3d 190, 196; 304 N.E.2d 113, 118 (3d Dist.1973).

50.03 Both Principal and Agent Sued--Agency Denied— Principal Sued Under Respondeat Superior Only

Defendant [principal's name] is sued as the principal and the defendant [alleged agent's name] as his agent. [It is denied that any agency existed.] [It is (also) denied that [alleged agent's name] was acting within the scope of his authority as an agent of the defendant [principal's name] at the time of the occurrence.]

If you find that the defendant [alleged agent's name] [was the agent of the defendant [principal's name]] [and] [was acting within the scope of his authority] at the time of the occurrence, and if you find [alleged agent's name] is liable, then both are liable. If you find that [alleged agent's name] is not liable, then neither defendant is liable.

If you find that the defendant [alleged agent's name] is liable but was not acting [as an agent of the defendant [principal's name]] [or] [within the scope of his authority as an agent of the defendant [principal's name]] at the time of the occurrence, then the defendant [principal's name] is not liable.

Notes on Use

This instruction should be used only where agency or the scope of the agency or both are in dispute as an issue of fact and where principal and agent are both sued in the same case. If there is a basis of liability against the principal independent of the agency, this instruction should be modified accordingly or replaced by other instructions.

If the principal is sued alone and the agency is in dispute as an issue of fact, IPI 50.04 should be used. When agency is not disputed use IPI 50.01.

If the negligence charged includes acts or omissions prior to the act or omission at the time of the occurrence, then the phrase "at the time of this occurrence" should be modified to read "at and before the time of this occurrence."

Comment

This instruction applies where both principal and agent are parties defendant and the agency is the only basis of liability against the principal, but some phase of the agency is in dispute as an issue of fact. *Hogan v. City of Chicago*, 319 Ill.App. 531, 536; 49 N.E.2d 861, 863 (1st Dist.1943); *Fox River Distilling Co. v. Andrichik*, 175 Ill.App. 305, 307 (2d Dist.1912); *Drury v. Barnes*, 29 Ill.App. 166, 169 (3d Dist.1890). *See Baikie v. Luther High School South*, 51 Ill.App.3d 405, 409-410; 366 N.E.2d 542, 545-546; 9 Ill.Dec. 285, 288-289 (1st Dist.1977) (not error to refuse this instruction when agency is admitted in pleadings and proved by evidence, and IPI 50.01 was given).

50.04 Principal Sued, But Not Agent--Agency Denied— Principal Sued Under Respondeat Superior Only

The defendant [principal's name] is sued as the principal and the plaintiff claims that [alleged agent's name] was acting as [principal's name] at the time of the occurrence. The defendant [principal's name] denies that [alleged agent's name] [was acting as his agent] [and] [was acting within the scope of his authority as an agent of the defendant] at the time of the occurrence.

If you find that [alleged agent's name] [was the agent of the defendant [principal's name]] [and] [was acting within the scope of his authority as the agent of the defendant], at the time of the occurrence, then any act or omission of [alleged agent's name] at that time was in law the act or omission of the defendant.

If you find that [alleged agent's name] [was not acting as the agent of the defendant] [or] [was not acting within the scope of his authority as an agent of the defendant] at the time of the occurrence, then the defendant is not liable.

Notes on Use

This instruction should be used only where a principal is sued for the acts of an alleged agent who is not sued and the existence or scope of the agency is denied. If the negligence charged includes acts or omissions prior to the act or omission at the time of the occurrence, then the phrase "at the time of this occurrence" should be modified to read "at and before the time of this occurrence."

This instruction should not be given where there is no issue of fact as to the agency or where the alleged agent is also a party defendant.

50.05 Agent--Definition

An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written, express or implied.

[If you find that one person has the right to control the actions of another at a given time, you may find that the relation of principal and agent exists, even though the right to control may not have been exercised.]

Notes on Use

This instruction should be given only where there is an issue as to the existence of an agency. It should not be given in those circumstances where a person is estopped to deny agency as a matter of law or if there is a question of fact as to the estoppel.

The bracketed second paragraph should be used only if the right to control the purported agent is an issue.

In a proper case, both IPI 50.05 and 50.10 may be given. *Pease v. Ace Hardware Home Center*, 147 Ill.App.3d 546, 498 N.E.2d 343, 101 Ill.Dec. 161 (2d Dist.1986) (not redundant).

Comment

An agent is a person who acts for a principal in accordance with a consensual arrangement and who is subject to the control or right to control by the principal. *Olympic Commissary Co. v. Industrial Comm'nr*, 371 Ill. 164, 171; 20 N.E.2d 86, 89 (1939) (control by right of termination or discharge); *Postal Telegraph Sales Corp. v. Industrial Comm'n*, 377 Ill. 523, 37 N.E.2d 175 (1941) (same); *Hartley v. Red Ball Transit Co.*, 344 Ill. 534, 539; 176 N.E. 751, 753-754 (1931) (control by right to supervise acts and manner of performance); *Lawrence v. Industrial Comm'n*, 391 Ill. 80, 87; 62 N.E.2d 686, 689 (1945) (same); *Shannon v. Nightingale*, 321 Ill. 168, 151 N.E. 573 (1926) (same); *Sacks v. Helene Curtis Industries*, 340 Ill.App. 76, 86; 91 N.E.2d 127, 131-132 (1st Dist.1950) (defense of lack of agency); *see generally*, Restatement of Agency §1; *Mosby v. Kimball*, 345 Ill. 420, 427; 178 N.E. 66, 68 (1931); Black v. Texas Co., 247 Ill.App. 301 (4th Dist.1928).

This instruction should not be given if there is no proof of an agency relationship but there is proof of "holding out" from which an agency is sought to be established by estoppel. *Feitl v. Ricker*, 287 Ill.App. 329, 335-340; 4 N.E.2d 907, 909-911 (1st Dist.1936) (because the purchaser of the property did not rely on the mortgagee when he assumed that the person to whom he made mortgage payments was the mortgagee's agent, the mortgagee was not estopped to deny that an agency existed and prove that he had never received the final mortgage payment); *Indemnity Ins. Co. v. Midwest Transfer Co.*, 184 F.2d 633, 635 (7th Cir.1950) (the fact that the insurance company designated a broker as its agent on certain binders and policies presented a question of fact as to whether it would be estopped to deny the agency although in fact none existed).

50.06 Agent--Issue As To Scope of Authority of Agent Only

One of the questions for you to determine is whether or not [alleged agent's name] was acting within the scope of his/her authority.

An agent is acting within the scope of his/her authority if he/she is engaged in an activity which has been assigned to him/her by his/her principal, or if he/she is doing anything that may reasonably be said to have been contemplated as a part of that activity which benefits the principal. It is not necessary that an act or failure to act must have been expressly authorized by [principal].

Instruction, Notes and Comment revised September 2009.

Notes on Use

If both principal and agent are sued and the scope of the agency is in dispute, IPI 50.03 should accompany IPI 50.06. If the principal alone is sued and he disputes the scope of the agency relation, IPI 50.04 should accompany IPI 50.06. If scope of employment is at issue, use IPI 50.06.01. If apparent agency is at issue in a medical malpractice action, use 150.10.

Comment

The statements of the alleged agent, made outside the presence of the principal and not subsequently approved by him, do not establish the existence of the principal-agent relationship. The principal is the source of the power and the agent's authority can be proved only by tracing it to that source in some word or act of the alleged principal. *Yugoslav-American Cultural Ctr., Inc. v. Parkway Bank & Trust Co.*, 289 Ill. App. 3d 728, 682 N.E.2d 401, 224 Ill. Dec. 840 (1st Dist. 1977).

The party asserting agency has the burden of proving the existence of agency but may do so by inference and circumstantial evidence. The agent may bind his principal by acts which the principal has not given the agent actual authority to perform, but which the agent appears authorized to perform. *Lundberg v. Church-Farm, Inc.*, 151 Ill. App.3d 452, 502 N.E.2d 1240, 104 Ill. Dec. 309 (5th Dist. 1986).

Where the principal places an agent in a situation to act for the principal, the principal is estopped as against a third person from denying the agent's apparent authority. *Sakun v. Taffer*, 268 Ill. App.3d 343, 643 N.E.2d 1271, 205 Ill. Dec. 644 (1st Dist. 1994); *see also Martinez v. Knochel*, 123 Ill. App.3d 555, 462 N.E.2d 1281, 78 Ill. Dec. 927 (4th Dist. 1984).

An existing agency relationship may be determined not to exist when the agent fails to act for the benefit of the principal, *Cheatem v. Cook*, 8 Ill. App.3d 425, 290 N.E.2d 707 (1st Dist. 1972), or when the acts of the agent are determined to have exceeded the scope of the agent's authority. *In re Estate of Romanowski*, 329 Ill. App. 3d 769, 771 N.E.2d 966, 265 Ill. Dec. 7 (1st Dist. 2002); *see also Lombard Pub. Facilities Corp. v. Dep't. of Revenue*, 378 Ill. App. 3d 921, 881 N.E.2d 598, 317 Ill. Dec. 430 (2d Dist. 2008).

50.06.01 Employee--Issue As To Scope of Employment

One of the questions for you to determine is whether or not [alleged employee name] was acting within the scope of his/her employment.

An employee is acting within the scope of his/her employment if each of the following is shown by the evidence:

a. The employee's conduct is of a kind he/she is employed to perform or reasonably could be said to have been contemplated as part of his/her employment; and

b. The employee's conduct occurs substantially within the authorized time and space limits of his/her employment; and

c. The employee's conduct is motivated, at least in part, by a purpose to serve the employer.

Instruction, Notes and Comment created September 2009.

Notes on Use

This instruction has been drafted to conform with the Supreme Court's decision concerning the scope of employment in *Bagent v. Blessing Care Corp.*, 224 Ill.2d. 154, 862 N.E.2d 985, 308 Ill. Dec. 782 (2007). If agency is unrelated to employment, IPI 50.06 should be used. If apparent agency in a medical malpractice action is at issue, IPI 150.10 should be used.

Comment

Each of the criteria listed in the *Restatement 2nd of Agency* §228, for determining whether an employee's acts were within the scope of employment, must be met to conclude that an employee was acting within the scope of employment for purposes of a respondeat superior claim. A hospital phlebotomist who exceeded the scope of employment by disclosing confidential patient information at a tavern was not the kind of conduct an employee of the hospital was employed to perform nor was such conduct motivated to serve her employer. Such employee's conduct was beyond the scope of her employment. *Bagent*, *supra*; *see also Adames v. Sheahan*, 2009 WL 711297 (Ill. 2009).

50.07 Inference of Agency--Agency and Scope of Employment Inferred From Ownership of Automobile

If you decide that the automobile being driven by [driver's name] was owned by the defendant, you may infer from such evidence that [driver's name] was acting as the agent of the owner and within the scope of his authority, unless you find that inference is overcome by other believable evidence. You may consider that inference [and any other evidence in the case] in deciding whether [driver's name] was acting as agent and within the scope of his authority as the defendant's agent.

Notes on Use

This instruction may be given only where existence of agency is in issue and it is sought to be established from evidence of ownership of a motor vehicle. The bracketed phrase may be used if there is evidence other than ownership on the agency issue.

Comment

The inference of agency from proof of ownership of the vehicle has long been recognized in the law. *Paulsen v. Cochfield*, 278 Ill.App. 596, 603 (2d Dist.1935).

50.08 Inference of Agency--Ownership of Automobile and Employment or Agency Admitted, But Scope of Authority Denied

At the time of the occurrence, the automobile being driven by [driver's name] was owned by the defendant and [driver's name] was the employee of the defendant. You may infer from this fact that [driver's name] was acting within the scope of his authority, unless you decide that the inference is overcome by other believable evidence. You may consider this inference [and any other evidence in the case] in deciding whether [driver's name] was acting in the scope of his authority as the defendant's agent.

Notes on Use

This instruction may be given only where ownership and agency are not in issue, but it is denied that the agent was acting within the scope of his authority at the time of the occurrence. *See* Comment to IPI 50.07. The bracketed phrase may be used if there is evidence other than the employment relationship on the issue of scope of authority.

50.09 Deviation

No instruction has been drafted on this subject.

Comment

No instruction has been drafted on this subject. The resolution of the question whether a deviation by an agent from the scope of his employment is casual or so substantial in kind or area that in fairness the principal should not be held for the actions of his agent depends on many detailed circumstances which vary widely from case to case. Because of this fact, the Committee was unable to draw an instruction for deviation more concrete than IPI 50.06 which relates to the scope of an agent's authority. The Committee suggests that that instruction may be used as a basis for the contention that an agent has deviated far enough from the scope of his employment to relieve the principal from liability for his actions.

The court approved this approach in *Fischer v. Ross*, 79 Ill.App.2d 372, 377; 223 N.E.2d 722, 724-725 (2d Dist.1967).

50.10 Agent or Independent Contractor

The question has been raised whether at the time of the occurrence [alleged agent's name] was the agent of the defendant [defendant's name] or was an independent contractor. An agent is a person who by agreement with another, called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair, or does some service for the principal, with or without compensation. The agreement may be oral or written, express or implied. [The term "agent" is broader than either "servant" or "employee." A servant or employee is an agent, but one may be an agent although he is neither servant nor employee.]

[If you find that one person has the right to control the actions of another at a given time, you may find that the relation of principal and agent exists, even though the right to control may not have been exercised.]

An independent contractor is one who undertakes a specific job where the person who engages him does not have the right [to discharge him] [or] [to direct and control the method and manner of doing the work].

In determining whether at the time of the occurrence [alleged agent's name] was the agent of the defendant [defendant's name] or was an independent contractor, you may also consider [the method of payment;] [the right to discharge;] [the skill required in the work to be done;] [who provides tools, materials or equipment;] [whether the worker's occupation is related to that of the employer;] [whether the employer deducted for withholding tax;] [and] [[other relevant factor(s)].

The principal is liable to third persons for the negligence of his agent in the transaction of the business of the principal, if the agent himself is liable. But one who engages an independent contractor is not liable to others for the negligence of the contractor.

Notes on Use

The bracketed material in the first paragraph should be used only where there is need to point out that a person may be an agent without being a servant or employee.

The bracketed material in the second paragraph should be used only if the right to control the purported agent is an issue.

Only such elements of the bracketed material in the fourth paragraph should be used as may be supported by the evidence. *See Wenholdt v. Industrial Comm'n*, 95 Ill.2d 76, 447 N.E.2d 404, 69 Ill.Dec. 187 (1983).

In a proper case, both IPI 50.05 and 50.10 may be given. *Pease v. Ace Hardware Home Center*, 147 Ill.App.3d 546, 498 N.E.2d 343, 101 Ill.Dec. 161 (2d Dist.1986) (not redundant).

Comment

Generally, a principal is liable for the acts of an agent within the course and scope of the agent's employment, but not for the acts of an independent contractor. The principal difference between the two relationships is that the principal has the right to control the agent, but not the independent contractor. For control by right of termination or discharge, *see Olympic Commissary Co. v. Industrial Comm'nr*, 371 Ill. 164, 171; 20 N.E.2d 86, 89-90 (1939); *Postal Telegraph Sales Corp. v. Industrial Comm'n*, 377 Ill. 523, 37 N.E.2d 175 (1941). For control by right to supervise acts and manner of performance, *see Hartley v. Red Ball Transit Co.*, 344 Ill. 534, 539; 176 N.E. 751, 753-754 (1931); *Lawrence v. Industrial Comm'n*, 391 Ill. 80, 87; 62 N.E.2d 686, 689 (1945); *Shannon v. Nightingale*, 321 Ill. 168, 151 N.E. 573 (1926). *See generally*, Restatement of Agency, §1; *Mosby v. Kimball*, 345 Ill. 420, 427; 178 N.E. 66, 68 (1931); *Richardson v. United States Mortgage & Trust Co.*, 194 Ill. 259, 62 N.E. 606 (1901); Black v. Texas Co., 247 Ill.App. 301 (4th Dist.1928); *City of Moline v. McKinnie*, 30 Ill.App. 419, 424 (2d Dist.1888).

However, in certain types of cases the duty to exercise ordinary care cannot be delegated. *City of Joliet v. Harwood*, 86 Ill. 110 (1877) (work inherently dangerous); *Frost v. Andes Candies, Inc.*, 329 Ill.App. 535, 69 N.E.2d 732 (1st Dist.1946) (abstract) (hazard accompanies work); *People ex rel. Hepburn v. Maddox*, 340 Ill.App. 34, 38; 91 N.E.2d 107, 109 (3d Dist.1950) (work creates public nuisance); *Girdzus v. Van Etten*, 211 Ill.App. 533 (1st Dist.1918) (duty imposed by statute); *Kennerly v. Shell Oil Co*., 13 Ill.2d 431, 150 N.E.2d 134 (1958) (same); *Orange v. Pitcairn*, 280 Ill.App. 566, 572 (4th Dist.1935) (nondelegable corporate power); *City of Chicago v. Murdoch*, 113 Ill.App. 656 (1st Dist.1904), *aff'd*, 212 Ill. 9, 72 N.E. 46, 103 Am. St. Rep. 221 (1904) (same); *Starr v. Stanard-Tilton Milling Co.*, 183 Ill.App. 454 (4th Dist.1913) (injury resulting from acts rendered necessary by the contract); *Raxworthy v. Heisen*, 191 Ill.App. 457 (1st Dist.1915), *aff'd*, 274 Ill. 398, 113 N.E. 699 (1916) (duty of furnishing employee safe place to work); *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139, 48 N.E. 66 (1897) (exercise of powers granted under franchise); *Louis v. Youngren*, 12 Ill.App.2d 198, 138 N.E.2d 696 (1st Dist.1956) (same).

50.11 A Corporation Acts Through Its Employees

The [(plaintiff) (defendant) is a corporation] [the parties are corporations] and can act only through [its] [their] officers and employees. Any act or omission of an officer or employee within the scope of his employment is the action or omission of the [plaintiff] [defendant] corporation.

Notes on Use

If the agent is the officer of the defendant corporation, this instruction may be given in lieu of IPI 50.02. *Schmidt v. Blackwell*, 15 Ill.App.3d 190, 196; 304 N.E.2d 113, 118 (3d Dist.1973).

When the requirements for holding a corporate master liable for punitive damages have not been fulfilled, this instruction may not be given in this form when its effect would be to permit vicarious liability for punitive damages, since it would impute liability for *any* act done by an employee, rather than only those specifically ordered, participated in or ratified by a superior officer. *Pendowski v. Patent Scaffolding Co.*, 89 Ill.App.3d 484, 488-489; 411 N.E.2d 910, 913-924; 44 Ill.Dec. 544, 547-548 (1st Dist.1980).

50.12 Partner--Liability of--No Issue As To Partnership, Agency, or Scope of Authority

The defendants [1st partner's name] and [2d partner's name] are partners. [allegedly negligent partner's name] was acting on behalf of the partnership and within the scope of his authority. Therefore, if you decide for the plaintiff, your verdict must be against all the defendants.

Notes on Use

This instruction should be used only where there is no issue as to the existence and scope of a partnership. If the partnership is a plaintiff, the instruction should be modified accordingly, or applied to both sides, if the suit is by one partnership against another.

Comment

A partnership is a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his co-partner. 805 ILCS 205/9 (1994). *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N.E. 250 (1927). Like any other agency relationship, the act or omission of a partner must be within the scope of the undertaking in order to charge it to the other partners. *McDonald v. McDonald*, 408 Ill. 388, 394; 97 N.E.2d 336, 339 (1951).

50.13 Partnership--Existence Admitted--Scope of Authority In Issue--Consequence of Relationship

[1st partner's name] and [2d partner's name] are partners.

If you find that [1st partner's name] action in [insert action or inaction of 1st partner] was [apparently] in furtherance of the partnership business, then [2d partner's name] is responsible for [1st partner's name]'s action.

Notes on Use

This instruction should be used only when the existence of the partnership is admitted but the scope of the partner's authority is in issue.

Comment

The instruction is based on §9 (1), (2) of the Uniform Partnership Act. 805 ILCS 205/9(1), (2) (1994); *Crane Co. v. Tierney*, 175 Ill. 79, 83; 51 N.E. 715, 716 (1898) (an instruction that the partnership would be liable only for purchase of goods within the apparent scope of the partnership articles or within the apparent scope of business warranted by the articles was held to be erroneous; liability extends to the apparent scope of the business actually transacted).

Where it was shown that the act giving rise to the debt was apparently done in carrying on the business of the partnership in the usual way, plaintiff could recover without evidence that the partner had given express authority to contract. It was defendant's burden to establish absence of authority. *Stratemeyer v. West*, 125 Ill.App.3d 597, 466 N.E.2d 306, 80 Ill.Dec. 854 (5th Dist.1984).

50.14 Partnership--Existence of Relationship And Scope of Authority In Issue--Consequence of Relationship

The act or omission of one partner [apparently] in furtherance of the partnership business is, in law, the responsibility of all the partners [even though they did not know of the act or omission].

If you find that [1st partner's name] and [2d partner's name] were partners and that [1st partner's name]'s act or omission in [insert action or inaction of partner] [apparently] was in furtherance of the partnership business, then [2d partner's name] is responsible for [1st partner's name]'s act or omission.

Notes on Use

This instruction should be used only when the existence of the partnership and the question of the scope of the partner's authority are in issue.

Comment

If the action of a partner is apparently in furtherance of the partnership business, it binds the other partners. 805 ILCS 205/9(1), (2) (1994); *J.L. Gardenhire Drilling Co. v. Ray*, 302 Ill.App. 268, 274; 23 N.E.2d 927, 929-930 (4th Dist.1939). An act by a partner within his authority binds the partnership even though the other partners do not know of the act. *Swannell v. Byers*, 123 Ill.App. 545 (1st Dist.1905); Schwabacker v. Riddle, 84 Ill. 517 (1877); *Stratemeyer v. West*, 125 Ill.App.3d 597, 466 N.E.2d 306, 80 Ill.Dec. 854 (5th Dist.1984).

50.15 Partnership--Definition

One of the issues in this case is whether [1st partner's name] and [2d partner's name] were partners. Persons who join together or agree to join together in a business or venture for their common benefit, each contributing property, money, or services to the business or venture and having a community of interest in any profits, are partners.

Notes on Use

This instruction should be used only where the existence of a partnership is in issue.

Comment

A partnership is defined in paragraph 6 of the Uniform Partnership Act as an "association of two or more persons to carry on as co-owners a business for profit." The existence of a partnership is a question of intention to be gathered from all the facts and circumstances surrounding a transaction. A partnership may exist under written or verbal agreement. When persons associate to carry on a business or venture for their common benefit, contribute property or services to the business and have a community of interest in the profits, they are partners. Uniform Partnership Act, §6, 805 ILCS 205/6 (1994); *Peck v. Peck*, 16 Ill.2d 268, 280; 157 N.E.2d 249, 257 (1959); *Rizzo v. Rizzo*, 3 Ill.2d 291, 298; 120 N.E.2d 546, 550 (1954); *Swannell v. Byers*, 123 Ill.App. 545, 549 (1st Dist.1905).

What constitutes a partnership under an uncontested set of facts may be a question of law. *Sharp v. Gallagher*, 94 Ill.App.3d 1128, 419 N.E.2d 443, 50 Ill.Dec. 335 (1st Dist.1981), *rev'd on other grounds*, 95 Ill.2d 322, 447 N.E.2d 786, 69 Ill.Dec. 351 (1983).

50.16 Apparent Agency

Comment

The Committee has prepared instructions dealing with these issues which can be found at 105.10 and 105.11.

55.00

CONSTRUCTION NEGLIGENCE

PERMISSION TO PUBLISH GRANTED IN 2002

INTRODUCTION

Prior to February 14, 1995, workers injured in construction related settings had a number of avenues under the law by which to pursue a cause of action. Among those were the Illinois Structural Work Act, 740 ILCS 150/1 through 150/9, repealed by P.A. 89-2 §5, effective Feb. 14, 1995, Restatement (Second) of Torts §343 & §343A and Restatement (Second) of Torts §414. Construction negligence law has existed for some time, however it was rarely used due to the availability of the Illinois Structural Work Act. Following the Act's repeal in 1995, construction negligence actions have been thrust into the forefront. The law is currently in a state of flux and continues to be an area that is changing and developing.

Restatement (Second) of Torts §414 remains a viable remedy for some construction related injuries. This section is an exception to the general rule of agency dealing with independent contractors. The Restatement is as follows:

One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Comment a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in the Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

Comment b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know

that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

Comment c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts §414 (West 2000).

"Control over any part of the work" is the key element imposing liability under §414. The term "control" has been compared to the "in charge of" requirement under the Structural Work Act, 740 ILCS 150/1 through 150/9, repealed by P.A. 89-2 §5, effective Feb. 14, 1995. Adopted by the Illinois Supreme Court in *Larson v. Commonwealth Edison*, 33 Ill.2d 316, 211 N.E.2d 247 (1965), §414 was most notably discussed and clarified in the cases of *Weber v. Northern Illinois Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1st Dist.1973) and *Pasko v. Commonwealth Edison Co.*, 14 Ill.App.3d 481, 302 N.E.2d 642 (1st Dist.1973). These cases set the early standard for §414's interpretation and application in Illinois.

In *Larson*, the court held that a general contractor who retains control of any part of the work of a subcontractor will be liable for injuries resulting from his failure to exercise this control with reasonable care. *Id.* 33 Ill.2d 316, 325; 211 N.E.2d at 252-253. Although a defendant's conduct is an appropriate consideration under §414, the most significant question to analyze is whether the defendant retained the authority to control the work. *Larson*, 33 Ill.2d 316, 324-335; 211 N.E.2d at 252. (emphasis added). At common law, retention of the right to control the work is sufficient to subject one to duty and tort responsibility. *Id.* 211 N.E.2d at 252-253, *citing* Restatement of Torts, §414.

The *Weber* court found that §414 "is applicable to anyone with authority who entrusts work to an independent contractor, e.g., an owner, general contractor or architect." *Id.* 10 Ill.App.3d 625, 639; 295 N.E.2d at 50. Thus, more than one person may have "control" over a contractor's work. Further, "a contractor owes an independent contractor whom he employs and all the subcontractors' employees a non-delegable duty to provide a safe place to work." *Id.* 10 Ill.App.3d 625, 640; 295 N.E.2d at 51. This duty applies to anyone connected to a construction project who evidences the requisite level of control. *Damnjanovic v. United States*, 9 F.3d 1270 (7th Cir.1993).

In *Pasko*, the court stated that "[t]he power to forbid work from being done in a manner likely to be dangerous to himself or others is given as an illustration of the type of power retained

by an employer which could subject him to liability." *Id.* 14 Ill.App.3d 481, 488; 302 N.E.2d at 648. The *Pasko* court placed great emphasis on a defendant's ability to implement or enforce safety procedures. *Id.*

Due to the availability of the Structural Work Act, there was a long period of time where there were not many cases decided under §414. Since the repeal of the Act, conflicts have arisen regarding the application of §414, and, specifically, what control is sufficient to render a party liable for failing to exercise that control with reasonable care. These conflicts are most evident in the cases of *Fris v. Personal Products Company*, 255 Ill.App.3d 916, 627 N.E.2d 1265, 194 Ill.Dec. 623 (3d Dist.1994), *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174, 241 Ill.Dec. 313 (1st Dist.1999), *Brooks v. Midwest Grain Products of Illinois, Inc.*, 311 Ill.App.3d 871, 726 N.E.2d 153, 244 Ill.Dec. 557 (3d Dist.2000), and *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644 (1st Dist.2000).

The Third District in *Fris* focused on whether the defendant actually exercised its control over the means and methods of the work. Even though the *Fris* court acknowledged that the defendant retained the right to inspect the work, issue change orders, ensure that safety precautions were observed and ensure the work was done in a safe manner, it held that the defendant did not retain sufficient control over the "operative details" or "routine and incidental aspects" of the plaintiff's work. *Id.* 255 Ill.App.3d 916, 924-925; 627 N.E.2d at 1270; 194 Ill.Dec. 623. The term "routine and incidental aspects" has no progenitor and is not defined in the case.

In *Rangel*, a subcontract between the defendant and the plaintiff's employer provided that the defendant would exercise complete supervision and control over the plaintiff's work. *Id.*, 307 Ill.App.3d 835, 838; 719 N.E.2d at 177, 241 Ill.Dec. at 316. The First District stated that liability would not be imposed on the defendant unless it retained control over the "incidental aspects" of the plaintiff's work. *Id.* 307 Ill.App.3d 835, 839; 719 N.E.2d at 178; 241 Ill.Dec. at 316 (*citing Fris*, 255 Ill.App.3d at 924). The court held that the defendant never actually exercised its control over the "operative details" of the plaintiff's work and therefore the §414 exception did not apply. *Id*. 307 Ill.App.3d 835, 839; 719 N.E.2d at 177-178; 241 Ill.Dec. at 316. The court did not define "incidental aspects" of the work.

Less than one year later, the First District decided *Bokodi*. In *Bokodi*, the defendant superintended the entire job and retained a right of supervision such that the subcontractors were not free to do their work without compliance with safety regulations. *Id.* 312 Ill.App.3d 1051, 1064; 728 N.E.2d at 736; 245 Ill.Dec. at 658. Additionally, the defendant discussed safety matters in meetings, was responsible for the overall construction schedule and coordination of subcontractors. *Id.* 312 Ill.App.3d 1051, 1053-1054; 728 N.E.2d at 728 245 Ill.Dec.at 647. Further, the defendant retained the authority to stop the work of any subcontractor if they witnessed a potential safety hazard and subsequently would not allow work to resume until they were satisfied safety issues were in compliance. *Id.* 312 Ill.App.3d 1051, 1054; 245 Ill.Dec. 644, 728 N.E.2d at 728-729. The court specifically found the general contractor's authority over job site safety to be a determining factor and found the general contractor had "control" for purposes of §414 as a matter of law.

In Brooks, the Third District reviewed the standard for control under §414 as set forth by both *Fris* and *Rangel*. The defendant was present on the construction site and retained the authority to stop the work if safety rules were not followed. *Id.* 311 Ill.App.3d 871, 873; 726 N.E.2d at 154; 244 Ill.Dec. at 558. The Brooks court specifically pointed to §414, which states that a general contractor "who retains the control of any part of the work, is subject to liability for physical harm to others caused by the [plaintiff's] employer's failure to exercise his control with reasonable care." *Id.* 311 Ill.App.3d 871, 874; 726 N.E.2d at 155, 244 Ill.Dec. at 558. Thus, the defendant need not affirmatively direct the subcontractor's work. Rather, a defendant's omission in regards to its retained right of control is determinative in deciding whether a duty existed and whether that duty was breached.

The *Brooks* court distinguished the holdings in both *Rangel* and *Fris* and reversed the trial court's finding that the defendant did not owe the plaintiff a duty of care. The committee had difficulty reconciling *Fris* and *Rangel* with *Brooks* and *Bokodi*.

Illinois courts have identified a number of factors to be considered in determining whether a defendant is in control of the work. These include, but are not limited to: (1) the right to stop work for safety reasons; (2) authority to implement safety rules/procedures; (3) safety consultant consistently present on job site; (4) supervision and control of the work; (5) retention of the right to supervise and control the work; (6) supervision and coordination of subcontractors; (7) responsibility for taking safety precautions at the job site; (8) authority to issue change orders; (9) holding meetings in which safety issues are discussed; (10) ownership of the equipment used at the job site; and (11) authority to order unsafe equipment removed. *See Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 511 N.E.2d 805, 110 Ill.Dec. 628 (5th Dist.1987); *Sobczak v. Flaska*, 302 Ill.App.3d 916, 706 N.E.2d 990, 236 Ill.Dec. 116 (1st Dist.1998); *Weber*; *Pasko*; *Brooks*; and *Bokodi*.

Cases in which the defendant did not retain sufficient control include *Rogers v. West Construction Co.*, 252 Ill.App.3d 103, 623 N.E.2d 799, 191 Ill.Dec. 209 (4th Dist.1993) (defendant completely vacated the construction site prior to plaintiff's arrival); *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill.App.3d 351, 726 N.E.2d 1171, 244 Ill.Dec. 860 (4th Dist 2000) (insufficient control because plaintiff could not establish causation in fact based on surmise or conjecture as to the cause of injury); *Fris v. Personal Products Company*, 255 Ill.App.3d 916, 627 N.E.2d 1265, 194 Ill.Dec. 623 (3d Dist.1994) (defendant did not retain sufficient control over the "operative details" or "routine and incidental aspects" of the plaintiff's work); and *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174, 241 Ill.Dec. 313 (1st Dist.1999) (defendant never exercised its control over the "operative details" of the plaintiff's work).

Due to the lack of consensus among the appellate courts and no Supreme Court cases on this subject since *Larson* in 1965, the concept of "control" caused the committee great difficulty. The committee chose to concentrate on the area of "safety" in these instructions. The committee believed that the overriding consideration throughout all of these cases is the ability of the controlling entity to affect overall job safety. It would appear that the ability to stop unsafe work and not permit it to be resumed until done to the satisfaction of the controlling entity satisfies both the requirement of "control" and demonstrates that the contractor is "not entirely free to do

the work in his own way."

In addition, the committee was cognizant of the fact that the term "having charge of the work" was never defined in the Structural Work Act IPI instructions. *See* Illinois Pattern Jury Instructions 180.16 (2000). In *Larson* the Supreme Court chose not to define "having charge of" stating it was a "generic term of broad import". *Id.* 33 Ill.2d 316, 321, 323; 211 N.E.2d at 251-252. Whether the term "control" will be treated similarly will depend on further judicial interpretation to help guide the committee.

The instructions that follow allow the jury to determine whether the defendant retained sufficient "control" to give rise to the duty to exercise that control in a reasonable manner.

55.01 Construction Negligence--Work Entrusted To Another

A[n] [owner] [contractor] [other] who entrusts work to a [subcontractor] [contractor] [other] can be liable for injuries resulting from the work if the [owner] [contractor] [other] retained some control over the safety of the work and the injuries were proximately caused by the [owner's] [contractor's] [other's] failure to exercise that control with ordinary care.

Notes on Use

This should be given as an introduction to the subject of construction negligence.

Comment

See Restatement (Second) of Torts, §414 (West 2000), and the Introduction to this section.

55.02 Construction Negligence--Duty

A party who retained some control over the safety of the work has a duty to exercise that control with ordinary care.

Notes on Use

This should be used in conjunction with IPI 55.03.

Comment

(*Cf. Restatement (Second) of Torts, §414*: "one who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.")

55.03 Construction Negligence--Issues Made by the Pleadings/Burden of Proof

Plaintiff ____ seeks to recover damages from defendant[s] ____. In order to recover damages, the plaintiff has the burden of proving:

1. [The defendant] [Defendants __, __, and __] retained some control over the safety of the work;

2. Defendant[s] [acted] [or] [failed to act] in one or more of the following ways:
   a. ____; or

   b. ____; or

   c. ____.;

and in so [acting] [or] [failing to act], was [were] negligent in the manner in which it [exercised] [or] [failed to exercise] its control.

3. Plaintiff [name] was injured; and
4. [The defendant's] [Defendants' ____, ____, or ____] negligence was a proximate cause of plaintiff's injuries.

[You are to consider these propositions as to each defendant separately.] If you find that any of these propositions has not been proven as to [the defendant] [any one] [or more] [or all] [of the defendants], then your verdict should be for [the] [that] [those] defendant[s]. On the other hand, if you find that all of these propositions have been proven as to [the defendant] [any one] [or more] [or all] [of the defendants], then you must consider defendant['s] [s'] claim[s] that the plaintiff was contributorily negligent.

As to [that] [those] claim[s], defendant[s] has the burden of proving:

A. Plaintiff [name] acted or failed to act in one or more of the following ways:
   1. ____; or

   2. ____; or

   3. ____.;

and in so [acting] [or] [failing to act] was negligent, and

B. Plaintiff's negligence was a proximate cause of [his injury] [and] [damage to his property].

If you find that plaintiff has proven all the propositions required of [him] [her], and the defendant[s] ha[s][ve] not proven all of the propositions required of the defendant[s], then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will not reduce

plaintiff's damages.

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for [that] [those] defendant[s].

If you find that defendant[s] [has] [have] proven all of the propositions required of [the] [those] defendant[s], and if you find that the plaintiff's contributory negligence was less than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff as to [that] [those] defendant[s] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

Notes on Use

This is a new instruction. In prior editions of the IPI, there were no specific instructions dealing with common law construction negligence cases. Most cases that could have been tried under that theory were typically tried as Structural Work Act cases. *Cf. IPI 180.01 et seq. (IPI 2000 ed.).*

This combined issue-burden instruction is designed for use in a common law construction negligence case. The committee drew heavily on Restatement (Second) of Torts, §414, and Illinois cases construing it. *E.g. Larson v. Commonwealth Edison* Co., 33 Ill.2d 316, 211 N.E.2d 247 (1965); *Weber v. Northern Ill. Gas Co.*, 10 Ill.App.3d 625, 295 N.E.2d 41 (1st Dist.1973); *Pasko v. Commonwealth Edison Co.*, 14 Ill.App.3d 481, 302 N.E.2d 642 (1st Dist.1973); *Ryan v. Mobil Oil Co.*, 157 Ill.App.3d 1069, 510 N.E.2d 1162, 110 Ill.Dec. 131 (1st Dist.1987); *Haberer v. Village of Sauget*, 158 Ill.App.3d 313, 511 N.E.2d 805, 110 Ill.Dec. 628 (5th Dist.1987); *Claudy v. City of Sycamore*, 170 Ill.App.3d 990, 524 N.E.2d 994, 120 Ill.Dec. 812 (1st Dist.1988); *Bezan v. Chrysler Motors Corporation*, 263 Ill.App.3d 858, 636 N.E.2d 1079, 201 Ill.Dec. 647 (2d Dist.1994); *Fris v. Personal Products Company*, 255 Ill.App.3d 916, 627 N.E.2d 1265, 194 Ill.Dec. 623 (3d Dist.1996); *Fancher v. Central Illinois Public Service Co.*, 279 Ill.App.3d 530, 664 N.E.2d 692, 216 Ill.Dec. 55 (5th Dist.1996); *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174, 241 Ill.Dec. 313 (1st Dist.1999); *Brooks v. Midwest Grain Prod. of Ill.*, 311 Ill.App.3d 871, 726 N.E.2d 153, 244 Ill.Dec. 557 (3d Dist.2000); *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 728 N.E.2d 726, 245 Ill.Dec. 644 (1st Dist. 2000); *Hutchcraft v. Independent Mechanical*, 312 Ill.App.3d 351, 726 N.E.2d 1171, 244 Ill.Dec. 860 (4th Dist. 2000).

This is a rapidly developing area of law due to the repeal of the Structural Work Act; 740 ILCS 150/1 through 150/9, repealed by P.A. 89-2 § 5, eff Feb. 14, 1995.

This instruction is designed to be given with IPI 10.01, “Negligence--Adult--Definition”, IPI 10.04 “Duty to use ordinary care--Adult-Defendant”, B10.03 “Duty to use ordinary care--Adult-Plaintiff--Definitions of contributory and comparative negligence--Negligence,” IPI

11.01 “Contributory negligence--adult--definition,” as appropriate. *See also*, premises liability cases arising under the deliberate encounter exception to the open and obvious doctrine, IPI 120.02.03.

55.04 Construction Negligence--More Than One Person Having Control

One or more persons may have some control over the safety of the work. Which person or persons had some control over the safety of the work under the particular facts of this case is for you to decide.

Notes on Use

This instruction should be given with IPI 55.03 in cases where there is evidence that more than one person, whether or not a defendant, had some control over the safety of the work. *Cf.* Restatement (Second) of Torts, §414.

Statutory Violations

60.00
Statutory Violations

Introduction

Two different types of legislation can affect civil remedies for personal injuries and property damage.

Statutory Causes of Action

Statutes can themselves create a tort or tort-like cause of action for personal injury (including death) or property damage. Examples include the Federal Employers' Liability Act (injuries to railroad workers), the Jones Act (injuries to seamen), the Illinois Dram Shop Act (injuries caused by intoxicated persons), and the Illinois Public Utilities Act (unsafe conditions created by specified public utilities).

These statutes are beyond the scope of this chapter. Other IPI chapters contain instructions for cases brought under some of those statutes. *See* Chapter 150 (Dram Shop Act); Chapter 160 (Federal Employers' Liability Act); Chapter 170 (Safety Appliance and Boiler Inspection Acts).

Legislation as Evidence of Standard of Care

In a negligence or product liability action, and certain other cases, relevant legislation may be admitted into evidence to assist the trier of fact in determining the applicable standard of conduct. Thus, in Illinois, violation of a statute, ordinance, or an administrative ruling, regulation or order designed for the protection of human life or property is *prima facie* evidence of negligence or other fault. *French v. City of Springfield*, 65 Ill.2d 74, 357 N.E.2d 438, 2 Ill.Dec. 271 (1976); *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976); *Dini v. Naiditch*, 20 Ill.2d 406, 417; 170 N.E.2d 881, 886 (1960). Where it is shown that a party has violated a statute, this *prima facie* evidence of his negligence may be rebutted by proof that the party acted reasonably under the circumstances of the case, despite the violation. *Johnson v. Pendergast*, 308 Ill. 255, 139 N.E. 407 (1923); *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976).

The *prima facie* evidence of negligence does not, of course, establish a *prima facie* case of liability, since the element of proximate cause must still be proved. *Tenenbaum v. City of Chicago*, 60 Ill.2d 363, 325 N.E.2d 607 (1975); *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 78-79; 117 N.E.2d 74, 77-78 (1954).

No distinction is made between a statute and an ordinance, if the ordinance is one which the city is authorized to enact. *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 537; 71 N.E. 1081, 1084 (1904); *Mangan v. F.C. Pilgrim & Co.*, 32 Ill.App.3d 563, 577; 336 N.E.2d 374, 379 (1st Dist.1975). Administrative rules, regulations and orders must be validly adopted, and have the force of law. Such rules may also be admissible as *indicia* of standards of care. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill.2d 326, 332; 211 N.E.2d 253, 257 (1965), *cert. denied*, 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966); *American State Bank v. County of Woodford*, 55 Ill.App.3d 123, 371 N.E.2d 232, 13 Ill.Dec. 515 (4th Dist.1977).

The statute, ordinance, or regulation must be one which is designed to protect against the type of injury complained of, *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954), and the plaintiff must also show that he is within the class intended to be protected by the statute, ordinance, or regulation. *Brunnworth v. Kerens-Donnewald Coal Co.*, 260 Ill. 202, 216-217, 103 N.E. 178, 184 (1913).

Instructions concerning violations of a statute, ordinance or regulation should not be given unless the evidence is adequate to support a finding that a violation actually occurred (*Tenenbaum v. City of Chicago*, 60 Ill.2d 363, 325 N.E.2d 607 (1975); *Figarelli v. Ihde*, 39 Ill.App.3d 1023, 351 N.E.2d 624 (1st Dist.1976)) and that the violation was a proximate cause of the injury (*French v. City of Springfield*, 65 Ill.2d 74, 79-80; 357 N.E.2d 438, 440-441; 2 Ill.Dec. 271, 273-274 (1976)).

60.01 Violation of Statute, Ordinance, or Administrative Regulation

There was in force in the [State of Illinois] [City of _____] at the time of the
e.g., Peoria
occurrence in question a certain [statute] [ordinance] [administrative (regulation) (rule) (order)] which provided that:

[*Quote or paraphrase applicable part of statute, ordinance or regulation as construed by the courts.*]

If you decide that [a party] [the parties] [_____] violated the [statute]
description of non-party
[ordinance] [regulation] [rule] [order] on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, [a party] [the parties] [_____] [was] [were] negligent before and at
description of non-party
the time of the occurrence.

Instruction revised December 2011.

Notes on Use

Permission to publish amended Notes on Use granted in 2002.

This instruction should be given only where the evidence would support a finding that the injury complained of was proximately caused by a violation of a statute, ordinance, or administrative regulation, rule, or order intended to protect against such an injury, and that the injured party is within the class intended to be protected by the statute, ordinance, or administrative regulation. This instruction should be given provided that the statute, ordinance, or administrative regulation has the force of law. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976). If the subject standard does not have the force of law, this instruction should not be given. *Poelker v. Warrensburg-Latham School District*, 251 Ill.App.3d 270, 621 N.E.2d 940, 190 Ill.Dec. 487 (4th Dist.1993) (rules and recommendations of the National Federation of High School Associations at issue). When IPI 60.01 has been given for standards that do not have the force of law, the appellate court has noted the holding in *Davis* and affirmed this practice only when waiver or other factors are present. *See, e.g.*, *American State Bank v. County of Woodford*, 55 Ill.App.3d 123, 371 N.E.2d 232, 13 Ill.Dec. 515 (4th Dist.1978) (precise objection not made at jury instruction conference); *Carlson v. City Construction Co.*, 239 Ill.App.3d 211, 606 N.E.2d 400, 179 Ill.Dec. 568 (1st Dist.1992) (compliance with standards required in contract between the parties). In at least one instance, however, the appellate court has affirmed, without reservation and without citation to *Davis*, a trial court's usage of IPI 60.01 where the standard did not have the force of law. *King v. American Food Equipment Co.*, 160 Ill.App.3d 898, 513 N.E.2d 958, 112 Ill.Dec. 349 (1st Dist.1987) (ANSI standard at issue).

This instruction may be used in a case where there is evidence tending to show that a violation of a statute by a non-party third person may have been a proximate cause of the occurrence. *See, e.g., Roberts v. City of Chicago*, 105 Ill.App.3d 383, 385; 434 N.E.2d 420, 422-423; 61 Ill.Dec. 267, 269-270 (1st Dist.1982); *Mizowek v. DeFranco*, 64 Ill.2d 303, 311; 356 N.E.2d 32, 36; 1 Ill.Dec. 32, 36 (1976); *Nowak v. Witt*, 14 Ill.App.2d 482, 144 N.E.2d 813 (2d Dist.1957). If it is so claimed, then a phrase

describing the non-party should be included where indicated, and IPI 12.04 should be given addition to this instruction.

A party is not entitled to multiple instructions containing the same legal principle. Thus, a party may properly be required to choose between several tendered instructions that embody the same or similar statutory violations. *Bernardoni v. Hebel*, 101 Ill.App.3d 172, 176-177; 427 N.E.2d 1288, 1291-1292; 56 Ill.Dec. 742, 745-746 (3d Dist.1981).

Evidence that a party *complied* with a relevant statute, ordinance, or administrative regulation, rule, or order, intended to protect against the injury complained of, may be admissible as evidence that the party was *not* negligent, or that a product was not defective or unreasonably dangerous. *Rucker v. Norfolk & W. Ry. Co.*, 77 Ill.2d 434, 396 N.E.2d 534, 33 Ill.Dec. 145 (1979). Just as in the case of other such legislation, compliance with applicable statutes and safety regulations is not conclusive evidence on the question of negligence, but it is relevant to that issue. *Moehle v. Chrysler Motors Corp.*, 93 Ill.2d 299, 305; 443 N.E.2d 575, 577-578; 66 Ill.Dec. 649, 651-652 (1982); *Christou v. Arlington Park-Washington Park Race Tracks Corp.*, 104 Ill.App.3d 257, 261; 432 N.E.2d 920, 923-924; 60 Ill.Dec. 21, 24-25 (1st Dist.1982). If the court rules that such a statute or other enactment is admissible for this purpose, and that an instruction is appropriate, this instruction may be modified and used.

Comment

Ordinarily the language of the statute, ordinance, or regulation may be used in the instruction. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976) (regulation pertaining to tank trucks); *Tenenbaum v. City of Chicago*, 60 Ill.2d 363, 325 N.E.2d 607 (1975); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253, 257 (1965) (hospital regulations of State Department of Public Health); *Bertrand v. Adams*, 344 Ill.App. 559, 562; 101 N.E.2d 841, 842 (4th Dist.1951) (statute prohibiting overtaking and passing near intersections); *Hann v. Brooks*, 331 Ill.App. 535, 551; 73 N.E.2d 624, 631 (2d Dist.1947) (statute providing for driving on the right side of the road). But if a judicial interpretation has modified the language, the change must be reflected in the instruction. *McElligott v. Illinois Cent. R. Co.*, 37 Ill.2d 459, 227 N.E.2d 764 (1967) (maintenance of railroad crossing); *De Legge v. Karlsen*, 17 Ill.App.2d 69, 79, 81; 149 N.E.2d 491, 495-497 (1st Dist.1958) (peremptory instruction in language of right-of-way statute held error); *Anderson v. Steinle*, 289 Ill.App. 167, 171; 6 N.E.2d 879, 881 (4th Dist.1937) (same ruling as to "flare statute").

If the statute, ordinance, or regulation is not intended to protect against the type of injury in question, *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74 (1954), or if the injured party is not within the protected class, *Brunnworth v. Kerens-Donnewald Coal Co.*, 260 Ill. 202, 216-217; 103 N.E. 178, 184 (1913), *Bitner v. Lester B. Knight & Associates, Inc.*, 16 Ill.App.3d 857, 307 N.E.2d 136 (3d Dist.1974), the statute, ordinance, or regulation should not be called to the jury's attention. In addition, there must be evidence from which the jury can find that the violation was a proximate cause of the injury. *French v. City of Springfield*, 65 Ill.2d 74, 79-80; 357 N.E.2d 438, 440-441; 2 Ill.Dec. 271, 273-274 (1976).

Violation of a statute, ordinance or regulation is not negligence *per se*, but only *prima facie* evidence of negligence. Such *prima facie* evidence may be rebutted by a showing that, under all the facts and circumstances of the case, the party who violated the statute acted reasonably. *See* IPI 60.00. Accordingly, violation of a statute, ordinance or regulation is but one fact to be taken into consideration by the jury along with all of the other facts and circumstances in determining the issue of negligence. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976).

It can be reversible error to use the phrase "*prima facie* evidence" in an instruction (*Hicks v. Hendricks*, 33 Ill.App.3d 486, 342 N.E.2d 144 (5th Dist.1975) ("yield right-of-way" statute; not error on

facts of this case); *Klinkenberg v. Horton*, 81 Ill.App.2d 152, 224 N.E.2d 597 (3d Dist.1967) ("yield right-of-way" statute; reversible error)), and, in any event, it would not be understood by a jury. *See Johnson v. Pendergast*, 308 Ill. 255, 264; 139 N.E. 407, 410 (1923); *Harris v. Piggly Wiggly Stores, Inc.*, 236 Ill.App. 392 (1st Dist.1925).

This instruction may not be modified so that it names one party only. An instruction on statutory violation which singles out one party is slanted, partial and argumentative and constitutes reversible error. *Macak v. Continental Baking Co.*, 92 Ill.App.2d 63, 235 N.E.2d 855 (1st Dist.1968). Nor may it be used without the second paragraph. *Ryan v. Fleischman*, 64 Ill.App.3d 75, 79; 380 N.E.2d 1099, 1102; 20 Ill.Dec. 890, 893 (2d Dist.1978); *Fornoff v. Parke Davis & Co.*, 105 Ill.App.3d 681, 688; 434 N.E.2d 793, 799; 61 Ill.Dec. 438, 444 (4th Dist.1982).

60.02 Violation of Statute, Ordinance, or Administrative Regulation Both By Defendant and Third Person or Third Person Alone

[Withdrawn]

Comment

This instruction formerly provided for situations where it was claimed that a third person violated a statute or ordinance, and that the third person was the sole proximate cause of the occurrence. The adoption of comparative fault has eliminated the need for a separate instruction to cover this situation. Under comparative fault, a non-party's violation of a statute is no longer relevant only on the sole proximate cause issue; it is now a factor in determining all parties' relative fault. IPI 60.01 has been modified to include non-parties, and former IPI 60.02 has therefore been deleted.

MOTOR VEHICLES

70.00.
MOTOR VEHICLES

72.00
AUTOMOBILE GUESTS—JOINT ENTERPRISE—PASSENGERS

73.00
RAILROAD CROSSINGS

70.00
Introduction

The instructions in this section deal with some of the duties of persons operating motor vehicles upon the public highways of Illinois. IPI 70.01 is a statement of the common law duty of ordinary care. This common law duty is supplemented by numerous specific obligations imposed by the various sections and subsections of the Illinois Vehicle Code, 625 ILCS 5/1-100 *et seq.* (1994). IPI 70.02 is a statement of the combined statutory and case law governing the difficult subject of the right of way at unmarked intersections. Other violations of the statute may be covered by adapting IPI 60.01.

An example of an instruction pertaining to the duties of pedestrians is set out in IPI 70.03.

IPI 70.02, pertaining to the right of way at an open, unmarked intersection, presents unique problems. The governing statute, now 625 ILCS 5/11-901 (1994), does not clearly codify the applicable law. A proper understanding of the statute requires some knowledge of its history. Prior to its amendment in 1953, the predecessor of this section (then §165) read as follows:

> Except as hereinafter provided, motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left.

The cases have made it clear that a driver does not have an unqualified right of way simply because he is approaching from the right. Instead, the car approaching from the right has the right of way only where, with both cars being driven within the recognized speed limits, the car on the right would reach the intersection before or at about the same time as the car on the left. *Salmon v. Wilson*, 227 Ill.App. 286, 288 (1st Dist.1923); *Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co.*, 243 Ill.App. 89, 94-95 (1st Dist.1926); *Gauger v. Mills*, 340 Ill.App. 1, 6; 90 N.E.2d 790, 792-793 (2d Dist.1950); *Sharp v. Brown*, 343 Ill.App. 23, 30; 98 N.E.2d

122, 125 (3d Dist.1951); *Relli v. Leverenz*, 23 Ill.App.3d 718, 320 N.E.2d 169 (1st Dist.1974).

In 1953, in an apparent attempt to put this judicial construction into the express terms of the statute, the legislature amended §165 to read as follows:

> (a) The driver of a vehicle approaching an intersection shall yield the right-of-way to a vehicle which has entered the intersection from a different highway.
>
> (a) When two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right.

Subsection (b) of the amended statute appears to be an attempt to codify the language of the cases which, under the old statute, had held that "where two vehicles at approximately the same time *approach* an intersection, the vehicle at the right has the right of way." *Leech v. Newell*, 323 Ill.App. 510, 56 N.E.2d 138 (1st Dist.1944) (emphasis added); *Partridge v. Enterprise Transfer Co.*, 307 Ill.App. 386, 30 N.E.2d 947 (1st Dist.1940); *Salmon v. Wilson*, 227 Ill.App. 286, 288 (1st Dist.1923). Note that the express terms of subsection (b) of the amended statute apply only to the case where "two vehicles *enter* an intersection . . . at approximately the same time." This language would seem too narrow to provide the necessary guidance to motorists, since, when two vehicles have actually *entered* an intersection at approximately the same time, it is usually too late to avoid a collision. It would appear that subsection (b) should have been addressed, as were the cases noted above, to the situation where two vehicles *approach* an intersection at approximately the same time.

Ordinary rules of reasonable care would seem to require that motorists approach intersections in such a manner that they will be able to comply with the terms of subsection (b) when they actually enter the intersection. Such a rule would, in effect, give the right of way to the driver on the right, where the vehicles approach the intersection at approximately the same time. This appears to be the result intended by the legislature. In this connection, it should be remembered that the Illinois courts developed the rule of relative speeds and distances at a time when the old §165 was silent on the subject.

The Supreme Court of Minnesota, confronted with the problem of construing a provision identical to subsection (b) of the 1953 version of the Illinois statute, held:

> *By approximately*, the legislature must have meant the *approach* to an intersection of two vehicles so nearly at the same time that there would be imminent hazard of a collision if both continued the same course at the same speed. In that case, he on the left should yield to him on the right. While the driver on the left is not required to come to a dead stop, as at a through highway stop sign, unless it is necessary to avoid a collision, he nevertheless must *approach* the intersection with his car so under control that he can yield the right-of-way to a vehicle within the danger zone on the right. Such must have been the legislative intent.

Moore v. Kujath, 225 Minn. 107, 112; 29 N.W.2d 883, 886 (1947) (emphasis on "approach" supplied).

Still another problem is created by the language of subsection (a) of the 1953 version of the statute, which provides that a driver who is "approaching" an intersection shall yield the right of way to one who has "entered" the intersection. What of the case where the car on the left enters the intersection before the car on the right, but where the two cars were nonetheless *approaching* the intersection at approximately the same time? In such a case, which car has the right of way, the car on the left, under subsection (a), or the car on the right under the suggested construction of subsection (b)? The Supreme Court of Minnesota also offered a resolution of this apparent dilemma in the *Moore* case (225 Minn. at 112, 29 N.W.2d at 886):

> Obviously, both of the foregoing sentences (subsections a and b) were placed in the statute by the legislature in an endeavor to promote safety on the highways, and they should be so interpreted. As we view the two sentences, the second one (subsection b) so modifies the first (subsection a) as to require the driver on the left, even though he may reach the intersection first, to yield the right-of-way to the driver on the right in a situation where the two vehicles would collide were each to continue its course and maintain its rate of speed. To otherwise interpret the law and to arbitrarily give to him who first enters the intersection the right-of-way *over another* vehicle approaching at approximately the same time from the right would be to increase rather than diminish the hazards of driving.

The Illinois statute was amended in 1969 (effective July 1, 1970) to its present form:

§ 11-901 Vehicles approaching or entering intersection.

(a) When 2 vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right.

(b) The right-of-way rule declared in paragraph (a) of this Section is modified at through highways and otherwise as stated in this Chapter.

625 ILCS 5/11-901 (1994). Although the language of the present version is significantly different from that of former §165, which it replaced, the 1969 provision does not appear to clarify the difficulty with the old statute which is described above. Section 11-901(a) provides that the driver on the right has an unqualified right-of-way if the two vehicles enter or approach the intersection at approximately the same time. Yet, the Illinois courts had interpreted the old statute to provide that the car on the left would have the right-of-way if it could, while being driven at a reasonable speed, clear the intersection before the vehicle on the right entered it, even if the car on the right could be said to have been approaching the intersection "at approximately the same time." It is this proposition which is expressed in the second paragraph of IPI 70.02. The disparity between the decisional law and the unqualified statement of the statute remains. Since, however, there is no reason to believe that the General Assembly intended to change the substance of the decisional law when it enacted the 1969 Illinois Vehicle Code, IPI 70.02 has not been revised.

IPI 70.02 as it appeared in the first edition was held to be a correct statement of the law

(*Payne v. Kingsley*, 59 Ill.App.2d 245, 250; 207 N.E.2d 177, 179 (2d Dist.1965)), and to be couched in terms fair to all (*Tipsword v. Melrose*, 13 Ill.App.3d 1009, 301 N.E.2d 614, 617 (3d Dist.1973)). It has been held that the instruction provides the only reasonable interpretation of §11-901 of the Illinois Vehicle Code. *Martin v. Clark*, 92 Ill.App.3d 518, 522; 415 N.E.2d 30, 33; 47 Ill.Dec. 305, 308 (3d Dist.1980).

In a 1990 decision, the appellate court reaffirmed that IPI 70.02 accurately reflects Illinois law, emphasizing that the vehicle on the left has the right-of-way only if the driver of that vehicle justifiably believes that he will be able to "pass through the intersection, that is, clear the intersection, before the vehicle on the right enter[s] the intersection." *Seaman v. Wallace*, 204 Ill.App.3d 619, 561 N.E.2d 1324, 1334; 149 Ill.Dec. 628, 638 (4th Dist.1990).

70.01 Duty of Driver Using Highway

It is the duty of every [driver] [operator] of a vehicle using a public highway to exercise ordinary care at all times to avoid placing [himself or] others in danger and to exercise ordinary care at all times to avoid a collision.

Notes on Use

This instruction defines the common law duty of persons operating motor vehicles on public highways and, when given, should be followed by IPI 10.02, which defines the term "ordinary care." If there are issues of both common law negligence and violation of statute, this instruction may be given in addition to the instructions on the statute involved.

If a driver is charged with contributory negligence, the bracketed phrase "himself or" should be included.

Comment

The common law duty of ordinary care and the specific duties imposed by statute are cumulative. *Christy v. Elliott*, 216 Ill. 31, 48-49; 74 N.E. 1035, 1043 (1905). This instruction provides a guideline of fairness to all parties. *Tipsword v. Melrose*, 13 Ill.App.3d 1009, 301 N.E.2d 614, 618 (3d Dist.1973).

70.02 Right of Way--Intersection

At the time of the occurrence in question, there was in force in the State of Illinois a statute governing the operation of motor vehicles approaching intersections.

If two vehicles are approaching an intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the right will enter the intersection first or both vehicles will enter the intersection at about the same time, then this statute requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.

On the other hand, if two vehicles are approaching the intersection from different highways at such relative distances from the intersection that if each is being driven at a reasonable speed, the vehicle on the left will enter the intersection and pass beyond the line of travel of the vehicle on the right before the vehicle on the right enters the intersection, then this statute requires the driver of the vehicle on the right to yield the right of way to the vehicle on the left.

The fact that a vehicle has the right of way does not relieve its driver from the duty to exercise ordinary care in approaching, entering and driving through the intersection.

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, that party was negligent before and at the time of the occurrence.

Notes on Use

This instruction applies only when the occurrence involved an open, unmarked intersection, with neither vehicle on a preferential highway; if one of the vehicles was on a preferential highway, this instruction should not be used. *Voyles v. Sanford*, 183 Ill.App.3d 833, 837; 539 N.E.2d 801, 803; 132 Ill.Dec. 238, 240 (3d Dist.1989).

This instruction should not be given when an intersection's traffic lights are temporarily inoperative due to a mechanical failure. In that case, the driver must stop before entering the intersection in accordance with the rules applicable in making a stop at a stop sign. 625 ILCS 5/11-305(e) (1994). This statute effectively overrules *Spiotta v. Hamilton*, 120 Ill.App.2d 387, 393-394; 256 N.E.2d 649, 651-652 (2d Dist.1970), which had held that under such circumstances this instruction was proper.

Comment

The statute governing right-of-way at unmarked intersections, 625 ILCS 5/11-901 (1994), reads as follows:

§ 11-901 Vehicles approaching or entering intersection.

(a) When 2 vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right.

(b) The right-of-way rule declared in paragraph (a) of this Section is modified at through highways and otherwise as stated in this Chapter.

This instruction does not quote the right-of-way statute, nor does it paraphrase the literal provisions of the statute. The reason for this is that the literal terms of the present statute are ambiguous, and would only confuse a jury. For a complete discussion of the history of this statute and the cases interpreting it, *see* the introduction to this chapter.

IPI 70.02 as it appeared in the first edition was held to be a correct statement of the law (*Payne v. Kingsley*, 59 Ill.App.2d 245, 250; 207 N.E.2d 177, 179 (2d Dist.1965)), and to be couched in terms fair to all (*Tipsword v. Melrose*, 13 Ill.App.3d 1009; 301 N.E.2d 614, 617 (3d Dist.1973)). It has been held that the instruction provides the only reasonable interpretation of §11-901 of the Illinois Vehicle Code. *Martin v. Clark*, 92 Ill.App.3d 518, 522; 415 N.E.2d 30, 33; 47 Ill.Dec. 305, 308 (3d Dist.1980).

In a 1990 decision, the appellate court reaffirmed that IPI 70.02 accurately reflects Illinois law, emphasizing that the vehicle on the left has the right-of-way only if the driver of that vehicle justifiably believes that he will be able to "pass through the intersection, that is, clear the intersection, before the vehicle on the right enter[s] the intersection." *Seaman v. Wallace*, 204 Ill.App.3d 619, 561 N.E.2d 1324, 149 Ill.Dec. 628 (4th Dist.1990).

70.03 Pedestrians--Crossing At Other Than Crosswalks

There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that:

> [*Quote or paraphrase applicable part of statute or ordinance as construed by the courts (see, e.g., 625 ILCS 5/11-1001 to 11-1010 (1994)). For example*:
>
> > Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
> >
> > Notwithstanding the foregoing provisions of this section every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway.]

If you decide that [a party] [the parties] violated the [statute] [ordinance] on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, [a party] [the parties] [was] [were] negligent before and at the time of the occurrence.

Notes on Use

This instruction is similar to IPI 60.01. *See* the Notes on Use and Comment to that instruction.

If 625 ILCS 5/11-1003(a) (1994) is applicable but there is a factual dispute as to distance and speed so as to raise the question of whether the motorist had the right-of-way, the language of that subsection may have to be modified if used in this instruction. An exact quotation of that paragraph might create the erroneous impression that the driver of a vehicle has an absolute right-of-way at places other than crosswalks. *Randal v. Deka*, 10 Ill.App.2d 10, 17; 134 N.E.2d 36, 40 (1st Dist.1956); *Parkin v. Rigdon*, 1 Ill.App.2d 586, 588-595; 118 N.E.2d 342, 343-347 (3d Dist.1954).

When children may reasonably be expected to be in the vicinity, a motorist, although still held to a standard of ordinary care, must exercise greater care for the safety of those children than he would for adults. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 403; 519 N.E.2d 1035, 1037; 116 Ill.Dec. 820, 822 (1st Dist.1988).

Comment

See introduction to IPI 10.00 and IPI 10.01 and 10.02 (negligence and ordinary care).

72.00

Automobile Guests--Joint Enterprise—Passengers

Introduction

The instructions in this section were prepared at a time when the rights of a guest and the duty of a host driver in Illinois were proscribed by the "guest act" (*see* Ill. Rev. Stat. ch. 95 1/2, &p;10-201 (1971)). IPI 72.01, 72.02, and 72.05 were prepared for use in cases brought under the "Guest Act". IPI 72.03 and 72.04 are useful in situations in addition to the guest-host situation.

In 1971, the "Guest Act" was repealed. For occurrences after January 1, 1972, a person riding as a guest need only prove negligence in order to recover from his host. 625 ILCS 5/10-201 (1994). However, a hitchhiker must still prove wilful and wanton conduct on the part of his host in order to recover damages from his host. 625 ILCS 5/10-201 (1994). For the hitchhiker, IPI 14.01, which defines wilful and wanton conduct, and the second portion of IPI 20.01.01, which states the issues in a case requiring proof of wilful and wanton conduct, may be used together with the second portion of IPI B21.02.02, which states the plaintiff's burden in a case requiring proof of wilful and wanton conduct.

Because it is unlikely that "Guest Act" cases remain unresolved, the Committee has withdrawn IPI 72.01, 72.02, 72.05, and 72.06. Where the injury occurred after January 1, 1972, IPI 20.01 (issues) and B21.02 (burden of proof) will be appropriate.

In *Rosenbaum v. Raskin*, 45 Ill.2d 25, 257 N.E.2d 100 (1970) the supreme court refused to apply the Guest Act to a child of 4 years. The court reasoned that a question arises as to mental capacity of a child of tender years to understand and accept the status of a guest-host.

A third person, usually the driver of another car, owes a rider the duty of ordinary care no matter in what legal relationship the rider stands to his own driver.

72.01 Definition of Guest In Motor Vehicle and Motorcycle Cases

Withdrawn

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.02 Definition of Guest--Motor Vehicle and Motorcycle Cases--Issues As To Driver's Authority To Invite

Withdrawn

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.03 Negligence of Driver Not Attributable To Passenger

If you find that there was negligence on the part of the driver of the vehicle in which the plaintiff was riding, then the driver's negligence cannot be charged to the plaintiff. The care required of the plaintiff in this case is that which a reasonably careful person riding as a passenger would use under similar circumstances.

Notes on Use

This instruction may not be given when the plaintiff is either the driver's employer, principal, partner or joint venturer.

This instruction should not be given where there is a dispute as to who was driving the vehicle.

Comment

Generally, the negligence of a driver may not be imputed to a passenger. *Milis v. Chicago Transit Authority*, 1 Ill.App.2d 236, 117 N.E.2d 401 (1st Dist.1954) (negligence of taxicab driver not imputable to passengers); *Ohlweiler v. Central Engineering Co.*, 348 Ill.App. 246, 109 N.E.2d 232 (2d Dist.1952) (error to refuse instruction to this effect in action by guest passenger against driver and highway contractor who failed to erect warning signs on road construction); *Buehler v. White*, 337 Ill.App. 18, 85 N.E.2d 203 (3d Dist.1949) (negligence of husband in parking at highway edge to adjust mechanical difficulty not imputable to plaintiff wife); *Walsh v. Murray*, 315 Ill.App. 664, 43 N.E.2d 562 (2d Dist.1942) (action for wrongful death of minor child of plaintiff; held: misconduct of driver could not be imputed to plaintiff because there was no evidence that driver had been appointed plaintiff's agent to bring minor child home).

An apparent exception to the foregoing rule is *Opp v. Pryor*, 294 Ill. 538, 547; 128 N.E. 580, 584 (1920), where, to sustain her burden of proof that she was in the exercise of ordinary care at the time of the accident, plaintiff relied upon the testimony of the driver and another passenger, the latter sitting in the rear seat while plaintiff occupied the front seat with the driver, as to what they could see. The court held it was erroneous to instruct that if the plaintiff was a guest, had no authority to control the operation of the automobile, and was in the exercise of due care for her own safety, then the negligence of the driver could not be imputed to her. Actually, the reasoning of the court indicates that, under such circumstances, the instruction is confusing because the only evidence from which due care on the part of the plaintiff could be inferred was the testimony of the driver as to her own care in the management of the automobile.

A difficult problem is presented where the owner is a passenger.

In *Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942) a guest sued the son of the car owner for injuries received when the son's friend negligently drove the car in which the three were riding into a tree. The Supreme Court held that there could be no agency between the driver and the son because of the son's minority; that the negligence of the driver could not be imputed to the son, and that any liability of the son had to rest on his own negligence in failing to control the driving of the car.

In *Rigdon v. Crosby*, 328 Ill.App. 399, 66 N.E.2d 190 (2d Dist.1946) (abstract), it was held error to instruct that the plaintiff could recover if the injuries were caused by the defendant's negligence and if the plaintiff was exercising due care, because it omitted the question of the due care of the driver of the car where plaintiff owned the car and had a duty to control the driver.

In *Koch v. Lemmerman*, 12 Ill.App.2d 237, 139 N.E.2d 806 (4th Dist.1956), the defendant owner was a passenger in the rear seat and his son was driving. Noting that there was evidence of wilful and wanton misconduct and that the owner had the right to control the manner in which the car was driven and had a duty to control the driver, the court sustained a recovery by another passenger against the owner. *See also Staken v. Shanle*, 23 Ill.App.2d 269, 162 N.E.2d 604 (3d Dist.1959); *Simaitis v. Thrash*, 25 Ill.App.2d 340, 166 N.E.2d 306, 311 (2d Dist.1960).

IPI 72.03 was held proper under the facts of the case. *Butler v. Chicago Transit Authority*, 38 Ill.2d 361, 367-368; 231 N.E.2d 429, 432-433 (1967).

It was held in *Dooley v. Darling*, 26 Ill.App.3d 342, 324 N.E.2d 684 (5th Dist.1975), that the use of IPI 72.03 is not precluded in owner-passenger cases. However, the court ruled that it may have been desirable and appropriate to temper the instruction in view of the plaintiff's de facto ownership powers over the use of the automobile. In this case, the plaintiff (passenger-owner's administrator) made a claim against his driver and the driver of the other car involved.

In *Bauer v. Johnson*, 79 Ill.2d 324, 403 N.E.2d 237, 38 Ill.Dec. 149 (1980), the Illinois Supreme Court reviewed the current cases and settled the law regarding the obligation of the owner-passenger. The court held an owner-passenger-plaintiff can be contributorily negligent in failing to control the conduct of the driver:

> The passenger's ownership of the car is relevant only insofar as it is a circumstance which gives the passenger reason to believe that his or her advice, directions or warnings would be heeded. (Restatement (Second) of Torts §495, comment *e* (1965).) But no passenger has a duty to keep a lookout or to control the driver unless the plaintiff knows or should know that such actions are essential to his or her safety. Restatement (Second) of Torts §495, comments *c* and *d* (1965).

Id. at 332, 403 N.E.2d at 241, 38 Ill.Dec. at 153.

72.04 Joint Enterprise--Definition

One of the issues to be decided by you is whether ____ and ____ were engaged in a joint enterprise. A joint enterprise exists if these four elements are present:

(1) An agreement, express or implied, between ____ and ____; and

(2) A common purpose to be carried out by ____ and ____; and

(3) A common business interest in that purpose between ____ and ____; and

(4) An understanding between them that each had a right to share in the control of the operation of the car.

As to the fourth element, the question for you to decide is whether there was a right in each to share the control of the operation of the car rather than the actual exercise of the right.

Notes on Use

Fill in the blanks with the names of the persons claimed to have been engaged in the joint enterprise at the time of the occurrence.

This instruction should be given only when the issues and burden of proof instructions include the "joint enterprise" element.

Comment

The previous version of this instruction required only a finding of a "community of interest" on the part of a driver and passenger rather than a common business enterprise. That instruction was criticized in a note in *Campanella v. Zajic*, 62 Ill.App.3d 886, 379 N.E.2d 866, 20 Ill.Dec. 33 (2d Dist.1978). In that case, the court carefully reviewed the law of Illinois with respect to a joint enterprise and also relied upon the Restatement (Second) of Torts, §§491 and 548. The previous version of this instruction did in fact omit the "common business enterprise" requirement established by the cases and the Restatement. For that reason, the instruction has been redrawn to incorporate the "common business enterprise" and the other requirements of the Restatement (Second) of Torts to accurately state the issues involved in a joint enterprise.

In *Grubb v. Illinois Terminal Co.*, 366 Ill. 330, 338-340; 8 N.E.2d 934, 938-939 (1937), the court held that an instruction which stated that the negligence of the driver could not be imputed to the passenger was erroneous where the evidence showed that three sisters were traveling to Springfield in order to purchase materials to decorate their home and that the expense of these materials and the cost of the trip were to be shared equally in accordance with an arrangement made before the trip started. *Birnbaum v. Kirchner*, 337 Ill.App. 25, 29-31; 85 N.E.2d 191, 192-194 (3d Dist.1949) (a guest en route to spend a weekend in the driver's cabin was not engaged in a joint enterprise while extricating the car from the ditch because he did not have "some" control over the operation); *Schmalzl v. Derby Foods, Inc.*, 341 Ill.App. 390, 94 N.E.2d 86 (1st Dist.1950) (a person who rode home from work every night with the driver who

occasionally paid some money to the driver had neither a common interest nor some right to control the enterprise).

It has been held error to instruct with respect to joint enterprise where the issue is not submitted and the term defined. *Stahnke v. American Carloading Corp.*, 308 Ill.App. 318, 31 N.E.2d 323 (1st Dist.1941) (abstract). However, in *Miller v. Green*, 345 Ill.App. 255, 261-263; 103 N.E.2d 188, 191, 192 (1st Dist.1951), the court held that failure to include a definition of joint enterprise in an instruction stating that plaintiff would be chargeable with the driver's negligence in case the jury found that the three police officers who were making their rounds in a private car owned by one of them were engaged in a joint enterprise was not reversible error. In that case the plaintiff who was appealing had himself offered an instruction on joint enterprise which did not contain a definition of joint enterprise.

The refusal of an instruction on joint enterprise was not error when there was no evidence of a business enterprise. *Smith v. Bishop*, 32 Ill.2d 380, 205 N.E.2d 461 (1965).

The giving of a joint enterprise instruction was reversible error where there was no evidence of a business enterprise. *Babington v. Bogdanovic*, 7 Ill.App.3d 593, 288 N.E.2d 40 (4th Dist.1972).

No common interest or business enterprise may be inferred from sharing incidental expenses or aiding a friend in shopping for an automobile. *Galliher v. Holloway*, 130 Ill.App.3d 628, 474 N.E.2d 797, 85 Ill.Dec. 837 (5th Dist.1985).

No joint enterprise existed between a mother and her sons who were traveling together in the family automobile to work at a restaurant. The relationship between two employees is not a joint enterprise. *Andes v. Lauer*, 80 Ill.App.3d 411, 399 N.E.2d 990, 993; 35 Ill.Dec. 701, 704 (3d Dist.1980).

72.05 Duty of Driver To Guest or Joint Venturer In Motor Vehicle or On Motorcycle

[Withdrawn]

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.06 Duty of Guest Rider To Warn Driver

[Withdrawn]

Comment

The "Guest Act" was repealed in 1971, effective January 1, 1972, and therefore this instruction has been withdrawn.

72.07 Gratuitous Bailment--Negligence of Driver Not Attributable To Owner

If you find that there was negligence on the part of the driver of the vehicle owned by the plaintiff, that driver's negligence cannot be charged to the plaintiff.

Notes on Use

This instruction is new. It should only be given where there is no issue of agency involved. If agency is an issue, use IPI 50.07.

Comment

In an action by an owner against a negligent third party for damage to the owner's property while in the possession of a gratuitous bailee, the negligence of the bailee is not imputed to the owner absent agency or negligent entrustment. This is true even if the owner is in the vehicle at the time of damage. *Andes v. Lauer*, 80 Ill.App.3d 411, 399 N.E.2d 990, 35 Ill.Dec. 701 (3d Dist.1980).

"It is settled law that the negligence of a bailee is not imputed to the bailor." *Eckerty v. Lowman*, 16 Ill.App.3d 373, 306 N.E.2d 356, 357 (4th Dist.1974).

"The modern rule supported by most authorities is that the bailee's negligence is not imputable to the bailor in the latter's action against a third person for injury to, or destruction of, the subject of the bailment." 8 Am. Jur. 2d *Bailments*, §269 (1980).

73.00

RAILROAD CROSSINGS

INTRODUCTION

The instructions in this section are unchanged even though there have been extensive changes and developments in the law which have had a profound impact upon the trial of railroad crossing cases.

In 1971 when IPI 2d was published, Illinois was a contributory negligence state and many railroad crossing cases failed because the plaintiff was found to be contributorily negligent as a matter of law. *Greenwald v. Baltimore & O. R. Co.*, 332 Ill. 627, 631-632; 164 N.E. 142, 143-144 (1928); *Tucker v. New York, C. & St. L. R. Co.*, 12 Ill.2d 532, 147 N.E.2d 376 (1957); *Moudy v. New York, C. & St. L. R. Co.*, 385 Ill. 446, 53 N.E.2d 406 (1944).

However, in 1981, the Illinois Supreme Court embraced comparative negligence in its pure form. *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Thereafter, a claim for damages for injury or death as the result of a collision at a railroad crossing could and did succeed even though the plaintiff was found to have been partly at fault. This rule (pure comparative negligence) was subsequently changed by the legislature affecting causes of action accruing on or after November 25, 1986, and now a claim is barred if the injured party's (or decedent's) fault was more than 50%. 735 ILCS 5/2-1107.1 (1994).

The adoption of comparative negligence, however, does not necessarily alter preexisting duty rules. For example, the doctrine does not change the rule that, ordinarily, a train stopped at a crossing is itself adequate notice of its own presence, and therefore the railroad has no duty to provide additional warnings unless the plaintiff can show "special circumstances." *Dunn v. Baltimore & O. R.R. Co.*, 127 Ill.2d 350, 537 N.E.2d 738, 741-743; 130 Ill.Dec. 409, 412-414 (1989) (no special circumstances shown).

There have been other changes which have affected trials and the results of trials which, while not as far reaching as the abandonment of contributory negligence as a total bar to a recovery, have had an impact upon railroad litigation.

At the time that these instructions were originally formulated, Ill. Rev. Stat. ch. 111 2/3, &p;77, provided for the imposition of punitive damages for wilful violations of the Public Utilities Act. Section 73 of that act provided:

> In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done either by any provisions of this act or any rule, regulation, order or decision of the commission, issued under authority of this act, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or

> omission was wilful, the court may in addition to the actual damages, award damages for the sake of example and by the way of punishment. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

In *Churchill v. Norfolk & W. Ry. Co.*, 73 Ill.2d 127, 383 N.E.2d 929, 23 Ill.Dec. 58 (1978), the Illinois Supreme Court held that this act provided a remedy for personal injuries sustained as a result of the violation of ICC rules. That remedy was also available to persons who had sustained financial injury from death caused by a wilful violation of the Public Utilities Act.

The Public Utilities Act was amended effective October 1, 1985, to exclude railroads, but the remedy remains available for any claims resulting from injuries sustained prior to that date.

A change has been made with respect to the manner in which culpable conduct on the part of the railroad could be established. At the time that these instructions were published in IPI 2d, it was proper to prove that a crossing was very inadequately protected. *Merchants Nat. Bank v. Elgin J. & E. Ry. Co.*, 121 Ill.App.2d 445, 257 N.E.2d 216 (2d Dist.1970), *aff'd*, 49 Ill.2d 118, 273 N.E.2d 809 (1971).

That proof may now no longer be available in some cases. 625 ILCS 5/18c-7401(3) (1994), provides that "[l]uminous flashing signal or crossing gate devices installed at grade crossings, which have been approved by the Commission, shall be deemed adequate and appropriate."

In *Hunter v. Chicago & N.W. Transp. Co.*, 200 Ill.App.3d 458, 558 N.E.2d 216, 146 Ill.Dec. 253 (1st Dist.1990), the appellate court (in dictum) concluded that:

> [T]he legislative intent was that the issue of the adequacy of the warning devices at a crossing, once ordered by the Commission, would no longer be an issue in this type of litigation. Once the Commission has investigated and ordered the installation of a particular kind of warning device, its decision is conclusive, and the railroad is precluded from installing any other signal. 82nd Ill.Gen.Assem., House Proceedings, April 22, 1982, at 114-23.

Id. at 465-466, 558 N.E.2d at 221, 146 Ill.Dec. at 258. However, if the Commission has not acted pursuant to the statute, the plaintiff arguably can still claim that the crossing was not adequately protected.

625 ILCS 5/18c-7401(3) (1994), establishes the duty of a railroad to sound a bell, whistle or horn. Other safety requirements, in addition to those stated in 625 ILCS 5/18c-7401 to 18c-7404 (1994), are now contained in title 92 of the Illinois Administrative Code, which supersedes and rescinds General Order 176 of the Illinois Commerce Commission, and supersedes and rescinds General Order 121 of the Illinois Commerce Commission to the extent that General Order 121 applies to railroads.

73.01 Duty of Driver Crossing Tracks

A railroad crossing is a place of danger. If you believe from the evidence that as the [plaintiff] [decedent] was approaching the crossing he knew, or, in the exercise of ordinary care should have known, that a train approaching the crossing was so close to the crossing that it would be likely to arrive at the crossing at about the same time as the plaintiff's vehicle, then it was the duty of the [plaintiff] [decedent] to yield the right of way to the train.

Notes on Use

This instruction generally should not be used in a case where there are automatic gates or flasher signals at a crossing and there is evidence tending to show that the gates were up or the flasher signals were not operating at the time of the occurrence. However, if there is also evidence sufficient to support a jury finding that, despite the fact that the gates or flashers were inoperative, the driver, in the exercise of ordinary care, should have known that a train was in fact approaching the crossing, this instruction may be appropriate.

Comment

This instruction is properly given if the crossing gates and flashers were operating properly. *Frankenthal v. Grand Trunk Western R. Co.*, 120 Ill.App.3d 409, 458 N.E.2d 530, 76 Ill.Dec. 130 (1st Dist.1983).

However, where automatic gates at a railroad crossing are in an upraised position, or where railroad crossing signals are not operating, under certain circumstances the driver of a motor vehicle approaching the crossing is justified in assuming that no train is at or near the crossing and in proceeding over the crossing on that assumption unless, in the exercise of ordinary care, he should have been aware that a train was in fact in dangerous proximity to the crossing. *Langston v. Chicago & N.W. Ry. Co.*, 398 Ill. 248, 75 N.E.2d 363 (1947); Humbert v. Lowden, 385 Ill. 437, 53 N.E.2d 418 (1944). *See also Dunn v. Baltimore & Ohio R. Co.*, 127 Ill.2d 350, 537 N.E.2d 738, 741-743; 130 Ill.Dec. 409, 412-414 (1989) (absent special circumstances, a train stopped at a crossing is itself adequate notice of its own presence).

Where the railroad's rules required the train to be stopped at crossings on company property and not to proceed until the crossing was protected by a member of the crew, refusal to give this instruction was proper. *Winsor v. Baltimore & O. R.R. Co.*, 92 Ill.App.3d 437, 415 N.E.2d 1141, 47 Ill.Dec. 828 (4th Dist.1980).

73.02 Speed At Which Trains Are Run

The Federal Government, by regulation, has established a speed limit of ____ for the section of track involved in this case. If you find that the Defendant was operating its train at or below this speed limit, then the speed of the train may not be the basis of [negligence] [fault] by the Defendant. If, on the other hand, you find that the train was operating in excess of this speed limit, then you may consider whether the speed of the train was consistent with the exercise of [ordinary care on the part of the Defendant] [the highest degree of care that could have been used in the practical operation of its business as common carrier by the railroad].

Notes on Use

In the last sentence, the second bracket is to be used instead of the first bracket where plaintiff was a passenger on defendant's train.

This instruction should be given only when there is some evidence tending to show that the train was traveling at a speed in excess of the federally prescribed speed limit for that section of track. If there is no evidence which tends to show that the train was traveling in excess of the federally posted speed limit, the speed of the train should not be an issue in the case.

Comment

In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993), the Supreme Court specifically held that under the Federal Railroad Safety Act of 1970, the federal regulations adopted by the Secretary of Transportation pre-empt a state tort claim based upon excessive speed where the speed of the train is below the speed set by the federal regulations promulgated at 49 CFR Sec. 213.9(a) (1992). The Court noted that these regulations set a speed limit for every section of freight or passenger track in the United States based upon the classification of the track.

In *Zook v. Norfolk & Western Railway Company*, 268 Ill. App.3d 157, 642 N.E.2d 1348, 205 Ill. Dec. 231 (1994), the Appellate Court for the Fourth District adopted the Supreme Court's directive in CSX. The Court indicated, however, that a tort law claim is viable where there is evidence that the train's speed was in excess of that set by the federal regulation for that section of track.

73.03 Duty of Railroad To Sound Bell, Whistle, or Horn Before Intersection

There was in force in the State of Illinois at the time of the occurrence in question a statute which provided:

> Every rail carrier shall cause a bell, and a whistle or horn to be placed and kept on each locomotive, and shall cause the same to be rung or sounded by the engineer or fireman, at the distance of at least 1,320 feet, from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or sounding until the highway is reached.

If you decide that the defendant violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether and to what extent, if any, the defendant was negligent before and at the time of the occurrence.

Notes on Use

The paraphrased paragraph, 625 ILCS 5/18c-7402(2) (a) (1994), continues as follows: "[P]rovided that at crossings where the [Illinois Commerce] Commission shall by order direct, only after a hearing has been held to determine the public is reasonably and sufficiently protected, the rail carrier may be excused from giving warning provided by this paragraph."

The Illinois Administrative Code (Title 92, §1535.501 (1985)) provides in part that railroads are excused from giving signals, "at such railroad highway grade crossings which are protected by flashing light signals or flashing light signals combined with short-arm gates that are automatically controlled and operated by means of track circuits or other automatic devices . . . ." This instruction should not be given when §1535.501 of the Administrative Code applies.

Comment

Prior to 1986, the "bell, whistle or horn" statute was codified as Ill. Rev. Stat. ch. 114, &p;59 (1983). Public Act 84-796, effective January 1, 1986, recodified it (with minor changes) as 625 ILCS 5/18c-7402(2) (a) (1994). However, decisions under the prior version should be fully applicable to the current version.

The failure to ring a bell or blow a whistle or horn as required by the statute establishes a prima facie case of negligence. *Randolph v. New York Cent. R. Co.*, 334 Ill.App. 268, 277; 79 N.E.2d 301, 305 (4th Dist.1948); *Hatcher v. New York Cent. R. Co.*, 20 Ill.App.2d 481, 156 N.E.2d 617 (3d Dist.1959) (abstract), *rev'd on other grounds*, 17 Ill.2d 587, 162 N.E.2d 362 (1959). However, the failure to ring a bell or sound a whistle or horn is not *per se* wilful and wanton misconduct. *Robertson v. New York Cent. R. Co.*, 388 Ill. 580, 585; 58 N.E.2d 527, 529 (1944).

In a case involving an Indiana statute very similar in nature to the Illinois statute, the Illinois Appellate Court, First District affirmed a judgment for compensatory damages but reversed an award for punitive damages. The court held that a statutory violation considered to be negligence *per se* would not, alone, necessarily indicate wilful and wanton conduct. The judgment for compensatory damages was affirmed and the award of punitive damages was reversed. *Anderson v. Chesapeake & O. Ry. Co.*, 147 Ill.App.3d 960, 498 N.E.2d 586, 101 Ill.Dec. 262 (1st Dist.1986).

PARTICULARIZED STANDARDS OF CONDUCT

100.00
COMMON CARRIERS

INTRODUCTION

These instructions are provided to address the common law and statutory duty imposed upon common carriers with regard to maintaining the safety of their passengers. A common carrier owes its passengers the duty to use the highest degree of care consistent with the type of vehicle used in the practical operation of its business. Rotheli v. Chicago Transit Authority, 7 Ill.2d 172, 130 N.E.2d 172 (1955).

Various conveyances and devices have been classified as common carriers:

Plane: Kamienski v. Bluebird Air Service, 321 Ill.App. 340, 53 N.E.2d 131 (1st Dist.1944); McCusker v. Curtiss Wright Flying Service, 269 Ill.App. 502 (1st Dist.1933).

Ship: Keokuk Northern Line Packet Co. v. True, 88 Ill. 608 (1878).

Bus: Ward v. Peoria Transit Lines, 2 Ill.App.2d 170, 118 N.E.2d 611 (2d Dist.1954); Duncan v. Fisher, 101 Ill.App.2d 213, 242 N.E.2d 479 (3d Dist.1968).

Taxicab: Przybylski v. Yellow Cab Co., 6 Ill.App.3d 243, 285 N.E.2d 506 (1st Dist.1972).

Limousine: Smith v. Chicago Limousine Service, 109 Ill.App.3d 755, 441 N.E.2d 81, 65 Ill.Dec. 289 (1st Dist.1982).

Amusement Devices: Pajak v. Mamsch, 338 Ill.App. 337, 87 N.E.2d 147 (1st Dist.1949) (ferris wheel).

Railroads: McNealy v. Illinois Cent. R. Co., 43 Ill.App.2d 460, 193 N.E.2d 879 (1st Dist.1963).

Elevator: Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center, 187 Ill.App.3d 1040, 543 N.E.2d 1014, 135 Ill.Dec. 446 (1st Dist.1989); Cobb v. Marshall Field & Co., 22 Ill.App.2d 143, 159 N.E.2d 520 (1st Dist.1959). The duty of highest degree of care is limited to the business house or the owner of the building operating the elevator as a part of its business operation. It does not extend to those who undertake to inspect and maintain elevators. They need only exercise due care. Jardine v. Rubloff, 73 Ill.2d 31, 382 N.E.2d 232, 21 Ill.Dec. 868 (1978) (owners of buildings with elevators are viewed as common carriers). Kaminsky v. Arthur Rubloff & Co., 72 Ill.App.2d 68, 218 N.E.2d 860 (1st Dist.1966).

However, escalators have been held not to be common carriers. *See* Tolman v. Wieboldt Stores, Inc., 38 Ill.2d 519, 525, 233 N.E.2d 33 (1967); Stach v. Sears, Roebuck and Co., 102

Ill.App.3d 397, 412, 57 Ill.Dec. 879, 429 N.E.2d 1242 (1st Dist. 1981).

The relationship of passenger and carrier exists only when the person is in the act of boarding, is upon, or is in the act of alighting from the carrier's vehicle. Katamay v. Chicago Transit Authority, 53 Ill.2d 27, 289 N.E.2d 623 (1972) (*citing* IPI 100.09). The scope of "boarding" the conveyance has been held to include standing in line to get on a train (Katamay, *supra*) and "alighting" the conveyance does not terminate until the passenger has had a reasonable opportunity to reach a place of safety. Garrett v. Grant School Dist. No. 124, 139 Ill.App.3d 569, 487 N.E.2d 699, 93 Ill.Dec. 874 (2d Dist.1985).

The common carrier's duty to protect its passengers also extends to acts committed by the carrier's employees, other passengers, and strangers. A common carrier undertakes by contract of carriage to protect its passengers. Therefore, the carrier is responsible for injury caused by the intentional acts of its employees regardless of whether the act was within the actual or apparent scope of the employee's authority. Chicago & Eastern Railroad Co. v. Flexman, 103 Ill. 546 (1882); McMahon v. Chicago City Railway Co., 239 Ill. 334, 88 N.E. 223 (1909).

However, when a passenger leaves a conveyance and reaches a place of safety, normal rules of respondeat superior apply. Horecker v. Pere Marquette R. Co., 238 Ill.App. 278 (1st Dist.1925).

A common carrier also owes the highest degree of care to protect its passengers from assault, injury, or abuse by other passengers or third parties. Where the common carrier knows, or from facts and circumstances known to it should anticipate the danger of assault to a passenger by a fellow passenger, then it has the duty to exercise the highest degree of care to protect a passenger from assault, injury or abuse. Blackwell v. Fernandez, 324 Ill.App. 597, 602-603; 59 N.E.2d 342, 344-345 (1st Dist.1945); McCoy v. Chicago Transit Authority, 69 Ill.2d 280, 371 N.E.2d 625, 13 Ill.Dec. 690 (1977); Letsos v. Chicago Transit Authority, 47 Ill.2d 437, 265 N.E.2d 650 (1970).

This duty arises only when the carrier has actual notice of a danger or notice of facts and circumstances that a danger probably exists. The carrier's knowledge is a prerequisite to the imposition of the duty of the highest degree of care. Anderson v. Yellow Cab Co., 28 Ill.App.3d 656, 329 N.E.2d 278 (1st Dist.1975).

Public Act 84-939, effective September 24, 1985, amended the Metropolitan Transit Authority Act (70 ILCS 3605/27 (1994)), the Regional Transportation Authority Act (70 ILCS 3615/2.08 (1994)), and the Local Mass Transit District Act (70 ILCS 3610/4 (1994)) excluding the entities governed by these acts, their board members, officers, and employees from liability for:

> [F]ailure to provide a security or police force or, if a security or police force is provided, for failure to provide adequate police protection or security, failure to prevent the commission of crimes by fellow passengers or other third persons or for the failure to apprehend criminals.

70 ILCS 3605/27 (1994).

The Illinois Supreme Court upheld the constitutionality of this Act in Bilyk v. Chicago Transit Authority, 125 Ill.2d 230, 531 N.E.2d 1, 125 Ill.Dec. 822 (1988). The Appellate Court in Young v. Chicago Transit Authority, 209 Ill.App.3d 84, 568 N.E.2d 18, 154 Ill.Dec. 18 (1st Dist.1990), held that the immunity afforded under this statute applied only prospectively from the statute's effective date of September 24, 1985.

In discharging its duty to passengers as a general class, a carrier has a qualified privilege under the common law to eject passengers for a failure to properly conduct themselves or obey reasonable rules. Carriers have the right to promulgate reasonable rules necessary to perform its statutory duty and may eject a passenger who violates such rules. Chicago & Alton Railroad Co. v. Willard, 31 Ill.App. 435 (4th Dist.1888). Railroad conductors are given the statutory power to arrest and eject passengers for specified acts under certain conditions. 610 ILCS 80/2, 80/3, 90/1, 90/2 (1994).

100.01 Duty Of Common Carrier To Passenger

At the time of the occurrence in question, the defendant, [name of carrier], was a common carrier. A common carrier is not a guarantor of its passengers' safety, but it has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by [rail, air, etc.]. Its failure to fulfill this duty is negligence.

Notes on Use

This instruction is not appropriate in a case where the affirmative act of a third person led to a passenger's injury. *Se*e IPI 100.02 (injury by third person); IPI 100.03 (injury by another passenger); IPI 100.04 (injury by carrier's employee). This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier.

Comment

This instruction sets forth the common law duty owed by a common carrier to its passengers. Loring v. Yellow Cab Co., 33 Ill.App.3d 154, 337 N.E.2d 428 (1st Dist.1975). While a common carrier owes its passengers the highest degree of care consistent with the operation of its vehicles, it is not an absolute insurer of its passengers' safety. A common carrier is not responsible for injuries suffered by a passenger unless a breach of the duty described herein is the proximate cause of the injury. Smith v. Chicago Limousine Service, Inc., 109 Ill.App.3d 755, 441 N.E.2d 81, 65 Ill.Dec. 289 (1st Dist.1982).

100.02 Duty Of Carrier To Protect Passengers From Injury By Third Persons

It was the duty of the defendant to exercise the highest degree of care consistent with the type of vehicle used and the practical operation of its business as a common carrier by [rail, air, etc.] to protect its passengers from the danger of injury from [e.g., stone throwing] of which it knew or should have anticipated from facts and circumstances known to it while the passengers were on its [train, plane, etc.] or while boarding or alighting therefrom. The failure of the defendant to fulfill this duty is negligence.

Notes on Use

This instruction is applicable when the injury is alleged to be the result of the direct conduct of a non-passenger. This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier.

Comment

This instruction, IPI 100.03 (common carrier's duty to protect passengers from assaults by other passengers) and IPI 100.12 (common carrier's duty to protect invitees from assault) have one rule of law in common. In order for any duty of protection to arise, the carrier must have notice of the actual danger, or notice from facts and circumstances known to it that the danger probably exists. Morris v. Chicago Transit Authority, 28 Ill.App.3d 183, 328 N.E.2d 208 (1st Dist.1975) (defendant had no notice of rock throwing incidents prior to occurrence); Blackwell v. Fernandez, 324 Ill.App. 597, 602-603; 59 N.E.2d 342, 344-345 (1st Dist.1945) (the carrier had notice from the insulting behavior of a drunk that an assault was likely); Neering v. Illinois Central R. Co., 383 Ill. 366, 378-380; 50 N.E.2d 497, 502-503 (1943) (the railroad was liable for an assault on a person waiting on a train platform by one of a group of hobos the railroad knew congregated in the area).

These situations where notice of the danger is required before a duty to protect from it arises must be distinguished from those situations in which the accident was caused by the act of a third person but the carrier was negligent in not guarding against the occurrence. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 51-52; 75 N.E. 436, 437 (1905) (railroad liable for injuries to passenger when boys threw unlocked and unattended switch); Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N.E. 960 (1893) (an instruction that the carrier was not liable if its tracks were “apparently” in good condition was held erroneous because the carrier had the duty to exercise the highest degree of care to discover the defects).

Amendments to the Metropolitan Transit Authority Act (70 ILCS 3605/27 (1994)), the Regional Transportation Authority Act (70 ILCS 3615/2.08 (1994)), and the Local Mass Transit District Act (70 ILCS 3610/4 (1994)), effective September 24, 1985, have exempted the Chicago Transit Authority and the other entities governed by these acts from liability for the failure to prevent the commission of crimes by fellow passengers or other third parties. *See* Introduction.

100.03 Duty Of Carrier To Protect Passengers From Other Passengers

It was the duty of the defendant to exercise the highest degree of care consistent with the type of vehicle used and the practical operation of its business as a common carrier by [rail, air, etc.] to protect its passengers while they were on its [train, plane, etc.], or while boarding or alighting therefrom, from [assault,] [injury,] [and] [abuse] from fellow passengers, of which it knew, or should have anticipated, from facts and circumstances known to it. The failure of the defendant to fulfill this duty is negligence.

[This obligation cannot be delegated to another. It is therefore not a defense for the defendant that another person, including [i.e., police department] failed to protect the defendant's passengers while they were on the defendant's [train, plane, etc.] from assault, injury and abuse from fellow passengers, of which the defendant knew, or should have anticipated from facts and circumstances known to it. Now, when I use the term "cannot be delegated" in these instructions, I mean that the duty must be performed by the defendant and cannot be left to some other person.]

Notes on Use

This instruction is applicable when the injury is alleged to be the result of the direct conduct of another passenger. This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier.

The bracketed second paragraph should only be used where evidence has been offered that a third party or entity (i.e., local police department) may have had a concurrent duty to protect the plaintiff or been present under circumstances where such third party or entity may have been expected to render protection to the plaintiff.

Comment

The duty to exercise the highest degree of care extends to the protection of passengers from assault by other passengers.

If the common carrier knows, or from facts and circumstances known to it should anticipate the danger of assault to a passenger by a fellow passenger, then it has the duty to exercise the highest degree of care to protect a passenger from assault, injury, or abuse. McCoy v. Chicago Transit Authority, 69 Ill.2d 280, 371 N.E.2d 625, 13 Ill.Dec. 690 (1977) (question of fact as to whether carrier should have been aware that three intoxicated men had propensity to cause injury); Watson v. Chicago Transit Authority, 52 Ill.2d 503, 288 N.E.2d 476 (1972) (question of fact whether bus driver should have known of danger presented by passengers brandishing a gun); Blackwell v. Fernandez, 324 Ill.App. 597, 602-603; 59 N.E.2d 342, 344-345 (1st Dist.1945) (the carrier had the duty to protect its passenger from abuse of a drunk and was therefore liable for the resulting knifing). This duty to protect passengers cannot be delegated by the carrier. The bracketed language was approved in Gordon v. Chicago Transit Authority, 128 Ill.App.3d 493, 470 N.E.2d 1163, 83 Ill.Dec. 743 (1st Dist.1984).

Amendments to the Metropolitan Transit Authority Act (70 ILCS 3605/27 (1994)), the

Regional Transportation Authority Act (70 ILCS 3615/2.08 (1994)), and the Local Mass Transit District Act (70 ILCS 3610/4 (1994)), effective September 24, 1985, have exempted the Chicago Transit Authority and the other entities governed by these acts from liability for the failure to prevent the commission of crimes by fellow passengers or other third parties. *See* Introduction.

100.04 Duty Of Carrier To Protect Passengers From Assault, Abuse, Or Intentional Harm By Employees

The defendant is liable for any injury caused to its passengers by any [assault] [abuse] [intentional harm] to them by an employee of the carrier [then on duty].

Notes on Use

The material in the last bracket, "then on duty," should only be used when this is an issue.

Comment

A common carrier undertakes by contract of carriage to protect its passengers. Therefore, when an employee is on duty, whether the act is or is not in the actual or apparent scope of authority is immaterial. In Chicago & E. R. Co. v. Flexman, 103 Ill. 546 (1882), a passenger who had lost his watch accused a brakeman of having it and was assaulted by the brakeman. The court held that whether or not the brakeman was furthering his employment was immaterial; the railroad by contract had undertaken to carry the passenger safely and treat him respectfully. McMahon v. Chicago City Ry. Co., 239 Ill. 334, 88 N.E. 223 (1909) (passenger knocked down in a scuffle between conductor and another passenger over a right to further "transfers").

However, when a passenger leaves a conveyance and reaches a place of safety, normal rules of respondeat superior apply. Horecker v. Pere Marquette R. Co., 238 Ill.App. 278 (1st Dist.1925) (railroad not liable for the assault of an off-duty gatekeeper on a husband accompanying his wife to the station).

100.05 Statutory Duty And Power Of Railroad Conductor To Arrest For Drinking Or Intoxication

There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that any person who shall drink any intoxicating liquor, or who shall be intoxicated in or upon any railroad car in use for the transportation of passengers, or in or about any railroad station or platform, shall be subject to arrest and conviction and any railroad conductor while on duty is authorized and empowered, for the purposes of enforcing this statute, to exercise all the powers conferred upon sheriffs. It is the duty of conductors to enforce this statute and to arrest without process any person who violates the statute and in so doing the railroad conductor shall be held to be acting for the State of Illinois and not as the employee of the railroad.

Notes on Use

This instruction should be used only where an arrest is made or attempted by a conductor. Where a conductor does not make an arrest, IPI 100.06 and 100.07 are more appropriate.

Comment

This instruction is based on 610 ILCS 90/1, 90/2 (1994).

100.06 Duty Of Carrier To Protect Passengers--Conductor Vested With Police Powers

There was in force in the State of Illinois at the time of the occurrence in question a certain statute which provided that the conductors of all railroad trains carrying passengers shall be vested with police powers while on duty on their respective trains. It is further provided in this statute that when any passenger [shall be guilty of disorderly conduct] [uses any obscene language, to the annoyance and vexation of passengers] [plays any games of cards or other games of chance for money or other valuable thing] upon any railroad train, the conductor of the train is authorized to stop the train and eject the passenger from the train, using only such force as may be necessary to accomplish the removal, and may command the assistance of the employees of the railroad company, or any of the passengers, to assist in the passenger's removal; but before ejecting the passenger the conductor shall tender to him any unused portion of the fare which he has paid.

In ejecting the passenger the conductor must exercise reasonable care to put him off at a reasonably safe place.

Comment

This instruction is based on 610 ILCS 80/2, 80/3 (1994). A carrier may have right to eject passenger but not at a time or under circumstances which make it dangerous to life or limb. Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N.E. 770 (1890) (noisy passenger forcibly ejected from train).

100.07 Conduct Of Passengers--Right Of Carriers To Eject

Passengers riding in public conveyances are required to conform their conduct to the ordinary and usual standards of passengers. They must also comply with reasonable rules and regulations of the carrier designed to provide for the safety and comfort of the passengers and the proper management of the conveyance as are made known to them.

The failure or refusal of a passenger so to conduct himself, or a violation of known reasonable rules and regulations of the carrier, results in a termination of his rights as a passenger. The defendant's employees then have the right to use such force as is reasonably necessary to eject the passenger from the conveyance on the tender by the carrier's employee to the plaintiff any unused portion of the fare which he has paid.

Comment

The carrier has the common law right to make and enforce reasonable and just rules enabling it to perform the duty owed to its passengers. Passengers must comply with such rules. A railroad may eject a passenger who violates reasonable rules and regulations. Chicago & Alton R. Co. v. Willard, 31 Ill.App. 435 (4th Dist.1888) (the railroad was privileged to eject a person who failed to produce a ticket by the time the train reached the next station and was forcibly put off). A train conductor has a statutory right to eject a passenger for failing to pay his lawful fare; the use of abusive, profane, vulgar, or obscene language; or conducting himself so as to make his presence offensive or unsafe to other passengers. 740 ILCS 135/31 (1994).

So long as the ejection does not employ unreasonable or unnecessary force and violence, it does not constitute an assault. People v. Ibom, 25 Ill.2d 585, 185 N.E.2d 690 (1962). The use of unreasonable force gives rise to a cause of action for damages against a train conductor. 740 ILCS 135/31 (1994).

100.08 Duty To Disabled, Infirm, Or Intoxicated Person, Or To A Child

When a carrier is aware that a passenger is [mentally or physically disabled] [feeble or infirm] [intoxicated] [a child traveling alone] so that the hazards of travel are increased as to [him] [her], it is the duty of the carrier to provide that additional care which the circumstances reasonably require. The failure of the defendant to fulfill this duty is negligence.

Notes on Use

This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier.

Comment

When a common carrier has actual knowledge that a person is suffering from some physical or mental disability, and further realizes that that person is in an unsafe place or cannot safely alight from its conveyance, the carrier owes him a duty to provide the additional care which his circumstances reasonably require. Burke v. Chicago & N.W. R. Co., 108 Ill.App. 565 (2d Dist.1902) (a helpless drunk was injured by a switching train after he had been deposited on a platform located between two sets of tracks). Chevalier v. Chicago Transit Authority, 338 Ill.App. 119, 86 N.E.2d 838 (1st Dist.1949) (carrier not on notice that drunk requires special attention when he was able to stand by himself). Dabney v. Baltimore & O.S.W. R. Co., 140 Ill.App. 269 (4th Dist.1908) (carrier's duty of additional care had terminated when drunk was deposited safely on platform and was later injured while trying to walk back to station along the tracks). Smorawski v. Chicago City R. Co., 211 Ill.App. 557, 561 (1st Dist.1918) (verdict affirmed for boy between 6 and 7 who fell from the back step of a streetcar where he was hanging by a grabrail).

100.09 Who Is A Passenger

When I use the word passenger, I mean a person who with the actual or implied consent of the carrier [is in the act of boarding] [is upon] [or] [is in the act of alighting from] the [vehicle] [conveyance] of a common carrier.

Notes on Use

IPI 100.10 covers the definition of a passenger when the issue of a transfer from one conveyance to another exists. IPI 100.11 covers the definition of a passenger on an elevator or escalator.

Comment

It is not a requirement that the plaintiff be in physical contact with the conveyance in order to occupy the status of passenger. In Katamay v. Chicago Transit Authority, 53 Ill.2d 27, 289 N.E.2d 623 (1972), the Illinois Supreme Court held that a woman standing on the platform provided for boarding and alighting was in the "act of boarding" if with the intent to board a standing train she was moving toward the train for that purpose. Although it is not necessary that a person shall have paid his fare or be in possession of a ticket, the person must put himself in the care of the carrier or directly within its control with the bona fide intention of becoming a passenger. Burns v. Regional Transp. Authority, 112 Ill.App.3d 464, 445 N.E.2d 348, 67 Ill.Dec. 868 (1st Dist.1982), *rev'd on other grounds sub nom.* Stack v. Regional Transp. Authority, 101 Ill.2d 284, 461 N.E.2d 969, 78 Ill.Dec. 135 (1984).

One who intends to become a passenger and boards a conveyance through the customary entrance becomes a passenger when expressly or impliedly accepted as such by the carrier. Illinois Cent. R. Co. v. O'Keefe, 168 Ill. 115, 119; 48 N.E. 294, 294 (1897) (a person who jumped on the baggage car platform of a moving train after the passenger doors had been closed was not impliedly accepted as a passenger by the railroad even though the conductor knew that someone had boarded the baggage car). Finley v. Chicago, A. & E. Ry. Co., 3 Ill.App.2d 436, 122 N.E.2d 594 (1st Dist.1954) (person who got on slowly-moving train at station only to be thrown off by a violent acceleration was a passenger). Actually paying a fare is unnecessary. Ruch v. Aurora, E. & C. R. Co., 150 Ill.App. 329 (2d Dist.1909) (plaintiff, who had fare and intended to pay it, was passenger notwithstanding conductor had not asked for the fare).

The relationship of passenger and carrier continues after the passenger alights until the passenger has had a reasonable opportunity to reach a place of safety. Loring v. Yellow Cab Co., 33 Ill.App.3d 154, 337 N.E.2d 428 (1st Dist.1975). From the moment a passenger reaches a place of safety, a common carrier owes a person only the duty of ordinary care. Sims v. Chicago Transit Authority, 4 Ill.2d 60, 122 N.E.2d 221 (1954) (person no longer a passenger after getting off streetcar in the middle of block and walking around in front of it where she was struck by streetcar coming in opposite direction).

100.10 Who Is A Passenger--Transfer From One Vehicle To Another At Issue

The duty of the defendant to a passenger to exercise the highest degree of care is suspended from the time the passenger alights at an intermediate point to transfer to another [train, plane, etc.] after the passenger has had a reasonable opportunity to reach a place of reasonable safety, and resumes when the passenger is in the act of boarding another [train, plane, etc.] within the time and place fixed by the transfer, to continue his journey. During the period from the time the plaintiff alighted from the defendant's [train, plane, etc.] and after he had a reasonable opportunity to reach a place of reasonable safety, until the time when he was in the act of boarding another of the defendant's [train, plane, etc.]s, the duty the defendant owed to the plaintiff was the same it owed to the general public, that is to exercise ordinary care.

A failure of the defendant to fulfill the duty applicable to the facts as you determine them to be in this case is negligence.

Notes on Use

This instruction is to be used only when there is a question of fact as to whether the injured person was in the process of transferring from one vehicle to another. This instruction may only be used in conjunction with IPI 100.09 defining a passenger. This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier under evidence giving rise to this instruction.

Comment

The duty of a common carrier to exercise the highest degree of care arises out of the contract of carriage in exchange for consideration. While the duty is continuous throughout this relationship and extends to transferring passengers from one conveyance to another, it is suspended from the time the carrier discharges a passenger at an intermediate point of his journey until the conveyance is resumed. The duty during the interim is one of ordinary care. Rotheli v. Chicago Transit Authority, 7 Ill.2d 172, 130 N.E.2d 172 (1955); Jones v. Chicago & N.W. Transp. Co., 206 Ill.App.3d 136, 563 N.E.2d 1120, 151 Ill.Dec. 14 (1st Dist.1990).

100.11 Who Is A Passenger--Elevator, Escalator Only

When I use the word passenger, I mean a person, who, with the actual or implied consent of the defendant, is [entering] [leaving] [or] [riding] upon an [elevator] [escalator] to be carried from one floor of the defendant's [building] [place of business] to another.

Notes on Use

This instruction is limited to passengers on elevators and escalators. For the definition of passengers in other situations *see* IPI 100.09, 100.10.

Comment

In elevator and escalator cases, whether the operator has accepted a person as a passenger will usually depend on the purpose for which the person is in the building. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N.E. 117 (1908) (an unsolicited, prospective employee who was directed to see the superintendent on the ninth floor was a passenger while on an elevator on the way down from that floor after he could not locate the superintendent); Heffernan v. Mandel Brothers, 297 Ill.App. 272, 17 N.E.2d 523 (1st Dist.1938) (a customer who slipped when an escalator jerked was a passenger).

100.12 Duty Of Carrier To Protect Invitees From Assault

It was the duty of the defendant to exercise ordinary care to protect [the plaintiff] [its invitees] while within or upon the premises of its [station] [depot] [platform] from the danger of assault of which it knew, or should have anticipated from facts and circumstances known to it.

Notes on Use

This instruction may be used when either a common carrier or terminal station operator is sued. This instruction should be used in conjunction with IPI 10.04.

The Premises Liability Act, 740 ILCS 130/1-130/4 (1994), abolished the distinction between licensees and invitees as to occurrences on or after September 12, 1984. The Act imposes a duty of ordinary care as to both licensees and invitees. Therefore, as to cases arising out of occurrences on or after September 12, 1984, "the plaintiff" will be used in the second line.

See IPI 120.06 as to duties to invitees for injuries other than assault.

Comment

The duties owed business visitors by common carriers in their stations and on their platforms was historically the same as that owed by the owners of business premises to their invitees. Haynes v. Chicago Transit Authority, 59 Ill.App.3d 997, 376 N.E.2d 680, 17 Ill.Dec. 534 (1st Dist.1978). Section 2 of the Premises Liability Act, 740 ILCS 130/2 (1994), provides (emphasis added):

> §2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of *any premises* to such entrants is abolished.
>
> The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

The statute therefore expanded the duty owed by the owner of any premises to include not only invitees, but licensees as well.

If the carrier's employees assault or injure the invitee, the carrier will be liable if the employee was acting in the actual or apparent scope of his duties. Horecker v. Pere Marquette R. Co., 238 Ill.App. 278 (1st Dist.1925) (the railroad was not liable for an assault by an off-duty gatekeeper on a husband accompanying his wife to the station).

On the other hand, if the assault is made by a stranger or another invitee, the carrier must know, or from facts or circumstances known to it should have known, that an assault was likely. Neering v. Illinois Central R. Co., 383 Ill. 366, 50 N.E.2d 497 (1943) (the railroad was liable to an invitee who was assaulted by one of a number of hobos, who usually congregated in that vicinity, while she was waiting for a train on the platform). Meyer v. Riverview Park Co., 342 Ill.App. 218, 96 N.E.2d 379 (1st Dist.1950) (defendant had no notice that a passenger who had just gotten off a roller-coaster would be assaulted by another passenger with whom he had a trivial scuffle before getting on the roller-coaster).

Amendments to the Metropolitan Transit Authority Act (70 ILCS 3605/27 (1994)), the Regional Transportation Authority Act (70 ILCS 3615/2.08 (1994)), and the Local Mass Transit District Act (70 ILCS 3610/4 (1994)), effective September 24, 1985, have exempted the Chicago Transit Authority and the other entities governed by these acts from liability for the failure to prevent the commission of crimes by fellow passengers or other third parties. *See* Introduction.

100.15 Place To Board And Alight

In selecting a place for the plaintiff to [board] [alight from] its vehicles, it was the duty of the defendant, as a common carrier, to exercise the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by [bus, taxi, etc.]. The failure of the defendant to fulfill this duty is negligence.

Notes on Use

This instruction shall be used in place of IPI 10.04 to define the duty underlying the issue of negligence when the defendant is a common carrier.

Comment

A common carrier has a duty to exercise the highest degree of care to a passenger, and that duty extends until the passenger has been given an opportunity to alight in a safe place. Miskunas v. Chicago Transit Authority, 42 Ill.App.3d 202, 355 N.E.2d 738 (1st Dist.1976). Therefore, the common carrier has a duty to furnish a reasonably safe place for a passenger to alight. Borus v. Yellow Cab Co., 52 Ill.App.3d 194, 367 N.E.2d 277, 9 Ill.Dec. 843 (1st Dist.1977); DeBello v. Checker Taxi Co., 8 Ill.App.3d 401, 290 N.E.2d 367 (1st Dist.1972); O'Shea v. Chicago Motor Coach Co., 328 Ill.App. 457, 66 N.E.2d 482 (1st Dist.1946) (the bus company was negligent when it stopped at a dark place where the street was severely cracked); Sims v. Chicago Transit Authority, 4 Ill.2d 60, 65; 122 N.E.2d 221, 223-224 (1954) (a streetcar discharged plaintiff at a reasonably safe place notwithstanding that it was in the middle of the block on a heavily-traveled street); Kiesel v. Chicago Transit Authority, 6 Ill.App.2d 13, 126 N.E.2d 170 (1st Dist.1955) (it was not negligent to let the plaintiff off on an icy patch where icy conditions were general throughout the city).

105.00
PROFESSIONAL NEGLIGENCE

INTRODUCTION

The jury instructions in the 105.00 series deal with negligence actions brought against professionals, including doctors, dentists, attorneys, architects and others. Generally, professional negligence actions are predicated on a failure of the professional to conform to the appropriate standard of care. In prior editions, the term "malpractice" was used. However, the committee believes that "professional negligence" more accurately describes the type of case in which these instructions can be used.

Actions based on the performance of a procedure on a patient by a medical professional without the consent of the patient or authorized individual are brought under the legal theory of assault and battery.

In an action for medical professional negligence the plaintiff must prove by expert testimony that the defendant physician failed to conform to the applicable standard of care unless the alleged negligence is grossly apparent or is obvious to a layman. Addison v. Whittenberg, 124 Ill.2d 287, 529 N.E.2d 552, 124 Ill.Dec. 571 (1988); Purtill v. Hess, 111 Ill.2d 229, 242; 489 N.E.2d 867, 872; 95 Ill.Dec. 305, 310 (1986); Walski v. Tiesenga, 72 Ill.2d 249, 381 N.E.2d 279, 21 Ill.Dec. 201(1978); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975). *See* 735 ILCS 5/2-1113 (1994). The applicable standard of care may also be proven by explicit manufacturer's instructions for proper use of a medication (Ohligschlager v. Proctor Community Hosp., 55 Ill.2d 411, 303 N.E.2d 392 (1973)), by cross-examination of the defendant (Metz v. Fairbury Hosp., 118 Ill.App.3d 1093, 455 N.E.2d 1096, 74 Ill.Dec. 472 (4th Dist.1983)), or by hospital licensing regulations or accreditation standards (Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989)).

The same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances. Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill.App.3d 479, 493 N.E.2d 6, 97 Ill.Dec. 524 (1st Dist.1986) (registered nurse); St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983) (dentist); Thompson v. Webb, 138 Ill.App.3d 629, 486 N.E.2d 326, 93 Ill.Dec. 225 (4th Dist.1985) (doctor); Laukkanen v. Jewel Tea Co., 78 Ill.App.2d 153, 222 N.E.2d 584 (4th Dist.1966) (engineer); Brown v. Gitlin, 19 Ill.App.3d 1018, 313 N.E.2d 180 (1st Dist.1974) (attorney); Rosos Litho Supply Corp. v. Hansen, 123 Ill.App.3d 290, 462 N.E.2d 566, 78 Ill.Dec. 447 (1st Dist.1984) (architect); Horak v. Biris, 130 Ill.App.3d 140, 474 N.E.2d 13, 85 Ill.Dec. 599 (2d Dist.1985) (social worker); Cereal Byproducts Co. v. Hall, 16 Ill.App.2d 79, 147 N.E.2d 383 (1st Dist.1958), *aff'd*, 15 Ill.2d 313, 155 N.E.2d 14 (1958) (accountant); Spilotro v. Hugi, 93 Ill.App.3d 837, 417 N.E.2d 1066, 49 Ill.Dec. 239 (2d Dist.1981) (veterinarian); Barnes v. Rakow, 78 Ill.App.3d 404, 396 N.E.2d 1168, 33 Ill.Dec. 444 (1st Dist.1979) (surveyor). Therefore, regardless of the defendant's profession, the same jury instructions may be used with appropriate modifications, if needed.

The Medical Malpractice Act, P.A. 84-7, modified the law of medical negligence for

cases filed after August 15, 1985. However, the Act did not require major changes in the professional negligence instructions in this chapter. The changes in jury instructions required by the Act are in the damages instructions. 735 ILCS 5/2-1109 (1994) (itemized verdicts); 735 ILCS 5/2-1707 (1994) (calculation of future damages).

Instructions dealing with informed consent, *res ipsa loquitur*, and the duty of a health care institution have been added to reflect the current state of the law. *See* 735 ILCS 5/2-622(3)(d) (1994).

105. 01 Professional Negligence – Duty

A _____ must possess and use
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

the knowledge, skill, and care ordinarily used by a reasonably careful

_____.
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

The failure to do something that a reasonably careful
_____
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

[practicing in the same or similar localities] would do, or the doing of something that a reasonably

careful _____ would not do, under
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

circumstances similar to those shown by the evidence, is "professional negligence".

The phrase "deviation from the standard of [care][practice]" means the same thing as

"professional negligence".

The law does not say how a reasonably careful _____would act
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

under these circumstances. That is for you to decide. In reaching your decision, you must rely upon

opinion testimony from qualified witnesses [and] [evidence of professional standards][evidence of

by-laws/rules/regulations/policies/procedures] [or similar evidence]. You must not attempt to

determine how a reasonably careful _____
[specialist/doctor/nurse/therapist/health-care provider/accountant/lawyer/other]

would act from any personal knowledge you may have.

Instruction and Notes on Use revised September 2011. Comment revised December 2011.

Notes on Use

The bracketed language ("deviation from the standard of practice") in the second paragraph may be more appropriate for an accountant or attorney malpractice case than the "deviation from the standard of care" language that is most appropriate for medical negligence cases.

The second paragraph must be given unless the Court determines that expert testimony is not necessary because the case falls within the "common knowledge" exception. *Jones v. Chicago HMO, Ltd. of Illinois,* 191 Ill.2d 278, 296, 730 N.E.2d 1119, 246 Ill.Dec. 654 (2000); *Borowski v. Van Solbrig,* 60 Ill.2d 418, 328 N.E.2d 301 (1975).

The bracketed language in paragraph three is limited to those cases where the evidence warrants its use and is not to be viewed as an alternative to expert testimony. *Studt v. Sherman Health Sys.,* 951 N.E.2d 1131, 2011 Ill. LEXIS 1093, 351 Ill.Dec. 467 (2011) (citing *Ohligshager v. Proctor Community Hosp.,* 55 Ill.2d 411, 303 N.E.2d 392 (1973); *Metz v. Fairbury Hosp.*, 118 Ill.App.3d 1093, 455 N.E.2d 1096, 74 Ill.Dec. 472 (1983)).

The locality rule has largely faded from current practice. If there is no issue of an applicable local standard of care, the locality language should be deleted. *Purtill v. Hess,* 111 Ill.2d 229, 489 N.E.2d 867, 95 Ill.Dec. 305 (1986); *Karsten v. McCray,* 157 Ill.App.3d 1, 509 N.E.2d 1376, 109 Ill.Dec. 364 (2d Dist. 1987). The locality rule has also been applied in attorney malpractice cases. *O'Brien v. Noble,* 106 Ill.App.3d 126, 435 N.E.2d 554, 61 Ill.Dec. 857 (4th Dist. 1982).

Comment

In *Studt v. Sherman Health Sys.*, 951 N.E.2d 1131, 2011 Ill. LEXIS 1093, 351 Ill.Dec. 467 (2011), the Illinois Supreme Court distinguished between professional medical negligence and institutional medical negligence, holding that expert opinion testimony is required in a professional medical negligence action, except in limited circumstances. Compare with IPI Civil 105.03.01 Duty of a Healthcare Institution – Institutional Negligence.

This instruction supersedes IPI 105.01 found in the IPI 2011 and previous editions.

105.02 Duty Of Specialist--Professional Negligence

[Withdrawn]

IPI 105.02 is withdrawn. Use the current version of IPI 105.01 for professional negligence cases against a specialist.

105.03 Duty To Refer To Specialist--Professional Negligence

[Withdrawn]

Comment

IPI 2d (Civil) contained a duty instruction on the duty of a physician to refer a patient to a specialist when ordinary care would so require. That instruction is withdrawn, and the Committee recommends that no such instruction be given. These allegations can be included in an appropriate issues instruction. The Committee believes that the legal duty of a professional to refer to a specialist is adequately covered by IPI 105.01 or 105.02 when used in conjunction with appropriate issues instructions.

105.03.01 Duty Of A Health Care Institution--Institutional Negligence

Negligence by a [hospital/other institution] is the failure to do something that a reasonably careful [hospital/other institution] would do, or the doing of something that a reasonably careful [hospital/other institution] would not do, under circumstances similar to those shown by the evidence.

[In deciding whether the defendant [hospital/other institution] was negligent, you may consider (opinion testimony from qualified witnesses) (evidence of professional standards) (evidence of by-laws/rules/regulations/policies/procedures) (evidence of community practice) (and other evidence) presented in this case.]

The law does not say how a reasonably careful [hospital/other institution] would act under these circumstances. That is for you to decide.

Notes on Use

This instruction incorporates the duty of a hospital or other treating institution as defined in Darling v. Charleston Community Memorial Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965). *See also* Stogsdill v. Manor Convalescent Home, Inc., 35 Ill.App.3d 634, 343 N.E.2d 589 (2d Dist.1976); Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Wogelius v. Dallas, 152 Ill.App.3d 614, 504 N.E.2d 791, 105 Ill.Dec. 506 (1st Dist.1987); Alford v. Phipps, 169 Ill.App.3d 845, 523 N.E.2d 563, 119 Ill.Dec. 807 (4th Dist.1988). Ordinarily, this duty involves the hospital's own management responsibility.

This instruction does not apply where the institution's liability is based on vicarious liability for the professional negligence of a doctor or nurse or similar professional. For such vicarious liability, use IPI 105.01 with appropriate agency instructions.

This instruction does not apply if the case involves only ordinary principles of negligence, such as premises liability, as opposed to *professional* negligence.

If the jury is entitled to rely on “common knowledge” in determining the standard of care, omit the second paragraph of this instruction.

Comment

A hospital is not an insurer of a patient's safety, but it owes the patient a duty of protection and must exercise reasonable care toward him as his known condition requires. Slater v. Missionary Sisters of the Sacred Heart, 20 Ill.App.3d 464, 314 N.E.2d 715 (1st Dist.1974). A hospital is under a duty to conform to the legal standard of reasonable conduct in light of the apparent risk. Ohligschlager v. Proctor Community Hosp., 55 Ill.2d 411, 303 N.E.2d 392 (1973); Johnson v. St. Bernard Hosp., 79 Ill.App.3d 709, 399 N.E.2d 198, 35 Ill.Dec. 364 (1st Dist.1979); Andrews v. Northwestern Memorial Hosp., 184 Ill.App.3d 486, 540 N.E.2d 447, 452; 132 Ill.Dec. 707, 712 (1st Dist.1989). “A hospital has an independent duty to its patients to review and supervise treatment.” *Id.*

Whether or not the defendant has conformed to this standard of care may be proved by a

wide variety of evidence, including, but not limited to, expert testimony, hospital by-laws, statutes, accreditation standards, customs, and community practice. Darling v. Charleston Community Memorial Hosp., 33 Ill.2d 326, 211 N.E.2d 253 (1965); Andrews v. Northwestern Memorial Hosp., 184 Ill.App.3d 486, 540 N.E.2d 447, 452; 132 Ill.Dec. 707, 712 (1st Dist.1989). There is no case law on whether the breach of the duty of an institution must be proven generally only by expert testimony or other evidence of professional standards. Accordingly, the second paragraph of this instruction does not use the mandatory language contained in the third paragraph of IPI 105.01. *See* Northern Trust Co. v. Louis A. Weiss Memorial Hosp., 143 Ill.App.3d 479, 492; 493 N.E.2d 6, 15; 97 Ill.Dec. 524, 533 (1st Dist.1986); Andrews v. Northwestern Memorial Hosp., *supra* (expert *medical* testimony not required in an institutional negligence case to establish standard of care).

One must distinguish cases of institutional *professional* negligence from cases that involve only ordinary principles of negligence, such as premises liability. *Compare* Kolanowski v. Illinois Valley Community Hosp., 188 Ill.App.3d 821, 544 N.E.2d 821, 136 Ill.Dec. 135 (3d Dist.1989) (hospital's alleged failure to provide adequate patient restraints, such as bed rails, was professional negligence requiring expert testimony) *with* Owens v. Manor Health Care Corp., 159 Ill.App.3d 684, 512 N.E.2d 820, 111 Ill.Dec. 431 (4th Dist.1987) (fall from wheelchair in nursing home involved only ordinary negligence). This instruction necessarily applies only to the former.

The predecessor version of this instruction and its Notes on Use were criticized in Ellig v. Delnor Community Hospital, 237 Ill.App.3d 396, 411-412; 603 N.E.2d 1203, 177 Ill.Dec. 829 (2d Dist.1992).

105.04 Delegation Of Duties--Professional Negligence

[Withdrawn]

Comment

IPI 2d (Civil) contained a duty instruction on the appropriateness in certain situations of the delegation of duties by a physician. That instruction is withdrawn, and the Committee recommends that no such instruction be given. These allegations can be included in an appropriate issues instruction. The Committee believes that the legal duty of a professional arising from the delegation of duties is adequately covered by IPI 105.01 or 105.02 when used in conjunction with appropriate issues instructions.

105.05 Consent To Procedure--Battery--Non-Emergency

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained.

[However, (if the patient is a minor) (if the patient lacks mental capacity to give consent), then the [insert appropriate medical professional person] is excused from obtaining consent of the patient to the procedure. In this situation the consent must be obtained from a person authorized to give consent to the [describe the procedure performed].]

Notes on Use

Any operation performed without consent in a non-emergency situation constitutes a battery. This instruction should not be given when the issue is informed consent. This instruction should only be used when the cause of action is the intentional tort of battery.

Comment

In performing an operation upon a patient, it is necessary to obtain the consent of the patient. This consent must be obtained from the patient unless the patient is legally unable or the patient's condition is such that obtaining consent would endanger the health of the patient. There are also exceptions for emergencies that develop during an operation or when the doctor determines that it is impracticable to obtain the consent of the patient or authorized person. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906); Beringer v. Lackner, 331 Ill.App. 591, 73 N.E.2d 620 (1st Dist.1947).

If the issue is whether or not the patient consented to the physician that performed the procedure, this instruction should be modified. Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983).

105.06 Emergency Arising During A Procedure--Battery

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained unless during the course of the [describe the procedure performed] an emergency arises requiring further or different treatment to protect the patient's health, and it is impossible or impracticable to obtain consent either from the patient or from someone authorized to consent for him. Whether there was such an emergency and whether it was impossible or impracticable to obtain consent is for you to decide.

Notes on Use

This instruction is proper only if the initial operation has been properly consented to and the cause of action is battery. It should not be given when the issue is informed consent and the cause of action is negligence.

Comment

Authority for this instruction was found in dictum in Pratt v. Davis, 224 Ill. 300, 309; 79 N.E. 562, 565 (1906), and Beringer v. Lackner, 331 Ill.App. 591, 73 N.E.2d 620 (1st Dist.1947). See Comment to IPI 105.05.

105.07 Emergency Arising Before A Procedure--Battery

Before a [insert appropriate medical professional person] may [describe the procedure performed] upon a patient, the consent of the patient for the [describe the procedure performed] must be obtained unless an emergency arises and treatment is required in order to protect the patient's health, and it is impossible or impracticable to obtain consent either from the patient or from someone authorized to consent for him. Whether there was such an emergency and whether it was impossible or impracticable to obtain consent is for you to decide.

Notes on Use

This instruction should not be given when the issue is informed consent and the cause of action is negligence. This instruction should only be given when the cause of action is battery.

Comment

See Pratt v. Davis, 224 Ill. 300, 309-310; 79 N.E. 562, 565 (1906).

Physicians who provide emergency care without a fee are not liable for their negligence. 225 ILCS 60/30 (1994). Other professionals or occupations are protected by similar "good Samaritan" laws. 225 ILCS 25/53 (1994) (dentists); 745 ILCS 20/1 (1994) (law enforcement officers and firemen); 225 ILCS 90/35 (1994) (physical therapists).

105.07.01 Informed Consent--Duty And Definition--Professional Negligence

In providing medical [services] [care] [treatment] to [patient's name], a [insert appropriate medical professional] must obtain [patient's name]'s informed consent.

When I use the expression "informed consent" I mean a consent obtained from a patient by a [insert appropriate medical professional] after the disclosure by the [insert appropriate medical professional] of those [risks of] [and] [or] [alternatives to] the proposed treatment which a reasonably well-qualified [insert appropriate medical professional] would disclose under the same or similar circumstances. A failure to obtain informed consent is professional negligence.

[The only way in which you may decide what (risks) (and) (or) (alternatives) the [insert appropriate medical professional] should have disclosed to [patient's name] is from expert testimony presented in the trial. You must not attempt to determine this from any personal knowledge you have.]

Notes on Use

This instruction is to be used when the case involves an allegation that the defendant failed to fully apprise the plaintiff of relevant factors affecting the plaintiff's decision concerning the service to be rendered. Such an action is based upon negligence.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

The third paragraph must be given unless the court determines that expert testimony is not necessary because the case falls within the "common knowledge" exception. Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980).

This instruction is not to be used where the patient has given consent to one professional and an unauthorized professional performs the service. Perna v. Pirozzi, 92 N.J. 446, 457 A.2d 431 (1983); Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983). In such cases, *see* IPI 105.05 or 105.06.

The phrase "in the same or similar localities" is deleted from this instruction because Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983), adopted a national standard and noted the inapplicability of the locality rule in informed consent cases. *See also* Weekly v. Solomon, 156 Ill.App.3d 1011, 510 N.E.2d 152, 109 Ill.Dec. 531 (2d Dist.1987).

Comment

This instruction differs from instructions based upon failure to obtain consent. Such actions are brought under a theory of battery. Informed consent is a negligence concept.

"The physician has a duty to disclose to the patient those risks, results or alternatives that

a reasonable medical practitioner of the same school, in the same or similar circumstances, would have disclosed." Miceikis v. Field, 37 Ill.App.3d 763, 767; 347 N.E.2d 320, 324 (1st Dist.1976). *See also* Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980); Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Hansbrough v. Kosyak, 141 Ill.App.3d 538, 490 N.E.2d 181, 95 Ill.Dec. 708 (4th Dist.1986).

Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983), adopted a national standard in defining what a reasonable physician under similar circumstances would disclose and noted the inapplicability of the locality rule in informed consent cases. *But see* Weekly v. Solomon, 156 Ill.App.3d 1011, 510 N.E.2d 152, 109 Ill.Dec. 531 (2d Dist.1987).

At the time of filing a professional negligence case relying upon informed consent, there must be filed a report from the reviewing health professional that there was a violation of what a reasonable health professional would have disclosed. 735 ILCS 5/2-622(3) (d) (1994). *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

The standard of disclosure must be proved by expert testimony (Magana v. Elie, 108 Ill.App.3d 1028, 439 N.E.2d 1319, 64 Ill.Dec. 511 (2d Dist.1982); Green v. Hussey, 127 Ill.App.2d 174, 262 N.E.2d 156 (1st Dist.1970); Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983); Sheahan v. Dexter, 136 Ill.App.3d 241, 483 N.E.2d 402, 91 Ill.Dec. 120 (3d Dist.1985)), unless the matters involved are common knowledge or within the experience of laymen (Taber v. Riordan, 83 Ill.App.3d 900, 403 N.E.2d 1349, 38 Ill.Dec. 745 (2d Dist.1980)).

105.07.02 Informed Consent--Issues Made By The Pleadings--Professional Negligence--One Plaintiff And One Defendant

[The plaintiff's complaint consists of ____ counts. The issues to be decided by you under Count ____ of the complaint are as follows:]

The plaintiff claims that the defendant failed to inform the plaintiff of those [risks of] [and] [or] [alternatives to] the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;

The plaintiff further claims that if the defendant had disclosed those [risks] [and] [or] [alternatives], a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed]; and

The plaintiff further claims that he was injured, and that the defendant's failure to disclose those [risks] [and] [or] [alternatives] was a proximate cause of that injury.

The defendant [denies that he failed to inform the plaintiff of those (risks of) (and) (or) (alternatives to) the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;] [denies that a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed] after being told of those (risks) (and) (or) (alternatives)]; [denies that the plaintiff was injured or sustained damages (to the extent claimed);] [and] [denies that any failure to disclose those (risks) (and) (or) (alternatives) was a proximate cause of any injury].

Notes on Use

This instruction should be used only for professional negligence cases based upon the failure to obtain the informed consent of the plaintiff.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

If the defendant has alleged any affirmative defenses, or if the defendant claims that the plaintiff was contributorily negligent, and if the trial court rules that the defendant has made a submissible case on any of these defenses, then appropriate language will need to be added to this instruction. *See, e.g.*, IPI 20.01.

If this instruction is given, IPI 105.07.01, defining informed consent, IPI 15.01, defining proximate cause, and IPI 105.07.03, the informed consent burden of proof instruction, must also be given.

Comment

Just as in all other negligence cases, the plaintiff must prove that the injury resulting from

the defendant's failure to make the required disclosure was proximately caused by the lack of informed consent. Green v. Hussey, 127 Ill.App.2d 174, 262 N.E.2d 156 (1970). In addition, Illinois follows the majority rule that, in informed consent cases, the plaintiff must also prove that a reasonable person in plaintiff's position would have chosen another alternative if the required disclosure had been made. Guebard v. Jabaay, 117 Ill.App.3d 1, 452 N.E.2d 751, 72 Ill.Dec. 498 (2d Dist.1983); St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983); Lowney v. Arciom, 232 Ill.App.3d 715, 597 N.E.2d 817, 173 Ill.Dec. 843 (3d Dist.1992).

This instruction may need to be modified in the situation where the medical procedure involves some type of aesthetic cosmetic surgery. Zalazar v. Vercimak, 261 Ill.App.3d 250, 633 N.E.2d 1223, 199 Ill.Dec. 232 (3d Dist.1993) (subjective causation standard for cosmetic surgery).

In informed consent cases, proof of causation may need to include expert testimony. St. Gemme v. Tomlin, 118 Ill.App.3d 766, 455 N.E.2d 294, 74 Ill.Dec. 264 (4th Dist.1983).

See also the Comment to IPI 105.07.01.

105.07.03 Informed Consent--Burden Of Proof On The Issues--Professional Negligence--One Plaintiff And One Defendant

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First, that the defendant failed to inform the plaintiff of those [risks of] [and] [or] [alternatives to] the [describe the procedure performed] which a reasonably well-qualified [insert appropriate medical professional] would have disclosed under the same or similar circumstances;

Second, that if the defendant had disclosed those [risks] [and] [or] [alternatives], a reasonable person in the plaintiff's position would not have submitted to the [describe the procedure performed].

Third, that the plaintiff was injured; and

Fourth, that the defendant's failure to disclose those [risks] [and] [or] [alternatives] was a proximate cause of the plaintiff's injury.

If you find from your consideration of all the evidence that all of these propositions have been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Notes on Use

This instruction should be used only for professional negligence cases based upon the failure to obtain the informed consent of the plaintiff.

In most cases, the evidence will show that what should have been disclosed consisted of the risks of the proposed treatment, alternatives to the proposed treatment, or both. However, if the evidence shows that some other factor (i.e., the relative benefits or lack of benefits of alternative treatments) should have been disclosed, then the instruction may be modified accordingly.

If the defendant has alleged any affirmative defenses, or if the defendant claims that the plaintiff was contributorily negligent, and if the trial court rules that the defendant has made a submissible case on any of these defenses, then the last paragraph of this instruction should be deleted and appropriate language added. *See, e.g.*, the last two paragraphs of IPI B21.02 (contributory negligence).

If this instruction is given, IPI 105.07.01, defining informed consent, IPI 15.01, defining proximate cause, and IPI 105.07.02, the informed consent issues instruction, must also be given.

Comment

See the Comments to IPI 105.07.01 and 105.07.02.

105.08 Ordinary Care--Duty To Follow Instructions--Submit To Treatment--Mitigation Of Damages--Professional Negligence

A patient must exercise ordinary care to [seek treatment] [follow reasonable medical (advice) (instructions)]. A physician is not liable for the consequences of a patient's failure to do so. A patient's failure to use ordinary care in obtaining treatment or in following instructions does not absolve the physician from any damages resulting from the physician's negligence. It only absolves the physician from any damages caused by the patient's failure to exercise ordinary care to [seek treatment] [follow reasonable medical (advice) (instructions)].

Notes on Use

This instruction applies only to those instances where the defendant claims that the plaintiff has failed to mitigate his damages by failing to use ordinary care in not seeking treatment or in not following the doctor's instructions concerning treatment. If this instruction is given, also use IPI 10.02 (ordinary care), modified as appropriate.

Comment

Once an injury has occurred as a proximate result of medical negligence, the patient has a continuing duty to follow the instruction of physicians in order to mitigate his damages. Haering v. Spicer, 92 Ill.App. 449 (1900); Littlejohn v. Arbogast, 95 Ill.App. 605 (1901). A physician will not be held liable for any injuries resulting from the patient's failure to follow instructions, but the physician will continue to be responsible for the injury caused by his original professional negligence. Wesley v. Allen, 235 Ill.App. 322 (4th Dist.1925); Krauss v. Ballinger, 171 Ill.App. 534 (1912).

This bar of recovery for additional injuries proximately caused by plaintiff's failure to mitigate damages has been consistently recognized in cases not involving professional negligence. Culligan Rock River Water Conditioning Co. v. Gearhart, 111 Ill.App.3d 254, 443 N.E.2d 1065, 66 Ill.Dec. 902 (2d Dist.1982). *See* IPI 33.01. Defendant must plead and prove plaintiff's failure to mitigate damages. Nancy's Home of the Stuffed Pizza, Inc. v. Cirrincione, 144 Ill.App.3d 934, 494 N.E.2d 795, 98 Ill.Dec. 673 (1st Dist.1986).

It is important, of course, to distinguish between mitigation of damages and contributory negligence. *See* Newell v. Corres, 125 Ill.App.3d 1087, 466 N.E.2d 1085, 81 Ill.Dec. 283 (1st Dist.1984).

105.09 *Res Ipsa Loquitur*--Burden Of Proof--Professional Negligence--Where No Claim Of Contributory Negligence

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [patient's name] was injured.

Second: That the injury [was received from] [occurred during] a [name of instrumentality or procedure] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, this injury would not have occurred if the defendant had used a reasonable standard of professional care while the [name of instrumentality or procedure] was under his [control] [management].

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to the [instrumentality or procedure] while it was under his [control] [management].

If you do draw such an inference, and if you further find that [patient's name]'s injury was proximately caused by that negligence, your verdict should be for the plaintiff [under this Count]. On the other hand, if you find that any of these propositions has not been proved, or if you find that the defendant used a reasonable standard of professional care for the safety of [patient's name] in his [control] [management] of the [instrumentality or procedure], or if you find that the defendant's negligence, if any, was not a proximate cause of [patient's name]'s injury, then your verdict should be for the defendant [under this Count].

[Whether the injury in the normal course of events would not have occurred if the defendant had used a reasonable standard of professional care while the [instrumentality or procedure] was under his [control] [management] must be determined from expert testimony presented in this trial. You must not attempt to determine this question from any personal knowledge you have.]

Notes on Use

Where the defendant charges contributory negligence, use IPI B105.09 in lieu of this instruction.

Unlike the old versions of the *res ipsa loquitur* instructions, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase “burden of proof.”

If the patient's/client's contributory negligence is an issue, IPI B21.07 should also be given.

Use “had been” in the second element if the instrumentality was not under the defendant's control at the time of the injury.

The bracketed final paragraph should not be used when the relevant *res ipsa* issue falls within the common knowledge exception. In all other cases the paragraph must be used. *See* 735 ILCS 5/2-1113 (1994). *See also* Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989).

This instruction should only be given where *res ipsa* is raised in a professional negligence case. In all other cases use IPI B22.01.

Comment

The doctrine of *res ipsa loquitur* is clearly applicable to medical negligence cases. The doctrine that is applicable is the same as defined in Metz v. Central Illinois Elec. & Gas Co., 32 Ill.2d 446, 207 N.E.2d 305 (1965), and as incorporated in the present IPI *res ipsa* instructions, IPI 22.01. Gatlin v. Ruder, 137 Ill.2d 284, 560 N.E.2d 586, 148 Ill.Dec. 188 (1990); Spidle v. Steward, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980). *See also* Edgar County Bank & Trust Co. v. Paris Hosp., Inc., 57 Ill.2d 298, 312 N.E.2d 259 (1974); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975); Alton v. Kitt, 103 Ill.App.3d 387, 431 N.E.2d 417, 59 Ill.Dec. 132 (4th Dist.1982). In Walker v. Rumer, 72 Ill.2d 495, 500; 381 N.E.2d 689, 691; 21 Ill.Dec. 362, 364 (1978), the supreme court stated that *res ipsa* was applicable in every malpractice case where it is shown that the injury would not have happened had proper care been used. The Walker court stated:

> The requirement for the application of the doctrine of *res ipsa loquitur* is not that the surgical procedure be "commonplace" or that the "average person" be able to understand what is involved; the determination which must be made as a matter of law is whether "the occurrence is such as in the ordinary course of things would not have happened" if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of laymen or expert testimony.

There is no reason the doctrine would not also be applicable to other professionals outside the medical area.

735 ILCS 5/2-622 (1994) provides that at the time of filing a professional negligence case relying upon *res ipsa loquitur*, there must be filed a report from a reviewing health care professional that professional negligence has occurred in the course of treatment. In addition, there must be a certification that this doctrine is being relied upon. *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

See Comment to IPI B22.01.

B105.09 *Res Ipsa Loquitur*--Burden Of Proof--Professional Negligence--Where Contributory Negligence Is Claimed

[Under Count ____,] The plaintiff has the burden of proving each of the following propositions:

First: That [patient's name] was injured.

Second: That the injury [was received from] [occurred during] a [name of instrumentality or procedure] which [was] [had been] under the defendant's [control] [management].

Third: That in the normal course of events, this injury would not have occurred if the defendant had used a reasonable standard of professional care while the [name of instrumentality or procedure] was under his [control] [management].

[Whether the injury in the normal course of events would not have occurred if the defendant had used a reasonable standard of professional care while the [instrumentality or procedure] was under his [control] [management] must be determined from expert testimony presented in this trial. You must not attempt to determine this question from any personal knowledge you have.]

If you find that each of these propositions has been proved, the law permits you to infer from them that the defendant was negligent with respect to [instrumentality or procedure] while it was under his [control] [management].

If you do draw such an inference, and if you further find that [patient's name]'s injury was proximately caused by that negligence, you must next consider the defendant's claim that [patient's name] was contributorily negligent.

As to that claim, the defendant has the burden of proving each of the following propositions:

First, that [patient's name] acted or failed to act in one of the ways claimed by the defendant as stated to you in these instructions and that in so acting, or failing to act, [patient's name] was negligent;

Second, that [patient's name]'s negligence was a proximate cause of his injury.

You must reach one of the following four verdicts (A, B, C, or D):

A:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has not proved both of the propositions required of him, then your verdict should be for the plaintiff [under this Count] and you will not reduce the plaintiff's damages.

B:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has proved both of the propositions required of him, and if you further find that [patient's name]'s contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the plaintiff [under this Count] and you will reduce the plaintiff's damages in the manner stated to you in these instructions.

C:. If you have found that the defendant was negligent and that that negligence was a proximate cause of plaintiff's injury, and if you further find that the defendant has proved both of the propositions required of him, and if you further find that [patient's name]'s contributory negligence was greater than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.

D:. If you find that any of the propositions required of the plaintiff has not been proved, or if you find that the defendant used a reasonable standard of professional care for the safety of

[patient's name] in his [control] [management] of the [instrumentality or procedure], or if you find that the defendant's negligence, if any, was not a proximate cause of [patient's name]'s injury, then your verdict should be for the defendant [under this Count].

Notes on Use

This instruction should be used only if contributory negligence is claimed. If not, use IPI 105.09.

Unlike the old versions of the *res ipsa loquitur* instructions, this instruction is now a complete burden of proof instruction. This instruction must be given with IPI 21.01, which defines the phrase "burden of proof." IPI B21.07 has been combined with this instruction, and therefore B21.07 should *not* be given when this instruction is used.

Use "had been" in the second element if the instrumentality was not under the defendant's control at the time of the injury.

The bracketed final paragraph should not be used when the relevant *res ipsa* issue falls within the common knowledge exception. In all other cases the paragraph must be used. *See* 735 ILCS 5/2-1113 (1994). *See also* Smith v. South Shore Hosp., 187 Ill.App.3d 847, 543 N.E.2d 868, 135 Ill.Dec. 300 (1st Dist.1989).

This instruction should only be given where *res ipsa* is raised in a professional negligence case. In all other cases use IPI B22.01.

Comment

The doctrine of *res ipsa loquitur* is clearly applicable to medical negligence cases. The doctrine that is applicable is the same as defined in Metz v. Central Illinois Elec. & Gas Co., 32 Ill.2d 446, 207 N.E.2d 305 (1965), and as incorporated in the present IPI *res ipsa* instructions, IPI B22.01. Gatlin v. Ruder, 137 Ill.2d 284, 560 N.E.2d 586, 148 Ill.Dec. 188 (1990); Spidle v. Steward, 79 Ill.2d 1, 402 N.E.2d 216, 37 Ill.Dec. 326 (1980). *See also* Edgar County Bank & Trust Co. v. Paris Hosp., 57 Ill.2d 298, 312 N.E.2d 259 (1974); Borowski v. Von Solbrig, 60 Ill.2d 418, 328 N.E.2d 301 (1975); Alton v. Kitt, 103 Ill.App.3d 387, 431 N.E.2d 417, 59 Ill.Dec. 132 (4th Dist.1982). In Walker v. Rumer, 72 Ill.2d 495, 500; 381 N.E.2d 689, 691; 21 Ill.Dec. 362, 364 (1978), the supreme court stated that *res ipsa* was applicable in every malpractice case where it is shown that the injury would not have happened had proper care been used. The Walker court stated:

> The requirement for the application of the doctrine of *res ipsa loquitur* is not that the surgical procedure be "commonplace" or that the "average person" be able to understand what is involved; the determination which must be made as a matter of law is whether "the occurrence is such as in the ordinary course of things would not have happened" if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of laymen or expert testimony.

There is no reason the doctrine would not also be applicable to other professionals outside the medical area.

735 ILCS 5/2-622 (1994) provides that at the time of filing a professional negligence case relying upon *res ipsa loquitur*, there must be filed a report from a reviewing health care professional that professional negligence has occurred in the course of treatment. In addition, there must be a certification that this doctrine is being relied upon. *See* DeLuna v. St. Elizabeth's Hosp., 147 Ill.2d 57, 588 N.E.2d 1139, 167 Ill.Dec. 1009 (1992) (§2-622 held constitutional).

See Comment to IPI B22.01.

105.10 Claims Based On Apparent Agency--Both Principal And Agent Sued--Principal Sued Under Respondeat Superior Only--Medical Malpractice Actions--Reliance On Principal Alleged

Under certain circumstances, the liability of a party may arise from an act or omission of that party's apparent agent.

In the present case, [plaintiff's name] has sued [principal's name] as the principal and [apparent agent's name] as [his] [her] [its] apparent agent. [principal's name] denies that any apparent agency relationship existed.

In order for an apparent agency relationship to have existed, [plaintiff's name] must prove the following:

First, that [principal's name] held [himself] [herself] [itself] out as a provider of [type of care, *e.g.*, complete emergency room care] and that [plaintiff's/decedent's name] neither knew nor should have known that [apparent agent's name] was not an employee of [principal's name].

Second, that [plaintiff's/decedent's name] [or others] did not choose [apparent agent's name] but relied upon [principal's name] to provide [type of care, *e.g.*, complete emergency room care].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, and if you find that [apparent agent's name] is liable, then both [defendant] and [defendant] are liable.

If you find that [apparent agent's name] is not liable, then neither [defendant] nor [defendant] is liable for the acts of [apparent agent's name].

If you find that [apparent agent's name] is liable, but that [he] [she] [it] was not the apparent agent of [principal's name] at the time of the occurrence, then [principal's name] is not liable for the acts of [apparent agent's name].

Notes on Use

This instruction should be used where the issue of apparent agency is in dispute, the principal and agent are sued in the same case, and plaintiff alleges reliance on a “holding out” by the principal. If plaintiff alleges reliance on a “holding out” by an agent and “acquiescence” by the principal, please refer to Gilbert v. Sycamore, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993), for a discussion for the necessary elements. If there is a basis for liability against the principal independent of apparent agency, this instruction should be modified accordingly or replaced by other instructions.

This instruction is intended to apply where apparent agency is alleged relative to a hospital or other such institutional provider. The instruction should not be used without modification where apparent agency is alleged relative to a health maintenance organization or health insurance provider. *See* Petrovich v. Share Health Plan of Illinois, 188 Ill.2d 17, 719 N.E.2d 756, 241 Ill.Dec. 627 (1999). Moreover, the instruction should not be used without modification where apparent agency is alleged in contexts other than medical negligence. *See* O'Banner v. McDonald's Corp., 173 Ill.2d 208, 670 N.E.2d 632, 218 Ill.Dec. 910 (1992).

The bracketed phrase “or others” in the instruction should be used where there is evidence that a person or persons other than the plaintiff or the decedent relied upon the principal

to provide the medical care under consideration. Please refer to the Comment below for a discussion of this issue.

If the issue of apparent agency is in dispute and the principal is sued alone, IPI 105.11 should be used.

Comment

This instruction reflects the opinion of the Illinois Supreme Court in Gilbert v. Sycamore, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993). Gilbert set forth and explained the elements necessary to establish apparent agency, namely, a "holding out" and "justifiable reliance." In Gilbert, the court further held that apparent agency cannot be established in situations where a patient knew or should have known that the physician providing treatment was not an agent or employee of the hospital. *Id.* at 524. In reaching its decision, the Gilbert court referred to "two realities of modern hospital care": first, that health care providers increasingly hold themselves out to the public as providers of health care through their marketing efforts; and, secondly, that patients have come to rely upon the reputations of hospitals in seeking health care. *Id*.

The element of "holding out" is satisfied where it is proven that the principal acted in a manner which would lead a reasonable person to conclude that the physician alleged to be negligent was an agent or employee of the principal. *Id*.

The element of "justifiable reliance" is satisfied where there is reliance upon the hospital to provide care, rather than upon a specific physician. *Id*. A pre-existing physician--patient relationship will not preclude a claim by the patient of reliance upon the hospital. Malanowski v. Jabamoni, 293 Ill.App.3d 720, 727; 688 N.E.2d 732, 738; 228 Ill.Dec. 34 (1st Dist.1997).

Although Gilbert involved an emergency room setting, the Gilbert analysis is not limited to such situations. *See, e.g.*, Malanowski v. Jabamoni, 293 Ill.App.3d 720, 688 N.E.2d 732, 228 Ill.Dec. 34 (1st Dist.1997) (applying Gilbert to an outpatient clinic situation).

In the absence of proof of actual reliance by plaintiff, several appellate decisions hold that the element of justifiable reliance may be satisfied where there is reliance by those acting on behalf of the plaintiff. *See, e.g.*, Monti v. Silver Cross Hospital, 262 Ill.App.3d 503, 507-508; 637 N.E.2d 427, 201 Ill.Dec. 838 (3d Dist.1994) (emergency personnel brought patient to hospital); Golden v. Kishwaukee Community Health Services, 269 Ill.App.3d 37, 46; 206 Ill.Dec. 314, 645 N.E.2d 319 (1st Dist.1994) (plaintiff brought to hospital at direction of plaintiff's friends); Kane v. Doctors Hospital, 302 Ill.App.3d 755, 706 N.E.2d 71, 235 Ill.Dec. 811 (4th Dist.1999) (plaintiff's personal physician arranged for treatment at hospital); Scardina v. Alexian Brothers Medical Center, 308 Ill.App.3d 359, 719 N.E.2d 1150, 241 Ill.Dec. 747 (1st Dist.1999) (plaintiff's physician referred him to a hospital where he was seen by a radiologist). But see, Butkiewicz v. Loyola University Medical Center, slip op. No. 1-98-2899 (1st Dist. Feb. 7, 2000) (disagreeing with Kane, distinguishing Monti, and finding that plaintiff's reliance on his "trusted" physician did not constitute "justifiable reliance" as to the defendant hospital).

105.11 Claims Based On Apparent Agency--Principal Sued, But Not Agent--Principal Sued Under Respondeat Superior Only--Medical Malpractice Actions--Reliance On Principal Alleged

Under certain circumstances, the liability of a party may arise from an act or omission of that party's apparent agent.

In the present case, [plaintiff's name] has sued [principal's name] as the principal. [plaintiff's name] claims that [apparent agent's name] was the apparent agent of [principal's name]. [principals' name] denies that any apparent agency relationship existed.

In order for an apparent agency relationship to have existed, [plaintiff's name] must prove the following:

First, that [principal's name] held [himself] [herself] [itself] out as a provider of [type of care, *e.g.*, complete emergency room care] and that [plaintiff's/decedent's name] neither knew nor should have known that [apparent agent's name] was not an employee of [principal's name].

Second, that [plaintiff's/decedent's name] [or others] did not choose [apparent agent's name] but relied upon [principal's name] to provide [type of care, *e.g.*, complete emergency room care].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, then any act or omission of [apparent agent's name] was the act or omission of [principal's name], and [principal's name] is liable for the acts or omissions of [apparent agent's name].

If you find that [apparent agent's name] was the apparent agent of [principal's name] at the time of the occurrence, then any act or omission of [apparent agent's name] was the act or omission of [principal's name], and [principal's name] is not liable for the acts or omissions of [apparent agent's name].

Notes on Use

This instruction should be used where the issue of apparent agency is in dispute, the principal alone is sued, and plaintiff alleges reliance upon a “holding out” on the part of the principal. If plaintiff alleges reliance upon a “holding out” by the agent and “acquiescence” by the principal, please see Gilbert v. Sycamore, 156 Ill.2d 511, 622 N.E.2d 788, 190 Ill.Dec. 758 (1993), for a discussion of the necessary elements. If there is a basis for liability against the principal independent of apparent agency, this instruction should be modified accordingly or replaced by other instructions. IPI 105.10 should be used where the issue of apparent agency is in dispute and where the principal and agent are sued in the same case.

Comments

Please refer to the comment to IPI 105.10.

110.00
ANIMALS

PERMISSION TO PUBLISH GRANTED IN 2003

INTRODUCTION

This chapter contains instructions for cases involving the special common law and statutory liability rules governing physical harm to persons or property caused by animals.

"Wild" or Inherently Dangerous Nondomestic Animals: Common Law Strict Liability

The owner or keeper of an animal which is not commonly domesticated is subject to common law strict liability for injuries caused by that animal. Restatement (Second) of Torts §507 (1977). The injury must be caused by a dangerous propensity which is characteristic of such an animal, or of which the possessor has reason to know. *Id*. §507(2).

Although liability is strict, certain defenses are available--for example, the fact that the plaintiff trespassed into the animal's presence (*id*. §511) or assumed the risk (*id*. §515), or when the possessor was required by law to keep or transport the animal (*id*. §517).

In Illinois, it is now unlawful to possess a "dangerous animal," defined as a "lion, tiger, leopard, ocelot, jaguar, cheetah, margay, mountain lion, lynx, bobcat, jaguarundi, bear, hyena, wolf or coyote, or any poisonous or life-threatening reptile," and the fact that an attempt was made to domesticate the animal is no defense. 720 ILCS 585/0.1-585/4 (1994). *See* People v. Fabing, 143 Ill.2d 48, 570 N.E.2d 329, 155 Ill.Dec. 816 (1991).

Domestic Animals: Common Law Strict Liability

Illinois follows the general common law rule that the owner or keeper of a domestic animal (most often dogs, cats, and horses or other livestock) is strictly liable for injuries caused by the animal only if the plaintiff can show that the animal had an uncommon "mischievous" or dangerous propensity to commit such an injury and that the owner had actual knowledge of that propensity. Domm v. Hollenbeck, 259 Ill. 382, 385; 102 N.E. 782, 783 (1913); Forsyth v. Dugger, 169 Ill.App.3d 362, 523 N.E.2d 704, 707, 119 Ill.Dec. 948, 951 (4th Dist.1988). *Accord*: Restatement (Second) of Torts §509 (1977).

Domestic Animals: Statutory Strict Liability

By statute, Illinois has broadened the strict liability of owners and keepers of animals. Section 16 of the Illinois Animal Control Act (510 ILCS 5/16 (1994)) provides:

> If a dog or other animal,[1] without provocation, attacks or injures any person who

[1] The statute, which originally applied only to dogs, was amended in 1973 to add the phrase "or other animal." A different section of the Act defines the term "animal" as "any animal, other than

> is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

"Owner" is defined as "any person[2] having a right of property in a dog or other animal, or who keeps or harbors a dog or other animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog or other domestic animal to remain on or about any premise occupied by him." 510 ILCS 5/2.16 (1994).

The statute thus eliminates the requirement that the "owner" have prior knowledge of the vicious or dangerous propensity of his animal. Steinberg v. Petta, 114 Ill.2d 496, 501 N.E.2d 1263, 103 Ill.Dec. 725 (1986). Under section 16, there are only four elements which the plaintiff must prove: (1) injury caused by an animal "owned" by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured; and (4) the presence of the injured person in a place where he has a right to be. Robinson v. Meadows, 203 Ill.App.3d 706, 710; 561 N.E.2d 111, 113; 148 Ill.Dec. 805, 807 (5th Dist.1990).

Common law strict liability and section 16 of the Animal Control Act are concurrent remedies; a plaintiff may seek recovery under either or both. Steichman v. Hurst, 2 Ill.App.3d 415, 275 N.E.2d 679 (1971); Reeves v. Eckles, 77 Ill.App.2d 408, 222 N.E.2d 530 (1966). While there may be situations in which the plaintiff will need to rely on the common law remedy, in most cases the statutory action will be preferred.

Provocation

Under both common law strict liability and section 16 of the Animal Control Act, plaintiff's provocation of the animal will defeat liability. (At common law, provocation is a defense; under section 16, plaintiff must prove his lack of provocation.) *See* Comment to IPI 110.04, *infra*.

Statutory Liability: Domestic Animals Running At Large

Another cause of action is created by the Domestic Animals Running At Large Act (DARAL) (510 ILCS 55/1-55/5.1 (1994)):

> No person or owner of livestock[3] shall allow livestock to run at large in the State

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man, which may be affected by rabies." 510 ILCS 5/2.02 (1994). However, no court so far has decided whether the term "animal" in section 16 is limited by this definition or whether it is all-inclusive.

[2] "Person" is defined to include any "person, firm, corporation, partnership, society, association or other legal entity, any public or private institution, the State of Illinois, municipal corporation or political subdivision of the State, or any other business unit." 510 ILCS 5/2.17 (1994).

[3] "Livestock" is defined as "bison, cattle, swine, sheep, goats, equidae, or geese." 510 ILCS

> of Illinois. All owners of livestock shall provide the necessary restraints to prevent such livestock from so running at large and shall be liable in civil action for all damages occasioned by such animals running at large; Provided, that no owner or keeper of such animals shall be liable for damages in any civil suit for injury to the person or property of another caused by the running at large thereof, without the knowledge of such owner or keeper, when such owner or keeper can establish that he used reasonable care in restraining such animals from so running at large.

510 ILCS 55/1 (1994). This statute applies only when grazing livestock escape from confinement. Moore v. Roberts, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990). Plaintiff must prove that (1) the owner had knowledge of the animal's escape, and (2) the owner was negligent in constructing or maintaining the enclosure. Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 1310; 158 Ill.Dec. 913, 917 (2d Dist.1991); O'Gara v. Kane, 38 Ill.App.3d 641, 348 N.E.2d 503 (5th Dist.1976); Guay v. Neel, 340 Ill.App. 111, 91 N.E.2d 151 (1st Dist.1950).

A typical case under this statute involves a horse or bovine that wanders onto a highway and is struck by the plaintiff's vehicle.

This statute is construed as an exception to section 16 of the Animal Control Act. If the DARAL applies, it is the exclusive remedy. Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991); Zears v. Davison, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987); McQueen v. Erickson, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978).

Strict Liability: Animals Entering Fenced Enclosure

A provision of the Fences Act (765 ILCS 130/1-130/21 (1994)) makes the owner of certain animals ("horse, mule, ass, or any neat cattle, hogs or sheep, or other domestic animals") strictly liable for all damages caused when the animals break into plaintiff's "inclosure, the fence being good and sufficient." 765 ILCS 130/20 (1994).

Common Law Negligence Liability

Although it has been suggested that the foregoing remedies replace common law negligence liability for injuries caused by a domestic animal (Forsyth v. Dugger, 169 Ill.App.3d 362, 523 N.E.2d 704, 707; 119 Ill.Dec. 948, 951 (4th Dist.1988), *citing* Beckert v. Risberg, 50 Ill.App.2d 100, 199 N.E.2d 811 (1st Dist.1964), *rev'd on other grounds*, 33 Ill.2d 44, 210 N.E.2d 207 (1965)), such an assertion is probably too broad. Forsyth and Beckert merely hold that a common law negligence action requires an allegation that the owner had knowledge of the animal's vicious propensity. *Accord:* Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158

55/1.1 (1994). This provision has been interpreted literally; thus, turkeys (McPherson v. James, 69 Ill.App. 337 (3d Dist.1897)) and ducks (Hamilton v. Green, 44 Ill.App.3d 987, 358 N.E.2d 1250, 3 Ill.Dec. 565 (2d Dist.1976)) are not included.

Ill.Dec. 913 (2d Dist.1991); *see* Domm v. Hollenbeck, 259 Ill. 382, 385; 102 N.E. 782, 783 (1913). Given the presumption that domestic animals are inherently harmless to humans, this allegation will be essential to any negligence claim arising out of an animal's attack. Lucas v. Kriska, 168 Ill.App.3d 317, 522 N.E.2d 736, 119 Ill.Dec. 74 (1st Dist.1988). Therefore, with the addition of this limitation, one should be able to assert a negligence cause of action in addition to, or in lieu of, common law or statutory strict liability claims for violence by domestic animals. *Id*.

In addition, there is no apparent reason why a negligence claim could not be made with respect to other types of injuries that happen to involve animals. *See* Ward v. Ondrejka, 5 Ill.App.3d 1068, 284 N.E.2d 470 (1st Dist.1972) (plaintiffs injured when auto struck steer on highway; common law liability assumed, but no negligence proved); Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991) (auto struck horse on highway; plaintiff failed to show dangerous disposition of which defendant was aware); Hamilton v. Green, 44 Ill.App.3d 987, 990; 358 N.E.2d 1250, 1252; 3 Ill.Dec. 565, 567 (2d Dist.1976) (plaintiff injured chasing stray ducks; no liability).

110.01 Inherently Dangerous Or "Wild" Animal--Common Law Strict Liability

One who [keeps] [owns] a [e.g., bear] is liable for injury caused by that animal [unless the person injured has deliberately provoked the animal] [, or] [unless the person injured, knowing of the animal's propensity to violence, voluntarily exposed himself to injury].

Notes on Use

This instruction does not apply to ordinary domestic animals.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

Comment

Lions, tigers, bears and many other "wild" animals are inherently dangerous. The owner of these types of animals is strictly liable for their acts which result in personal injury, provided the injury results from the animal's inherently dangerous characteristic. Restatement (Second) of Torts §507 (1977); Moss v. Pardridge, 9 Ill.App. 490, 491 (1st Dist.1881) (dictum). Probably a person who provokes the injury cannot recover. *See* Comment to IPI 110.04 for a discussion of provocation.

Under the Dangerous Animals Act, 720 ILCS 585/0.1-585/4 (1994), a dangerous animal is defined as a "lion, tiger, leopard, ocelot, jaguar, cheetah, margay, mountain lion, lynx, bobcat, jaguarundi, bear, hyena, wolf or coyote, or any poisonous or life-threatening reptile." "Life-threatening reptile" was held not to be unconstitutionally vague as to defendant's two 15-20 feet long Burmese Pythons and his alligator. But as to defendant's seven-foot-long boa constrictor, the court said that the statute was ambiguous and therefore unconstitutionally vague. People v. Fabing, 143 Ill.2d 48, 570 N.E.2d 329, 155 Ill.Dec. 816 (1991).

110.02 Domestic Animal--Common Law Strict Liability

One who [keeps] [owns] an animal which he knows is vicious or dangerous to people is liable to a person injured by the animal [unless the injured person did something a reasonable person should have known was likely to provoke an attack by the animal] [, or] [unless the injured person knew of an unusual characteristic of the animal and did something which a reasonable person could reasonably expect to provoke an attack by that particular animal] [, or] [unless the injured person voluntarily exposed himself to injury, either knowing the customary nature of the animal or knowing the peculiar nature of this specific animal].

Notes on Use

This instruction deals with common law strict liability for harm caused by domestic animals.

This cause of action may be combined with an action for strict liability under the Animal Control Act (IPI 110.04). If both theories are submitted to the jury, this instruction should be limited to a particular count.

The last bracketed phrase expresses the defense of primary assumption of risk. *See* Comment to IPI 110.04.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

Comment

Knowledge of Animal's Dangerous Propensity. At common law, domestic animals (dogs, cats, horses, cattle, sheep, etc.) are regarded as not inherently violent or dangerous to humans. Therefore, absent knowledge that a particular domestic animal has a vicious propensity, its owner is not liable for any injuries it may cause. However, once the owner has knowledge of the animal's dangerousness, the owner is thereafter strictly liable for harm caused by that propensity.

One is on notice that an animal is dangerous to others if that is a reasonable inference from the facts, notwithstanding the fact that the animal has yet to attack or bite anyone. Gerulis v. Lunecki, 284 Ill.App. 44, 45-47; 1 N.E.2d 440, 441 (1st Dist.1936) (an owner who bought a dog to watch her property and kept the dog chained during the daytime indicated by these acts awareness that it probably would bite humans); Steichman v. Hurst, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971).

Provocation. Under common law strict liability, provocation is an affirmative defense. The case law concerning provocation has largely developed under the Animal Control Act, and therefore is discussed in that context. *See* Comment to IPI 110.04, *infra*.

Persons Liable. One who owns, possesses, or voluntarily assumes control of a domestic animal becomes responsible for its actions. Ward v. Brown, 64 Ill. 307 (1872).

110.03 Domestic Animals Running At Large--Statutory Liability

An owner or keeper of an animal is liable in damages if his [e.g., horse] while running at large caused the injury or damage complained of, unless the owner or keeper did not know his animal was running at large and he used reasonable care in restraining it.

[A person is a "keeper" when he has the right to control the animal's movements or has knowingly and voluntarily undertaken to control the animal's movements.]

[An animal is "running at large" only if it strays from confinement or restraint and from the limits of the owner or keeper.]

Notes on Use

This instruction is based on a provision of the Domestic Animals Running At Large Act, 510 ILCS 55/1 (1994), which imposes liability for injuries and damages for allowing certain animals to run at large. Cities and villages may regulate the running at large of animals, 65 ILCS 5/11-20-9 (1994). Therefore, this source should be checked before this instruction is given.

This instruction should be used in an action to recover damages caused by animals grazing at pasture which are beyond the control and supervision of their keepers. Moore v. Roberts, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990); Zears v. Davison, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987). IPI 110.05 should be used when an animal breaks into an enclosure. IPI 110.02 (common law strict liability) and/or IPI 110.04 (statutory strict liability) applies when the animal is not grazing or is under the control of its owner or keeper. If, on the facts of the case, the Domestic Animals Running At Large Act (510 ILCS 55/1 (1994)) applies, then it is the exclusive remedy. Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991); Zears v. Davison, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987); McQueen v. Erickson, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978).

The second (bracketed) paragraph should be used if there is a fact issue as to whether the defendant qualifies as a "keeper" of the animal under the statutory definition added by P.A. 84-28, effective January 1, 1986 (510 ILCS 55/1.1 (1994)) as interpreted by the courts. The new statute defines an "owner" as "any person who (a) has a right of property in an animal, (b) keeps or harbors an animal, (c) has an animal in his care, or (d) acts as custodian of an animal." Since the issue will usually arise in the context of a defendant who is not the actual owner of the animal, the Committee has retained the term "keeper" to describe such persons.

The third (bracketed) paragraph should be used if there is an issue as to whether the animal was restrained or confined when it escaped. P.A. 84-28, effective January 1, 1986, added this definition of "running at large." 510 ILCS 55/1.1 (1994).

This instruction should be accompanied by appropriate issues and burden of proof instructions.

Comment

The statute upon which this instruction is based only prohibits certain kinds of animals

from running at large. Formerly, these were defined as "the species of horse, ass, mule, cattle, sheep, goat, swine, or geese." P.A. 84-28, effective January 1, 1986, made the statute applicable to "livestock" and defined the term "livestock" as "bison, cattle, swine, sheep, goats, equidae, or geese." ("Equidae" is the family of which "equus" is the only surviving genus. "Equus" comprises "horses, asses, zebras, and related ... animals . . . ." Webster's Third New International Dictionary 769 (1981).)

In defining the animals to which it applies, the statute has been literally construed. Thus, the statutory language does not encompass turkeys (McPherson v. James, 69 Ill.App. 337 (3d Dist.1897)) or ducks (Hamilton v. Green, 44 Ill.App.3d 987, 358 N.E.2d 1250, 3 Ill.Dec. 565 (2d Dist.1976)).

Keepers of horses or cows that escape their enclosure while grazing and wander into the road causing damage or injury are subject to liability under the statute. McQueen v. Erickson, 61 Ill.App.3d 859, 378 N.E.2d 614, 19 Ill.Dec. 113 (2d Dist.1978); Zears v. Davison, 154 Ill.App.3d 408, 506 N.E.2d 1041, 107 Ill.Dec. 150 (3d Dist.1987).

Plaintiff makes out a prima facie case by proving that a grazing animal escaped its enclosure and was running at large. Defendant can prevail only by showing that (1) he did not then know that the animal had escaped, and (2) he exercised reasonable care to keep it confined. While the prima facie case shifts the burden of going forward with the evidence to the defendant, the burden of proof on all elements remains on the plaintiff. Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 1310; 158 Ill.Dec. 913, 917 (2d Dist.1991); O'Gara v. Kane, 38 Ill.App.3d 641, 348 N.E.2d 503 (5th Dist.1976); Guay v. Neel, 340 Ill.App. 111, 91 N.E.2d 151 (1st Dist.1950).

Persons Liable. A defendant who lived on rented property and boarded horses was considered a "keeper" of a horse that escaped and caused property damage when it was hit by a car. Wakefield v. Kern, 58 Ill.App.3d 837, 374 N.E.2d 1074, 16 Ill.Dec. 299 (2d Dist.1978).

On the other hand, in Blakley v. Glass, 342 Ill.App. 90, 95 N.E.2d 128 (1st Dist.1950) (abstract decision), the court held that a horse pastured in a host's enclosure during a social visit did not make the host a keeper. In McEvoy v. Brown, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958), the court held that releasing and feeding a dog staked on a host's premises by guests did not make the host a keeper. In Gahm v. Cave, 194 Ill.App.3d 954, 551 N.E.2d 779, 141 Ill.Dec. 592 (3d Dist.1990), a calf escaped onto the defendant's property while being unloaded from the owner's trailer. The court held that the defendant was not a keeper under the statute because control and ownership of the calf remained with the calf owner during the unloading process. *Accord*, Ward v. Ondrejka, 5 Ill.App.3d 1068, 284 N.E.2d 470 (1st Dist.1972). In Smith v. Gleason, 152 Ill.App.3d 346, 504 N.E.2d 240, 105 Ill.Dec. 371 (2d Dist.1987), the court held that a complaint against a landowner under the statute was properly dismissed because he was not an owner or keeper of the animal. The landowner merely rented property to another who boarded horses as a business. Similarly, the owner of premises leased to another for pasture was not a "keeper" under the Act. Heyen v. Willis, 94 Ill.App.2d 290, 236 N.E.2d 580 (4th Dist.1968).

The statute did not apply when a horse broke through a racetrack enclosure at a county fair and ran through the crowd injuring plaintiff. Moore v. Roberts, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990). Nor did the statute apply when plaintiff, while riding defendant's horse, was killed by a cement truck when plaintiff lost control of the horse and it ran into the road. Chittum v. Evanston Fuel & Material Co., 92 Ill.App.3d 188, 416 N.E.2d 5, 48 Ill.Dec. 110 (1st Dist.1980). However, the court in Abadie v. Royer, 215 Ill.App.3d 444, 574 N.E.2d 1306, 158 Ill.Dec. 913 (2d Dist.1991), using language rejecting Chittum, held that the statute applied when the defendants' horse escaped from the barn and ran into the path of the plaintiff's car.

110.04 Liability Of Owner Or Keeper Of A Dog Or Other Animal--Statutory Strict Liability

The law provides that [the owner of an animal] [a person keeping an animal] [a person harboring an animal] [a person who knowingly permits an animal to remain on or about any premise occupied by that person] is liable in damages for injuries sustained from any attack or injury by the animal on a person peacefully conducting [himself] [herself] in a place where [he] [she] may lawfully be [unless that person (or another) provoked the animal] [or] [unless that person (or another) knew of the presence of the animal and of the unusual and dangerous nature of the animal and provoked it].

[The term "provoked" means any action or activity, whether intentional or unintentional, which would reasonably be expected (to cause a normal animal in similar circumstances to react in a manner similar to that shown by the evidence) (or) (to cause an animal with an unusual and dangerous nature to react in a manner similar to that shown by the evidence).]

Instruction revised June 2009.

Notes on Use

This instruction incorporates 510 ILCS 5/16 (1994). An action under this statute may be brought in the alternative with an action under the common law as embodied in IPI 110.02. Steichman v. Hurst, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971); Reeves v. Eckles, 77 Ill.App.2d 408, 222 N.E.2d 530 (2d Dist.1966).

This instruction should be used in an action to recover for injuries caused by animals other than those inherently dangerous. It does not apply to actions for injuries or damages caused by a grazing animal which is beyond the control and supervision of its keeper. In such a case, the Domestic Animals Running At Large Act (*see* IPI 110.03) is an exception to liability under the Animal Control Act.

This instruction should be accompanied by appropriate issues and burden of proof instructions. The second paragraph, and the references to "provocation" in the first paragraph, should be used only in cases where provocation is an issue.

Comment

Attack or Injury. The statute states that the owner is liable when the animal "attacks **or injures**" any person. The courts have interpreted that language to mean that an "attack" (an aggressive violent action) by the animal is not required. Any action which results in injury is covered by the statute. Chittum v. Evanston Fuel & Material Co., 92 Ill.App.3d 188, 416 N.E.2d 5, 48 Ill.Dec. 110 (1st Dist.1980) (horse bolted and ran into road, rider killed). The Animal Control Act is applicable when a dog is in the road and causes a wreck. Kirchgessner v. Tazewell County, 162 Ill.App.3d 510, 516 N.E.2d 379, 114 Ill.Dec. 224 (3d Dist.1987); Taylor v. Hull, 7 Ill.App.3d 218, 287 N.E.2d 167 (5th Dist.1972); *cf.* Aldridge v. Jensen, 124 Ill.App.2d 444, 259 N.E.2d 355 (3d Dist.1970) (dog owner subject to liability under Act when plaintiff injured in fall

from bicycle while being chased by defendant's dog). In Moore v. Roberts, 193 Ill.App.3d 541, 549 N.E.2d 1277, 140 Ill.Dec. 405 (4th Dist.1990), an action under the Animal Control Act was allowed when a racehorse broke out of the track and ran through the crowd injuring the plaintiff. In Ross v. Ross, 104 F.R.D. 439 (N.D.Ill.1984), the court said that recovery was available when the defendant's poodle excitedly greeted the plaintiff, knocking her down and causing her injury. And in McEvoy v. Brown, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958), a dog's owner was liable when the dog ran between the plaintiff's legs, causing her to fall.

However, when an animal is a passive causal force it cannot be the proximate cause of injuries if it stands or lies still or moves away from the plaintiff in a usual, predictable manner known to the plaintiff. King v. Ohren, 198 Ill.App.3d 1098, 556 N.E.2d 756, 145 Ill.Dec. 138 (1st Dist.1990). In King, the plaintiff (a domestic employee) was denied recovery for injuries sustained when she spilled boiling water as she stepped over defendant's dog which had been following her around the kitchen. In Bailey v. Bly, 87 Ill.App.2d 259, 231 N.E.2d 8 (4th Dist.1967), a dog owner was not liable for injuries sustained when the plaintiff tripped over the dog as it lay on the front porch steps. In Partipilo v. DiMaria, 211 Ill.App.3d 813, 570 N.E.2d 683, 156 Ill.Dec. 207 (1st Dist.1991), the plaintiff, who had fallen down a staircase after being frightened by defendants' dog, was denied recovery because it was "impossible for defendants' dog to attack or injure plaintiff" as the dog was in defendants' home, behind a locked gate, where it could not escape.

Assumption of Risk. The Illinois Supreme Court has held that the statute does not apply to the ordinary risks inherent in horseback riding, of which an experienced rider is presumed to be aware. Harris v. Walker, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988). This form of assumption of risk is sometimes referred to as the *primary* form of implied assumption of risk. *See* IPI 13.00. Other examples of such primary assumption of risk include Malott v. Hart, 167 Ill.App.3d 209, 521 N.E.2d 137, 138; 118 Ill.Dec. 69, 70 (3d Dist.1988) (experienced cattleman assumed known risk that cattle had normal propensity to trample people on occasion); Clark v. Rogers, 137 Ill.App.3d 591, 484 N.E.2d 867, 92 Ill.Dec. 136 (4th Dist.1985) (trained, experienced horsewoman assumed known risks of normal propensities of stallion); Vanderlei v. Heideman, 83 Ill.App.3d 158, 403 N.E.2d 756, 38 Ill.Dec. 525 (2d Dist.1980) (professional horseshoer assumed known risk of being kicked by horse being shod). However, in Guthrie v. Zielinski, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989), the court, emphasizing the absence of a contractual or employment relationship between the parties, declined to apply the doctrine of implied assumption of risk to defendants' daughter who merely entered their home unannounced with knowledge of their dog's unfriendly attitude toward her.

Express assumption of risk is also an available defense under this statute. Harris v. Walker, 119 Ill.2d 542, 519 N.E.2d 917, 116 Ill.Dec. 702 (1988).

This instruction does not include either form of assumption of risk. If assumption of risk is an issue, a separate instruction will be necessary. As to implied assumption of risk, *see* IPI 13.00.

Provocation. The provocation element of the Animal Control Act is not an affirmative defense. The burden is on the plaintiff to prove that there was no provocation. Stehl v. Dose, 83

Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980); Sobotta v. Carlson, 65 Ill.App.3d 752, 382 N.E.2d 855, 22 Ill.Dec. 465 (3d Dist.1978).

Whether plaintiff has sustained his burden of proof on lack of provocation under the statute is a question of fact. In Guthrie v. Zielinski, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989), the case was remanded for a factual determination of whether daughter's unannounced entry into her parents' home was provocation for the dog to attack her when it was known that the dog disliked her. In Steichman v. Hurst, 2 Ill.App.3d 415, 275 N.E.2d 679 (2d Dist.1971), it was not provocation for a 180 pound mail carrier to spray "Halt" at a ten pound dog that was advancing toward her. A jury found that the plaintiff did not sustain his burden of proof in Stehl v. Dose, 83 Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980), when he was attacked by a German Shepherd after entering the dog's territory and kneeling within the perimeter of its chain while it was eating. Other provocation cases include McEvoy v. Brown, 17 Ill.App.2d 470, 150 N.E.2d 652 (3d Dist.1958) (untying and feeding dog not provocation); Messa v. Sullivan, 61 Ill.App.2d 386, 209 N.E.2d 872 (1st Dist.1965) (stepping off elevator and walking toward apartment door not provocation); Siewerth v. Charleston, 89 Ill.App.2d 64, 231 N.E.2d 644 (1967) (boys pushing and kicking dog which is recuperating from an injury is provocation); and Keightlinger v. Egan, 65 Ill. 235, 238 (1872) (unjustifiably kicking a dog is provocation).

The prior version of this instruction provided that a plaintiff could not recover by reason of "provocation" if "that person knew of the presence of an animal and did something a reasonable person should have known would be likely to provoke" the animal. Kirkham v. Will, 311 Ill.App.3d 787, 724 N.E.2d 1062, 244 Ill.Dec. 174 (5th Dist.2000) noted that provocation is to be measured with respect to how a "normal" animal would react to an alleged act of provocation. Kirkham held that the prior version of this instruction did not correctly state the law in view of the absence of a definition of "provocation" which defined provocation with respect to the conduct of a "normal" animal. The Kirkham court further noted that the provoking act need not be intentional in character, as explained below. The prior version of the instruction has been modified to reflect the Kirkham opinion, and also to accommodate the factual possibility, discussed below, that someone other than the injured party may have committed the act of provocation.

The bracketed material referring to "an animal with an unusual and dangerous nature" is supported by Sections 509 and 515 of the Restatement of Torts, Second. Section 509 provides for liability on the part of a possessor of a domestic animal that the possessor "knows or has reason to know has dangerous propensities abnormal to its class." Section 515 states that in those situations, the general rule is that a plaintiff's contributory negligence is not a defense. Section 515 further provides that a plaintiff's contributory negligence "in knowingly and unreasonably subjecting himself to the risk that ... an abnormally dangerous domestic animal will do harm" is a defense to a strict liability claim. Although there are no known Illinois cases on this point, the bracketed material adapts "provocation" to a situation involving a domestic animal that is known to have an abnormally dangerous nature.

Unintentional provocation falls within the meaning of the statute. A Dalmatian scratched a child plaintiff in the eye after the plaintiff stepped on dog's tail while playing "Crack the

Whip." The court said that the dog's act was not out of proportion to the unintentional act involved, and therefore defendant was not liable. Nelson v. Lewis, 36 Ill.App.3d 130, 344 N.E.2d 268 (5th Dist.1976). *See also* Stehl v. Dose, 83 Ill.App.3d 440, 403 N.E.2d 1301, 38 Ill.Dec. 697 (3d Dist.1980), discussed above. However, in Robinson v. Meadows, 203 Ill.App.3d 706, 561 N.E.2d 111, 148 Ill.Dec. 805 (5th Dist.1990), the court overturned a jury verdict for the defendants because a child's screaming at the excited barking of a dog was not sufficient provocation for the brutal attack that resulted.

The injured party does not have to be the provocateur. In Forsyth v. Dugger, 169 Ill.App.3d 362, 523 N.E.2d 704, 119 Ill.Dec. 948 (4th Dist.1988), summary judgment for the defendant was upheld when the plaintiff was injured after defendant's pony bolted under a tree limb after a third party jumped onto its back. *See also* Siewerth v. Charleston, 89 Ill.App.2d 64, 231 N.E.2d 644 (1967) (plaintiff's playmate also kicked dog).

"Place Where He Has a Right to Be." An owner of property who provides a path or walk from the public way to his door, without some indication (sign, posting of notice, or words) warning away those who seek lawful business with him extends a license to use the path or walk during the ordinary hours of the day. A person who uses the path or walk is a licensee, and therefore is in a "place where he may lawfully be" within the meaning of the statute. Smith v. Pitchford, 219 Ill.App.3d 152, 579 N.E.2d 24, 161 Ill.Dec. 767 (5th Dist.1991) (8-year-old child); Dobrin v. Stebbins, 122 Ill.App.2d 387, 259 N.E.2d 405 (1st Dist.1970) (17-year-old magazine salesman). *See also* Messa v. Sullivan, 61 Ill.App.2d 386, 209 N.E.2d 872 (1st Dist.1965) (dog warning sign inadequate). And where plaintiff had her own key and regularly visited her parents' home unannounced, she was held to be lawfully on the premises. Guthrie v. Zielinski, 185 Ill.App.3d 266, 541 N.E.2d 178, 133 Ill.Dec. 341 (2d Dist.1989).

However, the defendant may be able to prevail by showing that the plaintiff was in an area closed to the public, or that a warning (such as signs or the dog's presence) was given to the victim before the incident. Frostin v. Radick, 78 Ill.App.3d 352, 397 N.E.2d 208, 210, 33 Ill.Dec. 875, 877 (1st Dist.1979).

"Owner." Although the statute places liability upon the animal's "owner," that term is defined to include not only persons having a right of property in the animal but also one who "keeps" or "harbors" it, or who has it in his "care," or acts as its "custodian," or "knowingly permits [it] to remain on or about any premise occupied by him." 510 ILCS 5/2.16 (1994).

A defendant is not a "harborer" of a dog when he is an absentee landlord who merely allows a tenant to keep a dog. Steinberg v. Petta, 114 Ill.2d 496, 501 N.E.2d 1263, 103 Ill.Dec. 725 (1986). However, a plaintiff who agreed to board and care for a dog could not recover when the dog attacked her because she fell within the definition of "owner" under the statute. Wilcoxen v. Paige, 174 Ill.App.3d 541, 528 N.E.2d 1104, 124 Ill.Dec. 213 (3d Dist.1988). In Thompson v. Dawson, 136 Ill.App.3d 695, 483 N.E.2d 1072, 91 Ill.Dec. 586 (4th Dist.1985), the appellate court sustained the trial court's factual determination that the act of feeding and watering a stray dog until it could be taken to the animal shelter or placed in a home did not make the defendants "owners" under the statute. However, in Kirchgessner v. Tazewell County, 162 Ill.App.3d 510, 516 N.E.2d 379, 114 Ill.Dec. 224 (3d Dist.1987), the court held that a county

animal shelter acting as a "keeper" of a dog falls within the definition of an "owner."

When the owner of a horse (or his employee) takes custody of the horse to ride it, the owner of the property on which the horse is being boarded is, during the time the employee has custody, no longer within the definition of "owner." Clark v. Rogers, 137 Ill.App.3d 591, 484 N.E.2d 867, 92 Ill.Dec. 136 (4th Dist.1985).

See also the cases discussed in the Comment to IPI 110.03 (Domestic Animals Running At Large Act).

110.05 Animals Breaking Into A Fenced Enclosure--Statutory Strict Liability

At the time of this occurrence there was in force in the State of Illinois a statute which provides if a [e.g., cow] breaks into any person's inclosure, the fence being good and sufficient, the [e.g., cow]'s owner is liable to the [owner] [occupier] of the property for all damages caused by the entry.

Notes on Use

This instruction is based on a provision of the Fence Act, 765 ILCS 130/20 (1994). It is distinguished from IPI 110.03 (Domestic Animals Running At Large Act) in that this instruction may be used when a domesticated animal breaks into an enclosure separated by a division fence. Under the DARAL, no such breaking is necessary, but there are other requirements.

This instruction should be accompanied by appropriate issues and burden of proof instructions.

Comment

In Hart v. Meredith, 196 Ill.App.3d 367, 553 N.E.2d 782, 784; 143 Ill.Dec. 75, 77 (3d Dist.1990), the court held that "a livestock owner is strictly liable under the Fence Law if his livestock enters a landowner's property enclosed with a good and sufficient fence." The Fence Act specifically provides that it does not require a landowner to construct a fence in order to maintain an action for injuries done by animals running at large. Therefore, if the landowner chooses not to construct a fence, the animal's owner may still be liable if the landowner can prove the requirements of the Domestic Animals Running At Large Act (*see* IPI 110.03). But if the landowner does have a fence, then the Fence Act provides a broader remedy.

The Fence Act has no application to outside fences; it is applicable only between the owners of adjoining lands. McKee v. Trisler, 311 Ill. 536, 143 N.E. 69 (1924); Smith v. Gleason, 152 Ill.App.3d 346, 504 N.E.2d 240, 105 Ill.Dec. 371 (2d Dist.1987). The Fence Act imposes a duty to erect a division line fence by adjoining owners. *Id*.

115.00
ULTRAHAZARDOUS ACTIVITIES

115.01 Ultrahazardous Activities--Strict Liability

When a person carries on an ultrahazardous activity such as [e.g., blasting], he is liable for any [injury] [property damage] proximately caused by that activity regardless of the amount of care used [except to one who has actual knowledge of the dangers involved and (voluntarily participates in the activity) (or) (voluntarily exposes himself to the dangers)].

Notes on Use

There is no Illinois case law as to whether the doctrine of strict liability for ultrahazardous activities applies to trespassers. *See* Restatement (Second) of Torts §520B (1977) (does not apply to intentional or negligent trespassers; no opinion as to whether doctrine applies to those who trespass accidentally, inadvertently, or by innocent mistake).

The bracketed phrase should be used if the court rules that the common-law defense of assumption of risk is applicable. *See* Restatement (Second) of Torts §523 (1977). As to whether this is a complete bar to recovery or is only a damage-reducing factor, the Committee expresses no opinion.

Comment

Use of explosives is the typical example of an ultrahazardous activity. Opal v. Material Serv. Corp., 9 Ill.App.2d 433, 133 N.E.2d 733 (1st Dist.1956); Hadraba v. Sanitary Dist. of Chicago, 309 Ill.App. 577, 33 N.E.2d 627 (1st Dist.1941) (abstract opinion); Baker v. S.A. Healy Co., 302 Ill.App. 634, 24 N.E.2d 228 (1st Dist.1939); City of Joliet v. Harwood, 86 Ill. 110 (1877); Fitzsimons & Connell Co. v. Braun, 199 Ill. 390, 65 N.E. 249 (1902). In Clark v. City of Chicago, 88 Ill.App.3d 760, 410 N.E.2d 1025, 43 Ill.Dec. 892 (1st Dist.1980), the court held that, as a matter of law, the demolition of a five-story building within the city of Chicago was an inherently dangerous activity for which the city should be held absolutely liable. *See also* Chicago & N.W. R. Co. v. Hunerberg, 16 Ill.App. 387 (1st Dist.1885) (train derailed and struck plaintiff's house); Indiana I. & I. R. Co. v. Hawkins, 81 Ill.App. 570 (2d Dist.1899) (fire escaped from defendant's right-of-way onto plaintiff's property).

The United States Court of Appeals for the Seventh Circuit held that determining what activity is "abnormally dangerous"[4] is a matter of law to be decided by the court, and that placing acrylonitrile in a rail shipment that will pass through a metropolitan area does not subject the shipper to strict liability. Indiana Harbor Belt R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir.1990). Neither does manufacturing polychlorinated biphenyls (PCBs) constitute an abnormally dangerous activity. City of Bloomington v. Westinghouse Electric Corp., 891 F.2d 611 (7th Cir.1989) (applying Indiana law, but stated as being no different from Illinois law). The Illinois Appellate Court held that the "plaintiff had failed to allege sufficient facts showing that

[4] The *Restatement (Second) of Torts* uses the phrase "abnormally dangerous" in place of the more traditional term "ultrahazardous." The Committee has kept the latter term, which was used in previous editions.

storing containers of highly flammable solid and liquid chemicals in the subject warehouse was an abnormally dangerous activity." Continental Bldg. Corp. v. Union Oil Co., 152 Ill.App.3d 513, 504 N.E.2d 787, 105 Ill.Dec. 502 (1st Dist.1987). A trampoline is not an abnormally dangerous instrumentality nor is its use an abnormally dangerous activity. Fallon v. Indian Trail School, 148 Ill.App.3d 931, 500 N.E.2d 101, 102 Ill.Dec. 479 (2d Dist.1986). In Anderson v. Marathon Petroleum Co., 801 F.2d 936 (7th Cir.1986), the court held that sandblasting was not an abnormally dangerous activity because the plaintiff had failed to show that people engaged in sandblasting cannot prevent a serious risk of injury by taking precautions. The manufacture and sale of handguns is not an ultrahazardous activity. Riordan v. Int'l Armament Corp., 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985); Martin v. Harrington & Richardson, Inc., 743 F.2d 1200 (7th Cir.1984). The Martin court stated, "plaintiff's attempt to impose strict liability for engaging in an ultrahazardous activity upon the sale of a nondefective product is unprecedented in Illinois . . . ." 743 F.2d at 1203. Both the Martin and Riordan courts stated that it was the use or misuse of the handgun that constitutes the ultrahazardous activity.

Traditionally, plaintiff's assumption of the risk of the activity has been regarded as a complete defense. Restatement (Second) of Torts §523 (1977). In Nat'l Bank of Bloomington v. City of Lexington, 138 Ill.App.3d 805, 486 N.E.2d 967, 93 Ill.Dec. 434 (4th Dist.1985), the court held that the trial court's granting of the city's summary judgment motion was in error because reasonable minds might differ as to whether plaintiff was participating (along with the city's independent contractor) in the allegedly ultrahazardous activity of felling a tree. (This issue as to whether the felling of the tree was an ultrahazardous activity was not before the reviewing court.)

Contributory negligence traditionally has not been a defense. Restatement (Second) of Torts §524 (1977).

See generally Restatement (Second) of Torts ch. 21 (1977); Prosser & Keeton on Torts ch. 13 (5th ed. 1984); Burke, *Rylands v. Fletcher in Illinois*, 22 Chi. Kent L. Rev. 103 (1944).</pub>

OWNERS AND OCCUPIERS OF LAND

120.00
PREMISES

PERMISSION TO PUBLISH GRANTED IN 2004.

INTRODUCTION

Over the past several years the committee has been working on streamlining the jury instructions and working to reduce redundancy. It was the committee's belief that one area of redundancy was the wording of the issues and burden of proof instructions. By combining these two instructions, the committee felt that redundancy would be reduced.

The premises instruction(s) are the first series to incorporate the new format of combined issue and burden of proof instructions.

Further, the effects of the jury's finding have been removed from the issues/burden of proof instruction and have been segmented into different components depending upon the state of the pleadings. Rather than have the committee try and draft instructions for every possible permutation or combination of affirmative defense, counter-claim, cross-claim or third-party claim, the "effects of finding" have been broken into their individual components and can be combined by the attorney as the parties appear before the court. Sample combinations to illustrate how the components go together are shown in IPI 128.04.

Under Illinois law, the duty owed by an owner or occupier of land to a third person depends upon that person's legal status. Prior to September 12, 1984, the effective date of the Premises Liability Act, 740 ILCS 130/1 et seq., non-trespassing visitors on land were divided into two categories, licensees and invitees. Section 2 of the Act abolished this distinction, as follows:

> §2. The distinction under the common law between invitees and licensees as to the duty owed by an owner or occupier of any premises to such entrants is abolished.
>
> The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

The Act applies to occurrences on and after September 12, 1984, and is not retroactive. Lorek v. Hollenkamp, 144 Ill.App.3d 1100, 495 N.E.2d 679, 681-82, 99 Ill.Dec. 232, 233-34 (2d Dist.1986); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 474 N.E.2d 920, 922-23, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The Act does not change the legal duty owed trespassers (§3) or users of certain recreational facilities (§4) as defined by 740 ILCS 130/1-130/5 (1994). Invitees become trespassers when they exceed the scope of the invitation. Cockerell v. Koppers Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers

strayed from the intended area); Briney v. Ill. Ctr. R.R. Co., 401 Ill. 181, 188, 190, 81 N.E.2d 866 (1948) (no invitation from caboose crew to boys to throw railroad switches).

Genaust v. Ill. Power Co., 62 Ill.2d 456, 343 N.E.2d 465 (1976), adopted §343 of the *Restatement (Second) of Torts* as the law governing landowner liability for negligence. The *Restatement* provides that a land possessor is liable for conditions of the land only if he:

> (1) Knows or in the exercise of reasonable care would discover the condition and should realize that the condition involves an unreasonable risk of harm to those on the land, and
> (2) Should expect that such persons will not discover or realize the danger, or will fail to protect themselves against it, or
> (3) Fails to exercise reasonable care to protect those lawfully on this land.

See also Sollami v. Eaton, 201 Ill.2d 1, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002); Longnecker v. Ill. Power Co., 64 Ill.App.3d 634, 381 N.E.2d 709, 713-14, 21 Ill.Dec. 382, 385-87 (5th Dist.1978); Chapman v. Foggy, 59 Ill.App.3d 552, 375 N.E.2d 865, 16 Ill.Dec. 758 (5th Dist.1978).

As a general rule, a landowner has no duty to warn of open and obvious conditions. Genaust v. Ill. Power Co., *supra* (electricity); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (body of water); Sepesy v. Archer Daniels Midland Co., 97 Ill.App.3d 868, 423 N.E.2d 942, 53 Ill.Dec. 273 (4th Dist.1981) (trucks poised on an inclined ramp). Whether a particular condition on defendant's property served as sufficient notice of its presence so as to be "open and obvious" may present a question of fact. Am. Nat'l Bank & Trust Co. of Chi. v. Nat'l Adver. Co., 149 Ill.2d 14, 594 N.E.2d 313, 171 Ill.Dec. 461; Simmons v. Am. Drug Stores, Inc., 329 Ill.App.3d 38, 768 N.E.2d 46, 263 Ill.Dec. 286 (1st Dist.2002); Pullia v. Builders Square, Inc., 265 Ill.App.3d 933, 939, 638 N.E.2d 688, 693, 202 Ill.Dec. 820 (1st Dist.1994). In Ward v. Kmart Corp., 136 Ill.2d 132, 147-48, 554 N.E.2d 223, 320, 143 Ill.Dec. 288 (1990), the Supreme Court rejected a "per se" open and obvious rule and adopted an exception described in *Restatement (Second) of Torts*, §343A. Under this "distraction exception," if the owner has reason to suspect that guests or workers may not appreciate the danger because they are distracted or preoccupied, the owner has a duty of reasonable care. In Ward, carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located near a doorway. *Ward*, 136 Ill.2d at 135-39. In Deibert v. Bauer Bros. Constr. Co., Inc., 141 Ill.2d 430, 433, 488, 566 N.E.2d 239, 240, 243, 152 Ill.Dec. 552 (1990), the Supreme Court applied the distraction exception to circumstances in which the plaintiff had failed to look at the ground he was walking on. In Menough v. Woodfield Gardens, 296 Ill.App.3d 244, 249, 694 N.E.2d 1038, 1042, 230 Ill.Dec. 760 (1st Dist.1998), the exception applied where playing basketball distracted the plaintiff from seeing the protruding base supporting the basket.

The second exception described in *Restatement (Second) of Torts* §343A, is the "deliberate encounter" exception. A duty to warn of an open and obvious danger exists where the owner may reasonably expect the person to encounter the danger, if the advantages of proceeding outweigh the apparent risk. The standard used is that of a reasonable person in the same position

as the possessor of the premises. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 396, 706 N.E.2d 441, 448, 450, 235 Ill.Dec. 886 (1998). The plaintiff in LaFever slipped on debris near a dumpster on the defendant's property, despite the fact that he knew the materials near the dumpster posed a hazard. His job entailed emptying the dumpster, necessitating that he encounter the waste. *LaFever*, 185 Ill.2d at 386. Unless one of these exceptions is found to apply, the law does not impose a duty to warn of open and obvious dangers. Sollami v. Eaton, 201 Ill.2d 1, 772 N.E.2d 215, 265 Ill.Dec. 177 (2002).

The "notice" requirement of *Restatement* §343 has long been recognized in Illinois. The property owner or occupier must have either "actual" or "constructive" notice of the dangerous condition to impose liability. Sparling v. Peabody Coal Co., 59 Ill.2d 491, 322 N.E.2d 5, 9-10 (1974); Perminas v. Montgomery Ward & Co., 60 Ill.2d 469, 328 N.E.2d 290 (1975). Without evidence that the owner knew or should have discovered the condition had he exercised ordinary care, liability cannot be imposed. Kostecki v. Pavlis, 140 Ill.App.3d 176, 488 N.E.2d 644, 646, 94 Ill.Dec. 645, 647 (1st Dist.1986); Hresil v. Sears Roebuck & Co., 82 Ill.App.3d 1000, 403 N.E.2d 678, 38 Ill.Dec. 447 (1st Dist.1982); Clarke v. Rural Electric Convenience Coop. Co., 110 Ill.App.3d 259, 442 N.E.2d 278, 280-81, 66 Ill.Dec. 6, 8-9 (4th Dist.1982).

Case law departs from the "notice" requirement of *Restatement* §343 when the plaintiff shows, through direct or circumstantial evidence, that the dangerous condition arose from the defendant's acts or as part of his business. Reed v. Walmart Stores, Inc., 298 Ill.App.3d 712, 233 Ill.Dec. 111, 700 N.E.2d 212 (4th Dist.1998). In Reed, the court indicated that an action may be based upon either ordinary negligence or premises liability-or both. In determining that the plaintiff in Reed was not required to prove notice, the court stated that "plaintiffs are masters of their complaint and are entitled to proceed under whichever theory they decide, so long as the evidence supports such a theory." *Id.* at 717-18 *see also* Piper v. Moran's Enters., 121 Ill.App.3d 644, 652, 459 N.E.2d 1382, 77 Ill.Dec. 133 (5th Dist.1984) (grocery patron fell after catching her foot in the slats of a pallet while trying to reach a carton of soda stacked at its rear); Donoho v. O'Connell's, 13 Ill.2d 113, 122, 148 N.E.2d 434 (1958) (slip and fall involving a piece of grilled onion at a restaurant); Rutzen v. Pertile, 172 Ill.App.3d 968, 979, 527 N.E.2d 603, 123 Ill.Dec. 140 (2d Dist.1988) (foot went through board on pier used by boating patrons of supper club). In such cases, the landowner owes a duty of exercising ordinary care for the safety of those lawfully on his property. Piper v. Moran's Enters., *supra*; Rutzen v. Pertile, *supra*; Donoho v. O'Connell's, Inc., *supra*.

An owner owes no duty to a trespasser for the condition of the premises, until the trespasser's presence on the land is either known or should be known, after which the owner has a duty not to cause injury willfully or wantonly. Morgan v. N.Y. Cent. R.R., 327 Ill. 339, 344, 158 N.E. 724, 726 (1927). If, however, the property owner knew or should have known that an artificial condition on his property presented a risk of death or serious bodily injury, and if the owner knew of, or had reason to anticipate, the presence of trespassers in dangerous proximity to the hazard, then the property owner had a duty to exercise ordinary care to warn of the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992) (applying the *Restatement (Second) of Torts* §337). In addition, if the owner knew or should have known that the trespasser was in a position where the owner's activities could endanger the trespasser, then the owner has a duty of ordinary care to avoid injuring others from those activities. Votava v.

Material Serv. Corp., 74 Ill.App.3d 208, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist.1979).

A final area is the landowner or occupier's potential liability for injury to trespassing children. Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), rejected imposing strict liability on landowners under the common law doctrine of "attractive nuisance," and in its place recognized a negligence cause of action based upon the foreseeability of risk to children on the premises and the relative expense in remedying dangerous conditions. Such actions could be maintained regardless of whether the injured child was lawfully on the premises. *See* IPI 120.10. Later cases continue to recognize that the duty owed to children is essentially a negligence concept and has based liability on the foreseeability of injury to children. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995). The landowner has no duty, however, to protect children from obvious risks that they would be expected to appreciate and avoid. Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); *Mt. Zion*, 169 Ill.2d at 120, 660 N.E.2d at 870, 214 Ill.Dec. at 165 (an above ground pool); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition). Where a child is harmed not by the owner, but by the acts of another trespasser, ordinary negligence rules apply. *Mt. Zion*, 169 Ill.2d at 124.

This chapter deals only with the liability of the owner or occupier of land for conditions on his premises. It can be used in conjunction with the instruction on liability for falls on snow and ice. (IPI 125.01).

120.01 Trespasser--Definition

A trespasser is a person who goes upon the premises of another without express or implied right. [A person can become a trespasser by going (beyond an area where he/she was invited) (into an area where he/she was not invited).]

Notes on Use

For trespassing children, refer to IPI 120.05 and IPI 120.10, as well as the Comment below.

Use the bracketed section if there is an issue concerning the scope of the invitation or the right of the plaintiff to go beyond a limited area. If there is an issue as to the scope of the invitation or permission, refer to IPI 120.06 in addition to this instruction.

Comment

A trespasser is one who enters the premises of another without permission, or without express or implied invitation. *Restatement (Second) of Torts* §329 (1965); Ill. Cent. R.R. Co. v. Eicher, 202 Ill. 556, 560, 67 N.E. 376, 378 (1903); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 711-12, 474 N.E.2d 920, 922, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The court in Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261 (5th Dist.1976), cited IPI 120.01 and defined "trespasser" as one who enters property "without permission, invitation, or other right, and intrudes for some purpose of his own, or at his convenience, or merely as an idler." Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261, 264-65 (5th Dist.1976) (citing 62 Am. Jur. 2d, *Premises Liability* (1972) and IPI). A trespasser is also someone who, after being invited upon the premises, goes to another area beyond the scope of the invitation. Cockrell v. Koppers Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers straying from the intended worksite are trespassers). Whether a person is a trespasser or someone lawfully on the premises is a question for the jury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (finding a jury should determine whether a fare-paying passenger, who left an "el" platform to urinate on the tracks, was a trespasser).

Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992), provides an exception that changes an owner's duty to a trespasser. Prior to Lee, a landowner or occupier owed a trespasser the duty of not willfully or wantonly causing injury. Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88, (1922); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 212, 392 N.E.2d 768, 771, 30 Ill.Dec. 113 (2d Dist.1979). Lee altered this traditional rule, by imposing a duty of ordinary care to trespassers who are known or should be known to the owner. The Illinois Supreme Court reached this decision through the following analysis. The *Restatement (Second) of Torts* §337 imposes liability on owners for highly dangerous, artificial conditions, which endanger known trespassers. For a duty of ordinary care to apply under §337, the owner or occupier must know, or have reason to know, of the trespasser's presence. The *Restatement* defines "reason to know," in §12, as having "information from which a person of reasonable intelligence ... would infer that the fact in question exists." *Lee*, 152 Ill.2d

at 448. The Lee court determined that the record showed reasonable anticipation by the CTA of a trespasser's presence, therefore an ordinary duty of care applied. *Id*. at 449, 452. The court noted that §337, *comment a*, did not render the "reason to know" requirement inapplicable. In support, the court turned to an Arizona Supreme Court case, Webster v. Culbertson, 158 Ariz. 159, 761 P.2d 1063 (1988) (barbed wire stretched across land used by trespassing equestrians). *Webster*, 158 Ariz. at 161. The Webster court determined that the "actual notice" requirement of *comment a* did not trump the "reason to know" requirement of §337. *Id*. The result was that, as the Lee court noted, "the [Webster court] placed a duty to warn on a person who maintains a dangerous artificial condition when the person is aware of the possibility that others will come into dangerous proximity of the condition." *Lee*, 152 Ill.2d at 451.

An owner's duty to trespassing children is somewhat unique. Illinois rejects strict liability under the "attractive nuisance" doctrine and instead places a duty on the landowner or occupier based upon the foreseeability of risk to the trespassing child. *See* IPI 120.10; *Restatement (Second) of Torts* §339 (1965); Kahn v. James Burton Co., 5 Ill.2d 614, 622, 126 N.E.2d 836, 840 (1955); Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 180, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 116, 120, 660 N.E.2d 863, 868, 869, 214 Ill.Dec. 156 (1995). The landowner has no duty, however, to protect trespassing children from obvious risks they would be expected to appreciate and avoid. *See, e.g., Mt. Zion*, 169 Ill.2d at 120, 660 N.E.2d at 870, 214 Ill.Dec. at 165 (an above ground pool).

Policemen, firemen and other public officials, entering the premises in their official capacity, are not considered trespassers and are owed a duty of ordinary care as to the condition of the premises. Dini v. Naiditch, 20 Ill.2d 406, 417, 170 N.E.2d 881 (1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill.2d 552, 556-57, 328 N.E.2d 538, 540-41 (1975) (applying *Restatement (Second) of Torts* §§345, 343 (1965)); Horn v. Urban Inv. & Dev. Co., 166 Ill.App.3d 62, 66, 519 N.E.2d 489, 491, 116 Ill.Dec. 597 (2d Dist.1988). The "fireman's rule," however, absolves the owner of liability, where the owner owes no duty to the fireman or policeman for the fire or criminal activity necessitating their presence on the premises. These are viewed as inherent risks of those occupations. Washington v. Atlantic Richfield Co., 66 Ill.2d 103, 108, 361 N.E.2d 282, 285, 5 Ill.Dec. 143 (1976); Court v. Grzelinski, 72 Ill.2d 141, 379 N.E.2d 281, 19 Ill.Dec. 617 (1978). The fireman's rule subsumes the deliberate encounter exception outlined in LaFever v. Kemlite Co., 185 Ill.2d 380, 706 N.E.2d 441, 235 Ill.Dec. 886 (1998) as the nature of a fireman's job is deliberately to encounter certain dangers that are known to them to be inherent in their job. Smithers v. Ctr. Point Props. Corp., 318 Ill.App.3d 430, 741 N.E.2d 1152, 251 Ill.Dec. 974 (1st Dist. 2000). An owner or possessor protected by the fireman's rule owes no duty to the plaintiff and may not be liable, even potentially, for the plaintiff's injury or wrongful death. Vroegh v. J & M Forklift, 165 Ill.2d 523, 531, 651 N.E.2d 121, 126, 209 Ill.Dec. 193 (1995). The Second District in Zimmerman v. Fasco Mills Co., 302 Ill.App.3d 308, 704 N.E.2d 949, 35 Ill.Dec. 376 (2d Dist.1998) found that the fireman's rule does not protect an owner from a risk that is unreasonable and unknown to the firefighter and held the fireman's rule inapplicable to the specific facts of the case. In Hedberg v. Mendino, 218 Ill.App.3d 1087, 1090-91, 579 N.E.2d 398, 399, 161 Ill.Dec. 850 (2d Dist.1991), the Second District declined to extend the fireman's rule to a situation where a police officer tripped on a broken sidewalk while responding to a call

about a prowler. The Second District noted that the police officer was injured by a cause independent of the emergency he was investigating. *Hedberg,* 218 Ill.App.3d at 1093.

120.02 Duty To An Adult Lawfully On The Property--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of those lawfully on the property.

Notes on Use

This instruction is to be used if the injury is to an adult lawfully on the premises. Use this instruction if the injury was caused by the condition of the premises. This instruction should also be used if the injury was caused by the condition of property owned or occupied by a local public entity. See Wojdyla v. City of Park Ridge, 209 Ill.App.3d 290, 293, 568 N.E.2d 144, 145, 154 Ill.Dec. 144 (1st Dist.1991). If the plaintiff is alleging an activity of the owner caused the injury, use the appropriate instructions for a negligence case. See Reed v. Wal-Mart Stores, Inc., 298 Ill.App.3d 712, 700 N.E.2d 212, 233 Ill.Dec. 111 (4th Dist.1998).

This instruction and IPI 120.03 should be combined in three paragraphs if there is a question of fact as to whether the plaintiff was a trespasser. Begin with this instruction, IPI 120.02, and add IPI 120.03 as the second and third paragraphs. IPI 120.01, the definition of a trespasser, should also be given.

Comment

The Illinois Supreme Court adopted §343 of the *Restatement (Second) of Torts* governing landowner liability for negligence in Genaust v. Illinois Power Co., 62 Ill.2d 456, 343 N.E.2d 465 (1976). The *Restatement* provides that a land possessor is liable for conditions of the land if he fails to exercise reasonable care to protect those lawfully on the land. However, as a general rule, a landowner has no duty to warn of open and obvious conditions. Sepesy v. Archer Daniels Midland Co., 97 Ill.App.3d 868, 423 N.E.2d 942, 53 Ill.Dec. 273 (4th Dist.1981). Whether or not a condition is open and obvious may present a question of fact. Am. Nat'l Bank & Trust Co. of Chi. v. Nat'l Adver. Co., 149 Ill.2d 14, 594 N.E.2d 313, 171 Ill.Dec. 461 (1992); Simmons v. Am. Drug Stores, Inc., 329 Ill.App.3d 38, 768 N.E.2d 46, 263 Ill.Dec. 286 (1st Dist.2002); Pullia v. Builders Square, Inc., 265 Ill.App.3d 933, 939, 638 N.E.2d 688, 202 Ill.Dec. 820 (1st Dist.1994). There are two exceptions to the open and obvious rule: the "distraction exception" set forth in Ward v. Kmart Corp., 136 Ill.2d 132, 147-48, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), and the "deliberate encounter exception" set forth in LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 235 Ill.Dec. 886 (1998). Under the "distraction exception," if the owner has reason to suspect that guests or workers may not appreciate the danger because they are distracted or preoccupied, the owner has a duty of reasonable care. In Ward, carrying a large mirror distracted the plaintiff, preventing him from seeing a concrete post located near a doorway. *Ward*, 136 Ill.2d at 135-39. In Deibert v. Bauer Bros. Constr. Co., Inc., 141 Ill.2d 430, 433, 566 N.E.2d 239, 240, 243, 152 Ill.Dec. 552 (1990), the court applied the distraction exception to circumstances in which the plaintiff had failed to look at the ground he was walking on. In Menough v. Woodfield Gardens, 296 Ill.App.3d 244, 249, 694 N.E.2d 1038, 1042, 230 Ill.Dec. 760 (1st Dist.1998), the exception applied where playing basketball distracted the

plaintiff from seeing the protruding base supporting the basket. Under the deliberate encounter exception outlined in LaFever, a landowner has a duty to warn of an open and obvious danger where the landowner may reasonably expect a reasonable person to encounter the danger given that the advantages of proceeding outweigh the apparent risk. The standard used for the reasonable expectation is that of a reasonable person in the same position as the possessor of the premises. *LaFever* at 396.

120.03 Duty To Adult Trespasser--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to refrain from willful and wanton conduct which would endanger the safety of (a) trespasser(s) on the property.

[However, if [defendant's name], knew of, or reasonably should have anticipated, the presence of [a] trespasser(s) where a condition on [defendant's name] property presented a risk of death or serious bodily injury and that the trespasser(s) would not discover or realize the risk involved, then [defendant's name] had a duty to exercise ordinary care to warn of that condition.]

Notes on Use

This instruction is to be used if the injury is to an adult trespasser on the landowner's premises. The last bracketed sentence should be used when there is an issue of negligently failing to warn a trespasser. See Comment below.

If the trespasser is a child, use IPI 120.05 and IPI 120.1.

Comment

A trespasser is one who enters the premises of another without permission or without express or implied invitation or one who goes beyond the scope of his invitation onto the premises. While a landowner or occupier does not owe a duty to a trespasser to see that the premises are safe for his use, (*See* Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 87-88 (1922); Smith v. Goldman, 53 Ill.App.3d 632, 368 N.E.2d 1052, 11 Ill.Dec. 444 (2d Dist.1977), a landowner or occupier owes a duty to trespassers to refrain from willful and wanton conduct. Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072-73, 82 Ill.Dec. 262, 270-71 (1st Dist.1984). If, however, a property owner knew or should have known that an artificial condition on his property presented a risk of death or serious bodily injury, and if the owner knew of or had reason to anticipate the presence of trespassers in dangerous proximity to the hazard, then the property owner had a duty to exercise ordinary care to warn of the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992), applying the *Restatement (Second) of Torts* §337. For a duty of ordinary care to apply under §337 of the *Restatement (Second) of Torts*, the landowner or occupier must know, or have reason to know of the trespasser's presence. As the Lee Court noted, "reason to know" is defined under the *Restatement* as having "information from which a person of 'reasonable intelligence would infer that the fact in question exists.' " *Lee* 152 Ill. 2d at, 448. Policemen, firemen, and other public officials entering premises in their official capacity are not considered trespassers and are owed a duty of ordinary care as to the condition of the premises. Dini v. Naiditch, 20 Ill.2d 406, 417, 170 N.E.2d 881 (1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill.2d 552, 556-57, 328 N.E.2d 538, 540-41 (1975) (applying *Restatement (Second) of Torts* §§345, 343 (1965)); Horn v. Urban Inv. & Dev. Co., 166 Ill.App.3d 62, 66, 519 N.E.2d 489, 491, 116 Ill.Dec. 597 (2d Dist.1988). Given that the nature of a fireman's job is to deliberately encounter certain dangers that are known to them to be inherent in their job, landowners owe no duty to

firemen as to the hazards inherent in fire fighting. Smithers v. Ctr. Point Props. Corp., 318 Ill.App.3d 430, 741 N.E.2d 1152, 251 lll.Dec. 974 (1st Dist.2000).

120.04 Duty To Children Lawfully On Property--Condition Of Property

It was the duty of [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of children lawfully on the property.

Notes on Use

This instruction is to be used if the injury is to a non-trespassing child on the premises. In addition to this instruction, use IPI 120.08. The duty stated here is the same as IPI 120.02, which applies to all persons lawfully on the premises. The purpose of this instruction is to distinguish between the duty to trespassing children and the duty to children lawfully on the premises.

If the child is a trespasser, use IPI 120.05 and IPI 120.10.

Comment

Ordinary negligence concepts are used in a case involving children lawfully on the property.

120.05 Duty To Trespassing Children--Condition Of Property

If [defendant's name], an as (owner) (occupier) (other) of the property in question knew of or reasonably should have anticipated the presence of [a child] [children] near a condition on [defendant's name] property which presented a risk of injury which children would not appreciate, and where the expense or inconvenience of remedying the condition is slight compared to the risk, then the (owner) (occupier) (other) has a duty to remedy the condition or protect children from injury resulting from the condition.

Notes on Use

Use IPI 120.10 in addition to this instruction for injury caused by condition of property to trespassing children. Combine the appropriate instructions from the 128.20 series. If contributory negligence is an issue, use IPI 128.02 and the appropriate instruction from the 11 series; if there is no issue of contributory negligence, use IPI 128.01.

Comment

The duty owed to a trespassing child injured as a result of a condition of a landowner's or occupier's property was outlined in Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955). In Kahn, the Illinois Supreme Court departed from the traditional strict liability "attractive nuisance" doctrine imposed upon landowners and occupiers of property, and instead, recognized a negligence cause of action based upon the foreseeability of risk to children on the premises and the relative expense in remedying dangerous conditions. The court in Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995), said that the attractive nuisance doctrine, although abandoned, retained utility in analyzing duty. The court held: "That an attraction or allurement existed on the land is significant insofar as it indicates that the trespass should have been anticipated." *Mt. Zion*, 169 Ill.2d at 118. Illinois case law, following Kahn, embraced the principle that a duty owed to trespassing children is essentially a negligence concept based upon the foreseeability of injury to children balanced against the relative expense in remedying dangerous conditions. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 325-26, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., *supra*. However, a landowner's liability to a trespassing child is not absolute. A landowner or occupier has no duty to protect trespassing children from obvious risks that a child would be expected to appreciate and avoid. Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); *Mt. Zion,* 169 Ill.2d at 120 (an above ground pool); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree); Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition).

120.06 Duty To Persons On Premises--Scope Of Invitation--Condition Of Premises

It was the duty of defendant, [defendant's name], as an (owner) (occupier) (other) of the property in question, to exercise ordinary care to see that the property was reasonably safe for the use of those lawfully on the property. [That duty extends only to the portion of the premises onto which the person has either expressly or impliedly (been invited) (or) (been given permission) to use (or) to that portion the (owner) (occupier) (other) might reasonably expect him to use in connection with the (invitation) (permission) (and) only to that manner of use which the (owner) (occupier) might reasonably expect in connection with the express or implied (invitation) (or) (permission)].

[However, if [plaintiff's name], was on a portion of the premises to which he was not expressly or impliedly (invited) (or) (permitted) (or) which the (owner) (or) (occupant) would not reasonably expect him to use in connection with the (invitation) (or) (permission) (or) was using the premises for a purpose other than that for which he was (invited) (or) (permitted) (or) (for which the (owner) (occupier) might reasonably have expected him to use the premises), then it was the duty of the defendant to refrain from willful and wanton conduct which would endanger the safety of the plaintiff.]

Notes on Use

If there is no issue as to the scope of the invitation or permission, use IPI 120.02 instead of this instruction.

The second sentence should be used only where there is a dispute as to whether plaintiff was in an area beyond the scope of his express or implied permission at the time of the occurrence. The last part of the bracketed phrase should be used only when there is an issue of whether the plaintiff's manner of use of the premises exceeded the express or implied permission. The entire bracketed sentence in the first paragraph can be used if scope of invitation and manner of use are disputed.

In the alternative, the last bracketed paragraph should be used only if plaintiff has pled that defendant was guilty of willful and wanton conduct toward a trespassing plaintiff.

Comment

A trespasser is one who enters the premises of another without permission or without express or implied invitation. *Restatement (Second) of Torts* §329 (1965); Ill. Cent. R.R. Co. v. Eicher, 202 Ill. 556, 560, 67 N.E. 376, 378 (1903); Grimwood v. Tabor Grain Co., 130 Ill.App.3d 708, 711-12, 474 N.E.2d 920, 922, 86 Ill.Dec. 6, 8-9 (3d Dist.1985). The court in Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261 (5th Dist.1976), cited IPI 120.01 and defined "trespasser" as one who enters property "without permission, invitation, or other right, and intrudes for some purpose of his own, or at his convenience, or merely as an idler." Trout v. Bank of Belleville, 36 Ill.App.3d 83, 87, 343 N.E.2d 261, 264-65 (5th Dist.1976) (citing 62 Am. Jur. 2d, *Premises Liability* (1972) and IPI). A trespasser is also someone who, after being invited upon the premises, goes to another area beyond the scope of the invitation. Cockrell v. Koppers

Indus., Inc., 281 Ill.App.3d 1099, 1104, 667 N.E.2d 676, 680, 217 Ill.Dec. 587 (1st Dist.1996) (workers straying from the intended worksite are trespassers). Whether a person is a trespasser or someone lawfully on the premises is a question for the jury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (finding a jury should determine whether a fare-paying passenger, who left an "el" platform to urinate on the tracks, was a trespasser).

120.07 Reserved

120.08 Issue/Burden Of Proof Premises/Condition/Distraction

[In Count __], [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that [people] [children] on the property [would not discover or realize the danger] [or] [would fail to protect themselves against such danger].

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction combines the issues instruction and burden of proof instruction into one instruction. Use this instruction for premises liability cases, including those in which the plaintiff claims that he/she was distracted and failed to observe an open and obvious defect on the property. It is also appropriate for cases involving children who were lawfully on the premises. For trespassing children, use IPI 120.10. If the action alleges that an activity on the premises caused the injury or that the dangerous condition arose as part of the defendant's business, use IPI 20.01 and IPI B10.03. If there is a dispute as to ownership of the property, add the following paragraph and label it "First":

First, the defendant, [owned] [controlled] [managed] the property.

This instruction should be combined on the same page with the appropriate instructions from the 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01. See Simich v. Edgewater Beach Apartments Corp., 368 Ill.App.3d 394, 306 Ill.Dec. 535, 857 N.E.2d 934 (1st Dist. 2006), for a limitation on the use of this instruction.

Notes revised April 2007.

Comment

Traditionally, a landowner or occupier owed no duty to a trespasser or a person legally on the premises, except not to willfully or wantonly cause injury. *Restatement (Second) of Torts* §336 (1965); Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88 (1922); Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072, 81 Ill.Dec. 262 (1st

Dist. 1984); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 213, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist. 1979) (citing IPI); Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992). The duty owed to both trespassers and people legally on the premises has changed to a shifting standard or a duty based upon knowledge of conditions on the property and the risk of harm to people who frequent the property. It is expected that people on the premises will notice and avoid open and obvious dangers. However, the owner has a duty to warn others about dangerous conditions on the property where the owner or occupier knows or should know that people will approach the hazard while distracted, Ward v. Kmart Corp., 136 Ill.2d 132, 149-50, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), or will perceive an economic necessity to deliberately encounter the danger. LaFever v. Kemlite Co., 185 Ill.2d 380, 395, 706 N.E.2d 441, 449, 235 Ill.Dec. 886 (1998).

For persons legally on the premises, the owner owes a duty of reasonable care. The Premises Liability Act states an owner's duty to non-trespassers is one of reasonable care under the circumstances. The Act abolishes the common-law distinction between the invitees and licensees. 740 ILCS 130/2 (West 1998), effective September 12, 1984; Erne v. Peace, 164 Ill.App.3d 420, 423, 517 N.E.2d 1203, 1205, 115 Ill.Dec. 517 (2d Dist. 1987). Open and obvious hazards on the premises are expected to be noticed and avoided. Deibert v. Bauer Bros. Constr. Co., 141 Ill.2d 430, 439, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990). An owner has no duty regarding open and obvious dangerous conditions except in two situations. *See Restatement (Second) of Torts* §343A. First, the open and obvious exception does not apply where something distracted the person, or where he deliberately encountered danger out of economic necessity. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998). Second, the owner or occupier does have a duty to warn about dangerous conditions on the property if he knows or should know that people on the premises with permission could approach the hazard while distracted, Ward v. Kmart Corp., 136 Ill.2d 132, 149-50, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990), or will do so deliberately out of economic necessity, LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

The rule applicable to trespassers is that an owner owes a duty of ordinary care regarding conditions on the property if the property owner knows, or should know, that an artificial condition on the property presents a risk of death or serious bodily injury, and if the owner knows about or anticipates the trespasser's presence in dangerous proximity to the condition. Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992) (applying the *Restatement (Second) of Torts* §337). The terms of *Restatement* §337 limit the application of the rule to "artificial" conditions. However, *Comment b* states:

> The few cases in which the situation covered by this Section has arisen have involved artificial conditions with a risk of death or serious bodily harm to the trespasser, and such harm has in fact resulted. No reason is apparent, however, for any limitation of the rule to such cases, and it may reasonably be expected to apply to natural conditions on the land, or to the risk of harm less than death or serious bodily harm, including harm to the trespasser's property.

So far, no Illinois case sets forth whether this rule extends to natural conditions for either a trespasser or a person lawfully on the premises. Burns v. Addison Golf Club, 161 Ill.App.3d 127, 130-31, 514 N.E.2d 68, 71, 112 Ill.Dec. 672 (2d Dist. 1987) (no liability for injury caused by the open and obvious, natural condition of an exposed tree root). The court in Burns v. Addison Golf Club analogized the hazard posed by a tree root to that of snow and ice under the natural accumulations rule. For accumulations of snow and ice, an owner generally is not liable for resultant injuries. However, a limited exception to this rule can impose liability if the owner aggravated or acted in a way that caused the natural condition to become an unnatural condition. Harkins v. Sys. Parking, Inc., 186 Ill.App.3d 869, 872, 542 N.E.2d 921, 923-24, 134 Ill.Dec. 575 (1st Dist. 1989) (no liability for a fall on a snowy and icy parking lot); Endsley v. Harrisburg Med. Ctr., 209 Ill.App.3d 908, 910, 568 N.E.2d 470, 471, 154 Ill.Dec. 470 (5th Dist. 1991) (liability for ruts in an ice-covered sidewalk, where defendant directed traffic solely on that path); Wittaker v. Honegger, 284 Ill.App.3d 739, 743, 674 N.E.2d 1274, 1276, 221 Ill.Dec. 169 (5th Dist. 1996) (extending liability to loose driveway gravel on highway).

120.09 Issue/Burden Of Proof Premises/Deliberate Encounter

[In Count __], [plaintiff's name] seeks to recover damages from the [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that a reasonable person in plaintiff's position, knowing of the condition, would proceed to encounter it because the advantage of doing so outweighs the apparent risk.

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction combines the issues instruction and burden of proof instruction into one instruction. Use this instruction when the issues involve the plaintiff's deliberate encounter with an open and obvious defect on the defendant's premises. If the action alleges an activity which is negligent, rather than a dangerous condition on the premises, see Notes on Use for IPI 120.02 and Reed v. Walmart Stores, Inc., 298 Ill.App.3d 712, 700 N.E.2d 212, 233 Ill.Dec. 111 (1998). This instruction should be combined with the appropriate instructions from the 128 series. If contributory negligence is an issue use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

The deliberate encounter exception extends owner liability to circumstances in which the open and obvious rule would otherwise bar liability. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

The Court assessed the defendant's duty by examining foreseeability, likelihood of injury, the magnitude of the defendant's burden to prevent the injury, and the consequences of placing this burden on the defendant. It also applied the foreseeability analysis of *Restatement (Second) of Torts* §343 (1965), as well as addressed the open and obvious rule set forth in §343A of *Restatement (Second) of Torts* (1965). The Court noted that §343A relieves possessors and owners of land from liability for open and obvious dangers. However, the Court noted that the open and obvious rule is not limitless in scope, but rather, it is limited by the distraction and deliberate encounter exceptions. To define the "deliberate encounter exception," the Supreme Court turned to the *Restatement (Second) of Torts* §343A, *Comment f*, at 220:

> [H]arm may be reasonably anticipated when the possessor "has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998). Under the *Restatement*, liability flows from the owner's knowledge of his premises and what he could expect a person to do, when encountering any hazards. LaFever (citing *Restatement (Second) of Torts* §343A, *Comment f*, at 220). Economic necessity is a factor to be considered in the deliberate encounter exception to the open and obvious rule. LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

120.10 Issue/Burden Of Proof--Injury To Trespassing Children

[In Count __], the minor plaintiff, [plaintiff's name], by [guardian's name], his/her Guardian, seeks to recover damages from defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, the defendant knew, or in the exercise of ordinary care, should have known, that children frequented defendant's [property] [land] [building] [other].

Second, there was a [condition] [activity] on defendant's [property] [land] [building] [other] that presented a risk of harm to children that they would not appreciate due to their immaturity.

Third, the expense or inconvenience to the defendant in protecting children against the [condition] [activity] would be slight in comparison to the risk of harm to them, and that in (failing to act) (acting) the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fourth, the minor plaintiff was injured.

Fifth, the [condition] [activity] was a proximate cause of the injury or damage to the minor plaintiff.

Notes on Use

This instruction should be used where injury is claimed to a trespassing child as a result of some condition of the premises. If the child was lawfully on the premises, use IPI 120.08. This instruction should be combined with the appropriate instructions from the IPI 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

For injuries to a trespassing child, the duty of a landowner or possessor turns upon the foreseeability of harm to the child, and the child's ability to appreciate danger on the property. The leading case, Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), rejected the implication in the attractive nuisance doctrine that the dangerous condition had to lure children into trespassing on the premises. Instead, Kahn established that the cornerstone of liability was foreseeability of harm to children. This test eliminated the need for distinctions between invitees, licensees, and trespassers. Corcoran v. Village of Libertyville, 73 Ill.2d 316, 326, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978), refined the landowner's duty by stating "The essence of the Kahn principle is to impose a duty ... to remedy conditions which, although considered harmless to adults, are dangerous to children who foreseeably wander onto the premises." This duty does not extend to remedying obvious risks that courts have held children are capable of "appreciating." *Id.* at 326 (ditch in park); Mt. Zion State Bank & Trust v. Consol. Commc'ns, Inc., 169 Ill.2d 110, 117, 660 N.E.2d 863, 868, 214 Ill.Dec. 156 (1995) (above ground pool); Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (thin ice on a pond); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 241, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (climbing a tree);

Bucheleres v. Chi. Park Dist., 171 Ill.2d 435, 455, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996) (diving into a large body of water with fluctuating water levels and bottom composition). Where the child is harmed not by the owner, but by another trespasser, ordinary negligence rules govern and apply to the activity of the other trespasser. *Mt. Zion*, 169 Ill.2d at 124.

After Kahn, the test for imposing liability is as follows: (1) the occupier knows that young children frequent the vicinity; (2) there is a defective structure or dangerous agency present on the land; (3) that structure or agency is likely to cause injury because of the child's inability to appreciate risk; and (4) the expense of remedying the situation is slight. Trobiani v. Racienda, 95 Ill.App.2d 228, 233, 238 N.E.2d 177, 179 (1st Dist.1968); *accord* LaSalle Nat'l Bank v. City of Chi., 132 Ill.App.3d 607, 478 N.E.2d 417, 424, 88 Ill.Dec. 102, 109 (1st Dist.1985); Cummings v. Jackson, 57 Ill.App.3d 68, 372 N.E.2d 1127, 14 Ill.Dec. 848 (4th Dist.1978); Dickeson v. Baltimore & O.C.T.R. Co., 73 Ill.App.2d 5, 32, 220 N.E.2d 43, 46 (1st Dist.1965).

If the owner lacks knowledge of the trespasser's presence, no duty applies, except not to willfully and wantonly cause injury. Eshoo v. Chi. Transit Auth., 309 Ill.App.3d 831, 837, 723 N.E.2d 334, 243 Ill.Dec. 307 (1st Dist.1999). Case law extends this rule to trespassing children. *Id*.; *Mt. Zion,* 169 Ill.2d at 116; *Kahn,* 5 Ill.2d at 624. However, where the owner knows, or reasonably should know, of the trespasser's presence, a duty of ordinary care applies. *Eshoo*, 309 Ill.App.3d at 837. The Appellate Court uniformly interprets Kahn to mean that a person must use ordinary care to protect children from dangerous conditions, whether created by the defendant or found on his property. Melford v. Gaus & Brown Constr. Co., 17 Ill.App.2d 497, 151 N.E.2d 128 (1st Dist.1958) (unguarded excavation); Runions v. Liberty Nat'l Bank, 15 Ill.App.2d 538, 147 N.E.2d 380 (1st Dist.1957) (playground equipment formed a natural ladder to garage roof); Kleren v. Bowman, 15 Ill.App.2d 148, 145 N.E.2d 810 (2d Dist.1957) (child rode a bicycle off parking lot and fell down an embankment); Wilinski v. Belmont Builders, Inc., 14 Ill.App.2d 100, 143 N.E.2d 69 (1st Dist.1957) (rung broke on a homemade ladder at a construction site).

If there are disputed facts or differing inferences from undisputed facts, the trespasser status of the child is a question for the jury. *Eshoo*, 309 Ill.App.3d at 836, 723 N.E.2d 339, 343, 243 Ill.Dec. 307 (1st Dist.1999) (jury determines whether a fare-paying, minor-passenger, who left an “el” platform to urinate on the tracks, was a trespasser). Cases applying Kahn to children lawfully on the premises, include: Cope v. Doe, 102 Ill.2d 278, 286, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (partially frozen pond on apartment grounds); Alop v. Edgewood Valley Cmty. Ass'n, 154 Ill.App.3d 482, 507 N.E.2d 19, 107 Ill.Dec. 355 (1st Dist.1987) (fall on asphalt surface of playground); Logan v. Old Enter. Farms, Ltd., 139 Ill.2d 229, 564 N.E.2d 778, 151 Ill.Dec. 323 (1990) (fall from tree).

120.11 Issue/Burden Of Proof--Premises/Willful And Wanton

[In Count __], plaintiff [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property] [land] [building] [other] which presented an unreasonable risk of harm to [people] [children] on the property.

Second, the defendant knew of [or] [was willful and wanton in failing to discover] both the condition and the risk.

Third, the defendant could reasonably expect that [people] [children] on the property would not discover or realize the danger.

Fourth, the defendant was willful and wanton in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's willful and wanton conduct was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction should be used if the condition is claimed to be a result of willful and wanton conduct. With respect to defendant's claim that plaintiff contributed to the injury, Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional."

This instruction should be combined with the appropriate instructions from the IPI 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no issue of contributory negligence, use IPI 128.01.

Comment

Traditionally, an owner's duty not to act in a willful or wanton manner applied toward both trespassers and persons legally on the premises. *Restatement (Second) of Torts* §336 (1965); Marcovitz v. Hergenrether, 302 Ill. 162, 167, 134 N.E. 85, 88 (1922); Bofman v. Material Serv. Corp., 125 Ill.App.3d 1053, 1064, 466 N.E.2d 1064, 1072, 81 Ill.Dec. 262 (1st Dist.1984); Votava v. Material Serv. Corp., 74 Ill.App.3d 208, 213, 392 N.E.2d 768, 771-72, 30 Ill.Dec. 113, 116-17 (2d Dist.1979) (citing IPI); Lee v. Chi. Transit Auth., 152 Ill.2d 432, 472, 605 N.E.2d 493, 511, 178 Ill.Dec. 699 (1992).

For a discussion of the law concerning trespassers, see the Comment to IPI 120.08.

An owner behaves in a "willful and wanton" manner if he has either a deliberate intent to harm, or an utter indifference to, or a conscious disregard for, the safety of others. Sumner v. Hebenstreit, 167 Ill.App.3d 881, 886, 522 N.E.2d 343, 118 Ill.Dec. 888 (5th Dist.1988) (citing

Hocking v. Rehnquist, 44 Ill.2d 196, 201, 254 N.E.2d 515, 518 (1969)). In premises liability cases, a landowner or possessor acts willfully and wantonly when failing to warn of a dangerous condition that actually is concealed. *Sumner*, 167 Ill.App.3d at 886. For persons lawfully on the premises, the occupier of land has no duty to render a condition safe, or to discover an unsafe condition. Stephen v. Swiatkowski, 263 Ill.App.3d 694, 701, 635 N.E.2d 997, 1003, 200 Ill.Dec. 658 (1st Dist.1994) (citing Schoen v. Harris, 108 Ill.App.2d 186, 190, 246 N.E.2d 849 (1969)). Instead, the open and obvious exception applies. *Stephen*, 263 Ill.App.3d at 702; LaFever v. Kemlite Co., 185 Ill.2d 380, 391, 706 N.E.2d 441, 448, 235 Ill.Dec. 886 (1998).

125.00
LIABILITY FOR FALLS ON SNOW AND ICE

PERMISSION TO PUBLISH GRANTED IN 2004.

INTRODUCTION

As a general rule, property owners have no duty to remove natural accumulations of snow, ice or melt water from their premises. Riccitelli v. Sternfeld, 1 Ill.2d 133, 115 N.E.2d 288 (1953); *see also* Selby v. Danville Pepsi-Cola Bottling Co., 169 Ill.App.3d 427, 435, 523 N.E.2d 697, 119 Ill.Dec. 941 (4th Dist.1988); Smalling v. LaSalle Nat'l Bank, 104 Ill.App.3d 894, 899, 433 N.E.2d 713, 60 Ill.Dec. 671 (4th Dist.1982); Hankla v. Burger Chef Sys., Inc., 93 Ill.App.3d 909, 418 N.E.2d 35, 49 Ill.Dec. 391 (1st Dist.1981). There is no liability for clearing off snow under which there is a natural accumulation of ice. McCann v. Bethesda Hosp., 80 Ill.App.3d 544, 549, 400 N.E.2d 16, 35 Ill.Dec. 879 (1st Dist.1979).

Recovery for falls on icy sidewalks or parking lots can be based on negligent design or maintenance of the underlying pavement. Sepesy v. Archer Daniels Co., 59 Ill.App.3d 56, 375 N.E.2d 180, 16 Ill.Dec. 549 (4th Dist.1978) (sloping surface created unnatural accumulations); McCann v. Bethesda Hosp., 80 Ill.App.3d 544, 549, 400 N.E.2d 16, 35 Ill.Dec. 879 (1st Dist.1970) (architect testified to improper design of entry way which resulted in unnatural accumulations); Webb v. Morgan, 176 Ill.App.3d 378, 531 N.E.2d 36, 125 Ill.Dec. 857 (5th Dist.1988) (slope of parking lot altered natural run-off); Wolter v. Chi. Melrose Park Assocs., 68 Ill.App.3d 1011, 1019, 386 N.E.2d 495, 25 Ill.Dec. 224 (1st Dist.1979) (negligent maintenance of parking lot surface could cause unnatural accumulation of ice). Other cases have recognized a cause of action for negligent removal of ice and snow because an "unnatural accumulation" resulted. Fitz Simons v. Nat'l Tea Co., 29 Ill.App.2d 306, 173 N.E.2d 534 (1961); Foster v. George J. Cyrus & Co., 2 Ill.App.3d 274, 276 N.E.2d 38 (1st Dist.1971); McCarthy v. Hidden Lake Village Condo. Ass'n, 186 Ill.App.3d 752, 542 N.E.2d 868, 134 Ill.Dec. 522 (1st Dist.1989).

Illinois courts have applied the "unnatural accumulation" requirement in a number of specific contexts. There is no duty to warn customers or invitees of the danger of natural accumulations. McCann v. Bethesda Hosp., 80 Ill.App.3d 544, 549, 400 N.E.2d 16, 35 Ill.Dec. 879 (1st Dist.1979). Property owners have no duty to clean up ice, snow or water which is tracked in by customers. Demario v. Sears, Roebuck & Co., 6 Ill.App.3d 46, 284 N.E.2d 330 (1st Dist.1972), or to provide mats or rugs for customers to wipe their feet. Lohan v. Walgreens Co., 140 Ill.App.3d 171, 488 N.E.2d 679, 94 Ill.Dec. 680 (1st Dist.1986). A mat, which becomes saturated in a store's entryway due to tracked-in water, does not transform the water into an unnatural accumulation, nor does it aggravate the water's natural accumulation. Wilson v. Gorski's Food Fair, 196 Ill.App.3d 612, 554 N.E.2d 412, 143 Ill.Dec. 477 (1st Dist.1990). Where there is no evidence to show that moisture originated from an unnatural accumulation, property owners are under no duty to remove water from interior floors near mats. Roberson v. J.C. Penney Co., 251 Ill.App.3d 523, 623 N.E.2d 364, 191 Ill.Dec. 119 (3d Dist.1993); *see* Richter v. Burton Inv. Props., Inc., 240 Ill.App.3d 998, 1004, 181 Ill.Dec. 780, 608 N.E.2d 1254 (2d Dist.1993) (holding that the placement of mats on a ceramic tile floor did not create a duty to

cure an excessively slippery floor). *But see* Fanning v. Lemay, 78 Ill.App.2d 166, 222 N.E.2d 815 (5th Dist.1966), *rev'd on other grounds*, 38 Ill.2d 209, 230 N.E.2d 182 (1967) (liability predicated on negligent use of floor tile which became slippery when wet). Normal usage of the property by vehicles or pedestrians which leaves ruts or ridges or ice in natural accumulations or which causes ice to form as a result of thawing and refreezing on an otherwise properly maintained surface has been held to be a natural accumulation. Selby v. Danville Pepsi-Cola Bottling Co., 169 Ill.App.3d 427, 435, 523 N.E.2d 697, 119 Ill.Dec. 941 (4th Dist.1988); Harkins v. Sys. Parking Inc., 186 Ill.App.3d 869, 872-73, 542 N.E.2d 921, 134 Ill.Dec. 575 (1st Dist.1989).

Given that a property owner is not liable for injuries caused by natural accumulations of ice and snow, a property owner cannot be held liable for a failure to provide adequate safeguards to prevent others from falling as a result of those natural accumulations. Branson v. R & L Inv., Inc., 196 Ill.App.3d 1088, 1094, 143 Ill.Dec. 689, 554 N.E.2d 624 (1st Dist.1992).

The existence of a municipal nuisance ordinance does not imply a duty to remove natural accumulations where the common law creates no such duty. Thompson v. Tormike, Inc., 127 Ill.App.3d 674, 469 N.E.2d 453, 82 Ill.Dec. 919 (1st Dist.1984). A municipal ordinance requiring abutting property owners to remove snow and ice from public sidewalks within 24 hours of snowfall of two inches or more is an ordinance for the benefit of the municipality. Such an ordinance does not create a duty for the landowners. Klikas v. Hanover Square Condo. Ass'n, 240 Ill.App.3d 715, 608 N.E.2d 541, 181 Ill.Dec. 468 (1st Dist.1992).

A contract or a lease agreement that requires snow removal can create a duty to remove natural accumulations. Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist.1980). The plaintiff has the burden of proving that the defendant knew or should have known of the dangerous condition and failed to take proper steps to guard against it. The lease may create a duty of snow removal but does not establish a strict liability standard. Tressler v. Winfield Vill. Coop., Inc., 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist.1985). A visitor on the property is not necessarily a third-party beneficiary of a contract of the property owner with a snow removal service. Wells v. Great Atl. & Pac. Tea Co., 171 Ill.App.3d 1012, 525 N.E.2d 1127, 121 Ill.Dec. 820 (1st Dist.1988). However, Eichler v. Plitt Theatres, Inc., 167 Ill.App.3d 685, 521 N.E.2d 1196, 118 Ill.Dec. 503 (2d Dist.1988), held that a lease requiring the removal of "all" snow and ice would be construed as requiring removal of all that was reasonably practical and that such a lease could create a duty of ordinary care toward a business patron who fell (applying the *Restatement (Second) of Torts* §324A).

The General Assembly adopted the Snow and Ice Removal Act (745 ILCS 75/1-75/2), effective September 14, 1979. Section 2 provides:

> §2. Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was willful or wanton.

In 1996, the Second District considered this statute in the context of removal of snow and ice from "sidewalks abutting" residential property. Yu v. Kobayashi, 281 Ill.App.3d 489, 667 N.E.2d 106, 217 Ill.Dec. 313 (2d Dist.1996). In Yu, the court found that the defendant was not liable for any negligence in removing or attempting to remove snow from a paved area between the stoop of an apartment and a parking lot where plaintiff slipped and fell. The court noted that the paved area, part of the continuous walkway, was sufficiently similar to a traditional sidewalk and to classify it otherwise would be unreasonable. Other cases have considered snow and ice removal from "sidewalks abutting" property without referring to the statute. See Klikas, 240 Ill.App.3d 715, 608 N.E.2d 541, 181 Ill.Dec. 468 (1st Dist.1992) discussed above.

125.01 Duty Of Landowner--Snow And Ice Removal--Condition Of The Premises

[However,] The [owner] [occupant] of property is under no duty to remove ice or snow which has resulted from natural accumulations.

Notes on Use

This instruction should be given in cases where the landowner or occupier's liability is based upon the existence of unnatural accumulations of snow or ice, whatever the cause. This instruction should be given in conjunction with IPI 125.02.

This instruction should be given with IPI 125.02 and such premises liability instructions as may be applicable. If the plaintiff claims he was injured directly by a snow removal operation, then use IPI 20.01 and IPI 10.03 instead of this instruction.

This instruction can be added as an additional paragraph to the applicable duty instruction (e.g. IPI 10.04-negligence, or IPI 14.04-willful and wanton) by using the bracketed word, "However," or can be given as a separate instruction without that word.

This instruction should not be given if "natural accumulation" is not an issue for the jury.

Comment

The refusal to give an instruction about the duty as to natural accumulations was held to be reversible error in Foster v. George J. Cyrus & Co., 2 Ill.App.3d 274, 276, 276 N.E.2d 38 (1st Dist.1971). A similar instruction was approved with additional comments on the law in Wolter v. Chi. Melrose Park Assocs., 68 Ill.App.3d 1011, 1019-20, 386 N.E.2d 495, 500-01, 25 Ill.Dec. 224, 229-30 (1st Dist.1979). *See* Smalling v. LaSalle Nat'l Bank, 104 Ill.App.3d 894, 433 N.E.2d 713, 60 Ill.Dec. 671 (4th Dist.1982).

If a duty to remove or protect against natural accumulations of snow or ice is created by conduct or contract, then the plaintiff need not prove the existence of "unnatural accumulation" and this instruction is inapplicable. Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist.1980); Tressler v. Winfield Vill. Coop., Inc., 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985); Eichler v. Plitt Theatres, Inc., 167 Ill.App.3d 685, 521 N.E.2d 1196, 118 Ill.Dec. 503 (2d Dist. 1988); Williams v. Alfred N. Koplin & Co., 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist.1983) (duty arose by voluntary conduct).

125.02 Falls On Ice Or Snow--Negligence Only--No Issue As To Ownership Or Control--Issues/Burden Of Proof

[In Count __], plaintiff [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was an unnatural accumulation of [ice] [snow] on the [property] [land] [building] [other] which presented an unreasonable risk of harm to people on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people on the property [would not discover or realize the danger] [or] [would fail to protect against such danger].

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Notes on Use

This instruction should be given with IPI 125.01 and IPI 125.04. If there is an issue as to ownership or control over the premises, this instruction must be modified accordingly. Do not use this instruction unless there is an issue concerning an unnatural accumulation. If the case is based upon improper removal of or attempts to remove snow and ice from residential sidewalks, pursuant to 745 ILCS 75/2, this instruction cannot be used as written because the statute requires "willful and wanton" conduct.

This instruction as drafted is applicable only if there is no willful and wanton allegation. Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used in its present form. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly. If there is a willful and wanton allegation, this instruction may need to be modified so that one instruction is given with respect to negligence and contributory negligence and one is given with respect to willful and wanton conduct. The content of the latter instruction will depend on the trial court's ruling as to the effect of the plaintiff's contributory fault, if any.

This instruction should be combined with the appropriate instructions from the 128 series. If contributory negligence is an issue, use IPI 128.02. If there is no contributory negligence issue, use IPI 128.01.

Comment

The plaintiff has the burden of proving that the accumulation of ice and snow is "unnatural," that the defendant had actual or constructive notice of the condition, and that defendant failed to take reasonable precaution to avoid injury to others. Wolter v. Chi. Melrose Park Assocs., 68 Ill.App.3d 1011, 1018-19, 386 N.E.2d 495, 500-01, 25 Ill.Dec. 224, 229-30 (1st Dist. 1979); *see also* Selby v. Danville Pepsi-Cola Bottling Co., 169 Ill.App.3d 427, 435, 523 N.E.2d 697, 700, 119 Ill.Dec. 941, 944 (4th Dist.1988).

The issue of whether or not accumulations are natural is a question of fact. Turner v. Cosmopolitan Nat'l Bank, 180 Ill.App.3d 939, 536 N.E.2d 706, 812, 129 Ill.Dec. 756, 762 (1st Dist. 1989) (broken door which allowed snow to blow into building created jury issue as to unnatural accumulation); Johnson v. Sears, Roebuck & Co., 186 Ill.App.3d 725, 727-28, 542 N.E.2d 841, 842-43, 134 Ill.Dec. 495, 496-97 (1st Dist. 1989) (broken bag of garden soil near door which mixed with tracked-in water created jury issue as to unnatural accumulation); McCarthy v. Hidden Lake Vill. Condo. Assoc., 186 Ill.App.3d 752, 542 N.E.2d 868, 134 Ill.Dec. 522 (1st Dist. 1989) (negligently conducted plowing created jury issue as to unnatural accumulation).

If a duty to remove or protect against natural accumulations of snow or ice is created by conduct or contract, then the plaintiff need not prove the existence of an "unnatural accumulation" and this instruction is inapplicable. Schoondyke v. Heil, Heil, Smart & Golee, Inc., 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist. 1980); Tressler v. Winfield Vill. Coop., Inc., 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985); Eichler v. Plitt Theatres, Inc., 167 Ill.App.3d 685, 521 N.E.2d 1196, 118 Ill.Dec. 503 (2d Dist. 1988); Williams v. Alfred N. Koplin & Co., 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist. 1983).

125.03 Reserved

125.04 Natural Accumulation Defined

In these instructions, I have used the expression "natural accumulation of [ice] [snow] [____]."

The [snow] [ice] [____] involved in this case was a natural accumulation if it resulted from [(fill in appropriate language determined by the court to define the disputed issue in the case, e.g., moisture which is tracked into a building; the normal effects of pedestrian or vehicular traffic on snowfall; normal freezing and thawing; the effects of normal snow removal, etc.)]

On the other hand, the [snow] [ice] [____] involved in this case was an unnatural accumulation if it resulted from [(fill in appropriate language by the court to define the disputed issue in the case, e.g., impaired or altered drainage of the premises; negligent maintenance of the underlying sidewalk/parking lot by the property owner; negligence of the property owner in leaving spilled liquid in a high traffic area, etc.)]

Whether the [snow] [ice] [____] which the plaintiff claims proximately caused injury was a natural accumulation or was an unnatural accumulation is for you to decide.

Notes on Use

This instruction is appropriate only if there is a disputed issue of fact for the jury to decide on the issue of "natural" vs. "unnatural" accumulation. If the material facts regarding this issue are not in dispute, this instruction should not be given and IPI 125.01 also should not be given.

Because this issue usually arises in a highly factually specific context, the court should determine which facts in the case will establish an "unnatural" accumulation giving rise to a duty, which facts will establish a "natural" accumulation, and complete the instruction accordingly. The examples in the instruction are offered as illustration based on present case law. However, these examples are not intended to represent any opinion by the committee as to what the law is or should be or as to the exact language for instructing the jury in any given case.

In completing the instruction, the language of the court should be based on the evidence and issues of the specific case and should be understandable and nonargumentative.

Comment

Swartz v. Sears Roebuck & Co., 264 Ill.App.3d 254, 636 N.E.2d 642, 201 Ill.Dec. 210 (1st Dist. 1993), held that it was reversible error for the trial court to refuse to instruct the jury on the issue of what constituted a natural accumulation of moisture in the context of that case.

For a general discussion of the law on this issue, see the Introduction, IPI 125.00.

128.00
CONCLUDING PARAGRAPHS--NO CONTRIBUTORY NEGLIGENCE--CONTRIBUTORY NEGLIGENCE--AFFIRMATIVE DEFENSE

INTRODUCTION

As alluded to in the introduction to the premises instructions the following chapter contains the alternative concluding paragraph(s) which would be appropriate for each case.

The alternatives are: a concluding paragraph that relates to no issues of contributory negligence or other affirmative defenses, a concluding paragraph to be used when there is a claim of contributory negligence, and a concluding paragraph that would incorporate the claim in an affirmative defense. These alternatives are put together much as IPI 30.01 is assembled with regard to damages. The trial attorneys and Court can then pick the appropriate alternatives based upon which claims the jury must decide. A sample instruction (IPI 128.04) shows how the various alternatives fit together.

128.01 Concluding Paragraph--No Issue Of Contributory Negligence Or Affirmative Defense

If you find from your consideration of all the evidence, that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if you find that any of these propositions has not been proved, your verdict should be for the defendant.

Notes on Use

The instructions numbered IPI 128.01 through 128.03 should be combined with the issues instructions IPI 120.08 through 125.02, as appropriate. Use IPI 128.01 as the last paragraph of the issue/burden of proof instruction in a premises case in which contributory negligence is not an issue. IPI 128.02 should follow the issue instruction when there is evidence supporting a contributory negligence verdict. IPI 128.03 contains an instruction for an affirmative defense.

If contributory negligence and/or an affirmative defense will be instructed upon, omit the final phrase "your verdict should be for the defendant." Also use IPI 128.02 or 128.03 as appropriate.

128.02 Concluding Paragraph--Contributory Negligence Claimed

If you find from your consideration of all of the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant. On the other hand, if you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

In order to reduce or deny plaintiff damages, the defendant has the burden of proving each of the following:

First, that plaintiff [plaintiff's name] failed to exercise ordinary care [for (his/her) own safety] [for the safety of (his/her) property] in one or more of the following ways:

a) _____,

b) _____,

c) _____,

Second, plaintiff's failure to exercise ordinary care was a proximate cause of plaintiff['s][s'] [injury] [and] [damage].

If you find that the defendant has not proved both of the propositions required of the defendant, then your verdict should be for the plaintiff and you will not reduce plaintiff's damages. You should use Verdict form A.

If you find that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was more than 50% of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the defendant. You should use Verdict form C.

If you find that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was 50% or less of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the plaintiff and you will reduce the plaintiff's damages in the manner stated to you in these instructions. You should use Verdict form B.

Instruction revised April 2007.

Notes on Use

The instructions numbered IPI 128.01 through IPI 128.03 should be used as concluding paragraphs with the issues/burden instructions IPI 120.08 through IPI 125.02. Use IPI 128.01 where contributory negligence is not an issue. Use IPI 128.02 where contributory negligence is claimed.

128.03 Concluding Paragraph--Affirmative Defense Claimed

If you find that the plaintiff has proved each of these propositions, then you should consider the defendant's affirmative defense of ____. In order to defeat the plaintiff's claim, the defendant must prove:

First: _____,

Second: _____,

(List the elements of the affirmative defense.)

If the defendant proves all of these propositions, your verdict should be for the defendant. If the defendant has failed to prove each of these propositions, [then you must consider the defendant's claim that the plaintiff was contributorily negligent] [then you must find for the plaintiff.]

Notes on Use

Use this instruction as the concluding paragraph to the issues/ burden instructions IPI 120.08 through IPI 125.02 where an affirmative defense other than contributory negligence is asserted.

If both an affirmative defense and contributory negligence are being asserted, a) this instruction should be appended to, and immediately follow, the appropriate issue/burden of proof instruction, b) the appropriate bracketed language above referring to the claim of contributory negligence must be used, rather than the language directing a finding for the plaintiff, and c) IPI 128.02, the contributory negligence instruction, should be appended to follow this instruction.

128.04 Sample Instruction--Premises--Contributory Negligence Claimed (120.08 And 128.02)

[In Count __], plaintiff [plaintiff's name] seeks to recover damages from the defendant [defendant's name]. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the [property, land, building, ____] which presented an unreasonable risk of harm to people [children] on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people [children] on the property [would not discover or realize the danger] [or] [would fail to protect themselves against such danger].

Fourth, the defendant was negligent in one or more of the following ways:

a) _____,

b) _____,

c) _____.

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

If you find from your consideration of all of the evidence that the plaintiff has proved each of these propositions, then you should consider the defendant's affirmative defense of ____. In order to defeat the plaintiff's claim, the defendant must prove:

First: _____.

Second: _____.

(List the elements of the affirmative defense.)

If the defendant proves all of these items, your verdict should be for the defendant. If the defendant has failed to prove each of these propositions, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

In order to reduce or deny plaintiff damages, the defendant has the burden of proving each of the following propositions:

First, plaintiff [plaintiff's name] failed to exercise ordinary care [for (his/her) own safety] [for the safety of (his/her) property] in one or more of the following ways:

a) _____,

b) _____,

c) _____.

Second, plaintiff's failure to exercise ordinary care was a proximate cause of plaintiff['s][s'] [injury] [and] [damage].

If you find the defendant has not proved both of the propositions required of the defendant, then your verdict should be for the plaintiff and you will not reduce plaintiff's damages. You should use Verdict form A.

If you find that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was more than 50% of the total proximate cause of the injury [or damage] for which recovery is sought, then your verdict should be for the defendant. You should use Verdict form C.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved both of the propositions required of the defendant, and if you find that the plaintiff's contributory negligence was 50% or

less of the total proximate cause of the [injury] [and] [damage] for which recovery is sought, then your verdict should be for the plaintiff and you will reduce the plaintiff's damages in the manner stated to you in these instructions. You should use Verdict form B.

130.00
LANDLORD AND TENANT

130.01 Accident On Leased Premises--Latent Defect

If a landlord either knows about an existing defect on the premises which is not readily apparent, or knows of facts and circumstances which would indicate that there is such a defect, then he must tell his tenant about it [before the tenant moves in] [at the time of the letting]. However, a landlord need not warn his tenant about a defect which the tenant could have discovered by a reasonable inspection.

Notes on Use

If there is no dispute as to the fact the landlord knew about the defect, use the following in lieu of the first sentence: "Usually a landlord must warn his tenant about defects in the premises which are not readily apparent."

This instruction is not intended for use when the accident occurs on that part of the premises reserved for use by all the tenants, such as hallways or stairs. In that case, IPI 130.02 should be used.

Do not use this instruction where the plaintiff is a small child. *See* Rahn v. Beurskens, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966).

Comment

A landlord must tell a tenant of a defect on the premises about which he knows or, from facts known to him, should know, and which could not be discovered by the tenant after a reasonable inspection. Mercer v. Meinel, 290 Ill. 395, 401; 125 N.E. 288, 290 (1919) (it was proper to direct a verdict when there was no evidence "that the defendant knew or from any fact or circumstance ought to have known" of an improperly vented exhaust from water heater in bathroom); Borggard v. Gale, 205 Ill. 511, 514; 68 N.E. 1063, 1064 (1903) (verdict for defendant with regard to an obvious hole in the floor affirmed); Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902) (it was error in effect to dismiss a complaint that alleged sickness was from sewer gas, the presence of which was known to the landlord and not known to the tenant); Hamilton v. Baugh, 335 Ill.App. 346, 82 N.E.2d 196 (4th Dist.1948) (plaintiffs did not prove that defendant landlord had knowledge of the rotted condition of the privy into the vault of which they fell); Taylor v. Geroff, 347 Ill.App. 55, 59; 106 N.E.2d 210, 212 (4th Dist.1952) (landlord had no actual knowledge of defects that made furnace explode and therefore was entitled to the directed verdict); Garcia v. Jiminez, 184 Ill.App.3d 107, 539 N.E.2d 1356, 132 Ill.Dec. 550 (2d Dist.1989) (verdict for defendant proper where jury could find from evidence that defendant did not and should not have known that the paint plaintiff's child ingested was peeling or contained lead); Kordig v. Northern Const. Co., 18 Ill.App.2d 48, 151 N.E.2d 470 (1st Dist.1958) (absence of extra handrail on stairway not a concealed or latent defect); Cromwell v. Allen, 151 Ill.App. 404 (4th Dist.1909) (no liability where defendant had no knowledge of rotted condition of porch); Shields v. J.H. Dole Co., 186 Ill.App. 250 (2d Dist.1914) (no liability for injury to

tenant's servant where landlord and tenant both had knowledge of the defective condition of the building); Soibel v. Oconto Co., 299 Ill.App. 518, 20 N.E.2d 309 (1st Dist.1939) (no evidence that landlord knew or should have known of rotted floor); Elbers v. Standard Oil Co., 331 Ill.App. 207, 72 N.E.2d 874 (1st Dist.1947) (lack of oil in hydraulic lift not a latent defect); Farmer v. Alton Bldg. & Loan Ass'n, 294 Ill.App. 206, 13 N.E.2d 652 (4th Dist.1938) (jury question as to whether a cesspool covering was defective and whether defendant knew or should have known about the defect); Clerken v. Cohen, 315 Ill.App. 222, 42 N.E.2d 846 (1st Dist.1942) (lack of gutters which caused ice to form not a latent defect); Sollars v. Blayney, 31 Ill.App.2d 341, 176 N.E.2d 477 (3d Dist.1961) (judgment for plaintiff proper where evidence showed landlord knew of defect in roof which caused puddle on plaintiff's floor); Murphy v. Messerschmidt, 41 Ill.App.3d 659, 355 N.E.2d 78 (5th Dist.1976), *aff'd*, 68 Ill.2d 79, 368 N.E.2d 1299, 11 Ill.Dec. 553 (1977) (texture of stairs not latent defect where fall was caused by severe rain); Webster v. Heim, 80 Ill.App.3d 315, 399 N.E.2d 690, 35 Ill.Dec. 624 (3d Dist.1980) (a single exit, lack of fire doors and provision of combustible furniture to other tenants were not latent defects).

A landlord has no duty, however, to notify a tenant of defects discovered after the time of letting. Long v. Joseph Schlitz Brewing Co., 214 Ill.App. 517 (1st Dist.1919).

130.02 Accident On Premises Reserved For Common Use

A landlord must use ordinary care to keep the [stairs, hallway, etc.] in a reasonably safe condition [for the purpose for which the [stairs, hallway, etc.] were reasonably intended].

Notes on Use

This instruction is applicable where there is more than one living unit in the building and there are premises reserved for common use. The blanks should be filled in with items used in common, such as stairs, hallway, etc.

The bracketed phrase should be used where there is a dispute as to whether the premises were being used for a purpose for which they were reasonably intended. The phrase may not be appropriate in the case of a minor using the premises for purposes other than those for which the premises were reasonably intended. Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955); Smith v. Springman Lumber Co., 41 Ill.App.2d 403, 191 N.E.2d 256 (4th Dist.1963) (verdict in favor of minor tenant proper where it was foreseeable that children would play on dangerous, unused fuel oil tank stored in side yard); Rahn v. Beurskens, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966) (jury question as to whether it was foreseeable that a minor tenant might grasp a defective electrical wire while simultaneously grasping a water faucet); Drell v. American Nat. Bank & Trust Co., 57 Ill.App.2d 129, 207 N.E.2d 101 (1st Dist.1965) (owner of apartment building liable when empty oxygen tank stored in passageway was upset by tug of dog's leash tied to tank, injuring minor plaintiff).

The fact that a minor may be trespassing on a landlord's property is not a defense. Schranz v. Halley, 114 Ill.App.3d 159, 448 N.E.2d 601, 69 Ill.Dec. 883 (3d Dist.1983) (instruction improper which implied that if the jury found that the minor plaintiff, who was injured when she leaned against a defective railing and fell to the ground, was trespassing, she could not recover).

IPI 120.04 should be used in a case involving a minor whose rights are governed by the doctrine in the Kahn case. *See* Comment to IPI 120.04.

Comment

The landlord must use ordinary care to keep the premises reserved for common use reasonably safe. Durkin v. Lewitz, 3 Ill.App.2d 481, 123 N.E.2d 151 (1st Dist.1954) (it was negligent to permit ice to form on a second floor landing as a result of defective gutter); Stevenson v. Byrne, 3 Ill.App.2d 43, 48, 120 N.E.2d 377, 379-380 (1st Dist.1954) (plaintiff fell because of a hole in the vestibule floor). Liability extends to injuries on the leased premises caused by negligence in maintaining the common premises. Ciskoski v. Michalsen, 19 Ill.App.2d 327, 152 N.E.2d 479 (1st Dist.1958) (blocked chimney caused asphyxiation from fumes of gas heater); Mangan v. F.C. Pilgrim & Co., 32 Ill.App.3d 563, 336 N.E.2d 374 (1st Dist.1975) (building's infestation with mice caused plaintiff to encounter a mouse in her apartment, become frightened, and fall). This duty of the landlord does not go beyond maintaining the common premises for the uses for which they were reasonably intended. If the tenant puts the common

premises to a different use, the landlord's duty ceases. McGinnis v. Berven, 16 Ill.App. 354, 356 (1st Dist.1885) (mandatory instructions were erroneous which did not limit use of a second story porch to its intended purposes where the porch gave way under the load of seven people and an ash box weighing one ton).

The landlord has no duty to remove natural accumulations of snow or ice regardless of the length of time which passes after the accumulation. Foster v. George J. Cyrus & Co., 2 Ill.App.3d 274, 276 N.E.2d 38 (1st Dist.1971) (rejecting dicta in Durkin, *supra*, indicating otherwise).

Liability may be incurred, however, when snow or ice is not produced or accumulated from natural causes, but as a result of artificial causes or in any unnatural way, or when defendant's own use of the area concerned created the condition, and whether the condition has been there long enough to charge the responsible party with notice and knowledge of the dangerous condition. Bakeman v. Sears, Roebuck & Co., 16 Ill.App.3d 1065, 307 N.E.2d 449 (2d Dist.1974); Cupp v. Nelson, 5 Ill.App.3d 37, 282 N.E.2d 513 (1st Dist.1972) (error to grant new trial where jury found defendant negligent in spreading salt on some but not all of the icy steps upon which plaintiff fell); Webb v. Morgan, 176 Ill.App.3d 378, 531 N.E.2d 36, 125 Ill.Dec. 857 (5th Dist.1988) (verdict for plaintiff proper where jury could determine that an icy parking lot upon which plaintiff fell was the product of an unnatural accumulation caused by water running off snowbanks onto a common parking area and freezing); Lapidus v. Hahn, 115 Ill.App.3d 795, 450 N.E.2d 824, 71 Ill.Dec. 136 (1st Dist.1983) (ice formed because of defective roof was an unnatural accumulation).

The mere sprinkling of salt on a stairway, which may cause ice to melt, although it later refreezes, is not the kind of act which aggravates a natural condition and leads to a landlord's liability. Lewis v. W. F. Smith & Co., 71 Ill.App.3d 1032, 390 N.E.2d 39, 28 Ill.Dec. 57 (1st Dist.1979). A custom of gratuitous snow and ice removal does not give rise to a duty to continue to remove natural accumulations of snow or ice. Chisolm v. Stephens, 47 Ill.App.3d 999, 365 N.E.2d 80, 7 Ill.Dec. 795 (1st Dist.1977).

130.03 Accident On Leased Premises--Landlord Undertakes Repairs

A landlord who undertakes to make improvements or repairs upon the leased premises is under a duty to use ordinary care in carrying out the work [even if the landlord was not under a legal obligation to make the improvements or repairs].

Notes on Use

Before this instruction can be given, there must be evidence of affirmative conduct which caused a defect. Saputo v. Fatla, 25 Ill.App.3d 775, 324 N.E.2d 34 (1st Dist.1975) (instruction properly refused where no evidence was presented linking general plumbing repairs with water on the floor of a bathroom); St. Mary's Hospital v. Auburn, 128 Ill.App.3d 747, 471 N.E.2d 584, 84 Ill.Dec. 55 (4th Dist.1984) (no liability in furnace explosion action for failing to inspect furnace where there was no evidence of the negligent performance of work on the furnace). Evidence of affirmative conduct may include a landlord's consistent course of conduct in making repairs, which may establish a duty to maintain plaintiff's premises. Jones v. Chicago Housing Authority, 59 Ill.App.3d 138, 376 N.E.2d 26, 17 Ill.Dec. 133 (1st Dist.1978) (landlord liable for failure to repair window latch where it had consistently made repairs in the past when notified of the need). Thus, failure to act can also impose liability where the landlord's course of conduct in consistently making repairs establishes a duty to maintain plaintiff's premises.

The bracketed material should be used when some point is made during the trial that the landlord undertook to make the repairs without compensation.

Comment

A landlord who undertakes repairs must use ordinary care in carrying them out whether fulfilling a contractual obligation or doing them gratuitously. Roesler v. Liberty Nat. Bank of Chicago, 2 Ill.App.2d 54, 118 N.E.2d 621 (1st Dist.1954); Jordan v. Savage, 88 Ill.App.2d 251, 232 N.E.2d 580 (1st Dist.1967) (plaintiff injured on stairs after landlord inadequately secured a bannister to a deteriorated plaster wall with straight nails); Watts v. Bacon & Van Buskirk Glass Co., 20 Ill.App.2d 164, 155 N.E.2d 333 (3d Dist.1958) (lessor liable for installing plate glass door instead of tempered glass); Sims v. Block, 94 Ill.App.2d 215, 236 N.E.2d 572 (5th Dist.1968) (landlord liable for negligent snow removal in parking lot); Williams v. Alfred N. Koplin & Co., 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist.1983) (summary judgment inappropriate where plaintiff alleged her fall was caused by the landlord's voluntarily shoveling a narrow path on a stairway which left a handrail inaccessible).

This duty extends to all those who may reasonably be expected to encounter the improved or repaired property. Brewer v. Bankord, 69 Ill.App.3d 196, 387 N.E.2d 344, 25 Ill.Dec. 688 (2d Dist.1979) (complaint alleging tenant's social guest injured by landlord's negligent repairs stated cause of action).

135.00
ABUTTING PROPERTY OWNER

135.01 Duty Of Owner Of Property Abutting Sidewalk

The owner of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition [which would interfere] [by interfering] with the customary and regular use of the walk.

Comment

An owner of abutting property who alters a sidewalk for his own convenience has a duty to use ordinary care to maintain the alteration in a reasonably safe condition. Kellems v. Schiele, 297 Ill.App. 388, 394; 17 N.E.2d 604, 606 (4th Dist.1938) (plaintiff walking on the sidewalk fell into a coal chute insecurely covered with a piece of iron); Sweat v. Aircraft & Diesel Equipment Corp., 335 Ill.App. 177, 81 N.E.2d 8 (1st Dist.1948) (owner liable when it roped off section of sidewalk to prevent the possibility of injury from a falling cornice, thereby forcing plaintiff to use a rough and slippery portion of the sidewalk on which she fell); McDonald v. Frontier Lanes, Inc., 1 Ill.App.3d 345, 272 N.E.2d 369 (2d Dist.1971) (owner liable where he allowed cars to park in a position blocking the sidewalk and forcing pedestrians to walk on a parkway).

For liability to be imposed, however, a landowner must perform some affirmative act in creating an unsafe condition or obstruction or in asserting control over a sidewalk. Dodd v. Cavett Rexall Drugs, Inc., 178 Ill.App.3d 424, 533 N.E.2d 486, 127 Ill.Dec. 614 (1st Dist.1988) (no affirmative act to assert control where sidewalk in question was not the only means of ingress and egress, and building did not even have an entrance along that sidewalk); *accord*, Thiede v. Tambone, 196 Ill.App.3d 253, 553 N.E.2d 817, 143 Ill.Dec. 110 (2d Dist.1990); Smith v. Rengel, 97 Ill.App.3d 204, 422 N.E.2d 1146, 52 Ill.Dec. 937 (4th Dist.1981) (landlord's actions in mowing lawn, shoveling snow and filling holes in parkway adjacent to walkway constituted sufficient exercise of control to impose liability for plaintiff's injury caused by hole in parkway); Perry v. Chicago & North Western Transp. Co., 54 Ill.App.3d 82, 369 N.E.2d 155, 11 Ill.Dec. 701 (1st Dist.1977) (instruction properly refused where construction of passenger terminal, though blocking motorists' vision of pedestrians, did not alter or create an obstruction on a sidewalk); Repinski v. Jubilee Oil Co., 85 Ill.App.3d 15, 405 N.E.2d 1383, 40 Ill.Dec. 291 (1st Dist.1980) (no liability when plaintiff tripped in a depressed area of sidewalk also used as driveway, where driveway was used for intended purpose and defect was caused by normal deterioration).

However, an owner is not liable for ice forming on a sidewalk as a result of his piling snow next to the sidewalk. Riccitelli v. Sternfeld, 1 Ill.2d 133, 115 N.E.2d 288 (1953) (merely adding snow from defendant's business premises to piles created by shoveling sidewalk did not create an unnatural condition).

140.00
MUNICIPALITY

140.01 Streets, Parkways, Sidewalks And Alleys--Duty Of City

[Withdrawn]

Comment

In prior editions of IPI, this instruction read: "A city has a duty to use ordinary care to maintain [streets] [parkways] [sidewalks] and [alleys] in a reasonably safe condition."

The committee has withdrawn IPI 140.01 and offers no instructions that deal specifically with the duties or negligence of municipalities. This is based on the committee's conclusion that such instructions are unnecessary and duplicative of IPI 10.04 (adult's duty to use ordinary care), 14.04 (duty to refrain from willful and wanton conduct) and 120.02 (duty of owner/occupier to exercise ordinary care to keep property in a reasonably safe condition). See Barreto v. City of Waukegan, 133 Ill.App.3d 119, 478 N.E.2d 581, 590; 88 Ill.Dec. 266, 274 (2d Dist.1985); Rehak v. City of Joliet, 52 Ill.App.3d 724, 367 N.E.2d 1070, 1071-1072; 10 Ill.Dec. 461, 462-463 (3d Dist.1977).

A municipality's duty to a particular plaintiff in a particular fact situation is an issue of law to be determined by the court. Once that determination is made, either IPI 10.04, 14.04, or 120.02 will almost always apply. Ordinarily, there should be no reason to particularize the duty to the facts of the case, any more than in any other case involving non-municipality defendants. In the rare case where a special duty exists, IPI 10.04 or 14.04 can be modified appropriately.

ACTIONS BASED ON STATUTES

150.00

DRAM SHOP ACT

PERMISSION TO PUBLISH GRANTED IN 2003.

INTRODUCTION

Section 6-21 of the Liquor Control Act of 1934 (the Dramshop Act) (235 ILCS 5/6-21 (2000)) creates a cause of action against owners of businesses that sell liquor, and also against lessors or owners of the premises on which the liquor is sold, for physical injury to a person, for injury to tangible property, or for injury to means of support or loss of society, but not both, caused by an intoxicated person.

The plaintiff must prove that the intoxication was caused by consumption of liquor provided by a defendant and that the injury, property damage, or loss of means of support or loss of society was caused by the act of an intoxicated person. Davis v. Oettle, 43 Ill.App.2d 149, 193 N.E.2d 111 (4th Dist.1963); Hernandez v. Diaz, 31 Ill.2d 393, 202 N.E.2d 9 (1964); Clifton v. Nardi, 65 Ill.App.3d 344, 382 N.E.2d 514, 22 Ill.Dec. 194 (1st Dist.1978). The concept of causation is one commonly understood and the jury need not be instructed as to its meaning. Kingston v. Turner, 115 Ill.2d 445, 505 N.E.2d 320, 106 Ill.Dec. 14 (1987). More than one dram shop may cause a single intoxication. In order to "cause" the intoxication the liquor must be a material and substantial factor in the intoxication. There is no liability for providing a de minimus amount. However, two 12 ounce cans of beer sold immediately before the collision is sufficient. Mohr v. Jilg, 223 Ill.App.3d 217, 586 N.E.2d 807, 166 Ill.Dec. 849 (4th Dist.1992). See also Kingston. An example of an action is one brought as the result of a collision of a car driven by an intoxicated person with another car, injuring its driver and killing the passenger, the father of four. In that case, there would be injury to the person of the driver, to the property of the driver, and injury to the means of support of the family of the passenger or, at his election, loss of society.

The practitioner should consider whether there is a basis to seek recovery simultaneously for property damage, personal injury, and damage to means of support or loss of society. Shiflett v. Madison, 105 Ill.App.2d 382, 388-389, 245 N.E.2d 567, 570-571 (1969); Kelly v. Hughes, 33 Ill.App.2d 314, 179 N.E.2d 273 (2d Dist.1962). Separate recoveries can be obtained as to each of these types of damage where applicable, and statutory limitations upon the amount of recovery apply to each element separately and not to the aggregate amount recovered. However, a plaintiff must elect between loss of society and loss of means of support as the statute provides that the plaintiff may not recover for both. 235 ILCS 5/6-21(a) (1998). Note, however, that if more than one dram shop is liable, the limits apply to all dram shops liable as a group. In other words, dram shops cannot be "stacked."

Pursuant to the Dram Shop Act, recovery is limited to $15,000 for personal injury and property damage and $20,000 for loss of support for actions arising prior to September 12, 1985.

However, for causes of action arising after that date, the limits of recovery have been raised by the 1985 amendment to the Dram Shop Act to $30,000 for personal injury and property damage and $40,000 for loss of support. Effective July 1, 1998, the limits were raised to $45,000 for personal injury or property damage and $55,000 for either loss of means of support or loss of society. Beginning in 1999 the amount is to be adjusted for inflation. It has been held that the legislature's increase in the liability limits did not change existing case law in regard to stacking. Rinkenberger v. Cook, 191 Ill.App.3d 508, 548 N.E.2d 133, 138 Ill.Dec. 903 (4th Dist.1989).

The dram shop litigant must also be aware of the types of expenditures which qualify as recoverable damages. As a general rule, medical expenses incurred on behalf of the injured person constitute personal injury damages, not property damage. Thorsen v. City of Chicago, 74 Ill.App.3d 98, 392 N.E.2d 716, 30 Ill.Dec. 61 (1st Dist.1979); Rinkenberger v. Cook, 191 Ill.App.3d 508, 548 N.E.2d 133, 138 Ill.Dec. 903 (4th Dist.1989). However, if the injured person is a minor or spouse physically injured by an intoxicated person, and the parent or non-injured spouse is obligated to pay the medical expenses under the family expense statute, 750 ILCS 65/15 (1994), these medical expenses may be considered property damage. Thompson v. Tranberg, 45 Ill.App.3d 809, 360 N.E.2d 108, 4 Ill.Dec. 361 (2d Dist.1977); Kelly v. Hughes, 33 Ill.App.2d 314, 179 N.E.2d 273 (2d Dist.1962); Shepherd v. Marsaglia, 31 Ill.App.2d 379, 176 N.E.2d 473 (2d Dist.1961); Fortner v. Norris, 19 Ill.App.2d 212, 153 N.E.2d 433 (3d Dist.1958).

In Ragan v. Protko, 66 Ill.App.3d 257, 383 N.E.2d 745, 22 Ill.Dec. 937 (5th Dist.1978), the court concluded that in order for a parent to recover for his adult child's medical and funeral expenses, he must be legally liable for the charges, and this liability must not arise due to a voluntary assumption of financial responsibility. Maras v. Bertholdt, 126 Ill.App.3d 876, 467 N.E.2d 599, 81 Ill.Dec. 728 (2d Dist.1984), also suggested (in dictum) that if the plaintiff-estate has paid the decedent's medical and funeral bills, the bills would be recoverable as property damage inasmuch as the estate has a legal obligation to pay the bills and suffered a loss of property.

Relying on Demikis v. One Cent Club, 319 Ill.App. 191, 48 N.E.2d 782 (1943), and Shiflett v. Madison, 105 Ill.App.2d 382, 245 N.E.2d 567 (1969), the court in Maras v. Bertholdt, supra, held that pain and suffering is an element recoverable as a personal injury. The Maras court further held that recovery for pain and suffering survives the death of the injured party, and that the plaintiff could recover for decedent's pain and suffering if the plaintiff could prove that the decedent consciously suffered pain following the accident. Prior to the 1998 amendment, loss of consortium was not recoverable under the Dram Shop Act. Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961). Effective July 1, 1998, plaintiff may recover loss of society. 235 ILCS 5/6-21 (1998).

Recovery for loss of support under the Act is justified under the theory that a person actually contributing to support prior to the time of his death would likely have continued such support had he lived. Angeloff v. Raymond, 70 Ill.App.3d 594, 388 N.E.2d 1128, 27 Ill.Dec. 165 (2d Dist.1979). The law requires a showing that support was in fact rendered, and recovery cannot be based upon the future potential of support not presently provable. Angeloff v. Raymond, supra, Penoyer v. Hare, 76 Ill.App.3d 225, 394 N.E.2d 1082, 31 Ill.Dec. 764 (2d Dist.1979). Support must be measured by such tangibles as loss of wages and inability to continue to earn a living. Stevens v. B & L Package Liquors, Inc., 66 Ill.App.3d 120, 383 N.E.2d 676, 22 Ill.Dec. 868 (5th Dist.1978). It need not be proven that the decedent had a legal obligation to support the plaintiff. Support actually received, though voluntarily contributed, is

sufficient and there need not be a legal claim to support. Robertson v. White, 11 Ill.App.2d 177, 136 N.E.2d 550 (1st Dist.1956).

Services rendered by a wife in performance of her household and domestic duties do not constitute a loss of means of support under the Act. Although there is a language in Weiner v. Trasatti, 19 Ill.App.3d 240, 311 N.E.2d 313 (1st Dist.1974), suggesting that domestic services are a means of support, the Illinois decisions since Weiner have continued to back away from that language. These courts construe the Wiener language as dicta, having no precedential value. See Farmers State Bank & Trust Co. v. Lahey's Lounge, Inc., 165 Ill.App.3d 473, 519 N.E.2d 121, 116 Ill.Dec. 531 (4th Dist.1988) (summarizing decisions); Wilberton v. Freddie's Pepper Box, Inc., 148 Ill.App.3d 319, 499 N.E.2d 615, 102 Ill.Dec. 58 (1st Dist.1986); Maras v. Bertholdt, 126 Ill.App.3d 876, 467 N.E.2d 599, 81 Ill.Dec. 728 (2d Dist.1984); Penoyer v. Hare, 76 Ill.App.3d 225, 394 N.E.2d 1082, 31 Ill.Dec. 764 (2d Dist.1979); Martin v. American Legion Post No. 784, 66 Ill.App.3d 116, 383 N.E.2d 672, 22 Ill.Dec. 864 (5th Dist.1978); Stevens v. B & L Package Liquors, Inc., 66 Ill.App.3d 120, 383 N.E.2d 676, 22 Ill.Dec. 868 (5th Dist.1978). Means of support as defined in the post Weiner decisions relates to a party's wage earning potential and does not include maternal duties and domestic chores. Note however that the cases holding loss of society is not recoverable as part of loss of support have been affected by the statutory amendment effective July 1, 1998, allowing recovery for loss of means of support.

The presumption of loss existing under the Wrongful Death Act when beneficiaries are lineal next of kin does not exist under the Dram Shop Act. Howlett v. Doglio, 402 Ill. 311, 83 N.E.2d 708 (1949); Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961).

In addition to those statutory amendments noted above, other amendments of significance to the Dram Shop Act occurred in 1965, 1971, 1986 and 1998. The 1965 Amendment allowed a person who was injured in means of support to maintain a loss of support action in his own name, even if the person providing the support was alive at the time the action was brought. Prior to 1965, the person providing the support was a necessary party in such cases. See Simmons v. Hendricks, 32 Ill.2d 489, 207 N.E.2d 440 (1965).

The 1971 amendment eliminated the words “in whole or in part” from the first sentence of the Act. Prior to the 1971 amendment, liability was imposed upon any defendant who “by selling or giving alcoholic liquor has caused the intoxication, in whole or in part, of such person ...” Thus, a dram shop plaintiff must now prove that the defendant dram shop “caused” the intoxication of the allegedly intoxicated person. The amendment established a requirement that the charged defendant must have done more than furnish a negligible amount of intoxicating liquor. Kingston v. Turner, 115 Ill.2d 445, 457; 505 N.E.2d 320, 325; 106 Ill.Dec. 14, 19 (1987); Caruso v. Kazense, 20 Ill.App.3d 695, 697, 313 N.E.2d 689, 691 (3d Dist.1974); Nelson v. Araiza, 69 Ill.2d 534, 372 N.E.2d 637, 14 Ill.Dec. 441 (2d Dist.1977); Henry v. Bloomington Third Ward Community Club, 89 Ill.App.3d 106, 411 N.E.2d 540, 44 Ill.Dec. 418 (4th Dist.1980). However, more than one dram shop can be liable if more than one “caused” the intoxication. Thompson v. Tranberg, 45 Ill.App.3d 809, 812; 360 N.E.2d 108, 111; 4 Ill.Dec. 361, 364 (2d Dist.1977).

A 1986 amendment provides that anyone at least 21 years old, who pays for a hotel or motel room or facility knowing that such place is to be used by anyone under 21 for the unlawful consumption of liquor and such consumption causes the intoxication of the person under 21, shall be liable to anyone who is injured by the intoxicated person. 235 ILCS 5/6-21.

The 1998 amendment increased the limits, provided for limit "indexing" and allowed for recovery for loss of means of support. The definition of loss of means of support is identical to the language of IPI 31.11. The Dram Shop Act itself contains a one-year limitations period. 235 ILCS 5/6-21 (1998). This restriction is statutory and not subject to the general provisions of the Limitations Act (735 ILCS 5/13-101 et seq. (1994)). The dram shop limitations period is not tolled for injuries to minors. Seal v. American Legion Post No. 492, 245 F.2d 908 (7th Cir.1957); Lowrey v. Malkowski, 20 Ill.2d 280, 170 N.E.2d 147 (1960); cert. denied, 365 U.S. 879, 81 S.Ct. 1029, 6 L.Ed.2d 191 (1961); Demchuk v. Duplancich, 92 Ill.2d 1, 440 N.E.2d 112, 64 Ill.Dec. 560 (1982). Nor is it equitably tolled merely because discovery could not be obtained because of a driver's invocation of the fifth amendment based on pending criminal charges. Bradford v. Soto, 159 Ill.App.3d 668, 512 N.E.2d 765, 111 Ill.Dec. 376 (2d Dist.1987).

The Dram Shop Act has limited extra-territorial effect. Thus, no cause of action arises under the Act for injuries occurring outside the State of Illinois, even though the gift or sale of alcoholic liquors which caused the occurrence may have occurred within this state and the person harmed is a resident of Illinois. Graham v. General U.S. Grant Post No. 2665, V.F.W., 43 Ill.2d 1, 248 N.E.2d 657 (1969); Colligan v. Cousar, 38 Ill.App.2d 392, 187 N.E.2d 292 (1st Dist.1963); Eldridge v. Don Beachcomber, Inc., 342 Ill.App. 151, 95 N.E.2d 512 (1st Dist.1950). This holding was codified by Public Act 84-1381, effective September 12, 1986, which explicitly provided that only persons injured "within this state" have a cause of action under the Dram Shop Act. However, that same amendment to the Act states that a cause of action can be maintained against any person, "licensed under the laws of this state or of any other state to sell alcoholic liquor," who sells or gives liquor "within or without the territorial limits of this state." Thus, although a prerequisite to a cause of action is that the injury occur within Illinois, a sale of liquor outside of Illinois causing injury within Illinois is now actionable under the Illinois Dram Shop Act. This 1986 amendment statutorily overrules prior cases (e.g., Wimmer v. Koenigseder, 108 Ill.2d 435, 484 N.E.2d 1088, 92 Ill.Dec. 233 (1985)) which held that no cause of action arises for injuries occurring in Illinois following the sale of alcoholic liquors outside of Illinois to Illinois residents.

An insurance carrier which has paid first party benefits to the injured victim has the right, as subrogee of an injured party, to bring an action against the responsible dram shop. Dworak v. Tempel, 17 Ill.2d 181, 161 N.E.2d 258 (1959).

An intoxicated person has no cause of action for his own injuries. Holmes v. Rolando, 320 Ill.App. 475, 51 N.E.2d 786 (4th Dist.1943); Monsen v. DeGroot, 130 Ill.App.3d 735, 475 N.E.2d 5, 86 Ill.Dec. 199 (1st Dist.1985). Contributory negligence is not a defense in dram shop cases. Merritt v. Chonowski, 58 Ill.App.3d 192, 373 N.E.2d 1060, 15 Ill.Dec. 588 (3d Dist.1978). Also, the doctrine of comparative negligence has not been recognized in a dram shop action. Reeves v. Brno, Inc., 138 Ill.App.3d 861, 486 N.E.2d 405, 93 Ill.Dec. 304 (2d Dist.1985). Furthermore, the Dram Shop Act does not create tort liability for purposes of the Contribution Act, since the liability created by the Dram Shop Act does not sound in tort. Hopkins v. Powers, 113 Ill.2d 206, 497 N.E.2d 757, 100 Ill.Dec. 579 (1986); Jodelis v. Harris, 118 Ill.2d 482, 517 N.E.2d 1055, 115 Ill.Dec. 369 (1987).

The Dram Shop Act provides the sole remedy against tavern operators and owners of tavern premises for any injury caused by an intoxicated person or in consequence of intoxication. Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157 (1961); see also Hopkins v. Powers, 113 Ill.2d 206,

497 N.E.2d 757, 100 Ill.Dec. 579 (1986). However, the Dram Shop Act does not insulate a tavern owner from all potential common law liability. Thus, a tavern keeper has a duty to see that his guests are free from annoyance of injury as much as any possessor of land must act as a reasonable man in avoiding harm to invitees from negligence or even intentional attacks of third persons. Lessner v. Hurtt, 55 Ill.App.3d 195, 371 N.E.2d 125, 13 Ill.Dec. 430 (2d Dist. 1977). It has been held that this duty of a tavern keeper to a patron is a "high duty of care." Hayes v. O'Donnell, 76 Ill.App.3d 695, 395 N.E.2d 184, 32 Ill.Dec. 237 (2d Dist. 1979). While the tavern owner's duty may decrease when the patron leaves the bar, the tavern operator is in a special relationship with third persons on his premises and has a duty to take reasonable action to protect invitees from foreseeable damages caused by third persons. St. Phillips v. O'Donnell, 137 Ill.App.3d 639, 484 N.E.2d 1209, 92 Ill.Dec. 354 (2d Dist. 1985). The tavern keeper must take reasonable affirmative action to protect against misconduct of third parties, when the danger is apparent and the circumstances are such as to put a prudent person on notice of the probability of danger. Yangas v. Charlie Club, Inc., 113 Ill.App.3d 398, 447 N.E.2d 484, 69 Ill.Dec. 267 (3d Dist. 1983). See also Osborne v. Stages Music Hall, Inc., 312 Ill.App.3d 141, 726 N.E.2d 728, 244 Ill.Dec. 753 (1st Dist. 2000).

A tavern keeper may be liable to his business invitees on the same basis as any other owner or occupier of property, even though the sale and consumption of alcoholic beverages may have been a factor in the injury. In Harris v. Gower, Inc., 153 Ill.App.3d 1035, 506 N.E.2d 624, 106 Ill.Dec. 824 (5th Dist. 1987), a complaint alleging that the tavern owners negligently removed an unconscious and intoxicated patron from the tavern and placed him in his car where he subsequently froze to death was held to state a cause of action for common-law negligence rather than negligence in the sale of intoxicating liquor, and thus was not barred by the existence of the Dram Shop Act as the exclusive remedy against tavern owners for injuries resulting from intoxication.

The two defenses which were generally recognized are commonly referred to as "complicity" and "provocation." Earlier cases based the defense of complicity on the proposition that a plaintiff cannot recover for injuries or damage inflicted by an intoxicated person when the plaintiff contributes to a material and substantial degree to the intoxication. Osinger v. Christian, 43 Ill.App.2d 480, 193 N.E.2d 872 (1st Dist. 1963); Holcomb v. Hornback, 51 Ill.App.2d 84, 200 N.E.2d 745 (4th Dist. 1964). In Nelson v. Araiza, 69 Ill.2d 534, 543; 372 N.E.2d 637, 641; 14 Ill.Dec. 441, 445 (1978), a number of inconsistent judicial definitions and applications of the complicity doctrine were "distilled" into this rule of law: "only one who actively contributes to or procures the intoxication of the inebriate is precluded from recovery." See also Parsons v. Veterans of Foreign Wars Post 6372, 86 Il.App.3d 515, 408 N.E.2d 68, 41 Ill.Dec. 722 (5th Dist. 1980). Following Nelson, there were several decisions that seemed to authorize other definitions of complicity. In Walter v. Carriage House, Hotels Ltd., 164 Ill.2d 80, 646 N.E.2d 599, 207 Ill.Dec. 33, (1995), the Supreme Court noted the bright line drawn by the Nelson court and found that IPI 150.17 did not reflect the law following Nelson. IPI 150.17 has been amended to follow Nelson.

Whether or not a plaintiff is barred by his conduct under the doctrine of complicity is generally a question of fact for the jury. Complicity is an affirmative defense which must be raised by the defendant. Goodknight v. Piraino, 197 Ill.App.3d 319, 554 N.E.2d 1, 7; 143 Ill.Dec. 208, 214 (4th Dist. 1990); cf. Darguzas v. Robinson, 162 Ill.App.3d 362, 515 N.E.2d 451, 452; 113 Ill.Dec. 642, 643 (2d Dist. 1987) (referring to the "affirmative defense of complicity").

Since complicity is not predicated on the plaintiff's contribution to his injury, but only upon his contribution to the intoxication, the question arises as to whether or not provocation is a defense to a claim under the Illinois Liquor Control Act. In Nelson v. Araiza, 69 Ill. 2d 534, 372 N.E.2d 637, 14 Ill.Dec. 441 (1978), the Illinois Supreme Court held that since the Illinois Liquor Control Act was not predicated on negligence, contributory negligence was not a defense in a dramshop case, and held that the doctrine of complicity was an affirmative defense under the Act. The Nelson court did not specifically address the issue of provocation. Before and after Nelson, but preceding Walter v. Carriage House Hotels, 164 Ill.2d 80, 646 N.E.2d 599, 207 Ill.Dec. 33 (1995), a variety of cases held under the old Act that provocation was an affirmative defense which must be raised by the defendant. Tresch v. Nielsen, 57 Ill.App.2d 469, 207 N.E.2d 109 (1st Dist. 1965); Williams v. Franks, 11 Ill.App.3d 937, 298 N.E. 401 (1st Dist. 1973); Aiken v. J.R.'s Lounge, Inc., 158 Ill.App.3d 834, 512 N.E.2d 130, 111 Ill.Dec. 226 (3rd Dist. 1987); Gilman v. Kessler, 192 Ill.App.3d 630, 548 N.E.2d 1371, 139 Ill.Dec. 657 (2nd Dist. 1989).

However, Galyean v. Duncan, 125 Ill.App.3d 464, 466 N.E.2d 264, 80 Ill.Dec. 812 (5th Dist. 1984), held that provocation was not a defense to the Act, refusing a defendant's proposed instructions on provocation. But see Werner v. Nebal, 377 Ill.App.3d 447, 878 N.E.2d 811, 316 Ill.Dec. 89 (1st Dist. 2007) (refusing an instruction on the issue of provocation because the facts did not warrant it, but stated that provocation is an affirmative defense under the Act.)

Charitable organizations selling liquor are liable, as is a trustee operating a dram shop pursuant to testamentary direction. Klopp v. Benevolent Protective Order of Elks, 309 Ill.App. 145, 33 N.E.2d 161 (3d Dist.1941); Moran v. Katsinas, 17 Ill.App.2d 423, 150 N.E.2d 637 (3d Dist. 1958), aff'd, 16 Ill.2d 169, 157 N.E.2d 38 (1959). However, a trustee under a land trust is not liable under the Dram Shop Act. Wendt v. Myers, 59 Ill.2d 246, 319 N.E.2d 777 (1974); Robinson v. Walker, 63 Ill.App.2d 204, 211 N.E.2d 488 (1st Dist. 1965).

Because the Dram Shop Act is designed to regulate the liquor traffic as a business, it does not apply to an individual who serves intoxicants to his guests. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Blackwell v. Fernandez, 324 Ill.App. 597, 59 N.E.2d 342 (1st Dist. 1945). Thus, social hosts whose guests became intoxicated are not liable under the Act. Miller v. Moran, 96 Ill.App.3d 596, 421 N.E.2d 1046, 52 Ill.Dec. 183 (4th Dist. 1981); Richardson v. Ansco, Inc., 75 Ill.App.3d 731, 394 N.E.2d 801, 31 Ill.Dec. 599 (3d Dist. 1979); Heldt v. Brei, 118 Ill.App.3d 798, 455 N.E.2d 842, 74 Ill.Dec. 413 (1st Dist. 1983); Wienke v. Champaign County Grain Ass'n, 113 Ill.App.3d 1005, 447 N.E.2d 1388, 69 Ill.Dec. 701 (4th Dist. 1983); Puckett v. Mr. Lucky's, Ltd., 175 Ill.App.3d 355, 357; 529 N.E.2d 1169, 1170; 125 Ill.Dec. 93, 94 (4th Dist. 1988). The Act has also been held not to be applicable to a noncommercial supplier and employer who served intoxicating liquor to his minor employee. Martin v. Palazzolo Produce Co., 146 Ill.App.3d 1084, 497 N.E.2d 881, 100 Ill.Dec. 703 (5th Dist.1986).

Illinois does not recognize a common law action for negligently furnishing alcoholic beverages which cause intoxication and result in injury. See e.g., Puckett v. Mr. Lucky's, Ltd., 175 Ill.App.3d 355, 357-358; 529 N.E.2d 1169, 1170-1171; 125 Ill.Dec. 93, 94-95 (4th Dist. 1988) (holding that there is no common law right to recover against a tavern for giving away or selling intoxicating liquor because the Dram Shop Act provides the exclusive source of such liability); but see Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 155 Ill.App.3d 231, 237; 507 N.E.2d 1193, 1197-1198; 107 Ill.Dec. 824, 828-829 (4th Dist. 1987), recognizing that the furnishing of intoxicating beverages to underage persons does not of itself create a legal duty

necessary for the establishment of a common law negligence action, but also finding that a fraternal organization may be held liable in negligence, under appropriate circumstances, for foreseeable injuries sustained by membership applicants required to engage in illegal and excessively dangerous activities.

Comments, instructions and related notes to "in consequence" actions have been omitted in that they apply only to causes of action accruing before 9/12/85. In the event a practitioner should need to review those, they are in the 1995 edition.

Introduction revised October 2008.

150.01 Dram Shop Act--Injury to Person or Property by an Intoxicated Person

There was in force in the State of Illinois at the time of the occurrence in question a statute called the Dram Shop Act providing that every person who shall be injured in person or property by any intoxicated person as a result of his intoxication shall have a right of action [in his own name] against any person who shall, by selling or giving alcoholic liquor, have caused the intoxication of such intoxicated person.

Notes on Use

This instruction is to be used when the seller alone is sued for injury to person or property by an intoxicated person. This instruction should be given with IPI 150.02 (elements), IPI 150.15 (defining intoxicated), and, if necessary IPI 150.16 (defining alcoholic liquor). These dramshop instructions should be used with as much of IPI 30.01-30.16 on damages as is applicable under the pleadings and proof. IPI 30.01 should be changed from "have resulted from the negligence [wrongful conduct] of the defendant" to "caused by the intoxicated person."

150.02 Dram Shop Act--Issue/Burden of Proof

[In this lawsuit] [In Count _____,] plaintiff [(name)] claims [(he/she)] is entitled to recover damages from the defendant. The plaintiff must prove:

First, [(allegedly intoxicated person)] was intoxicated at the time of the [(e.g., collision)].

Second, the defendant, his agents or servants, sold or gave intoxicating liquor consumed by [(allegedly intoxicated person)].

Third, the liquor thus consumed caused the intoxication of [(allegedly intoxicated person)].

Fourth, [(allegedly intoxicated person)]'s intoxication was at least one cause of the occurrence in question.

Fifth, as a result of the occurrence, plaintiff suffered [injury] [damage to his property].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes on Use revised May 2009.

Notes on Use

This instruction lists the elements in a cause of action against the seller alone for injury to person or property by an intoxicated person. Therefore, it is to be used with IPI 150.01. The addition of the last paragraph to this instruction is to advise the jury of the effect of their finding of the evidence and eliminates the need to give IPI 21.02 as a separate instruction.

Comment

While the defendant's actions must be a "material and substantial factor" in causing the intoxication (Thompson v. Tranberg, 45 Ill.App.3d 809, 360 N.E.2d 108, 4 Ill.Dec. 361 (2d Dist. 1977)), the Illinois Supreme Court held that the use of the Thompson language in a jury instruction was "confusing," "uninstructive" and "unnecessary." Kingston v. Turner, 115 Ill.2d 445, 461; 505 N.E.2d 320, 327; 106 Ill.Dec. 14, 21 (1987). The word "causes" is not a "technical legal term requiring definition" and "has a commonly understood meaning familiar to any jurors," and therefore it was inappropriate to define it using the Thompson language. Id. at 459-60, 505 N.E.2d at 326-327, 106 Ill.Dec. at 20, 21 (quoting in part Caruso v. Kazense, 20 Ill.App.3d 695, 697; 313 N.E.2d 689, 691 (3d Dist. 1974)). Pursuant to the Supreme Court's guidance, the word "caused" in element 3 will remain unmodified and undefined.

150.03 Dram Shop Act--Injury to Means of Support by an Intoxicated Person--Seller Sued

There was in force in the State of Illinois at the time of the occurrence in question a statute called the Dram Shop Act providing that every person who shall be injured in [means of support] [loss of society] by an intoxicated person or persons shall have a right of action against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication of such intoxicated person

[The suit is brought in the name of [plaintiff's name], for the exclusive benefit of [those claiming loss of support], the person(s) who claim(s) to have been injured in (his) (their) means of support, and (he) (they) (is) (are) the real (party) (parties) in interest.]

Notes on Use

This instruction is to be used when the seller alone is sued for injury to means of support or loss of society caused by an intoxicated person. A plaintiff cannot recover for both loss of society and loss of means of support.

This instruction should be given with IPI 150.04 (elements of cause of action), IPI 150.15 (defining intoxicated), IPI 150.14 (defining means of support), IPI 31.11 (defining loss of society), IPI 150.13 (damage for injury to means of support), and, if necessary, IPI 150.16 (defining alcoholic liquor).

Comment

The instruction is based on that part of 235 ILCS 5/6-21 (1998), which applies in cases of injury to means of support caused by an intoxicated person. Generally, the act of the intoxicated person must be a tort for which he would be liable at common law. Hill v. Alexander, 321 Ill.App. 406, 427, 53 N.E.2d 307, 316 (1st Dist. 1944).

150.04 Dram Shop Act--Issue/Burden of Proof--Loss of Means of Support or Society

[In this lawsuit] [In Count _____,] plaintiff [(name)] claims [(name)] is entitled to recover damages from the defendant. The plaintiff must prove:

First, [(allegedly intoxicated person)] was intoxicated at the time of the [(e.g., collision)].

Second, the defendant, his agents or servants, sold or gave intoxicating liquor consumed by [(allegedly intoxicated person)].

Third, the liquor consumed caused the intoxication of [(allegedly intoxicated person)].

Fourth, [(allegedly intoxicated person)]'s intoxication was at least one cause of the [injury] [death] of [(name)].

Fifth, as a result of the occurrence, [plaintiff's name] [names of real parties in interest] [has] [have] suffered [injury to [his] [their] means of support] [a loss of society].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes on Use revised May 2009.

Notes on Use

This instruction defines the elements necessary to be proved when a seller alone is sued for injury to means of support or loss of society caused by an intoxicated person. It should be given with IPI 150.03. The addition of the last paragraph to this instruction is to advise the jury of the effect of their finding of the evidence and eliminates the need to give IPI 21.02 as a separate instruction. If loss of society is an issue, IPI 31.11 should be used.

Comment

See Comment to IPI 150.02.

150.07 Dram Shop Act--Joint Liability of Owner, Lessor, etc.

The Dram Shop Act also provides that any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that alcoholic liquors are to be sold therein or who, having leased the same for other purposes, shall knowingly permit the sale therein of alcoholic liquors that have caused the intoxication of any person, shall be liable jointly with the person selling or giving alcoholic liquors.

Notes on Use

This instruction is to be used where both seller and another (such as the owner, lessor, etc.) are sued. It should be given with other instructions according to the theory of liability. For example:

(a) Injury to person or property by an intoxicated person, give with IPI 150.01 and IPI 150.09.

(b) Injury to means of support by an intoxicated person, give with IPI 150.03 and IPI 150.11.

Pursuant to an amendment to the Dram Shop Act, effective September 12, 1985, there is no cause of action under the Act for loss of means of support to dependents of the intoxicated person himself or by any person claiming to be supported by such intoxicated person.

In addition, in all three instances use IPI 150.15 (defining intoxicated) and, if necessary, IPI 150.16 (defining alcoholic liquor). Finally, if the injury is to means of support, IPI 150.14 (defining means of support) and IPI 150.13 (damages for means of support) should also be given. IPI 31.11 (defining loss of society) should be given if that is the loss claimed.

150.08 Dram Shop Act--Injury to Person or Property--Only Owner, Lessor, etc. Sued-- Statutory Provisions

There was in force in the State of Illinois at the time of this occurrence a statute called the Dram Shop Act providing that any person owning, renting, leasing or permitting the occupation of any building or premises and having knowledge that alcoholic liquors were to be sold therein, or who having leased the same for other purposes, shall knowingly permit the sale therein of alcoholic liquors, and if the sale or gift of alcoholic liquors in those premises has caused the intoxication of any person, then every person injured in person or property by the intoxicated person shall have a right of action [in (his)(her) own name] against the person owning, renting, leasing or permitting the premises to be so used for the sale or gift of alcoholic liquors.

Notes on Use

This instruction is to be used where the owner or another alone is sued for injury to person or property caused by an intoxicated person. It should be given with IPI 150.09 (elements of the cause of action), IPI 150.15 (defining intoxicated) and, if necessary, IPI 150.16 (defining alcoholic liquor). These dramshop instructions should be used with as much of IPI 30.01-30.16 on damages as is applicable under the pleadings and proof. IPI 30.01 should be changed from "have resulted from the negligence [wrongful conduct] of the defendant" to "caused by the intoxicated person."

150.09 Dram Shop Act--Burden of Proof--Injury to Person or Property by an Intoxicated Person--Tavern Operator and Property Owner Both Sued

[In this lawsuit] [In Count _____,] plaintiff [(name)] claims [(name)] is entitled to recover damages from the defendant. The plaintiff must prove:

First, [(name of intoxicated person)] was intoxicated at the time of the [(e.g., collision)].

Second, the defendant [(tavern operator)], or his agents or servants, sold or gave intoxicating liquors consumed by [(name of intoxicated person)].

Third, the liquor thus consumed caused the intoxication of [(name of intoxicated person)].

Fourth, [(intoxicated person)] intoxication was at least one cause of the occurrence in question.

Fifth, as a result of the occurrence, plaintiff suffered [injury] [damage to his property].

In the case against the defendant [name of property owner], the plaintiff has the burden of proving all the foregoing foregoing propositions and also must prove the further proposition that the defendant [name of property owner] [either] [owned], [rented], [leased] [or] [permitted the occupation of] the premises [knowing that alcoholic liquors were to be sold there] [or] [although (owning), (renting), (leasing) (or) (permitting the occupation of) the premises for purposes other than selling alcoholic liquors, knowingly permitted them to be sold there].

Notes on Use

This instruction lists the elements which must be proved in a suit for injury to person or property by an intoxicated person.

The instruction should be given with IPI 150.07 if the owner and seller are sued jointly. In that case identify the defendants by name in elements two and three.

The instruction should be given with IPI 150.08 if the owner is sued alone. In that case omit the bracketed material in element three.

These dramshop instructions should be used with as much of IPI 30.01-30.16 on damages as is applicable under the pleadings and proof. IPI 30.01 should be changed from "have resulted from the negligence [wrongful conduct] of the defendant" to "caused by the intoxicated person." You must also use an appropriate "effects of finding" instruction (i.e. 20.02) and a conclusion (i.e. 20.02(b) or 150.17) if complicity is plead.

Comment

See Comment to IPI 150.02.

150.10 Dram Shop Act--Injury to Means of Support--Loss of Society--Only Owner, Lessor, etc. Sued

There was in force in the State of Illinois at the time of the occurrence in question a statute called the Dram Shop Act providing that every person who shall [be injured in means of support] [suffer a loss of society] by an intoxicated person shall have a right of action against any person owning, renting, leasing or permitting the occupation of any building or premises and having knowledge that alcoholic liquors were to be sold therein or who having leased the same for other purposes shall knowingly permit the sale therein of alcoholic liquors that have caused the intoxication of such intoxicated person.

[The suit is brought in the name of [plaintiff's name] for the exclusive benefit of [those claiming loss of support], the person(s) who claim(s) to have been injured in (his) (their) means of support, and (he) (they) (is) (are) the real (party) (parties) in interest.]

Notes on Use

This instruction is to be used where the owner or lessor alone is sued for injury to means of support by the intoxicated person.

This instruction should be given with IPI 150.11.

In addition, it should be used with IPI 150.15 (defining intoxicated), IPI 150.14 (defining means of support), and IPI 150.13 (damages for injury to means of support), and, if necessary, IPI 150.16 (defining alcoholic liquors).

150.11 Dram Shop Act--Burden of Proof--Injury to Means of Support by an Intoxicated Person--Tavern Operator and Property Owner Both Sued

[In this lawsuit] [In Count _____,] plaintiff [(name)] claims [(name)] is entitled to recover damages from the defendant. The plaintiff must prove:

First, [(name of intoxicated person)] was intoxicated at the time of the [(e.g., collision)].

Second, the defendant [(tavern operator)], or his agents or servants, sold or gave intoxicating liquors consumed by [(name of intoxicated person)].

Third, the liquor thus consumed caused the intoxication of [(name of intoxicated person)].

Fourth, [(intoxicated person)] intoxication was at least one cause of [(injured person)]'s [injury] [death].

Fifth, as a result of the occurrence, [(plaintiff's name)] [one or more of the following: [(names of real parties in interest)]] [has] [have] suffered [injury] [to (his) (their) means of support] [damage to his property].

In his case against the defendant [name of property owner], the plaintiff has the burden of proving all of the foregoing propositions and also must prove the further propositions that the defendant [name of property owner] [either] [owned], [rented], [leased] [or] [permitted the occupation of] the premises knowing that alcoholic liquors were to be sold there [or] [although (owning), (renting), (leasing) (or) (permitting the occupation of) the premises for purposes other than selling alcoholic liquors, knowingly permitted them to be sold there].

Notes on Use

This instruction sets forth the elements in a cause of action for injury to means of support or loss of society by the intoxication of a person.

The instruction should be given with IPI 150.07 if the owner and seller are sued jointly.

The instruction should be given with IPI 150.10 if the owner is sued alone. IPI 31.11 (defining loss of society) should be given if that is the loss claimed. Appropriate effect of findings instruction and a concluding paragraph are also required.

Comment

See Comment to IPI 150.02.

150.13 Dram Shop Act--Damages--Apportionment--Means of Support--Loss of Society

If you decide for the plaintiff on the question of liability, you must then fix the total amount of money which will reasonably and fairly compensate the person[s] you find [has] [have] suffered [loss to [his] [their] means of support] [for their loss of society], for such loss.

[You should also state the proportions in which the amount shall be distributed among those persons.]

Notes on Use

Use the second paragraph if more than one person claims loss of support and if plaintiff requests that the jury apportion the damages. In that case, a verdict form must also be submitted which includes the names of the claimants and a line for each on which the jury can fill in the amount awarded to that person. The Committee recommends that the verdict form use dollar amounts rather than percentages.

IPI 41.04 may be used with this instruction if there are two or more defendants.

IPI 150.14 should be used to define means of support. IPI 31.11 defines loss of society.

Comment

Prior to the September 12, 1985, amendment to the Dram Shop Act, the amount that can be recovered for loss of support resulting from an injury to the person furnishing support is an aggregate of $20,000. Under the September 12, 1985, amendment, the amount that can be recovered for loss of support resulting from an injury to the person furnishing support is an aggregate of $40,000. Effective on July 1, 1998, this was raised to $55,000 and added an alternative to recover loss of society but not both. This is true regardless of the fact that several persons claim loss of support. See Moran v. Katsinas, 16 Ill.2d 169, 157 N.E.2d 38 (1959).

No special instructions as to the dollar limits on recovery may be given the jury. 235 ILCS 5/6-21 (1994).

235 ILCS 5/6-21 (1998) provides in part that the amount awarded, "shall be distributed to such persons in the proportions determined by the judgment or verdict rendered in the action." Therefore, because of the inclusion of the words "or verdict," it seems proper either for the jury in its verdict or the court after the verdict to allocate the sum among the persons claiming loss of support. The defendant or defendants cannot object that the jury has not made an allocation because this determination is a matter between the beneficial plaintiffs in which the defendants have no real interest. Peters v. Kamiczaitis, 161 Ill.App. 575 (3d Dist. 1911).

A jury may not return a verdict apportioning damages between joint defendants, as for example, between the first tavern and the last tavern where the intoxicated person was served liquor. Schwehr v. Badalamenti, 14 Ill.App.2d 128, 134-136; 143 N.E.2d 558, 561-562 (4th Dist. 1957).

150.14 Dram Shop Act--"Means of Support"--Defined

The phrase, "means of support" includes the necessities of life, and comforts as well. Whatever lessens or impairs the ability to supply the necessities of life and suitable comforts which might reasonably be expected from the person who furnished support, considering his occupation and capacity for earning money, may be regarded as lessening or impairing the "means of support" referred to in these instructions.

Comment

Under the September 12, 1985, amendment to the Dram Shop Act, there is no cause of action remaining under the Act for loss of means of support to dependents of the intoxicated person himself or by any person claiming to be supported by such intoxicated person. For causes of action arising after that amendment, therefore, this instruction only has applicability for loss of means of support caused by an intoxicated person.

In McMahon v. Sankey, 133 Ill. 636, 24 N.E. 1027 (1890), the court approved an instruction similar to this one and also approved deleting from another instruction the question of whether the person injured in means of support was financially independent. No definite basis for estimating damages need be proved, nor need there be a legal liability for support. Pearson v. Renfro, 320 Ill.App. 202, 50 N.E.2d 598 (2d Dist. 1943) (injured sons contributed to parent's household expenses); Herring v. Ervin, 48 Ill.App. 369 (3d Dist. 1892).

Possible prospective support is not sufficient. See the Introduction.

150.15 Dram Shop Act—"Intoxicated" Defined

A person is "intoxicated" when as a result of drinking alcoholic liquor there is an impairment of his mental or physical faculties so as to diminish his ability to think and act with ordinary care.

Notes on Use

This instruction may also be used in negligence or other cases in which intoxication is claimed. See IPI 12.01.

Comment

This instruction was approved in Navarro v. Lerman, 48 Ill.App.2d 27, 36, 198 N.E.2d 159, 162-163 (1st Dist. 1964). See also Woolley v. Hafner's Wagon Wheel, Inc., 22 Ill.2d 413, 420; 176 N.E.2d 757, 760-761 (1961).

150.16 Dram Shop Act—"Alcoholic Liquor" Defined

The term "alcoholic liquor" means and includes every liquid or solid containing alcohol, wine, beer, or spirits including brandy, rum, whiskey, and gin and capable of being consumed as a beverage by a human being, but does not mean or include any such liquid or solid which contains one-half of one per cent, or less, of alcohol, by volume.

Comment

The definition is based on 235 ILCS 5/1-3.01 to 5/1-3.05 (1994), especially the latter. An instruction in the words of the statute was approved in Cox v. Hrasky, 318 Ill.App. 287, 295; 47 N.E.2d 728, 732 (4th Dist. 1943).

150.17 Dram Shop Act—Affirmative Defense--Complicity

[In this lawsuit][In Count _____] the defendant claims the plaintiff should not recover because of plaintiff's conduct in causing [(allegedly intoxicated person)]'s intoxication. To establish this defense the defendant must prove the plaintiff actively contributed to or procured the intoxication of [(allegedly intoxicated person)].

If you find the plaintiff actively contributed to or procured the intoxication of [(allegedly intoxicated person)], then your verdict should be for the defendant.

Instruction, Notes on Use and Comment revised May 2009.

Notes on Use

Use in conjunction with the issue/burden of proof instruction IPI 150.02 and/or 150.04.

Comment

This is the only definition of complicity after Nelson v. Araiza, 69 Ill.2d 534, 372 N.E.2d 637, 14 Ill.Dec. 441 (1978). There the court enumerated why the other previous alternatives including provocation were not complicity.

After Nelson, several appellate cases seemed to adopt pre-Nelson definitions of complicity. In Walter v. Carriage House Hotels, Ltd., 164 Ill.2d 80, 646 N.E.2d 599, 207 Ill.Dec. 33 (1995), the Supreme Court again dealt with the issue of complicity. The court started with a detailed review of Nelson. The court explained how post-Nelson cases ignored the clear language of Nelson: that a plaintiff is guilty of complicity only if he actively contributed to or procured the intoxication of the intoxicated person.

Since Walter, this is the only definition used in reported cases. See Kulikowski v. Lawson, 305 Ill.App.3d 110, 710 N.E.2d 1275, 238 Ill.Dec. 173 (3d Dist.1999) and dissenting opinion in Charles v. Seigfried, 165 Ill.2d 482, 651 N.E.2d 154, 209 Ill.Dec. 226 (1995).

150.17A Dram Shop Act--Effect of Finding Complicity Defense

[Withdrawn]

Instruction withdrawn May 2009.

Comment

See IPI 150.17.

150.18 Dram Shop Act--Injury to Person or Property--Person Paying for Hotel or Motel Room or Facility

There was in force in the State of Illinois at the time of this occurrence a statute called the Dram Shop Act, providing that any person at least 21 years of age who pays for a hotel or motel room or facility knowing that the room or facility is to be used by any person under 21 years of age for the unlawful consumption of alcoholic liquors shall be liable to any person who is injured in person or property by the intoxicated person under 21 years of age who used the room or facility for such consumption and became intoxicated.

Notes on Use

This instruction is to be used where a person at least 21 years of age, who pays for the hotel or motel room or facility, is sued for injury to person or property caused by an intoxicated person under 21 years of age. It should be given with IPI 150.19 (elements of the cause of action), IPI 150.15 (defining intoxicated) and, if necessary, IPI 150.16 (defining alcoholic liquor). These dramshop instructions should be used with as much of IPI 30.01 through 30.16 on damages as is applicable under the pleadings and proof. IPI 30.01 should be changed from "have resulted from the negligence (wrongful conduct) of the defendant" to "caused by the intoxicated person."

Comment

This provision was added by amendment to 235 ILCS 5/6-21(c)(1994).

150.19 Dram Shop Act--Burden of Proof--Injury to Person or Property by an Intoxicated Person Under 21--Person Paying for Hotel or Motel or Facility

[In this lawsuit] [In Count ____,] plaintiff [(name)] claims [(name)] is entitled to recover damages from the defendant. The plaintiff must prove:

First, [(name of intoxicated person under 21 years of age)] was intoxicated at the time of the [(e.g., collision)].

Second, the defendant, [(person allegedly paying for room or facility)], paid for a hotel or motel room or facility.

Third, the defendant [(person allegedly paying for room or facility)], was at least 21 years of age when he paid for the hotel or motel room or facility.

Fourth, the defendant [(person allegedly paying for room or facility)], knew that the hotel or motel room or facility was to be used by a person under 21 years of age for the unlawful consumption of alcoholic liquors.

Fifth, the liquor thus consumed caused the intoxication of [(name of intoxicated person under 21 years of age)].

Sixth, [(intoxicated person under 21 years of age)]'s intoxication was at least one cause of the occurrence in question.

Seventh, as a result of the occurrence, plaintiff suffered [injury] [damage to his property].

Notes on Use

This instruction lists the elements which must be proved in a suit for injury to person or property by an intoxicated person under 21 years of age with respect to a person who pays for a hotel or motel room or facility. See 235 ILCS 5/6-21(a)(1994).

The instruction should be given with IPI 150.18 and with an appropriate effect of finding concluding paragraph.

These dramshop instructions should be used with as much of IPI 30.01-30.16 on damages as is applicable under the pleadings and proof. IPI 30.01 should be changed from “have resulted from the negligence [wrongful conduct] of the defendant” to “caused by the intoxicated person.”

155.00

The Drug or Alcohol Impaired Minor Responsibility Act

INTRODUCTION

Illinois courts have been consistent in relying on over a century of precedent prohibiting common-law actions for injuries arising out of the sale or gift of alcoholic beverages. Charles v. Seigfried, 165 Ill.2d 482, 209 Ill.Dec. 226, 651 N.E.2d 154 (1995). Our Supreme Court has held that the legislature, through the enactment of the Illinois Liquor Control Act of 1934, 235 ILCS 5/6-21 (West 2000), has preempted the field of alcohol-related liability, and that any changes in the law governing alcohol-related liability should be made by the General Assembly. Charles, supra.

Two exceptions have arisen, however, and common-law tort causes of action have been held to exist where a.) there have been violations of the Illinois Hazing Statute (720 ILCS 120/5) where plaintiffs were required to drink to intoxication to become members of a fraternity, Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 155 Ill.App.3d 231, 107 Ill.Dec. 824, 507 N.E.2d 1193 (1987); Haben v. Anderson, 232 Ill.App.3d 260, 173 Ill.Dec. 681, 597 N.E.2d 655 (1992); Goodknight v. Piraino, 197 Ill.App.3d 319, 143 Ill.Dec.208, 554 N.E.2d 1(1990), expressly rejecting the extension of the Quinn-Haben analysis to situations other than those involving a college hazing incident and b.) where there has been a negligent performance of a voluntary undertaking (adopting Restatement (2nd) of Torts section 323) where one voluntarily undertakes the responsibility to care for an intoxicated person and does so negligently. Wakulich v. Mraz, 203 Ill.2d 223, 271 Ill.Dec. 649, 785 N.E.2d 843 (2003).

After Wakulich, 740 ILCS 58/5, et seq. became effective on January 1, 2004, applying to causes of action accruing on or after October 1, 2004.

Instruction approved January 2010.

155.01 The Drug or Alcohol Impaired Minor Responsibility Act--Injury to Person or Property by an Impaired Minor

There was in force in the State of Illinois at the time of the occurrence in question a statute called "The [Drug] [or] [Alcohol] Impaired Minor Responsibility Act," which states:

Any person 18 years of age or older who [willfully supplies, sells, gives or delivers (alcoholic liquor)(illegal drugs)] [willfully permits the consumption of (alcoholic liquor)(illegal drugs) on non-residential premises owned or controlled by that person] to a person under the age of 18 and causes or contributes to cause the impairment of that person, is liable for [death][or][injury] to a [person][or] [property] caused by the impairment of such person.

Instruction, Notes on Use and Comment approved January 2010.

Notes on Use

The above is a synopsis of the Act. The bracketed language should be used to comply with the facts of the case.

Comment

Note that paragraph (a) of the statute imposes liability on a person "at least 18 years of age" but paragraphs (b) and (b)(ii) refer to a person "over the age of 18." The committee believes it was the legislature's intent to impose liability on a person "18 years of age or older," and the legislative hearings so reflect.

155.02 The Drug or Alcohol Impaired Minor Responsibility Act--Issues/Burden of Proof-- Willfully Supplied

[In this lawsuit] [In Count], [plaintiff's name] claims [he] [she] [it] is entitled to recover damages from [defendant's name]. The plaintiff must prove:

First, [defendant] is a person at least 18 years of age;

Second, [defendant] willfully [(supplied)(sold)(gave)(delivered)] [(alcoholic liquor)(illegal drugs)] to [AIP], a person under the age of 18, which

Third, caused or contributed to cause the impairment of [AIP].

Fourth, the impairment of [AIP] caused [injury to [plaintiff]] [the death of [plaintiff's decedent]][property damage to [plaintiff]].

[Defendant's name] [denies that he did (any)(one or more) of the things alleged by (plaintiff's name)][denies that any claimed act on his part was a cause of the impairment of [AIP]][denies that the impairment caused injury or damage to (plaintiff's name)] and denies that [plaintiff's name] has been injured to the extent claimed.

Instruction, Notes on Use and Comment approved January 2010.

Notes on Use

Use Issue/Burden of Proof 155.03 if the allegations involve consumption of liquor or drugs on non-residential property.

Comment

Note that the person injured may be the impaired person. Also, neither "willful" nor "impairment" is defined under the Act.

155.03 The Drug or Alcohol Impaired Minor Responsibility Act--Issues/Burden of Proof-- Willfully Permitted

[In this lawsuit] [In Count], [plaintiff's name] claims [he] [she] [it] is entitled to recover damages from [defendant's name]. The plaintiff must prove:

First, [defendant] is a person at least 18 years of age;

Second, [defendant] willfully permitted the consumption of [(alcoholic liquor)(illegal drugs)] on non-residential property owned or controlled by [defendant], to [AIP], a person under the age of 18, which

Third, caused or contributed to cause the impairment of [AIP].

Fourth, the impairment of [AIP] caused [injury to [plaintiff]] [the death of [plaintiff's decedent]][property damage to [plaintiff]].

[Defendant's name] [denies that he did (any)(one or more) of the things alleged by (plaintiff's name)][denies that any claimed act on his part was a cause of the impairment of [AIP]][denies that the impairment caused injury or damage to (plaintiff's name)] and denies that [plaintiff's name] has been injured to the extent claimed.

Instruction, Notes on Use and Comment approved January 2010.

Notes on Use

Use Issue/Burden of Proof 155.02 if the allegations do not involve consumption of liquor or drugs on non-residential property.

Comment

Note that the person injured may be the impaired person. Also, neither “willful” nor “impairment” is defined under the Act.

155.04 The Drug or Alcohol Impaired Minor Responsibility Act--Measure of Damages

If you decide for [plaintiff's name] on the question of liability, you must then fix the amount of money that will reasonably and fairly compensate [him] [her] [it] for any of the following elements of damages proved by the evidence to have resulted from the impairment of the person under the age of 18:

Economic Damages

[the cost of treatment and rehabilitation]

[medical expenses]

[loss of economic or educational potential]

[loss of productivity]

[absenteeism]

[support expenses]

[accidents or injuries]

[any other pecuniary loss]

Non-Economic Damages

[physical and emotional pain]

[suffering]

[physical impairment]

[emotional distress]

[mental anguish]

[disfigurement]

[loss of enjoyment of life]

[loss of companionship]

[services]

[consortium]

[any other non-pecuniary losses]

Property Damages

Punitive Damages

Whether any of these elements of damages has been proved by the evidence is for you to decide.

Instruction, Notes on Use and Comment approved January 2010.

Notes on Use

The bracketed subparts should only be used if there is evidence of such damage(s). For property damage instructions, refer to IPI 30.10 to 30.20, when appropriate. For punitive damages, refer to the new instruction within this section.

Comment

In addition to the above damages, the statute, 740 ILCS 58/10 (3) and (4), allows attorneys' fees and costs of suit, including, but not limited to, reasonable expenses for expert testimony. The committee believes that these elements of damages should be assessed by the court rather than by a jury.

155.05 The Drug or Alcohol Impaired Minor Responsibility Act--Punitive Damages

In addition to compensatory damages, the law permits you to award punitive damages for conduct that violates the Act. If you believe that justice and the public good require it, you may award an amount of money that will punish [(defendant's name)] and discourage [it, him, her] and others from similar conduct.

In arriving at your decision as to the amount of punitive damages, you should consider the following three questions. The first question is the most important to determine the amount of punitive damages:

1. How reprehensible was [(defendant's name)] conduct?

On this subject, you should consider the following:

a) The facts and circumstances of defendant's conduct;

b) The [financial] vulnerability of the plaintiff;

c) The duration of the misconduct;

d) The frequency of defendant's misconduct;

e) Whether the harm was physical as opposed to economic;

f) Whether defendant tried to conceal the misconduct;

g) [other]

2. What actual and potential harm did defendant's conduct cause to the plaintiff in this case?

3. What amount of money is necessary to punish defendant and discourage defendant and others from future wrongful conduct [in light of defendant's financial condition]?

[In assessing the amount of punitive damages, you may not consider defendant's similar conduct in jurisdictions where such conduct was lawful when it was committed].

The amount of punitive damages must be reasonable and in proportion to the actual and potential harm suffered by the plaintiff.

Instruction and Notes on Use approved January 2010.

Notes on Use

The Act allows for punitive damages, and this instruction should be used instead of the common-law instruction for punitive damages (see IPI 35.01 for comparison).

155.06 The Drug or Alcohol Impaired Minor Responsibility Act--Contributory Negligence and Contributory Willful and Wanton Conduct--Not Defenses

[In this lawsuit] [In Count __] [contributory negligence][contributory willful and wanton conduct] is not a defense.

You must not consider whether there was [contributory negligence][contributory willful and wanton conduct] on behalf of [plaintiff or the injured party claiming damages].

Instruction and Notes on Use approved January 2010.

Notes on Use

Section 58/15 (740 ILCS 58/15) specifically excludes contributory negligence and willful and wanton conduct as defenses.

160.00

FEDERAL EMPLOYERS' LIABILITY ACT

INTRODUCTION

Railroad employees who are injured in the course of their employment have a cause of action against their employer under a Federal statute known as The Federal Employers' Liability Act (FELA), 46 U.S.C.A. §§ 51-59, rather than under the common law. Under certain circumstances, FELA actions may also involve either the Safety Appliance Act, 45 U.S.C.A. §§ 1-16, the Boiler Inspection Act, 45 U.S.C.A. §§ 22-23, or both. In addition to railroad employees, the protection of the Federal Employers' Liability Act is also extended to seamen by the Jones Act, 46 U.S.C.A. § 688. The instructions in this section can be readily adapted for use in Jones Act cases.

Section 51 of FELA provides for an action for damages against any common carrier by railroad in interstate or foreign commerce arising out of the injury or death of an employee while employed in such commerce, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The second paragraph of that section declares that any employee, "any part of whose duties ... shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce," is within the scope of the Act.

Section 53 removes contributory negligence as a complete defense to the action and provides instead for proportionate diminution of damages to the extent of the employee's contributory negligence. This is the "pure" form of comparative negligence as adapted in Illinois for negligence in *Alvis v. Ribar,* 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), not the statutory comparative fault subsequently mandated by the Illinois General Assembly for causes of action accruing on and after November 25, 1986 (735 ILCS 5/2-1116 (1994)). Moreover, under FELA, where a carrier's violation of a statute enacted for the safety of employees (such as the Safety Appliance Act or Boiler Inspection Act) contributes to the injury or death, the employee cannot be deemed guilty of any contributory negligence.

Section 54, by its language, removes assumption of risk as a defense in cases where the injury or death resulted, in whole or in part, from the negligence of an officer, agent or employee of the carrier, or where the violation of a statute enacted for the safety of employees contributed to the injury or death.

Section 59 provides for the survival of actions under the Act to the personal representative for the benefit of the surviving spouse and children, and if none, for the benefit of the parents, and if none, for the benefit of the next of kin dependent on the decedent. As opposed to the Illinois Wrongful Death Act, which is for the benefit of the "surviving spouse and next of

kin" (740 ILCS 180/2 (1994)), the next of kin under FELA have no right of recovery if there is a spouse, child or parent surviving.

A final general area of difference includes the extent to which federal, rather than state, law is applicable, even where the action is tried in a state court. *Bowman v. Illinois Central R. Co.,* 11 Ill.2d 186, 142 N.E.2d 104 (1957), *cert. denied*, 355 U.S. 837, 78 S.Ct. 63, 2 L.Ed.2d 49 (1957) (reviewing court in FELA case may not determine whether jury verdict and judgment are against the manifest weight of the evidence; limited to determining whether there is an evidentiary basis for the verdict); *Mitchell v. Toledo, P. & W. R. Co.,* 4 Ill.App.3d 1, 279 N.E.2d 782 (3d Dist.1972) (scope of appellate review is governed by federal law and is limited to determining whether there is an evidentiary basis for the verdict; only when there is a complete absence of probative facts to support the verdict can there be a reversal).

160.01 Statutory Provisions

At the time of the occurrence, there was in force a federal statute known as the Federal Employers' Liability Act. That Act provided that whenever an employee of a railroad is [injured] [or] [killed] while engaged in the course of his employment, the railroad shall be liable in damages [to the injured employee] [and/or] [for the death of the employee], where the [injury] [and/or] [death] results in whole or in part [from the negligence of any of the officers, agents, or other employees of the railroad] [or] [by reason of any defect or insufficiency, due to the railroad's negligence, in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (other equipment)].

[Contributory negligence on the part of the injured employee shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.]

Notes on Use

The bracketed material should be selected to fit the charges of negligence to be submitted to the jury. For example, in a case involving only allegations charging negligence of an employee, the bracketed phraseology concerning equipment should be omitted.

If contributory negligence is a factual issue, the second paragraph should be given.

If the Safety Appliance or Boiler Inspection Acts are at issue, then use the IPI 170 series of instructions.

The instruction as to the method by which damages should be adjusted for contributory negligence, IPI 160.13, should also be given when this issue is involved.

The instruction should be accompanied by IPI 10.01 defining negligence. If contributory negligence is an issue, IPI 160.04 defining contributory negligence in FELA cases should also be used with this instruction. *See Wilson v. Norfolk & W. Ry. Co.,* 109 Ill.App.3d 79, 440 N.E.2d 238, 64 Ill.Dec. 686 (5th Dist.1982).

Moreover, IPI 15.01 dealing with proximate cause should not be used in a FELA case.

160.01 is a combination of former instructions 160.01-160.04.

Comment

This instruction paraphrases the pertinent portions of the Act, 45 U.S.C.A. §§ 51 et seq. An instruction in the language of the statute has been sustained. *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (7th Cir.1950), and authorities therein cited. The categories of equipment set out in the bracket meets the requirement that only the specific provisions of the Act actually involved should be mentioned. *Terminal R. Ass'n of St. Louis v. Fitzjohn,* 165 F.2d 473, 480 (8th Cir.1948).

Conforming to the committee's decision to follow the statutory language, the phrase "results in whole or in part from the negligence" has been employed in lieu of the proximate cause terminology more customary in common law negligence actions. Such an instruction is adequate, and the addition of the terminology "proximate" adds nothing and is not essential. *Gilmore v. Toledo P.W. R.R. Co.,* 36 Ill.2d 510, 515, 224 N.E.2d 228, 231 (1967). *See* the Comment to IPI 160.04 regarding the issue of proximate cause.

Although the statutory language does not specifically so provide, the decisions restrict the effect of contributory negligence to that which is direct, or proximate, in considering diminution of damages. *Broadley v. Union R. Co.,* 132 F.2d 419 (6th Cir.1942) (error to give instruction permitting jury to consider remote contributory negligence). In connection with this instruction *see also* the Comments to IPI 160.01 and 160.13.

If the negligence of an employee was the sole cause of his injury he may not recover. *Helton v. Thomson,* 311 Ill.App. 354, 36 N.E.2d 267 (1st Dist.1941), *cert. denied*, 316 U.S. 688, 62 S.Ct. 1280, 86 L.Ed. 1760 (1942).

In *Chicago, St. P., M. & O. R. Co. v. Arnold,* 160 F.2d 1002 (8th Cir.1947), the court held the jury had been correctly charged that if it found that the plaintiff's negligence was the sole proximate cause of his injury, he could not recover. The court, however, reversed a jury verdict for the plaintiff on the ground that the trial court refused to give an instruction tendered by the defendant railroad. The gist of the instruction was that if the jury found the plaintiff was given timely warning by a supervisor that there was insufficient clearance, the verdict should be for the defendant. In so holding, the Court of Appeals said (160 F.2d at 1008):

> In the absence of the requested instruction the jury could not be expected to understand that [plaintiff's] failure to obey the warning, if given, was the sole proximate cause of his injury within the meaning of the court's charge.

Contrary to the *Arnold* case is *Trowbridge v. Chicago & Ill. Midland Ry. Co.,* 131 Ill.App.2d 707, 263 N.E.2d 619 (3d Dist.1970). In that case the railroad requested an instruction using the language of former IPI 160.02 but modified by the addition of the following language: "If, however, you find from the evidence that the sole proximate cause of the injury was the negligence of the plaintiff, then the plaintiff shall not recover any damages from defendant railroad." The railroad also objected to the plaintiff's burden of proof instruction (IPI 21.02) because the instruction failed to refer to the plaintiff's contributory negligence as the sole proximate cause of his injury. After reviewing, among others, the *Helton* and *Arnold* cases cited above, the court said, in sustaining a verdict for the plaintiff (263 N.E.2d at 622, 623):

> We do not believe the general language of the foregoing cases can be extended to authorize or approve the giving of a sole proximate cause instruction. On the contrary Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir.1965), concludes that the introduction of such an issue is likely to be confusing and is not a distinct issue apart from the standard imposed by the FELA.

* * *

As indicated earlier in this opinion *Helton v. Thomson and Chicago, St. P., M. & O. R. Co. supra* (cited in the IPI comment to 160.02) do not authorize or require the modification recommended.

See also the comment to IPI 160.10.

160.02 FELA--Issues Made by the Pleadings

[1] [The plaintiff claims that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[The plaintiff claims that damages were sustained by reason of the (injury) (death) of the decedent while the decedent was engaged in the course of his employment by the railroad.]

[2] The plaintiff further claims that the railroad violated the Federal Employers' Liability Act in that:

a. [an (officer) (agent) (or) (other employee) (of the) railroad was negligent in that]

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [there was a defect or insufficiency due to the railroad's negligence in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (or) (other equipment).]

[3] The plaintiff further claims that the [injury] [death] resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The railroad denies [that it violated the Federal Employers' Liability Act as claimed by the plaintiff] [or] [and] [that the (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence].

[5] [The railroad further denies that (any of the alleged injuries) (the death) resulted, in whole or in part, from any violation of the Act.]

[6] [The railroad further denies that the plaintiff (was injured) (or) sustained damages (to the extent claimed).]

[7] [The railroad claims that the (plaintiff) (decedent) was contributorily negligent (in that) (in one or more of the following respects):]

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's or decedent's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] [The railroad further claims that one or more of the foregoing caused in whole or in part the (plaintiff's injuries) (decedent's death).]

[9] [The plaintiff (denies that (he did) (the decedent did) any of the things claimed by the railroad,) (denies that (he) (the decedent) was negligent (in doing any of the things claimed by

the railroad,) (to the extent claimed by the railroad),) (and denies that any claimed act or omission on (his) (the decedent's) part caused in whole or in part (his claimed injuries) (the decedent's death)).]

Notes on Use

The instruction assumes that there is no factual issue as to whether the defendant was a common carrier by railroad in interstate commerce and whether the plaintiff was employed in such commerce. Where such issues exist, the instruction should be modified by inserting the necessary additional statutory language in lieu of the terms "railroad" or "employee," as the case may be. In the event there is an issue as to whether interstate commerce is involved, the definition of "interstate commerce" contained in paragraph 2 of 45 U.S.C.A. § 51 should be given. Where there is an issue as to whether the employee was engaged in the course of his employment, IPI 160.05, defining this phrase, should be used with this instruction.

Also see Notes on Use to IPI 160.01.

This instruction can be used in cases involving injury or death. Section 59 of the Act provides for the survival of actions under the Act to the personal representative for the surviving spouse, child, parent or next of kin. As opposed to the Illinois Wrongful Death Act, which is for the benefit of the "surviving spouse and next of kin" (740 ILCS 180/2 (1994)), the next of kin under FELA have no right of recovery if there is a spouse, child or parent surviving. In a death case under FELA use IPI 160.26.

Comment

See Comment to IPI 160.01.

For the issue of proximate cause *see* Comment to IPI 160.04.

In *Bridgeman v. Terminal R.R. Ass'n,* 195 Ill.App.3d 966, 552 N.E.2d 1146, 142 Ill.Dec. 405 (5th Dist.1990), a railroad employee had notified co-workers, including a foreman, that he was not feeling well. He was subsequently found in a bathroom, slumped down against the wall. An ambulance was called and the employee was pronounced dead at the scene. The court held that the railroad had a duty to help the employee once it was aware of his need for help. Because there was conflicting testimony as to when help was sought, the court held that enough had been established to submit the question of the railroad's negligence to the jury.

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), a railroad employee who had a long history of back problems was injured after helping to move 200 pound kegs and 150 pound spike pullers. In its motion for a directed verdict, the railroad claimed that because the employee failed to obtain an off-duty or light-duty medical excuse, it was his own negligence that was the sole proximate cause of his injuries. The appellate court upheld the denial of this motion and held that "the railroad had a duty to assign employees to work for which they are reasonably suited and will breach that duty if it negligently assigns an employee to perform work beyond his capacity."

160.02.01 FELA--Issues Made by the Pleadings--Emotional Injury--Zone of Danger

[1] [The plaintiff claims that he suffered emotional injury that resulted in damages while he was in the zone of danger of physical harm and while he was engaged in the course of his employment by the railroad.]

[2] The plaintiff further claims that the railroad violated the Federal Employers' Liability Act in that:

a. [an (officer) (agent) (or) (other employee) (of the) railroad was negligent in that]

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [there was a defect or insufficiency due to the railroad's negligence in its (cars) (engines) (appliances) (machinery) (track) (roadbed) (works) (boats) (wharves) (or) (other equipment).]

[3] The plaintiff further claims that his injury and damages resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The railroad [denies that it violated the Federal Employers' Liability Act as claimed by the plaintiff] [or] [and] [denies that the plaintiff was in the zone of danger of physical harm] [or] [and] [denies that the (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence].

[5] [The railroad further denies that any of the alleged emotional injuries resulted, in whole or in part, from any violation of the Act.]

[6] [The railroad further denies that the plaintiff (was emotionally injured) (or) sustained damages (to the extent claimed).]

[7] [The railroad claims that the (plaintiff) (decedent) was contributorily negligent (in that) (in one or more of the following respects):]

[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] [The railroad further claims that one or more of the foregoing caused in whole or in part the plaintiff's emotional injuries.]

[9] [The plaintiff (denies that he did any of the things claimed by the railroad,) (denies that he was negligent (in doing any of the things claimed by the railroad,) (to the extent claimed

by the railroad),) (and denies that any claimed act or omission on his part caused in whole or in part his claimed emotional injuries).]

Notes on Use

The instruction assumes that there is no factual issue as to whether the defendant was a common carrier by railroad in interstate commerce and whether the plaintiff was employed in such commerce. Where such issues exist, the instruction should be modified by inserting the necessary additional statutory language in lieu of the terms "railroad" or "employee," as the case may be. In the event there is an issue as to whether interstate commerce is involved, the definition of "interstate commerce" contained in paragraph 2 of 45 U.S.C.A. § 51 should be given. Where there is an issue as to whether the employee was engaged in the course of his employment, IPI 160.05, defining this phrase, should be used with this instruction.

Also see Notes on Use to IPI 160.01.

This instruction should be used in cases involving emotional injury only. Use of this instruction assumes that the plaintiff suffered no physical injury other than that resulting from his emotional injury.

Comment

See Comment to IPI 160.01.

For the issue of proximate cause *see* Comment to IPI 160.04.

In *Bridgeman v. Terminal R.R. Ass'n,* 195 Ill.App.3d 966, 552 N.E.2d 1146, 142 Ill.Dec. 405 (5th Dist.1990), a railroad employee had notified co-workers, including a foreman, that he was not feeling well. He was subsequently found in a bathroom, slumped down against the wall. An ambulance was called and the employee was pronounced dead at the scene. The court held that the railroad had a duty to help the employee once it was aware of his need for help. Because there was conflicting testimony as to when help was sought, the court held that enough had been established to submit the question of the railroad's negligence to the jury.

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), a railroad employee who had a long history of back problems was injured after helping to move 200 pound kegs and 150 pound spike pullers. In its motion for a directed verdict, the railroad claimed that because the employee failed to obtain an off-duty or light-duty medical excuse, it was his own negligence that was the sole proximate cause of his injuries. The appellate court upheld the denial of this motion and held that "the railroad had a duty to assign employees to work for which they are reasonably suited and will breach that duty if it negligently assigns an employee to perform work beyond his capacity."

In *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), the Court recognized a claim for negligent infliction of emotional distress under FELA

and further held that the zone of danger test applies to determine who may recover for the negligent infliction of emotional distress.

160.03 FELA--Burden of Proof

[Part A]

The plaintiff has the burden of proving each of the following propositions:

[First, that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[First, that the plaintiff sustained damages as a result of the decedent's death while the decedent was engaged in the course of his employment by the railroad.]

Second, that the railroad violated the Federal Employers' Liability Act in one of the ways claimed by the plaintiff as stated to you in these instructions.

Third, that the [injury] [death of the decedent] and damages to the plaintiff resulted, in whole or in part, from a violation of the Federal Employers' Liability Act.

[If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.]

[Part B]

[If you find in favor of the plaintiff and against the railroad, you must then consider the railroad's claim that the plaintiff was contributorily negligent.

As to that claim, the railroad has the burden of proving each of the following propositions:

First, that the (plaintiff) (decedent) acted or failed to act in one of the ways claimed by the railroad as stated to you in these instructions and that in so acting, or failing to act, the (plaintiff) (decedent) was negligent;

Second, that the (plaintiff's) (decedent's) negligence was a cause in whole or in part of his (injury) (and) (death).

If you find from your consideration of all the evidence that the railroad has proved each of these propositions, then you will reduce the plaintiff's damages in the manner stated to you in these instructions. On the other hand, if you find from your consideration of all the evidence that either of these propositions has not been proved, then you will not reduce the plaintiff's damages.]

Notes on Use

If there is evidence of the plaintiff's or decedent's contributory negligence, then Part B of this instruction should be given.

Also see Notes on Use to IPI 160.01.

Comment

See Comment to IPI 160.01.

An instruction that under the FELA the burden is on the defendant to prove contributory negligence by the preponderance of the evidence was approved in *Fisher v. Chicago, R. I. & P. R. Co.,* 290 Ill. 49, 124 N.E. 831 (1919). The reason for inclusion of such an instruction is that the burden of proof has been held a matter of substance to be determined by federal law rather than local law in actions under this statute. *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), and cases there cited. In that case, the Court said (238 U.S. at 512, 83 S.Ct. at 868):

> But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff . . . . Congress in passing the Federal Employers' Liability Act evidently intended that the federal statute should be construed in the light of these and other decisions of the federal court.

160.03.01 FELA--Burden of Proof--Emotional Injury--Zone of Danger

[Part A]

The plaintiff has the burden of proving each of the following propositions:

[First, that he suffered emotional injury that resulted in damages while he was in the zone of danger of physical harm and while he was engaged in the course of his employment by the railroad.]

Second, that the railroad violated the Federal Employers' Liability Act in one of the ways claimed by the plaintiff as stated to you in these instructions.

Third, that the emotional injury and damages to the plaintiff resulted, in whole or in part, from a violation of the Federal Employers' Liability Act.

[If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.]

[Part B]

[If you find in favor of the plaintiff and against the railroad, you must then consider the railroad's claim that the plaintiff was contributorily negligent.

As to that claim, the railroad has the burden of proving each of the following propositions:

First, that the plaintiff acted or failed to act in one of the ways claimed by the railroad as stated to you in these instructions and that in so acting, or failing to act, the plaintiff was negligent;

Second, that the plaintiff's negligence was a cause in whole or in part of his emotional injury.

If you find from your consideration of all the evidence that the railroad has proved each of these propositions, then you will reduce the plaintiff's damages in the manner stated to you in these instructions. On the other hand, if you find from your consideration of all the evidence that either of these propositions has not been proved, then you will not reduce the plaintiff's damages.]

Notes on Use

If there is evidence of the plaintiff's contributory negligence, then Part B of this instruction should be given.

Also see Notes on Use to IPI 160.01 and 160.02.01

Comment

See Comments to IPI 160.01 and 160.02.01.

An instruction that under the FELA the burden is on the defendant to prove contributory negligence by the preponderance of the evidence was approved in *Fisher v. Chicago, R. I. & P. R. Co.,* 290 Ill. 49, 124 N.E. 831 (1919). The reason for inclusion of such an instruction is that the burden of proof has been held a matter of substance to be determined by federal law rather than local law in actions under this statute. *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), and cases there cited. In that case, the Court said (238 U.S. at 512, 83 S.Ct. at 868):

> But the United States Courts have uniformly held that as a matter of general law the burden of proving contributory negligence is on the defendant. The federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff . . . . Congress in passing the Federal Employers' Liability Act evidently intended that the federal statute should be construed in the light of these and other decisions of the federal court.

160.03.02 FELA--Definition of Zone of Danger of Physical Harm

When I use the expression "zone of danger of physical harm," I mean that location where the plaintiff [suffered physical impact] [or] [was placed in immediate risk of physical harm] from the claimed acts of the railroad.

Notes on Use

This instruction should be given whenever IPI 160.02.01 or IPI 160.03.01 is given.

Comment

See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994).

160.04 Definition of Contributory Negligence for Use in FELA Cases Only

When I use the expression "contributory negligence" [in Count ____], I mean negligence on the part of the [plaintiff] [decedent] that contributed in whole or in part to the [alleged] [injury] [death].

Notes on Use

This instruction is to be used only when contributory negligence is an issue. If contributory negligence is not an issue, use IPI 160.11.

Contributory negligence may also be at issue in a count other than the count of the complaint based on FELA. If contributory negligence is at issue in a count other than the FELA count, then specify in the bracket in which count the FELA definition of contributory negligence is to be used.

Comment

The IPI 160 series instructions do not use the phrase "proximate cause," but instead uses the phrase "that contributed in whole or in part" in reference to negligence or contributory negligence. Early FELA cases refer to "proximate cause." *See*, e.g., *Tennant v. Peoria & P. U. Ry. Co.,* 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Williams v. N.Y. Central R. Co.,* 402 Ill. 494, 84 N.E.2d 399 (1949); *Allendorf v. E., J. & E. Ry. Co.,* 8 Ill.2d 164, 133 N.E.2d 288 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *Ganotis v. New York Central R.R. Co.,* 342 F.2d 767 (6th Cir.1965); *Coray v. Southern Pacific Co.,* 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949).

The more recent FELA cases have, however, adopted the standard set forth in *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). In *Rogers,* the court reversed the Missouri Supreme Court and sustained a jury verdict in holding that (352 U.S. at 506, 77 S.Ct. at 448):

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

In so holding, the court rejected the Missouri Supreme Court's decision as having adopted the "language of proximate causation."

In *Hamrock v. Consolidated Rail Corp.,* 151 Ill.App.3d 55, 501 N.E.2d 1274, 1278; 103 Ill.Dec. 736, 740 (1st Dist.1986), the court quoted from *Rogers* and added, "In order to recover under the FELA, a plaintiff must show both negligence on the part of the employer and causation; however, 'the quantum of evidence necessary to establish liability is much less in a FELA case than it would be in an ordinary negligence case [cite].' "

The Fifth Circuit discussed proximate cause, negligence and contributory negligence at great length in *Page v. St. Louis Southwestern Ry. Co.,* 349 F.2d 820 (5th Cir.1965), where the district court defined an injury "proximately caused" as one caused by an act or omission which "played any part, no matter how small, in actually bringing about or causing the injury." *Id.* at 822, fn. 3. In reversing a judgment for the defendant, the court remarked (349 F.2d at 824, 827):

> [O]n the Rogers thesis which we follow, there is really no place for "proximate cause" as such. True, there must be a causal relation either to impose damages against the Railroad or to require diminution for negligence of the injured worker. But it only adds to the problem to recast this simplified formula in the awkward but outmoded dialectic.
>
> * * *
>
> We ought to avoid those practices which "distract the jury's attention from the simple issues of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury." [Citation omitted]. All of the issues, affirmative and defensive ... can be simply inquired into in a simple way . . . . When done in this fashion, with suitable accompanying general instruction ..., there is no need any longer for putting this in the labored terms of "proximate cause" or "sole proximate cause" or "contributory negligence."

In *Weese v. Chesapeake & O. Ry. Co.,* 570 F.2d 611, 613 (6th Cir.1978), *Essary v. Louisiana Dock Co.,* 66 Ill.App.3d 182, 383 N.E.2d 731, 22 Ill.Dec. 923 (5th Dist.1978), and *Hollinghead v. Toledo P. & W. R.R. Co.,* 39 Ill.App.3d 538, 349 N.E.2d 98, 101 (3d Dist.1976), the courts adopted the *Rogers* standard, that the proofs need only justify the conclusion that the employer's negligence played any part, *even the slightest*, in producing the injury.

In *Gilmore v. Toledo, P. & W. R.R. Co.,* 36 Ill.2d 510, 224 N.E.2d 228 (1967), the court also considered the question. After discussing the old and new concepts of what constituted "proximate cause," the court concluded (36 Ill.2d at 515, 224 N.E.2d at 231):

> It is apparent from what we have already said that an instruction saying defendants' negligence must be in whole or in part "the cause" of the injury is an adequate one in a FELA case. The addition of the word proximate would add nothing and is not essential.

In *Ganotis v. New York Central R.R. Co.,* 342 F.2d 767 (6th Cir.1965), the court stated (342 F.2d at 768-769):

> One of the purposes of the Federal Employers' Liability Act, as amended, was to abolish the common law defenses of assumption of risk, fellow servant rule and contributory negligence. With respect to contributory negligence it established the rule of comparison of negligence instead of barring the employee from all recovery because of contributory negligence. [cite] We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and

proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used.

Based on the above-cited cases, the committee believes the term “proximate cause” should not be used in the plaintiff's case or in the defendant's case. The committee believes that in place of the term “proximate cause,” the terms “in whole or in part” should be used to define the causation element because the terms “in whole or in part” are used in the statute.

160.05 FELA--When Employee Is Engaged in the Course of His Employment

A person is in the course of his employment when he is doing anything he was employed to do, or when he is doing anything which his employment authorizes him to do or which is reasonably incidental to the employment.

Notes on Use

This instruction should only be given where there is a factual issue whether the employee was engaged in the course of his employment at the time of the occurrence.

Comment

The phrase "course of his employment" has received a broad construction in FELA cases, due, in part, to the fact that the exigencies of railroading require a wide variety of activities, otherwise personal, to be done on the job. *Chicago, M., St. P. & P. R. Co. v. Kane,* 33 F.2d 866 (9th Cir.1929), *cert. denied*, 280 U.S. 588, 50 S.Ct. 37, 74 L.Ed. 637 (1929) (employee crossing track from bunk car to toilet before going to work); *Mostyn v. Delaware, L. & W. R. Co.,* 160 F.2d 15 (2d Cir.1947), *cert. denied*, 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed. 355 (1947) (employee sleeping on ground along side track where he was injured was in the "employ" of the railroad); *Healy v. Pennsylvania R. Co.,* 184 F.2d 209 (3d Cir.1950), *cert. denied*, 340 U.S. 935, 71 S.Ct. 490, 95 L.Ed. 674 (1951) (employee crossing tracks to inquire of supervisor as to delivery of war bond; scope of employment held for jury).

Several decisions have indicated that § 229 of the Restatement (Second) of Agency (1957) sets forth appropriate guidelines for determining whether the employee's conduct is within the scope of his employment. *Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 841 F.2d 1347, 1355 (7th Cir.1988); *Rogers v. Chicago & N.W. Transp. Co.,* 947 F.2d 837, 839 (7th Cir.1991). These factors include (a) whether or not the acts are commonly done by such servants; (b) the time, place, and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal. Restatement (Second) of Agency § 229(2) (1957).

Acts of employee were deemed within the scope of his employ where employee, while on his way to eat lunch, slipped on ice in parking lot of the motel at which he was staying during a rest period. Duffield v. Marra, Inc., 166 Ill.App.3d 754, 520 N.E.2d 938, 117 Ill.Dec. 587 (5th Dist.1988).

160.06 FELA--Course of Employment as Matter of Law

At the time of this occurrence the [plaintiff] [decedent] was in the course of his employment.

Notes on Use

This instruction may be given only where there is no question of fact as to whether the plaintiff was in the course of his employment. It is given because IPI 160.01-160.03 refers to the statutory requirement that a plaintiff or decedent, under the Act, must be injured "while employed." Therefore, it is desirable, where no such issue has been raised, to remove any question concerning it from the jury's consideration.

160.07 FELA--Duty to Provide Safe Tools, Appliances, and Machinery Where Tools, etc., Supplied

It was the duty of the railroad to use ordinary care to provide [the plaintiff] [its employees] with reasonably safe and suitable [tools] [machinery and appliances] with which to do [his] [their] work. [Tools] [Machinery and appliances], in order to be reasonably safe and suitable, need not necessarily be the latest or best which could have been provided to do the work.

Comment

A railroad's duty with respect to tools, machinery and appliances is to use ordinary or reasonable care to furnish those which are reasonably safe and suitable. *Jacob v. New York City,* 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942). What is reasonable depends upon the circumstances, and the greater the danger, the greater the obligation to use all appliances readily obtainable to prevent accidents. *Margevich v. Chicago & N.W. Ry. Co.,* 1 Ill.App.2d 162, 116 N.E.2d 914 (1st Dist.1953), *cert. denied*, 348 U.S. 861, 75 S.Ct. 84, 99 L.Ed. 678 (1954).

In *Lowe v. Norfolk & W. Ry. Co.,* 124 Ill.App.3d 80, 463 N.E.2d 792, 79 Ill.Dec. 238 (5th Dist.1984), employees had presented evidence of a lack of protective clothing and the trial court modified the instruction by replacing "[tools] [machinery and appliances]" with "protective equipment." The Appellate Court, in reversing the case for retrial, held that the use of the language was not error, but that instruction should be more carefully reworded on retrial.

160.08 FELA--Duty to Provide a Reasonably Safe Place to Work

It was the duty of the railroad to use ordinary care to provide the plaintiff with a reasonably safe place in which to do his work.

Comment

The duty of a railroad is to use ordinary care to furnish a reasonably safe place to work. The diligence which must be used to meet this duty increases as the danger increases. *Bailey v. Central Vermont Ry. Co.,* 319 U.S. 350, 352; 63 S.Ct. 1062, 1063; 87 L.Ed. 1444 (1943); *Inman v. Baltimore & Ohio R. Co.,* 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed.2d 198 (1959) (reversal of trial court's judgment for plaintiff affirmed by 5 to 4 vote, where plaintiff, a crossing guard, was struck by drunken motorist while flagging traffic and action was predicated on violation of the duty to provide a safe place to work).

This duty exists even when railroad employees are required to go onto premises of a third party over which the railroad has no control. *Duffield v. Marra, Inc.,* 166 Ill.App.3d 754, 520 N.E.2d 938, 117 Ill.Dec. 587 (5th Dist.1988).

In *Laird v. Illinois Central Gulf R. Co.,* 208 Ill.App.3d 51, 566 N.E.2d 944, 153 Ill.Dec. 94 (5th Dist.1991), the court held that where IPI 160.02 and 160.07 were given, the trial court did not commit error by refusing to give a non-IPI instruction that the employer was not a guarantor of the safety of the work place.

In *Ellis v. St. Louis Southwestern Ry. Co.,* 193 Ill.App.3d 357, 549 N.E.2d 899, 140 Ill.Dec. 248 (5th Dist.1990), the jury was given this instruction, and the employee claimed that the railway furnished him defective equipment with which to work. The Appellate Court held that because the plaintiff had not presented any evidence that the employee's injury was due to an unsafe workplace, it was not error to refuse to give a separate safe workplace issues instruction.

Use of this instruction in unmodified form was upheld in *Greenfield v. Consolidated Rail Corp.,* 150 Ill.App.3d 331, 500 N.E.2d 1083, 103 Ill.Dec. 12 (5th Dist.1986), and *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973).

160.09 FELA--No Assumption of Risk By Employee

At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad to recover damages for [injury to] [death of] an employee, the employee shall not be held to have assumed the risks of his employment in any case where the [injury] [death] resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad, [or by reason of any defect, due to the railroad's negligence, in its (cars,) (engines,) (machinery,) (track,) (roadbed,) (works,) (boats,) (wharves,) (or) (other equipment)].

Comment

This instruction includes language from that portion of Section 4 of the Act, 45 U.S.C.A. § 54, applicable to FELA actions which do not involve either Safety Appliance or Boiler Inspection Act violations. It also includes language concerning equipment which is, due to the railroad's negligence, defective, since courts have held that the assumption of risk defense is also unavailable when such defective equipment causes an injury. *Birchem v. Burlington N. R. Co.,* 812 F.2d 1047 (8th Cir.1987).

In *Hamrock v. Consolidated Rail Corp.,* 151 Ill.App.3d 55, 501 N.E.2d 1274, 103 Ill.Dec. 736 (1st Dist.1986), refusal to give a similar instruction was held to be reversible error. Although the defense was not explicitly asserted, there was evidence from which a jury could have reasonably inferred that the employee had assumed the risk. The railroad had attempted to show that the employee's negligence was the sole cause of employee's injuries. *See also Dilley v. Chesapeake & O. R. Co.,* 327 F.2d 249 (6th Cir.1964) (stating that where the jury had heard nothing with respect to the doctrine of assumption of risk until the doctrine was defined and its application debated in final arguments, and merely mentioned in court instructions, it would have been better practice to have eliminated any reference to the doctrine), and *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973) (in which the court held that it was not error to give the instruction under the facts of that case, although it was not necessary to include the instruction in every case).

160.10 FELA--Burden of Proof--Contributory Negligence

[Withdrawn]

Notes on Use

This instruction has been withdrawn, and is now part of IPI 160.03. It previously provided "The burden of proving contributory negligence on the part of the [plaintiff] [decedent] rests upon the railroad."

The instruction on issues is now IPI 160.02.

The instruction on contributory negligence is now IPI 160.04.

160.11 FELA--No Contributory Negligence as a Matter of Law

The evidence in this case fails to show contributory negligence on the part of [the plaintiff] [the deceased employee], and, therefore, you should not consider the question of contributory negligence raised by the defendant.

Notes on Use

This instruction is to be given only when the jury has been told during the trial that contributory negligence is in issue, and at the close of all the evidence, the proof is insufficient to submit the issue to the jury. Where no mention of contributory negligence has been made there is no need for this instruction.

160.12 Damages Instructions

Comment

Additional damage instructions are necessary in FELA actions because of differences in comparative negligence rules and the elements of damages recoverable in death actions under the FELA as opposed to a state wrongful death action. Therefore, in injury actions, the basic group of damage instructions is the 30.00 series supplemented with IPI 160.13 or 160.23, depending on whether there are single or multiple defendants. On the other hand, in death actions, IPI 160.14-160.20 entirely replace the 31.00 series on wrongful death. General damage instructions concerning mitigation of damages, IPI 33.01 and 33.02, discount of future damages and mortality tables, IPI 34.00, exemplary damages, IPI 35.00, and forms of verdict, IPI 45.00, can be used in either injury or death actions under the FELA.

160.13 FELA--Diminishing Damages Because of Contributory Negligence

If you find that the [plaintiff's injury] [decedent's death] was caused by a combination of negligence of [one or more of] the railroad defendant[s] and contributory negligence of the [plaintiff] [decedent], you must determine the amount of damages to be awarded by you on Verdict Form ____ as follows:

First: Determine the total amount of damages to which the [plaintiff] [decedent] would be entitled under the court's instructions if the plaintiff had not been contributorily negligent.

Second: Assume that 100% represents the total combined negligence of all persons whose negligence contributed in whole or in part to the [plaintiff's] [decedent's] [injury] [or] [death], including the plaintiff[,] [and] the defendant[s you found liable] [, and all other persons]. Determine the percentage of such negligence attributable solely to the plaintiff [the decedent].

Third: Reduce the total amount of the plaintiff's damages by the proportion or percentage of negligence attributable solely to the plaintiff.

The resulting amount, after making such reduction, will be the amount of your verdict.

Notes on Use

The bracketed words and phrases in this instruction represent the alternative forms necessary to adapt the instruction to either a death action or an action for personal injuries under the Act. *See* IPI 160.01.

Comment

The jury should be instructed on the pure form of comparative negligence, in accord with Section 53 of the Act. *See Louisville & N. R. Co. v. Wene,* 202 Fed. 887, 890 (7th Cir.1913); *Sprickerhoff v. Baltimore & O. R. Co.,* 323 Ill.App. 340, 55 N.E.2d 532 (4th Dist.1944); *Thatch v. Missouri Pac. R. Co.,* 47 Ill.App.3d 980, 362 N.E.2d 1064, 6 Ill.Dec. 242 (5th Dist.1977).

160.14 FELA--Measure of Damages--Death--No Contributory Negligence

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

[In calculating the amount of any future pecuniary loss, you must not simply multiply the survivors' life expectancies by the annual losses. Instead, you must determine the present cash value of the future losses. "Present cash value" means the sum of money needed now which, together with what that sum may reasonably be expected to earn in the future, will equal the amounts of the pecuniary losses at the times in the future when they will be sustained.]

Notes on Use

If the mortality tables have been introduced into evidence, IPI 34.05 should be used. Failure to give that type of cautionary instruction concerning life expectancy, work expectancy, and present value, has been held error in a FELA case. *Fritz v. Pennsylvania R. Co.,* 185 F.2d 31 (7th Cir.1950). *But see* Illinois Supreme Court Rule 366(b) (2) (i) (1994): "No party may raise on appeal the failure to give an instruction unless he shall have tendered it" and Fed. R. Civ. P. 51: "No party may assign as error the giving or failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict . . . ."

Because it duplicates certain portions of IPI 34.05, the bracketed material should be omitted when that instruction is given.

Comment

The damages available under FELA are less extensive than those recoverable under the Illinois Wrongful Death Act. For example, under FELA, no cause of action for loss of consortium is allowed. *Kelsaw v. Union Pacific R. Co.,* 686 F.2d 819 (9th Cir.1982), *cert. denied*, 459 U.S. 1207, 103 S.Ct. 1197, 75 L.Ed.2d 440 (1983); *Howes v. Baker,* 16 Ill.App.3d 39, 305 N.E.2d 689 (1st Dist.1973). By contrast, the Illinois Wrongful Death Act does allow for recovery based on loss of consortium. *See*, *e.g.*, *Bullard v. Barnes,* 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984); *Elliott v. Willis,* 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982).

The limited measure of damages available under FELA was discussed by the United States Supreme Court in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990). In that case, the Court held that the federal statute providing for damages in an admiralty wrongful death action (known as the Jones Act) incorporates FELA standards and, like FELA, allows recovery only for pecuniary loss. The Court thus denied recovery for loss of society.

The United States Supreme Court has also held that, as a matter of federal law, damage awards in suits governed by federal law, including FELA cases, should be based on present

value. *St. Louis Southwestern R. Co. v. Dickerson,* 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985).

160.15 FELA--Death Action--How to Determine Pecuniary Loss

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate [name(s) of survivors entitled to claim] for the pecuniary loss proved by the evidence to have resulted to [name(s) of survivors entitled to claim] from the death of the decedent. "Pecuniary loss" may include loss of money, benefits, goods, services.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. The decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give his child(ren) had he lived;]

[5. His age;]

[6. His sex;]

[7. His health;]

[8. His habits of (industry,) (sobriety,) (and) (thrift);]

[9. His occupational abilities].

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of [decedent's name].

Comment

The FELA has consistently been interpreted as providing recovery only for pecuniary loss. In *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913), the United States Supreme Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Although Lord Campbell's Act did not explicitly limit the "damages" to be recovered, that Act and many state statutes that followed it were consistently

interpreted as providing only for pecuniary loss. *Vreeland*, 227 U.S. at 69-71; 33 S.Ct. at 195-196. The Supreme Court accordingly so construed the death provision of FELA. *Id*.

The limited measure of damages available under the FELA was reaffirmed in *Miles v. Apex Marine Corp.,* 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990), where the Supreme Court construed the federal statute providing for damages in an admiralty wrongful death action (Jones Act). Recognizing that Congress incorporated the FELA unaltered into the Jones Act, the Court stated that "Congress must have intended to incorporate the pecuniary limitation on damages as well." 498 U.S. at _, 111 S.Ct. at 325. The Court thus held that there is no recovery for loss of society in a Jones Act wrongful death action. *Id.*

By contrast, damages recoverable under the Illinois Wrongful Death Act are not limited solely to tangible economic loss; they may also include recovery for loss of consortium or for loss of society. *See* IPI 160.14.

Damages recoverable by the deceased's children are restricted to the benefits they might have expected to receive during minority, unless proof is made of unusual facts showing that a child might reasonably expect support after reaching majority. *Hines v. Walker,* 225 S.W. 837 (Tex.Civ.App.1920), *error refused*.

Cases recognizing that the care, attention, instruction, training, advice and guidance which the evidence showed the decedent reasonably might have been expected to give his children during their minority have pecuniary value are: *Norfolk & W. R. Co. v. Holbrook,* 235 U.S. 625, 629; 35 S.Ct. 143, 144; 59 L.Ed. 392 (1915); *St. Louis & S.F.R. Co. v. Duke,* 192 Fed. 306, 309-310 (8th Cir.1911); *Duke v. St. Louis & S.F.R. Co.,* 172 Fed. 684, 688-89 (C.C.W.D.Ark.1909); *Cain v. Southern R. Co.,* 199 Fed. 211, 213 (C.C.E.D.Tenn.1911); *Giles v. Chicago Great Western R. Co.,* 72 F.Supp. 493 (D.Minn.1947); *Liepelt v. Norfolk & W. Ry. Co.,* 62 Ill.App.3d 653, 378 N.E.2d 1232, 19 Ill.Dec. 357 (1st Dist.1978), *rev'd on other grounds*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

In *St. Louis & S.F.R. Co. v. Duke,* 192 Fed. 306 (8th Cir.1911), the court approved an instruction that "neither sympathy nor bereavement, nor affection, nor love, nor devotion which might have existed between the husband and wife and children can be rightly considered as an element of damage in a case of this kind. The law permits compensation for the pecuniary loss sustained, but not for sorrow, loss of companionship, or society." *See also Michigan Cent. R. Co. v. Vreeland,* 227 U.S. 59, 33 S.Ct. 192, 57 L.Ed. 417 (1913); *Allendorf v. Elgin, J. & E. Ry. Co.,* 8 Ill.2d 164, 179-180; 133 N.E.2d 288, 295-296 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956). Evidence of the anticipated future income tax liability that the decedent would have incurred had he lived is admissible to assist the jury in determining the survivor's net loss. *Norfolk & W. Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

Loss of future earnings may be based on the decedent's full life expectancy and need not be limited to an arbitrary retirement age as a wage earner. *Allendorf v. Elgin, J. & E. R. Co.,* 8 Ill.2d 164, 181, 133 N.E.2d 288, 296 (1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 49, 1 L.Ed.2d 53 (1956); *Avance v. Thompson,* 387 Ill. 77, 84, 55 N.E.2d 57, 60 (1944), *cert. denied*, 323 U.S. 753, 65 S.Ct. 82, 89 L.Ed. 603 (1944).

160.16 FELA--Death Case--Survival Action

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will provide reasonable and fair compensation for any of the following elements of damages proved by the evidence to have been suffered by the decedent during the period between the time of the decedent's injuries and the time of his death and resulting from defendant's violation of the FELA, taking into consideration the nature, extent, and duration of the injury:

[Here insert the elements of damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Notes on Use

This instruction is based upon IPI 30.01 and combines former IPI 160.16, 160.17, 160.18 and 160.19. With respect to appropriate elements of damage, *see generally* IPI Chapter 30. If contributory negligence is an issue in the case, IPI 160.13 concerning the diminution of damages due to contributory negligence, and IPI 11.01 defining contributory negligence, should be used with this instruction.

Comment

Survival action recovery under the FELA was cited by the Illinois Supreme Court in Murphy v. Martin Oil Co., 56 Ill.2d 423, 308 N.E.2d 583 (1974), as persuasive authority for departing from prior precedent and construing the Illinois Survival Act (735 ILCS 5/27-6 (1994)) to permit recovery for loss of property, loss of wages and conscious pain and suffering.

160.17 FELA--Medical Expenses--Death Case--Contributory Negligence an Issue

This instruction has been merged with IPI 160.16.

160.18 FELA--Death Case--Pain and Suffering of Deceased--No Contributory Negligence

This instruction has been merged with IPI 160.16.

160.19 FELA--Death Case--Pain and Suffering of Decedent--Contributory Negligence an Issue

This instruction has been merged with IPI 160.16.

160.20 FELA--Concerning Allocation of Damages--Death Case

The committee recommends that no instruction requiring the jury to allocate damages in a death case be given.

Comment

To conform to the statutory provision and the decisions construing it, an instruction on this subject should state that the jury should award only one aggregate sum. This is predicated upon the fact that section nine of the Act, 45 U.S.C.A. § 59, provides for "only one recovery." This may be covered by the forms of verdict so that no instruction is necessary.

The problem arises as to whether the jury should then allocate the award among the various beneficiaries. The statute is silent upon this point, and the decisions are not clear.

In *Gulf, C. & S. F. R. Co. v. McGinnis,* 228 U.S. 173, 176; 33 S.Ct. 426, 427; 57 L.Ed. 785 (1913), the statement was made that it was the function of the jury to apportion damages among the beneficiaries. In the later case of *Central Vermont R. Co. v. White,* 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915), the court interpreted the *McGinnis* case to mean that the jury might apportion damages among the beneficiaries in a FELA case where the state practice so provided. However, the Court also said (238 U.S. at 515, 35 S.Ct. at 869):

> That omission [of a statutory requirement that the jury apportion damages] clearly indicates an intent on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes, when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for in connection with the determination of negligence and damage, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased--a matter for probate courts, and not for jurors.

It has likewise been held that a court has the power to compel a proper distribution of the recovery so as to protect the defendant against the claims of persons other than the plaintiff. *Anderson v. Louisville & N. R. Co.,* 210 Fed. 689 (6th Cir.1914). And, in connection with a judicially approved settlement, the apportionment has been held to be collateral or ancillary to the main controversy and, hence, within the jurisdiction of the Federal court in which the action was pending. *Stark v. Chicago, N. S. & M. Ry. Co.,* 203 F.2d 786 (7th Cir.1953).

In view of the foregoing authorities, the practical difficulties of proofs and computation involved in an apportionment, and possible disputes between the various classes of beneficiaries, the preferable practice is to permit the jury to return a verdict for the total damages and to require the trial judge to apportion that verdict among the beneficiaries shown to be entitled to participate in the recovery, protecting the defendant against additional claims. This treatment of the matter turns the apportionment into an ancillary proceeding between or among the beneficiaries.

160.21 FELA--Differing Effect of Contributory Negligence--Railroad and Non-Railroad Defendants--Employing and Non-Employing Railroad Defendants

The liability of the defendants in this case will be different if you find that the [plaintiff] [decedent] was guilty of contributory negligence.

As to the defendant [name railroad which employed plaintiff or decedent], if you find that its negligence, in whole or in part, caused [injury to the plaintiff] [the death of the decedent], then the defendant [name railroad which employed plaintiff or decedent] is liable, even if the [plaintiff] [decedent] was guilty of contributory negligence, because so far as the defendant [name railroad which employed plaintiff or decedent] is concerned, contributory negligence of the [plaintiff] [decedent] would reduce the amount of the damages which may be recovered but would not entirely prevent the [decedent's] [plaintiff's] recovery [of damages against that defendant].

As to the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent], however, negligence of the [plaintiff] [decedent] which is more than 50% of the cause of the [injury] [death] would be a complete bar to recovery of damages from the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent].

Notes on Use

IPI 160.13 concerning the diminution of damages because of contributory negligence, and IPI 11.01 defining contributory negligence should be used with this instruction.

Comment

At the time of the publication of IPI, Second Edition, contributory negligence was a complete bar to a common law negligence action. As a result, IPI 160.21 in the Second Edition instructed the jury as to the difference between pure comparative negligence under the FELA (damage reduction) and contributory negligence under Illinois law (complete bar to recovery) for actions which joined FELA claims with common law negligence actions. In *Alvis v. Ribar,* 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the Illinois Supreme Court adopted the pure form of comparative negligence for all cases in which the trial commences on or after June 8, 1981. This decision conformed the Illinois law of contributory negligence to that which has been historically applicable to FELA actions. Because the plaintiff's contributory negligence would then have the same effect on railroad defendants which employed the plaintiff or decedent, non-railroad defendants, or non-employer railroad defendants, pursuant to the *Alvis* decision, former IPI 160.21 would no longer be applicable to actions arising prior to November 25, 1986.

For causes of action accruing on or after November 25, 1986, Illinois has adopted by statute a modified form of comparative negligence. The court is required to instruct the jury in writing that a non-FELA defendant should be found not liable if the jury finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury. *See* 735 ILCS 5/2-1107.1 (1994). As a result, this instruction should be given instructing the jury on the

difference between pure comparative negligence under the FELA and a modified comparative negligence under Illinois law.

This instruction differentiates between a FELA action and an ordinary negligence action as to the effect of contributory negligence. It is intended for use where liability against one co-defendant is asserted under the Act and liability against the other co-defendant is asserted under common law and both actions are tried together. The joinder of a FELA action with a common law action has repeatedly been sustained. *Doyle v. St. Paul Union Depot Co.,* 134 Minn. 461, 159 N.W. 1081 (1916); Bankson v. Illinois Central R. Co., 196 Fed. 171 (N.D.Iowa 1912); *Robbins v. Illinois Power & Light Corp.,* 255 Ill.App. 106 (3d Dist.1929). Even in jurisdictions where contributory negligence is a complete bar to recovery under the common law, it has been held that a FELA action may be tried together with a common law action. *Waylander-Peterson Co. v. Great Northern Ry. Co.,* 201 F.2d 408 (8th Cir.1953). Each party is entitled to have the law applicable to his case stated correctly. Because of the identity of terms, the jury will be less confused if the principles applicable to contributory negligence for both the FELA and the common law action are stated in the same instruction and differentiated.

160.22 Employing and Non-Employing Railroad Defendants--Differing Effect of Contributory Negligence on Liability

This instruction has been merged with 160.21.

160.23 FELA--Effect of Contributory Negligence on Damages Where Plaintiff, Third Party, and Railroad Are Negligent

If you find the defendant [non-FELA defendant or railroad defendant that did not employ plaintiff or decedent] not liable by reason of contributory negligence on the part of the [plaintiff] [decedent], and if you further find that the defendant [railroad that employed plaintiff or decedent] is liable, then you should assess damages against defendant [railroad which employed plaintiff or decedent] in the same manner as stated to you in these instructions.

Notes on Use

IPI 160.13 concerning the diminution of damages due to contributory negligence, and IPI 160.21 concerning the differing effect of contributory negligence in FELA and common law actions, should also be given. It is recommended that this instruction be given immediately following those instructions.

160.24 FELA--Burden of Proof--Contributory Negligence When Railroad and Either Non-Employing Railroad or Non-Railroad Are Defendants

The committee has withdrawn this instruction. The instruction on burden of proof on the issue of contributory negligence is now part of IPI 160.03.

Comment

In *Casey v. Baseden,* 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986), the Illinois Supreme Court held that the defendant has the burden of proving the plaintiff's contributory negligence. Since the burden of proving contributory negligence is the same under Illinois law as under the FELA, former IPI 160.24 is no longer a correct statement of the law.

160.25 FELA--Any Award of Damages Is Not Subject to Taxation

If you find for the plaintiff, any damages you award will not be subject to income taxes and therefore you should not consider taxes in fixing the amount of the verdict.

Comment

This instruction reflects the decision of the United States Supreme Court in Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 498; 100 S.Ct. 755, 759; 62 L.Ed.2d 689 (1980), and must be given if requested. It is applicable to all claims based on federal law but not as to claims involving purely state law. *See* Klawonn v. Mitchell, 105 Ill.2d 450, 456; 475 N.E.2d 857, 861; 86 Ill.Dec. 478, 482 (1985).

160.26 Death Case Under FELA

The plaintiff [personal representative] brings this action in a representative capacity by reason of his being [administrator] [executor] of the estate of [deceased's name], deceased. He represents the [surviving spouse] [child(ren)] [parent(s)] [next of kin] of the deceased. He is the real party in interest in this lawsuit, and in that sense is the real plaintiff whose damages you are to determine if you decide for the [administrator] [executor] of the estate of [deceased's name].

Comment

Under Section 59 of FELA the right of action given to the injured employee survives to his personal representative for the benefit of the beneficiaries provided for in this section; namely, "for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee . . . ." 45 U.S.C.A. § 59.

Although the deceased's administrator is the "personal representative" under Section 59, *Williams v. Louisville & N.R. Co.,* 371 F.2d 125 (6th Cir.1967), *cert. denied*, 388 U.S. 919, 87 S.Ct. 2138, 18 L.Ed.2d 1364 (1967), the cause of action which survives under this section does not survive for the benefit of the deceased's estate, but only for the benefit of the relatives stated in this section and in the order specified. If no such relatives survive, no right of recovery is given by this section. *Hogan v. New York Cent. & H. R.R. Co.,* 223 Fed. 890 (2d Cir.1915).

160.27 Measure of Damages, Federal Employers' Liability Act Aggravation of Pre-Existing Condition

If you find for [(plaintiff's name)], you should compensate [(plaintiff's name)] for any aggravation of an existing disease or physical defect resulting from such injury. If you find that the pre-existing condition made [him] [her] more susceptible to injury than a person in good health, [(defendant's name)] is responsible for all injuries suffered by [him] [her] as a result of [their] [its] [his] [her] negligence. This is true even if those injuries are greater than would have been suffered by a person in good health under the same circumstances.

If you find that there was an aggravation of a pre-existing condition you should determine what portion of [(plaintiff's name)] condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make the determination or if it cannot be said that the condition would have existed apart from the injury, then [(defendant's name)] is liable for all of the injuries.

Notes on Use

This instruction should be given whenever there is evidence of an aggravation of a preexisting condition in a FELA case.

Comment

In *Schultz v. Northeast Illinois Regional Commuter Railroad Corporation, d/b/a Metra,* 201 Ill.2d 260, 775 N.E.2d 964, 266 Ill.Dec. 892 (2002), the Supreme Court determined that in FELA cases, the proper content of jury instructions regarding damages for an injury resulting from an aggravation of a pre-existing condition is determined by federal law. The Court concluded that an instruction essentially similar to 160.27 correctly stated the law that when the defendant's negligence aggravates a plaintiff's pre-existing condition, the defendant is liable only for the additional injury caused by the negligence.

This instruction is a composite of the instruction that the Supreme Court approved in the *Schultz* case and instructions cited in *Sauer v. Burlington Northern R.R. Co.,* 106 F.3d 1490 (10th Cir.1997) and *Stevens v. Bangor & Aroostook R.R. Co.,* 97 F.3d 594 (1st Cir.1996). In *Sauer,* the Court cited the Federal Pattern Instruction § 155.65 from the Federal Jury Practice and Instructions, 5th Edition (2001).

170.00

SAFETY APPLIANCE AND BOILER INSPECTION ACTS

INTRODUCTION

Certain types of FELA actions are commonly referred to as "Safety Appliance Act" and "Boiler Inspection Act" cases. The actual relationship between the three acts is that all actions for personal injuries by railroad employees falling within the scope of FELA are brought under that Act, but, in instances where violation of either the Safety Appliance Act or the Boiler Inspection Act is involved, the violation of these Acts supplies the wrongful act necessary for liability under the FELA and the question of the railroad's negligence is not involved. The relation between the FELA and either of these two Acts, as well as the issues involved in a FELA action predicated upon one of these Acts, was explained as follows in *Carter v. Atlanta & St. A.B. Ry. Co.,* 338 U.S. 430, 434-435; 70 S.Ct. 226, 229; 94 L.Ed. 236 (1949):

> In this situation the test of causal relation stated in the Employers' Liability Act is applicable, the violation of the Appliance Act supplying the wrongful act necessary to ground liability under the F.E.L.A. [Citations.] Sometimes that violation is described as "negligence per se," [citations]; but we have made clear in the *O'Donnell* case [*O'Donnell v. Elgin, J. & E. R. Co.,* 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187 (1949)] that that term is a confusing label for what is simply a violation of an absolute duty.
>
> Once the violation is established, only causal relation is in issue. And Congress has directed liability if the injury resulted "in whole or in part" from defendant's negligence or its violation of the Safety Appliance Act.

Under the Safety Appliance Act, there are two different categories of violations that serve as a basis upon which liability may be predicated.

The first category consists of violations of the statutory provisions themselves. These include: a prohibition against using any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system or running a train without a sufficient number of cars equipped with sufficient train brakes so that the engineer can control its speed without requiring brakemen to use hand brakes for that purpose, 45 U.S.C.A. § 1; a requirement that cars be equipped with couplers, which couple automatically upon impact and can be uncoupled without the necessity of men going between the ends of the cars, 45 U.S.C.A. § 2; a requirement of secure grab irons on the ends and sides of cars, 45 U.S.C.A. § 4; and the general provision, 45 U.S.C.A. § 11:

> All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the top of such ladders . . . .

The second category consists of violations of regulations promulgated by the Secretary of Transportation. Some of the sections under which the Secretary's regulatory powers might be exercised are 45 U.S.C.A. § 5 which prohibits the use of freight cars that do not comply with the "prescribed standards" as to the height of drawbars; section 9, which requires that at least 50% of the cars in any train be equipped with power brakes, subject to the power of the Secretary to increase the percentage, and which further requires that such power brakes conform to the Association of American Railroads standards for such brakes, subject to the Secretary's power to modify such standards for the purpose of achieving safety; and section 12, which requires that the appliances specified in section 4 (secure grab irons and handholds) and section 11 (secure sill steps, efficient hand brakes, secure ladders and running boards, secure grab irons or handholds) of the Act shall conform in number, dimensions, location, and manner of application to the standards fixed, and to be fixed by the Secretary.

Thus, in instructions as to duty in this second class of cases, attention must be given to the applicable rules and regulations, as well as to the statute itself. *See Atchison, T. & S.F. Ry. Co. v. Scarlett,* 300 U.S. 471, 57 S.Ct. 541, 81 L.Ed. 748 (1937) (liability predicated upon violation of rule prescribing standards for ladders; brace rod held not a ladder and rule not applicable); *Williams v. New York Central R. Co.,* 402 Ill. 494, 501-503; 84 N.E.2d 399, 403-404 (1949) (ICC rules required boxcars to be equipped with running boards and had no such requirement for gondola cars; another rule provided that special cars should have the same equipment as required for cars of the nearest approximate type; question whether converted boxcar more nearly approximated a boxcar or a gondola car held for the jury).

The section of the Boiler Inspection Act establishing standards imposes a dual requirement that a locomotive, its boiler, tender and all parts and appurtenances (1) shall be in proper condition and safe to operate so that they may be employed in the active service of the carrier without unnecessary peril to life and limb, and (2) shall have been inspected as provided in the Act and be able to withstand the tests prescribed by the Secretary, 45 U.S.C.A. § 23. This latter requirement has been construed as delegating rule making power to the Interstate Commerce Commission (which was the predecessor to the Department of Transportation) under this Act as well. *Napier v. Atlantic Coast Line R. Co.,* 272 U.S. 605, 612; 47 S.Ct. 207, 209; 71 L.Ed. 432 (1926).

The FELA itself provides for a further differentiation between actions based in part on the Safety Appliance and Boiler Inspection Acts and other actions based entirely on the FELA. Where violations of the Boiler Inspection and Safety Appliance Acts are involved, contributory negligence may not be considered in mitigation of damages, 45 U.S.C.A. § 53. In addition to the general section of the FELA abolishing the defense of assumption of risk, 45 U.S.C.A. § 54, the Safety Appliance Act contains a section also abolishing assumption of risk where the employee is injured even though the employee has actual notice of the violation, 45 U.S.C.A. § 7, and a specific provision saving actions for personal injury to employees in situations where the penal provisions of the act are not enforceable, 45 U.S.C.A. § 13.

A further difference arises in the manner of proof of cases based partly on the Safety Appliance and Boiler Inspection Acts. As expressed in *Myers v. Reading Co.,* 331 U.S. 477, 483;

67 S.Ct. 1334, 1338; 91 L.Ed. 1615 (1947), quoting from *Didinger v. Pennsylvania R. Co.,* 39 F.2d 798, 799 (6th Cir.1930):

> 'There are two recognized methods of showing the inefficiency of hand brake equipment. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural, and usual manner.'

See also Spokane & I. E. R. Co. v. Campbell, 241 U.S. 497, 505; 36 S.Ct. 683, 687; 60 L.Ed. 1125 (1916), for an illustration of the kind of evidence that establishes a violation of the Safety Appliance Act. The terms efficient and inefficient as used in 45 U.S.C.A. § 11 have been defined as follows: "Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect: incapable; incompetent; inadequate." *Spotts v. Baltimore & O.R. Co.,* 102 F.2d 160, 162 (7th Cir.1938).

In *O'Donnell v. Elgin, J. & E. Ry. Co.,* 338 U.S. 384, 394; 70 S.Ct. 200, 206; 94 L.Ed. 187 (1949), the Court, in holding that plaintiff was entitled to a peremptory instruction that equipping a car with a coupler that broke was a violation of the Safety Appliance Act, in effect held that proof of malfunction was sufficient evidence of a violation, indicating, by means of a footnote, that the only defense would be proof that the failure was caused through something other than the inadequacy or defectiveness of the appliance. *See also Coleman v. Burlington Northern, Inc.,* 681 F.2d 542 (8th Cir.1982), where the court held that where there is no factual issue as to the failure of a safety appliance required by the Act to function properly, the jury must be given a preemptive instruction that said failure did constitute a violation of the Act.

Finally, sections 1, 2, 6 and 11 of the Safety Appliance Act as well as language in the Boiler Inspection Act (§ 23) limit their applicability to equipment which is hauled or used on the carrier's line. *Tisneros v. Chicago & N.W. Ry. Co.,* 197 F.2d 466 (7th Cir.1952), *cert. denied*, 344 U.S. 885, 73 S.Ct. 184, 97 L.Ed. 685 (1952) (fire knocker, injured while climbing engine to either extinguish or build up fire in engine standing in roundhouse, denied recovery); *Lyle v. Atchison, T. & S.F. Ry. Co.,* 177 F.2d 221 (7th Cir.1949), *cert. denied*, 339 U.S. 913, 70 S.Ct. 574, 94 L.Ed. 1339 (1950) (hostler's helper servicing locomotives to prepare them for use, denied recovery); *Baltimore & Ohio R. Co. v. Hooven,* 297 F. 919 (6th Cir.1924) (Safety Appliance Act case; locomotive in roundhouse for monthly inspection and repairs held not in use). *But see Jenkins v. Chicago & Eastern Ill. R.R.,* 5 Ill.App.3d 954, 284 N.E.2d 392 (1st Dist.1972) (prior use is not a sufficient basis for liability, but a car held to be "in use" even though it had been delivered to a user on its own spur track for loading and unloading); *Angell v. Chesapeake & O. Ry. Co.,* 618 F.2d 260 (4th Cir.1980) (engine held "in use" even though it was on a service and maintenance track when maintenance was completed and engine was being returned to active track).

More extended discussions of the problems involved in actions predicated upon violations of these two Acts are contained in the articles cited in the introduction to the FELA at IPI 160.00.

These instructions do not cover the following factual issues: whether the locomotive was being "used on its line" by the railroad, whether the plaintiff or decedent was an employee, or the question of interstate commerce. Where such an issue exists, the instructions should be modified or supplemented, if and to the extent that the court determines that the issue is one for the jury.

170.01.01 Safety Appliance Act--Statutory Provisions

At the time of the occurrence, there was in force a federal statute known as the Safety Appliance Act. That Act imposed upon the railroad the absolute duty to have all cars that it hauls or permits to be hauled or used on its line [equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of persons going between the ends of the cars] [equipped with efficient hand brakes] [equipped with secure and adequate grab irons or handholds at the ends and sides of each car (and on the roof at the top of the ladder on each car)].

This statute is violated when [a coupler fails to function properly while (used) (operated) in the usual and customary manner] [a coupler fails to function properly because of a defect] [hand brakes fail to perform properly while (used) (operated) in the usual and customary manner] [hand brakes fail to perform properly because of a defect] [a car does not have the required grab irons or handholds] [a car grab iron or handhold on a car is not secure or adequate for use].

The statute provides that railroads violating the Act are liable to persons covered under the Act for [injuries] [death] caused in whole or in part by such violations.

The statute further provides that neither negligence on the part of the employee nor the absence of negligence on the part of the railroad is a defense to liability under this Act.

Notes on Use

This instruction is a combination of, and replaces, former IPI instructions 170.01, 170.02, and 170.03.

A violation of the Act is proved by establishing a specific defect or by proof that the coupler or brake failed to function properly when used with due care in the normal and usual manner. *See* Introduction. The bracketed terms in paragraph two of the instruction should be used to make the instruction conform to the evidence.

Comment

The instruction follows the language of the statutory sections except for the phrase "absolute duty" and the use of this paragraph, including that phrase is proper. *Howard v. Baltimore & O. C. T. R. Co.,* 327 Ill.App. 83, 63 N.E.2d 774 (1st Dist.1945). The second paragraph states the way in which the violation may be proved. *See* Introduction. Where the evidence tends to support both allegations of negligence and violation of the Act, a plaintiff is entitled to have the instruction given. *O'Donnell v. Elgin, J. & E. Ry. Co.,* 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187 (1949).

It is reversible error if the court does not separate the negligence claim from the claim for violation of the Act and make it clear that neither evidence of negligence nor due care can be considered in determining a defendant's liability under the Act. *Trout v. Pennsylvania R. Co.,* 300 F.2d 826 (3d Cir.1962).

If the evidence establishes that the plaintiff or decedent was engaged in the "coupling process" when injured or killed, the evidence is sufficient as a matter of law to constitute cause in fact, and there is no issue of proximate cause to be decided by the jury. *Reynolds v. Alton & Southern Ry. Co.,* 115 Ill.App.3d 88, 450 N.E.2d 402, 70 Ill.Dec. 929 (5th Dist.1983).

In *Spotts v. Baltimore & O. R. Co.,* 102 F.2d 160, 162 (7th Cir.1938), the court defined the terms efficient and inefficient under this section as follows: "Efficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent, inadequate."

170.01.02 Safety Appliance Act--Issues Made by the Pleadings

[The plaintiff claims that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[The plaintiff claims that [decedent's name] was killed while [decedent's name] was engaged in the course of his employment by the railroad, and that [names of beneficiaries] sustained damages by reason of [decedent's name]'s death.]

The plaintiff further claims that the railroad violated the Safety Appliance Act in [that] [one or more of the following respects]:

[1.] [The coupler (on a car used on its line) (on one of its cars) failed to function properly] [when it was (used) (operated) in the usual and customary manner].

[2.] [The coupler (on a car used on its line) (on one of its cars) failed to function properly because of a defect.]

[3.] [The hand brakes (on a car used on its line) (on one of its cars) failed to perform properly when they were (used) (operated) in the usual and customary manner.]

[4.] [The hand brakes (on a car used on its line) (on one of its cars) failed to perform properly because of a defect.]

[5.] [A car used on its line] [One of its cars] [did not have the required grab irons or handholds.]

[6.] [The grab iron or handhold (on a car used on its line) (on one of its cars) was not secure or adequate for use.]

The plaintiff further claims that the [injury] [death] resulted in whole or in part from [one or more of] the alleged violation[s] of the Act.

The railroad denies [that it violated the Safety Appliance Act as claimed by the plaintiff] [or] [and] [that (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence].

[The railroad further denies that (any of alleged injuries) (the death) and damage resulted, in whole or in part, from any violation of the Act.]

[The railroad further denies that the plaintiff was injured or sustained damages (to the extent claimed).]

Notes on Use

This instruction is new. The former Safety Appliance Act instructions did not include an issues instruction.

The first two paragraphs are alternatives.

The numbered bracketed terms should be used to make the instruction conform to the evidence and the statutory violation alleged. For example, [1] and [2] are for use with alleged violations of 45 U.S.C.A. § 2; [3] and [4] are for use with alleged violations of 45 U.S.C.A. § 11; and [5] and [6] are for use with alleged violations of 45 U.S.C.A. § 4.

Factual issues as to whether the car was being "used on its line" by the railroad, whether the plaintiff or decedent was an employee, or whether there was the requisite nexus with interstate commerce are not covered by this instruction. Where such issues exist and the court rules that the issue is one for the jury, the instruction should be modified accordingly.

170.01.03 Safety Appliance Act--Burden of Proof

The plaintiff has the burden of proving each of the following propositions:

First, that the [plaintiff was injured] [decedent was killed] while the [plaintiff] [decedent] was engaged in the course of his employment by the railroad.

Second, that the railroad violated the Safety Appliance Act in one of the ways claimed by the plaintiff as stated in these instructions.

Third, that the [plaintiff's injury] [decedent's death] resulted, in whole or in part, from a violation of the Safety Appliance Act.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.

Notes on Use

The former Safety Appliance Act instructions did not include a burden of proof instruction.

170.04 Safety Appliance Act--Boiler Inspection Act--No Assumption of Risk by Employee

At the time of the occurrence there was in force a federal statute known as the [Safety Appliance Act] [Boiler Inspection Act] which provided that in any action brought against a railroad to recover damages for [injury to] [the death of] an employee, the employee shall not be held to have assumed the risks of his employment in any case where the violation by the railroad of the Act caused, in whole or in part, the [injury to] [death of] the employee.

Comment

This instruction paraphrases that portion of 45 U.S.C.A. § 54 applicable to cases based upon Safety Appliance Act and Boiler Inspection Act violations.

170.05 Combined FELA & Safety Appliance Act or Boiler Inspection Act Case--No Assumption of Risk by Employee

At the time of the occurrence there was in force a federal statute which provided that in any action brought against a railroad to recover damages for [injury to] [the death of] an employee, the employee shall not be held to have assumed the risks of his employment in any case where the [injury] [death] resulted in whole or in part from the negligence of any of the officers, agents, or employees of the railroad or where the violation by the railroad of any statute enacted for the safety of the employee caused, in whole or in part, the [injury to] [death of] the employee.

Notes on Use

This instruction combines the portion of 45 U.S.C.A. § 54 applicable to FELA negligence actions with those applicable to actions based on violations of the Safety Appliance Act or Boiler Inspection Act. It should be given in lieu of IPI 160.09 and 170.04 when both types of action are submitted to the jury.

Comment

See Comment to IPI 160.09.

170.06 Boiler Inspection Act--Statutory Provisions

At the time of the occurrence, there was in force a federal statute known as the Boiler Inspection Act. That Act imposed upon the railroad the absolute duty to have every locomotive used or permitted to be used on its line, together with [the (boiler) (tender)] all parts and appurtenances of any such locomotive, in a proper and safe condition for operation on the railroad without unnecessary danger to life or limb.

The statute provides that railroads violating the Act are liable to persons covered under the Act for [injuries] [death] caused in whole or in part by such violations.

The statute further provides that neither negligence on the part of the employee nor the absence of negligence on the part of the railroad is a defense to liability under this Act.

Notes on Use

The second paragraph has been added to make it clear that the statute is violated if the equipment is unsafe in use despite the fact that no actual defect in the equipment is shown.

Comment

This instruction covers a violation of 45 U.S.C.A. § 23, the Boiler Inspection Act. The comment under IPI 170.01.01 is applicable since the Act is given the same construction as the Safety Appliance Act. *Lilly v. Grand Trunk Western R. Co.,* 317 U.S. 481, 485-488; 63 S.Ct. 347, 350-352; 87 L.Ed. 411 (1943); *Calabritto v. New York, N.H. & H.R. Co.,* 287 F.2d 394 (2d Cir.1961), *cert. denied*, 366 U.S. 928, 81 S.Ct. 1649, 6 L.Ed.2d 387 (1961).

Dangerous conditions caused by foreign substances (such as ice or sand and oil) may give rise to liability under the Boiler Inspection Act even in the absence of a violation of federal safety regulations. *Whelan v. Penn Cent. Co.,* 503 F.2d 886 (2d Cir.1974).

In *Bankston v. Chesapeake & Ohio Ry. Co.,* 128 Ill.App.3d 166, 470 N.E.2d 512, 83 Ill.Dec. 386 (1st Dist.1984), there was evidence that oil was on the exterior catwalk of the locomotive and that the plaintiff slipped on the oil. This instruction was given without objection. The court held that this evidence supported the jury's findings that the railroad had violated 45 U.S.C.A. § 23 and was liable to the plaintiff.

170.06.01 Boiler Inspection Act--Issues Made by the Pleadings

[The plaintiff claims that he was injured and sustained damages while he was engaged in the course of his employment by the railroad.]

[The plaintiff claims that [decedent's name] was killed while [decedent's name] was engaged in the course of his employment by the railroad, and that [names of beneficiaries] sustained damages by reason of [decedent's name]'s death.]

The plaintiff further claims that the railroad violated the Boiler Inspection Act in that the locomotive used or permitted to be used on its line together with [the boiler, tender, and] all parts and appurtenances of the locomotive was not in a proper and safe condition for operation on the railroad and was a danger to life or limb.

The plaintiff further claims that the [injury] [death] resulted in whole or in part from [one or more of] the alleged violation[s] of the Act.

The railroad [denies that it violated the Boiler Inspection Act as claimed by the plaintiff] [and] [denies that the (plaintiff) (decedent) was engaged in the course of his employment for the railroad at the time of the alleged occurrence.]

The railroad further denies that [(any of) the alleged (injuries) (damages)] [the death] resulted, in whole or in part, from any violation of the Act.

[The railroad further denies that the plaintiff (was injured) (or) (sustained damages) (to the extent claimed).]

Notes on Use

The former Boiler Inspection Act instructions did not include an issues instruction.

The first two paragraphs are alternatives.

170.06.02 Boiler Inspection Act--Burden of Proof

The plaintiff has the burden of proving each of the following propositions:

First, that the [plaintiff was injured] [decedent was killed] while the [plaintiff] [decedent] was engaged in the course of his employment by the railroad.

Second, that the railroad violated the Boiler Inspection Act in one of the ways claimed by the plaintiff as stated in these instructions.

Third, that the [plaintiff's injury] [decedent's death] resulted, in whole or in part, from a violation of the Boiler Inspection Act.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the railroad.

Notes on Use

The former Boiler Inspection Act instructions did not include a burden of proof instruction.

170.07 Damages--Contributory Negligence Not a Bar and Does Not Diminish Damages Where Injury or Death Caused by Violation of Safety Appliance or Boiler Inspection Act

If you find that the [plaintiff's injuries] [decedent's death] resulted in whole or in part from the violation by the railroad of the [Safety Appliance Act] [Boiler Inspection Act], then contributory negligence of the [plaintiff] [decedent] shall neither bar a recovery nor reduce the amount of the plaintiff's damages.

Comment

This instruction states the applicable provisions of 45 U.S.C.A. § 53.

180.00

STRUCTURAL WORK ACT

STATUTE REPEALED IN 1995.

185.00

MAGNUSON-MOSS

ACT INTRODUCTION

The Magnuson-Moss Act was enacted in 1975 "to improve the adequacy of information available to consumers, prevent deception and improve competition" with respect to consumer products issued with written warranties. 15 U.S.C. § 2302 (a) (1994). The Act was designed to protect consumers from deceptive warranty practices by establishing standards for the form and content of written warranties. Lysek v. Elmhurst Dodge, Inc., 325 Ill. App. 3d 536, 259 Ill. Dec. 454 (2001).

The Act applies to consumer products, which are tangible items of personal property "normally used for personal, family or household purposes." 15 U.S.C. § 2301 (1) (1975). The Act does not require that manufacturers give a warranty; however, if a written warranty is given, the Act "imposes certain requirements as to its contents, disclosures, and the effect of extending a written warranty." Szajna v. Gen. Motors Corp., 115 Ill. 2d 294, 312, 503 N.E.2d 760, 768 (1986). Written warranties must be designated as either "full" or "limited." 15 U.S.C. § 2304 (1976). "A warrantor giving a 'full' written warranty may not impose any limitations on the duration of an implied warranty and may not exclude or limit consequential damages for breach of a written or implied warranty." Szajna, 115 Ill. 2d at 312-13 (citing 15 U.S.C. § 2304 (1976)). Within a reasonable amount of time, a full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10-12). Only a supplier giving a limited written warranty may disclaim or modify an implied warranty; and, the only modification allowed is that the duration of the implied warranty may be limited to the duration of the written warranty "if such limitation is conscionable and is clearly set forth." Szajna, 115 Ill. 2d at 313 (citing 15 U.S.C. § 2308 (1976)).

Introduction approved January 2007.

185.01. Statutory Provisions

At the time of the [sale] [lease] [service contract] of the [vehicle] [product] there was in force a federal statute known as the Magnuson-Moss Warranty Act. That Act provided that a consumer who is damaged by the failure of a [manufacturer] [seller] [supplier] [service contractor] [warrantor] to comply with a [written] [and/or] [implied] warranty may bring suit for [damages], [refund], [repair], or [replacement].

Instruction and Comment approved January 2007.

Comment

Pursuant to the Magnuson-Moss Act, "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1) (1994). Actions for breach of an implied warranty of merchantability arise under the Act by state law. 15 U.S.C. § 2301(7) (1994). Illinois state law regarding actions for breach of an implied warranty of merchantability is stated in section 2-314 of the UCC (810 ILCS 5/2-314 (West 2002)). Under the UCC, a buyer of goods seeking purely economic damages for a breach of an implied warranty has "a potential cause of action only against his immediate seller." The Magnuson-Moss Act imposes on manufacturers the same implied warranties that state law imposes on the buyer's immediate seller. In actions where (1) a consumer filed against a manufacturer pursuant to the Magnuson-Moss Act and (2) the manufacturer has expressly warranted a product to the consumer, the plaintiff has a cause of action for breach of implied warranty under the Magnuson-Moss Act against the manufacturer. Razor v. Hyundai Motor Am., 349 Ill.App.3d 651, 285 Ill.Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)), citing Mekertichian v. Mercedes-Benz U.S.A., 347 Ill.App.3d 828, 807 N.E.2d 1165 (2004), citing Szajna v. Gen. Motors Corp., 115 Ill. 2d 294, 311, 503 N.E. 2d 760, 767, 104 Ill.Dec. 898, 503 N.E.2d 760, 768 tline(1986), and Rothe v. Maloney Cadillac, Inc., 119 Ill.2d 288, 292, 518 N.E.2d 1028, 1029-30 (1988). The Magnuson-Moss Act prohibits anyone who offers a written warranty from disclaiming or modifying implied warranties. No matter how broad or narrow a written warranty is, consumers always receive the basic protection of the implied warranty of merchantability. The Act applies to sales, leases, service contracts and the sale of extended warranties after sale with the product. Lysek v. Elmhurst Dodge, Inc., 325 Ill. App. 3d 536, 259 Ill. Dec. 454 (2001); Mangold v. Nissan N. Am., Inc., 347 Ill. App. 3d 1008, 809 N.E.2d 251, 284 Ill. Dec. 129 (2004).

185.02 Magnuson-Moss Act--Issues Made by the Pleadings

[1] [The Plaintiff claims that he sustained damages as a [purchaser] [lessee] of a [vehicle] [product] [manufactured] [sold] [leased] [distributed] [supplied] [warranted] by the Defendant.]

[2] The Plaintiff further claims that the Defendant violated the Magnuson-Moss Act in that

a. [the Defendant breached a written warranty given with the vehicle [product].

Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to breach of a written warranty which have not been withdrawn or ruled out by the court and are supported by the evidence.]

b. [the Defendant breached the implied warranty of merchantability given with the [vehicle] [product].

Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to breach of the implied warranty of merchantability which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] The Plaintiff further claims that damages resulted in whole or in part from one or more of the alleged violations of the Act.

[4] The Defendant denies that it violated the Magnuson-Moss Act as claimed by the Plaintiff.

[5] The Defendant further denies that any of the alleged damages resulted, in whole or in part, from any violation of the Act.

[6] The Defendant further denies that the Plaintiff sustained damages (to the extent claimed).

[7] The Defendant also sets up the following affirmative defense[s]:

[Set forth in simple terms without undue emphasis or repetition those affirmative defenses to warranty enforcement in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[8] The Plaintiff denies that [summarize affirmative defense or defenses].

Instruction approved January 2007.

185.03 Magnuson-Moss Act--Burden of Proof—Breach of Written Warranty

In order for Plaintiff to recover for a breach of written warranty claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, the existence of a defect in the [vehicle] [product] covered by the warranty;

Second, compliance with the terms of the warranty by Plaintiff;

Third, that the Plaintiff afforded Defendant a reasonable opportunity to repair the defect; and

Fourth, that Defendant, through its authorized dealer [did not repair] [was unable to repair] the [vehicle] [product] after being given a reasonable number of attempts or a reasonable amount of time; or did not offer to refund or replace within a reasonable amount of time.

Fifth, that Plaintiff sustained damages as a result of Defendant's failure to take action required by the warranty to correct the defect or malfunction or otherwise to correct the problem.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the Plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should be used where no affirmative defenses have been raised or the sole affirmative defense raised is mitigation of damages. Where mitigation of damages is raised also give IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

This instruction conforms to the burden of proof requirements for breach of a written warranty as stated in Pearson v. DaimlerChrysler Corp., 349 Ill. App. 3d 688, 286 Ill. Dec. 173, 813 N.E.2d 230 (2004) and Razor v. Hyundai Motor Am., 349 Ill. App. 3d 651, 286 Ill. Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)), which states that the plaintiff has the burden of proving a reasonable basis for damages proximately caused by defendant's breach.

In the fourth burden of proof element the phrase "or did not offer to refund or replace within a reasonable amount of time" should be included in full warranty cases, and only those limited warranty cases where the right to recover a refund or replacement of the product is provided in the warranty.

Comment

The Magnuson-Moss Warranty Act creates a contractual right on the part of consumers

for the replacement of or refund of the purchase price of defective products which are covered by a full warranty. The warrantor's failure to allow the consumer to elect replacement or refund gives rise to an action at law for breach of warranty in which the consumer must prove only that a defect in the product exists which the warrantor was unable to repair after a reasonable number of attempts. Sadat v. Am. Motors Corp., 114 Ill. App. 3d 376, 70 Ill. Dec. 22, 448 N.E.2d 900 (1983). A full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10-12). A limited written warranty may offer a remedy of repair, replacement or refund but it is not required. The Magnuson-Moss Act applies to limited warranties. A plaintiff is entitled to bring an action under the Act based on alleged breach of a limited written warranty provided by defendant. Mydlach v. DaimlerChrysler Corp., 364 Ill. App. 3d 135, 301 Ill. Dec. 164, 846 N.E.2d 126 (2006). The Act requires that every written warranty on a consumer product that costs more than $10 have a title that says the warranty is either “full” or “limited.” Lara v. Hyundai Motor Am., 331 Ill. App. 3d 53, 264 Ill. Dec. 416, 770 N.E.2d 721 (2002).

185.04 Magnuson-Moss Act--Burden of Proof--Breach of Written Warranty—Affirmative Defenses to Warranty Enforcement

In order for Plaintiff to recover for a breach of written warranty claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, the existence of a defect in the [vehicle] [product] covered by the warranty;

Second, compliance with the terms of the warranty by Plaintiff;

Third, that the Plaintiff afforded Defendant a reasonable opportunity to repair the defect; and

Fourth, that Defendant, through its authorized dealer [did not repair] [was unable to repair] the [vehicle] [product] after being given a reasonable number of attempts or a reasonable amount of time; or did not offer to refund or replace within a reasonable amount of time.

Fifth, that Plaintiff sustained damages as a result of Defendant's failure to take action required by the warranty to correct the defect or malfunction or otherwise to correct the problem.

[In this case Defendant has asserted the affirmative defense that:

Summarize in simple form and without undue emphasis or repetition affirmative defense(s) to warranty enforcement which has not been withdrawn or ruled out by the court and is supported by the evidence.

The Defendant has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that the propositions required of the Plaintiff have been proven and that [the Defendant's affirmative defense has not] [none of the Defendant's affirmative defenses has] been proven, then your verdict should be for the Plaintiff. If, on the other hand, you find from your consideration of all the evidence, that the propositions the Plaintiff is required to prove have not been proven, or that [any one of] the Defendant's affirmative defense[s] has been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should only be used when affirmative defenses other than mitigation of damages are raised. Where mitigation of damages is raised give IPI 185.03 and IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

This instruction conforms to the burden of proof requirements for breach of a written warranty as stated in Pearson v. DaimlerChrysler Corp., 349 Ill. App. 3d 688, 286 Ill. Dec. 173, 813 N.E.2d 230 (2004) and Razor v. Hyundai Motor Am., 349 Ill. App. 3d 651, 286 Ill. Dec. 190, 813 N.E.2d 247 (2004) (affirmed in part, reversed in part, and remanded 222 Ill. 2d 75 (2006)),

which states that the plaintiff has the burden of proving a reasonable basis for damages proximately caused by defendant's breach.

In the fourth burden of proof element the phrase "or did not offer to refund or replace within a reasonable amount of time" should be included in full warranty cases, and only those limited warranty cases where the right to recover a refund or replacement of the product is provided in the warranty.

Comment

The Magnuson-Moss Warranty Act creates a contractual right on the part of consumers for the replacement of or refund of the purchase price of defective products which are covered by a full warranty. The warrantor's failure to allow the consumer to elect replacement or refund gives rise to an action at law for breach of warranty in which the consumer must prove only that a defect in the product exists which the warrantor was unable to repair after a reasonable number of attempts. Sadat v. Am. Motors Corp., 114 Ill. App. 3d 376, 70 Ill. Dec. 22, 448 N.E.2d 900 (1983). A full written warranty must offer a remedy of repair, replacement or refund, at the option of the warrantor, for any defect, malfunction or failure to comply with the written warranty, without charge to the consumer. 15 U.S.C. § 2304 (a) (1); 15 U.S.C. § 2301 (10). A limited written warranty may offer a remedy of repair, replacement or refund but it is not required. The Act requires that every written warranty on a consumer product that costs more than $10 have a title that says the warranty is either "full" or "limited." Lara v. Hyundai Motor Am., 331 Ill. App. 3d 53, 264 Ill. Dec. 416, 770 N.E.2d 721 (2002).

185.05 Magnuson-Moss Act--Burden of Proof--Breach of Implied Warranty

In order for Plaintiff to recover for a breach of implied warranty of merchantability claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, that the problem of which Plaintiff complains existed when it left Defendant's control. The Plaintiff may prove this by showing:

a. [the problem was due to a defect or malfunction of the [vehicle] [product];] or

b. [in the absence of abnormal use or reasonable secondary causes the [vehicle] [product] failed to perform in the manner reasonably expected in light of its nature and intended function;]

Second, that the defect made the [vehicle] [product] unfit for the ordinary purpose such a [vehicle] [product] is used;

Third, that the Plaintiff notified Defendant or its authorized dealer of the defect within a reasonable amount of time after discovering it;

Fourth, that Defendant or its authorized dealer did not repair the vehicle [product] after being given a reasonable number of attempts or did not offer to refund, replace or take other remedial action within a reasonable amount of time.

Fifth, that Plaintiff sustained damages; and

Sixth, that Plaintiff's damages were proximately caused by the [vehicle] [product] being unfit for the ordinary purpose for which such [vehicles] [products] are used.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the Plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should be used where no affirmative defenses have been raised or the sole affirmative defense raised is mitigation of damages. Where mitigation of damages is raised also give IPI 185.11. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

Comment

The first element of the burden of proof conforms to the alternative manner which plaintiff may prove a defect in implied warranty cases as held in Alvarez v. Am. Isuzu Motors, 321 Ill. App. 3d 696, 749 N.E.2d 16 (2001). Plaintiff may prove that the product was defective

and that the defect existed when it left defendant's control either through expert testimony or by excluding abnormal use and reasonable secondary causes for the problems with the product.

185.06 Magnuson-Moss Act--Burden of Proof--Breach of Implied Warranty—Affirmative Defenses

In order for Plaintiff to recover for a breach of implied warranty of merchantability claim against Defendant, Plaintiff has the burden of proving each of the following propositions:

First, that the problem of which Plaintiff complains existed when it left Defendant's control. The Plaintiff may prove this by showing:

a. [the problem was due to a defect or malfunction of the [vehicle] [product];] or

b. [in the absence of abnormal use or reasonable secondary causes the [vehicle] [product] failed to perform in the manner reasonably expected in light of its nature and intended function;]

Second, that the defect made the [vehicle] [product] unfit for the ordinary purpose such a [vehicle] [product] is used;

Third, that the Plaintiff notified Defendant or its authorized dealer of the defect within a reasonable amount of time after discovering it;

Fourth, that Defendant or its authorized dealer did not repair the [vehicle] [product] after being given a reasonable number of attempts or did not offer to refund, replace or take other remedial action within a reasonable amount of time.

Fifth, that Plaintiff sustained damages; and

Sixth, that Plaintiff's damages were proximately caused by the [vehicle] [product] being unfit for the ordinary purpose for which such [vehicles] [products] are used.

[In this case Defendant has asserted the affirmative defense that:

Summarize in simple form and without undue emphasis or repetition affirmative defense(s) to warranty enforcement which has not been withdrawn or ruled out by the court and is supported by the evidence.

The Defendant has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that the propositions required of the Plaintiff have been proven and that [the Defendant's affirmative defense has not][none of the Defendant's affirmative defenses has] been proven, then your verdict should be for the Plaintiff. If, on the other hand, you find from your consideration of all the evidence, that the propositions the Plaintiff is required to prove have not been proven, or that [any one of] the Defendant's affirmative defense[s] has been proven, then your verdict should be for the Defendant.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This burden of proof instruction should only be used when affirmative defenses other than mitigation of damages are raised. Where mitigation of damages is raised give IPI 185.03 and IPI 185.11 This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

Comment

The first element of the burden of proof conforms to the alternate manner by which plaintiff may prove a defect in implied warranty cases as held in Alvarez v. Am. Isuzu Motors, 321 Ill. App. 3d 696, 749 N.E.2d 16 (2001). Plaintiff may prove that the product was defective and that the defect existed when it left defendant's control either through expert testimony, or by excluding abnormal use and reasonable secondary causes for the problems with the product.

185.07 Magnuson-Moss Act--Written Warranty--Definition

A written warranty is a writing provided by the supplier to a lessee or purchaser setting out the promises and obligations of the supplier.

Instruction, Notes and Comment approved January 2007.

Notes on Use

This instruction should be given without reference to the fact that the written affirmation must "become part of the bargain between the supplier and a buyer for purposes other than resale of the product." 15 U.S.C. § 2301(6). In the vast majority of cases, whether the warranty is a part of the basis of the buyer's decision to buy the product will not be an issue. Nonetheless, in cases where there is an issue as to whether the warranty became a part of the basis of the buyer's decision to buy the product, this element should be added to the Plaintiff's burden of proof.

Comment

Magnuson-Moss broadly defines written warranty as "any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." 15 U.S.C. § 2301(6)(B) (1982).

The Magnuson-Moss Act requires the Federal Trade Commission to enact a regulation requiring that the terms of any written warranty on a consumer product be made available to the consumer or prospective consumer prior to the sale of the product to him. 15 U.S.C. § 2302(b)(1)(A). In the case of a limitation of liability withheld from a car buyer until after the purchase contract has been signed, where the car buyer never saw the clause nor is there any basis for concluding that the car buyer could have seen the clause, before entering into the sale contract, the limitation of liability is ineffective. A limitation of liability given to the buyer after he makes the contract is ineffective. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

A dealer who agrees, in a dealer's sales contract, to promptly perform and fulfill all terms and conditions of the owner's service policy has given a written warranty within the meaning of Magnuson-Moss. Rothe v. Maloney Cadillac, Inc., 142 Ill. App. 3d 937, 492 N.E.2d 497 (1986).

A "New Car Get Ready" form, which was completed by a new car dealer and which stated that the dealer prepared the auto for delivery and provided a "Rusty Jones" treatment did not constitute a "written warranty" within the meaning of the Act. Lytle v. Roto Lincoln Mercury & Subaru, Inc., 167 Ill. App. 3d 508, 516, 521 N.E.2d 201, 205 (1988).

185.08 Magnuson-Moss Act--Implied Warranty--Definition

An implied warranty of merchantability is a warranty which is implied in law and generally not reduced to writing. It is an implied promise that the [vehicle] [product] is fit for the ordinary purpose for which such [vehicles] [products] are used.

Instruction and Notes approved January 2007.

Notes on Use

This instruction should be given without any additional language if the plaintiff's claim is that the vehicle was not fit for the ordinary purpose. If the plaintiff has a different implied warranty claim, this instruction should be modified to reflect what is alleged. See generally 810 ILCS 5/2-314(2)(a) though (f).

185.09 Magnuson-Moss Act--Measure of Damages--Breach of Warranty

If you decide for the Plaintiff on [his] [her] claim for breach of warranty, you must fix the amount of money which will reasonably compensate the Plaintiff for damages naturally arising from the breach. In calculating Plaintiff's damages, you should determine that sum of money that will put the Plaintiff in as good a position as [he] [she] would have been in if both Plaintiff and Defendant had performed all of their promises under the contract.

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of goods accepted and the value they would have had if they had been as warranted.

Whether any of these elements of damages has been proven by the evidence is for you to determine.

Instruction, Notes and Comment approved January 2007.

Notes on Use

Where the product is the subject matter of a lease use IPI 185.10.

Where a Defendant has shown some "diminished value" an additional, separate instruction should be used, including a burden of proof instruction on "diminished value."

Where special circumstances show proximate damages of a different amount, and/or expenses saved in consequence of the lessor's breach of warranty, an additional instruction should be used.

Comment

Under the Uniform Commercial Code, the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount. 810 Ill. Comp. Stat. Ann. 5/2-714(2) (2000). While it is not necessary that damages for breach of warranty be calculated with mathematical precision, basic contract theory requires that damages be proved with reasonable certainty, and precludes damages based on conjecture or speculation. In proving damages, the burden is on a plaintiff to establish a reasonable basis for computing damages. Damages may be proven in any reasonable manner. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

185.10 Magnuson-Moss Act--Measure of Damages--Breach of Warranty--Leases

If you decide for the Plaintiff on [his] [her] claim for breach of warranty, you must fix the amount of money which will reasonably compensate the Plaintiff for damages naturally arising from the breach. In calculating Plaintiff's damages, you should determine that sum of money that will put the Plaintiff in as good a position as [he] [she] would have been in if both Plaintiff and Defendant had performed all of their promises under the contract.

The measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods [product] accepted and the value if they [it] had been as warranted for the lease term.

Whether any of these elements of damages has been proven by the evidence is for you to determine.

Instruction, Notes and Comment approved January 2007.

Notes on Use

Where a Defendant has shown some "diminished value" an additional, separate instruction should be used, including a burden of proof instruction on "diminished value."

Where special circumstances show proximate damages of a different amount, and/or expenses saved in consequence of the lessor's breach of warranty, additional instructions should be used.

Comment

Where the product is the subject matter of a lease, 810 ILCS 5/2A-519(4) provides: "Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty." The official comments state: "The measure in essence is the present value of the difference between the value of the goods accepted and of the goods if they had been as warranted." While it is not necessary that damages for breach of warranty be calculated with mathematical precision, basic contract theory requires that damages be proved with reasonable certainty, and precludes damages based on conjecture or speculation. In proving damages, the burden is on a plaintiff to establish a reasonable basis for computing damages. Damages may be proven in any reasonable manner. Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

185.11 Magnuson-Moss Act--Affirmative Defense--Mitigation of Damages

In fixing the amount of money which will reasonably and fairly compensate the Plaintiff, you must consider that a person who has been damaged by a breach of warranty must exercise ordinary care to minimize existing damages and to prevent further damage. Damages caused by a failure to exercise such care cannot be recovered. The Defendant has the burden of proof to show the Plaintiff failed to minimize existing damage and prevent further damage.

Instruction and Notes approved January 2007.

Notes on Use

This instruction should be used if the Defendant has pleaded the affirmative defense of failure to mitigate damages. This instruction should be given with IPI 21.01 which defines the phrase "burden of proof."

185.12 Magnuson-Moss Act--Incidental and Consequential Damages

You may also award incidental or consequential damages if the Plaintiff proves that [he] [she] is entitled to recover these damages.

Incidental damages resulting from the Defendant's breach include any reasonable expense proximately caused by the breach.

Consequential damages resulting from a Defendant's breach include any loss resulting from general or particular requirements and needs of which the Defendant had reason to know at or before the time the [vehicle][product] left Defendant's control which could not be prevented by the Plaintiff.

Instruction and Comment approved January 2007.

Comment

A warrantor may not exclude or limit consequential damages for breach of any full written or implied warranty on a product, unless such exclusion or limitation conspicuously appears on the face of the warranty. 15 U.S.C. § 2304(3). The Magnuson-Moss Warranty Act, itself, does not determine the enforceability of a consequential damages disclaimer. To determine the enforceability of a consequential damages disclaimer in a limited warranty, a reviewing court looks to state law. 810 Ill. Comp. Stat. Ann. 5/2-719(3) (2000) is part of the Uniform Commercial Code and permits a seller to limit or exclude consequential damages unless to do so would be unconscionable. A determination of whether a contractual clause is unconscionable is a matter of law, to be decided by the court. 810 Ill. Comp. Stat. Ann. 5/2-302(1) (2000); Razor v. Hyundai Motor Am., 222 Ill. 2d 75, 305 Ill. Dec. 15, 854 N.E.2d 607 (2006).

NURSING HOME CARE ACT

INTRODUCTION

The Nursing Home Care Act, 210 ILCS 45/1, *et seq.*, was adopted "amid concern over reports of 'inadequate, improper and degrading treatment of patients in nursing homes.'" *Eads v. Heritage Enters., Inc.*, 204 Ill.2d 92, 97, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003) (citing *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 357-58, 489 N.E.2d 1374, 95 Ill. Dec. 510 (1986) (quoting Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 184 (statements of Senator Karl Berning)). A principal component of the Act is the residents' "bill of rights," under which nursing-home residents are guaranteed certain rights, including, *inter alia*, the right to be free from abuse and neglect by nursing home personnel. *See* 210 ILCS 45/2-101 through 2-113; *see also Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 97, 787 N.E.2d at 774; *Harris v. Manor Healthcare Corp.*, 111 Ill.2d at 358, 489 N.E.2d at 1377.

To ensure that nursing homes comply with the Act, the legislature invested the Department of Public Health with expanded regulatory and enforcement powers and created civil, as well as criminal, penalties. *See, e.g.*, 210 ILCS 45/3-119, 3-301 through 3-318; *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 97-98, 787 N.E.2d at 774-75; *Harris v. Manor Healthcare Corp.*, 111 Ill.2d at 358-59, 489 N.E.2d at 1377-78. The legislature also expressly granted nursing-home residents a private cause of action for damages and other relief, including attorneys' fees, costs, and injunctive relief, against nursing- home owners and operators who violate the Act's provisions. *See* 210 ILCS 45/3-601, 3-602, 3-603; *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 98, 787 N.E.2d at 774 (citing *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 461, 722 N.E.2d 1115, 243 Ill. Dec. 46 (1999)).

Article II of the Act enumerates the statutory rights of residents, *see* 210 ILCS 45/2-101, *et seq.*, and the statutory responsibilities of owners and facilities. *See* 210 ILCS 45/2-201, *et seq*. For example, under the Act, facilities shall establish clear and unambiguous written policies and procedures, available for inspection by any person, to implement the responsibilities and rights set forth in Article II. *See* 210 ILCS 45/2-210. In addition, the trial court may instruct and jurors may consider the Department of Public Health's administrative regulations promulgated by the Act, along with the Act's statutory language, in determining whether a facility violated a resident's rights. *Graves v. Rosewood Care Ctr., Inc.*, 968 N.E.2d 103, 360 Ill. Dec. 24 (5th Dist. 2012).

The Act provides, *inter alia*, that the owner and licensee of a nursing-home facility are liable to a resident for any intentional or negligent act or omission of their agents or employees that injures the resident. *See* 210 ILCS 45/3-601. Among the wrongs that the Act is designed to deter, are "abuse" and "neglect" of residents. As defined by the Act, "'[a]buse' means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility." 210 ILCS 45/1-103. As defined by the Act, "'[n]eglect' means a facility's failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that is necessary to avoid physical harm, mental anguish, or mental illness of a resident." 210 ILCS 45/1-117.

Unlike in cases of abuse and neglect, the Act does not necessarily extend vicarious liability to facility owners and licensees in cases where the violation of the Act only relates to misappropriation of a resident's property, as opposed to an "injury" to the resident, because "the legislature did not intend to make nursing homes insurers of their residents' personal property." *Starr v. Leininger*, 198 Ill. App. 3d 622, 625, 556 N.E.2d 266, 144 Ill. Dec. 799 (3rd Dist. 1990). In contrast, in cases involving any intentional or negligent act (e.g., abuse and neglect) resulting in physical or mental injury to a resident, the typical exculpating defenses (e.g., scope of employment)

are not available to nursing-home facilities. *See Maplewood Care, Inc. v. Arnold*, 2013 IL App (1st) 120602, ¶64, 991 N.E.2d 1, 371 Ill. Dec. 914; *see also* IPI 190.8 (Notes on Use).

To encourage the ability of facility residents to file complaints with the Department of Public Health or to bring private civil actions, the Act makes it illegal for a licensee of a facility, or its agents and employees, to transfer, discharge, evict, harass, dismiss, or retaliate against a resident, a resident's representative, or any employee or agent who makes a report, files a complaint, or brings a legal action. *See* 210 ILCS 45/3-608. Generally, the Act also renders null and void any "waiver" of a resident's right to sue or right to a jury trial. *See* 210 ILCS 4/3-606; 4/3-607. However, where a valid and otherwise enforceable contract is shown to exist between the resident and the facility, the Federal Arbitration Act, 9 U.S.C. § 2 (2000), preempts the "anti-waiver" provision of the Act and provides for enforcement of an arbitration clause contained within a resident/facility service agreement. *Carter v. SSC Odin Operating Co., LLC*, 237 Ill.2d 30, 927 N.E.2d 1207, 340 Ill. Dec. 196 (2010).

In addition to the rights of living residents, an executor of the estate of a deceased resident may bring the decedent's cause of action against a nursing home for statutory violations of the Act pursuant to the Survival Act. *Myers v. Heritage Enters., Inc*., 332 Ill. App. 3d 514, 773 N.E.2d 767, 266 Ill. Dec. 32 (4th Dist. 2002). However, dependent next of kin of a deceased resident may not bring an action under this Act for wrongful death, but must do so under the Wrongful Death Act, 740 ILCS 180/1, *et seq*.; *see Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App. 3d 1043, 769 N.E.2d 134, 263 Ill. Dec. 932 (1st Dist. 2002). Unlike a Survival Act claim, a Wrongful Death Act claim is not an asset of the deceased's estate. Thus, a facility cannot compel arbitration of a claim brought under the Wrongful Death Act. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶¶ 56-61, 976 N.E.2d 344, 364 Ill. Dec. 66.

An action under the Act is not an action for "healing art malpractice" within the meaning of 735 ILCS 5/2-622, and therefore, a plaintiff who asserts a private right of action under the Act is not required to comply with the mandates of section 2-622. *Eads v. Heritage Enters., Inc.*, 204 Ill.2d at 108-09, 787 N.E.2d at 779-80. Although claims under the Act may sometimes involve a resident's medical care, they do not directly implicate the individual health-care providers. *Id.* Rather, the only defendants liable for damages, costs, and attorneys' fees under the Act are the owners and licensees of the nursing home. *Id.* Medical malpractice lawsuits against the individuals who actually provided the care must be asserted independently of the Act. *Id.* at 109.

The Act allows residents to recover common-law punitive damages upon proof of willful and wanton misconduct on the part of defendants. *Eads v. Heritage Enters., Inc.*, 204 Ill. 2d at 104, 787 N.E.2d at 777-78. However, because the Act does not provide for statutory punitive damages, a resident's right to common-law punitive damages is extinguished when the patient dies. *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 948 N.E.2d 610, 350 Ill. Dec. 330 (2011).

The Act's allowance for the recovery of attorneys' fees, *see* 210 ILCS 45/3-602, is intended to encourage lawyers to take cases that may be of little monetary value. Fees need not be proportional to the verdict because fees in direct proportion to the damages would discourage private enforcement of the Act. *Berlak v. Villa Scalabrini Home for the Aged, Inc.*, 284 Ill. App. 3d 231, 671 N.E.2d 768, 219 Ill. Dec. 601 (1st Dist. 1996). Although attorneys' fees are not recoverable under either common law or the Wrongful Death Act, they are recoverable if the wrongful death claim is "intertwined" with a survival action pursued under the Act. *Id.*

Introduction approved July 2014.

190.01 Nursing Home Care Act – Statutory Provisions

There was in force in the State of Illinois at the time of the occurrence a statute known as the Nursing Home Care Act which provided that the owner and licensee of facilities that provide personal care, sheltered care or nursing care to residents are liable to any resident for [any intentional act or omission] [and] [or] [any negligent act or omission] [of their agent or employee] that injures the resident.

Instruction, Notes and Comment approved May 2014.

Notes on Use

The bracketed language should be selected to fit the allegations of the specific case. For example, in cases involving abuse, the bracketed language referencing intentional acts or omissions should be utilized. Cases of neglect involving the failure to provide adequate care should use the bracketed language referencing negligent acts or omissions. Cases involving negligent acts or omissions should be accompanied by IPI 10.01. Cases involving intentional or willful conduct should be accompanied by IPI 14.01. If agency is an issue in the case, IPI 190.08 and IPI 190.09 should be submitted.

Comment

This instruction paraphrases the pertinent portions of 210 ILCS 45/3-601. Unlike professional negligence cases in which doctors and nurses are liable for violations of the standard of care, in a Nursing Home Care Act case owners and licensees are liable for intentional or negligent acts. Because a cause of action under the Act is distinct from a cause of action for medical malpractice, no report under 735 ILCS 5/2-622 is required. *Eads v. Heritage Enters., Inc.*, 204 Ill.2d 92, 787 N.E.2d 771, 272 Ill. Dec. 585 (2003). Negligence and neglect under the Act have been defined as the failure to provide adequate care which has been found to be synonymous with ordinary care, due care, and reasonable care. *Harris v. Manor Health Care Corp.*,111 Ill.2d 350, 489 N.E.2d 1374, 95 Ill. Dec. 510 (1986). For this reason, IPI 10.01 defining negligence should be utilized instead of IPI 105.01 for negligence allegations made under the Act. If the claim alleges willful conduct, IPI 14.01 should be submitted. If a claim for professional negligence is made under a separate count, IPI 105.01 should also be submitted.

190.02 Nursing Home Care Act – Issues Made by the Pleadings – No Issue as to Agency

[1] [The plaintiff claims that the defendant(s) (was) (were) the (licensee) (and) (or) (owner) of _____].
name of facility

[2] [The plaintiff claims that _____ was a resident of
name of resident
_____].
name of facility

[3] The plaintiff claims that _____ was injured and sustained
name of resident
damage and that the defendant[s] violated the Nursing Home Care Act in that:

A. [The defendant negligently]

B. [The defendant intentionally]

[*Set forth in simple form without undue emphasis or repetition those allegations of the complaint asserting abuse or neglect under the Act or violations of federal or state regulations that have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[4] The plaintiff further claims that one or more of the foregoing was a proximate cause of _____ injuries.
name of resident

[5] The defendant(s) (denies) (deny) [that it violated the Nursing Home Care Act] [and] [that (it) (they) (was) (were) an (owner) (licensee) of a facility covered under this Act] [and] [that _____ was a resident of _____].
name of resident name of facility

[6] [The defendant(s) (denies) (deny) that any claimed act or omission on the defendant's part was a proximate cause of _____ claimed
name of resident
injuries].

[7] [The defendant(s) further (denies) (deny) that _____ (was
name of resident
injured) (or) sustained damages (to the extent claimed)].

[8] [The defendant(s) (claims) (claim) that _____ was
name of resident
contributorily negligent in one or more of the following respects].

[*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence that have not been withdrawn or ruled out by the court and are supported by the evidence*].

[9] [The defendant(s) further claim(s) that one or more of the foregoing was (a) (the sole) proximate cause of the _____ injuries].
name of resident

[10] [The plaintiff (denies that _____ did any of the things
name of resident
claimed by defendant) (denies _____ was negligent in
name of resident
doing any of the things claimed by the defendant to the extent claimed by the defendant) (and denies that any claimed act or omission on _____
name of resident
part was a proximate cause of _____ claimed injuries)].
name of resident

Instruction and Notes approved May 2014.

Notes on Use

The bracketed material in paragraphs 1 and 2 should only be utilized if the defendant raises these issues as defenses. Similarly, the bracketed language in paragraph 8 should only be utilized if the defendant claims the resident was contributorily negligent and the plaintiff's allegations involve negligent or reckless acts or omissions. Allegations involving intent are not subject to contributory negligence. *Poole v. City of Rolling Meadows*, 167 Ill. 2d 41, 656 N.E.2d 768, 212 Ill. Dec. 171 (1995).

190.03 Nursing Home Care Act – Burden of Proof – No Contributory Negligence

The plaintiff has the burden of proving each of the following propositions:

[First, that _____ was injured and sustained damages [while
name of resident
_____ was a resident of _____];
name of resident name of facility

[Second, that the defendant[s] [were] [was] the [owner] [and] [licensee] of a covered facility];

Third, that the defendant[s] [negligently] [and] [or] [intentionally] violated the Nursing Home Care Act in one of the ways claimed by the plaintiff as stated to you in these instructions;

Fourth, that the defendant's violation of the Nursing Home Care Act was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all of the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes approved May 2014.

Notes on Use

If the allegations in the case involve negligence, IPI 10.01 should be given. If the allegations involve willful conduct, IPI 14.01 should be given.

190.03.01 Nursing Home Care Act – Burden of Proof – Contributory Negligence an Issue

The plaintiff has the burden of proving each of the following propositions:

[First, that _____ was injured and sustained damages [while
name of resident
_____ was a resident of _____];
name of resident name of facility

[Second, that the defendant[s] [was] [were] the [owner] [and] [licensee] of a covered facility];

Third, that the defendant[s] violated the Nursing Home Care Act in one of the ways claimed by the plaintiff as stated to you in these instructions;

Fourth, that the defendant's violation of the Nursing Home Care Act was a proximate cause of the injury to the plaintiff.

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict shall be for the defendant. On the other hand, if you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff was contributorily negligent.

As to that claim, the defendant has the burden of proving both of the following propositions:

A. That _____ acted or failed to act in one of the ways claimed
name of resident
by the defendant as stated to you in these instructions and that in so acting, or failing to act,
_____ was negligent;
name of resident

B. That _____ negligence was a proximate cause of [his] [her]
name of resident
injury.

If you find from your consideration of all of the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved both of the propositions required of the defendant, then your verdict shall be for the plaintiff and you shall not reduce plaintiff's damages.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant, and if you find that _____
name of resident
contributory negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict shall be for the defendant.

If you find from your consideration of all the evidence that the defendant has proved both of the propositions required of the defendant, and if you find that _____
name of resident
contributory negligence was 50% or less of the total proximate cause of the injury or damage for which recovery was sought, then your verdict shall be for the plaintiff and you shall reduce the plaintiff's damages in the manner stated to you in these instructions.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be utilized if plaintiff's allegations involve negligent or reckless conduct and should be accompanied by IPI 10.01 and IPI 11.01 and/or IPI 14.01 and IPI 14.02 or IPI B14.03. Contributory negligence is not a defense to intentional acts and for this reason this instruction should not be utilized in cases where only intentional acts are alleged by the plaintiff. *Poole v. City of Rolling Meadows*, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill. Dec. 171 (1995). This instruction will need to be modified if the plaintiff is presenting to the jury theories of recovery that allege both purely intentional acts and acts that amount to negligent or reckless conduct. In such cases, this instruction should be modified so that the jury is instructed that there should be no reduction for those allegations involving intentional conduct.

190.04 Abuse – Definition

Abuse means any physical or mental injury or sexual assault inflicted on a resident other than by accidental means in a facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if abuse is an issue in the case.

190.05 Neglect – Definition

Neglect means a facility's failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that are necessary to avoid physical harm, mental anguish, or mental illness of a resident.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if neglect is an issue in the case.

190.06 Licensee – Definition

Licensee means the individual or entity licensed to operate the facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if the defendant disputes that it is a licensee.

190.07 Owner – Definition

Owner means the individual, partnership, corporation, association or other person [who owns] [operates] a facility.

Instruction and Notes approved May 2014.

Notes on Use

This instruction should only be given if the defendant disputes it is an owner.

190.08 No Issue as to Agency

_____ was the agent of the defendant _____ at [and before]
Agent's name [owner's] [licensee's] name

the time of this occurrence. Therefore any act or omission of the agent at that time was in law the act or omission of the defendant _____ .
[owner's] [licensee's] name

Instruction, Notes and Comment approved May 2014.

Notes on Use

This instruction should only be used when there is no issue as to agency. If the defendant disputes agency, the Committee is of the opinion that a modified version of IPI 50.04 should be utilized. Specifically, it is the Committee's position that because the Nursing Home Care Act provides that owners and/or licensees are liable for all negligent and intentional acts of their agents without stating any limitation, requiring proof that the agent was acting within the scope of his or her authority is not required.

Comment

The language of 213 ILCS 45/3-601 provides that owners and/or licensees are liable "for any intentional or negligent act or omission of their agents or employees which injures the resident." Because the Act places no limitation on this liability, the Committee's position is that IPI 50.04 should be modified to remove the requirement that the agent or employee was acting within the scope of authority. For the same reason, the Committee's position is that IPI 50.06 should not be used in these cases.

190.09 [An Owner] [A Licensee] Acts Through Its Employees

The defendant is [a nursing home owner] [a nursing home licensee] and can act only through its officers and employees. Any act or omission of an officer or an employee is the action or omission of the defendant [owner] [licensee].

Instruction and Notes approved May 2014.

Notes on Use

This instruction should be used when a nursing home's alleged liability is based on the acts or omissions of its officers or employees.

200.00

Will Contest

Introduction

A. General Principles

The statutory authority for a will contest is contained in 755 ILCS 5/8-1 and 8-2 (1994). Section 8-1 provides that within six (6) months after the admission to probate of a will, an interested person may contest the will.[1]

The representatives and all the heirs and legatees of the testator must be made parties to the proceeding. Any party to the proceeding may demand a jury trial on whether or not the instrument produced is the will of the testator. Section 8-2 contains the same statutory ability to contest the denial of an admission of a will to probate within six (6) months after entering the order denying the admission. In a will contest proceeding, all issues regarding the validity of the will are tried *de novo*; the order admitting the will to probate cannot be introduced into evidence and has no force and effect. *In re Ketter's Estate*, 63 Ill.App.3d 796, 380 N.E.2d 385, 389, 20 Ill.Dec. 407, 411 (1st Dist.1978), *citing Sternberg v. St. Louis Union Trust Co.*, 394 Ill. 452, 68 N.E.2d 892 (1946).

B. Standing

In order to contest a will, the plaintiff must have standing. This requires a direct, pecuniary, existing interest which would be detrimentally affected by the probate of the proffered will. *In re Estate of Keener*, 167 Ill.App.3d 270, 521 N.E.2d 232, 234, 118 Ill.Dec. 164, 166 (3d Dist.1988) (*citing Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 401 N.E.2d 247, 36 Ill.Dec. 566 (3d Dist.1980)). This includes legatees[2] of a prior will who stand to inherit if the contested will is set aside. *Keener*, 167 Ill.App.3d at 271-72, 521 N.E.2d at 234, 118 Ill.Dec. at 166 (*citing In re Lipchik's Estate*, 27 Ill.App.3d 331, 326 N.E.2d 464 (1st Dist.1975)).

These requirements were strictly interpreted by the court of appeals in Keener, which held that the wife of the testator's grandson, who was named as a beneficiary in a prior will, lacked standing to contest the will because she was not an "interested person" in that she was not named in the will which immediately preceded the final will. *Keener*, 167 Ill.App.3d at 272, 521 N.E.2d at 234, 118 Ill.Dec. at 166. The dissent argued that this construction was too strict, and that the

[1] An action to set aside or contest validity of a revocable inter vivos trust to which a legacy is provided by will which is admitted to probate must also be commenced within the time allowed to contest the validity of a will (six months from admission of the will to probate). 735 ILCS 5/13-223 (1994).

[2] "Legatee" includes devisee. 755 ILCS 5/1-2.12 (1994).

majority was in conflict with the rule established in Kelley v. First State Bank of Princeton, 81 Ill.App.3d 402, 413, 401 N.E.2d 247, 255, 36 Ill.Dec. 566, 574 (3d Dist.1980), that a "prior will" is not necessarily limited to the "immediately preceding" will. *Keener*, 167 Ill.App.3d at 273, 521 N.E.2d at 234-35, 118 Ill.Dec. at 166-67.

The purpose of a will contest proceeding is to determine whether the writing produced is the will of the decedent. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 478, 46 Ill.Dec. 36, 38 (2d Dist.1980). A plaintiff with standing to contest a will[3] may assert any number of grounds to invalidate it. These grounds include undue influence, lack of testamentary capacity, fraud, forgery, revocation, ignorance of the contents of the will, partial invalidity, or any other ground that would show that the document is not the decedent's will. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d at 671, 413 N.E.2d at 478, 46 Ill.Dec. at 38. The party contesting the will has the burden of proving its invalidity. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 877, 69 Ill.Dec. 960, 965 (1983).

C. Grounds for Invalidity of a Will

1. Undue Influence

Influence is "undue" when it "prevents the testator from exercising his own will in the disposition of his estate" such that the testator's will is rendered more the will of another. *Id.*, 69 Ill.Dec. at 963. In order to invalidate a will, the undue influence must have been "directly connected with the execution of the will" and it must have operated at the time the will was made. *Schmidt v. Schwear*, 98 Ill.App.3d 336, 424 N.E.2d 401, 405, 53 Ill.Dec. 766, 770 (5th Dist.1981). Undue influence can be exerted by direct beneficiaries or by third parties, such as the spouse of a beneficiary. *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 234 N.E.2d 91, 98 (2d Dist.1968). Influence need not be exerted in an untoward manner to be undue. Even kindness and affection can constitute undue influence if they destroy the testator's "free agency." *Kelley v. First State Bank of Princeton*, 36 Ill.Dec. at 575.

a. Presumption of Undue Influence

A rebuttable presumption of undue influence can result when a fiduciary relationship exists between the testator and a legatee. A rebuttable presumption arises when the plaintiff proves (1) the existence of an attorney-client relationship or other fiduciary relationship between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will, and (4) that the beneficiary would receive a substantial benefit under the document. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473 (1945) (the leading case). *Accord Redmond v. Steele*, 5 Ill.2d 602, 610, 126 N.E.2d 619, 624 (1955); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984); *In re Estate of Mooney*, 117 Ill.App.3d 993, 997, 453 N.E.2d 1158, 1161, 73 Ill.Dec.

[3] "Will" includes testament and codicil. 755 ILCS 5/1-2.18 (1994).

169, 172 (3d Dist.1983); *In re Stuhlfauth's Estate*, 88 Ill.App.3d 974, 979, 410 N.E.2d 1063, 1066-67, 43 Ill.Dec. 930, 933-34 (3d Dist.1980); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413-14, 401 N.E.2d 247, 256, 36 Ill.Dec. 566, 575 (3d Dist.1980); *In re Basich's Estate*, 79 Ill.App.3d 997, 1002, 398 N.E.2d 1182, 1186, 35 Ill.Dec. 232, 236 (1st Dist.1979); *Estate of Letsche*, 73 Ill.App.3d 643, 646, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 436, 369 N.E.2d 1320, 1326, 12 Ill.Dec. 306, 312 (3d Dist.1977); Herbolsheimer v. Herbolsheimer, 46 Ill.App.3d 563, 565-66, 361 N.E.2d 134, 136, 5 Ill.Dec. 134, 136-37 (3d Dist.1977); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99, 234 N.E.2d 91, 97 (2d Dist.1968). By proving these elements, a party contesting a will establishes a *prima facie* case of undue influence. *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984).

A presumption of undue influence will not arise merely upon proof of a fiduciary relationship. Instead, the party contesting the will must demonstrate that the legatee who is the dominant party procured the execution of the will. *Estate of Letsche*, 73 Ill.App.3d 643, 392 N.E.2d 612, 614, 29 Ill.Dec. 915, 917 (1st Dist.1979).

b. Proof of Fiduciary Relationship

The fiduciary relationships referred to in this four-part test are not limited to fiduciary relationships that exist as a matter of law, such as those between an attorney and client or a guardian and ward. A fiduciary relationship can also arise out of an informal relationship, which is "moral, social, domestic or even personal in its origin." *Swenson v. Wintercorn*, 234 N.E.2d at 97. Thus, courts have found fiduciary relationships between an elderly or infirm testator and a devisee or legatee who was taking care of the testator or who was handling the testator's financial affairs at the time the will was executed. *See Nemeth v. Banhalmi*, *supra*; *Kelley v. First State Bank* of Princeton, *supra*. Where a fiduciary relationship does not exist as a matter of law, the existence of the fiduciary relationship must be established by proof that is "clear, convincing, and so strong, unequivocal and unmistakable as to lead to but one conclusion." *Swenson v. Wintercorn*, 234 N.E.2d at 97.

c. Effect of Presumption

Once the plaintiff has raised the presumption of undue influence, the burden of producing evidence to rebut the presumption shifts to the persons standing in the fiduciary relationship to the testator. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 964. The burden of persuasion, however, remains with the plaintiff, since plaintiff has the burden of proving undue influence. *Id.* at 964-65. The amount of evidence necessary to rebut the presumption depends upon the facts of each case. *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 297, 115 Ill.Dec. 770, 772 (1st Dist.1987), citing *Nemeth v. Banhalmi*, 81 Ill.Dec. at 191. Establishment of a *prima facie* case of undue influence in the procurement of the will has been held to be sufficient to overcome a motion for summary judgment. *In re Estate of Jessman*, 197 Ill.App.3d 414, 554 N.E.2d 718, 143 Ill.Dec. 783 (5th Dist.1990).

The issues of whether a presumption of undue influence has been raised and whether sufficient evidence to rebut the presumption has been produced are questions of law for the court to decide. If the presumption of undue influence is not rebutted, the plaintiff is entitled to a judgment as a matter of law. *Franciscan Sisters Health Care Corp. v. Dean*, 69 Ill.Dec. at 965. If the presumption is rebutted, the presumption of undue influence ceases to exist, but an inference of undue influence remains. Plaintiff then has the burden of proving that the will was the product of undue influence on the basis of the evidence offered at trial. *Id.* In a case tried before a jury, the issue of undue influence must be submitted to the jury without any mention of the presumption if the presumption has been rebutted. *Id.* at 964, *citing Diederich v. Walters*, 65 Ill.2d 95, 357 N.E.2d 1128, 1130-31, 2 Ill.Dec. 685, 687-88 (1976).

2. Lack of Testamentary Capacity

Proof that a testator lacked testamentary capacity is another ground for invalidating a will. Testamentary capacity is defined as the "mental ability to know and remember who are the natural objects of [one's] bounty, to comprehend the kind and character of [one's] property, and to make disposition of the property according to some plan formed in [one's] mind." *Beyers v. Billingsley*, 54 Ill.App.3d 427, 369 N.E.2d 1320, 1328, 12 Ill.Dec. 306, 314 (3d Dist.1977). The law presumes the sanity and soundness of mind of every person until the contrary is proved. *Sloger v. Sloger*, 26 Ill.2d 366, 186 N.E.2d 288 (1962). The party contesting a will on grounds of lack of testamentary capacity has the burden of proving such. *Estate of Wrigley*, 104 Ill.App.3d 1008, 433 N.E.2d 995, 1003, 60 Ill.Dec. 757, 765 (1st Dist.1982). Evidence of physical impairment and evidence that a guardian was appointed for the testator can be considered on the issue of testamentary capacity, but neither piece of evidence is conclusive. *Manning v. Mock*, 119 Ill.App.3d 788, 457 N.E.2d 447, 457, 75 Ill.Dec. 453, 463 (4th Dist.1983); *In re Basich's Estate*, 79 Ill.App.3d 997, 398 N.E.2d 1182, 1185, 35 Ill.Dec. 232, 235 (1st Dist.1979). Evidence of a lack of testamentary capacity "must relate to a time at or near the execution of the will," *Manning v. Mock*, 75 Ill.Dec. at 462, since the will may only be invalidated on this ground if plaintiff can prove that the testator lacked testamentary capacity at the time the will was executed. *Id.* at 463.

3. Fraud or Forgery

The fraud which will invalidate a will relates to "such conduct as a trick or device by which a person may be induced to sign the paper under the impression it is something else, or to the alteration of the will after it is signed, or the substitution of another paper for part of the will after it has been signed, and matters of like character." *Swirski v. Darlington*, 369 Ill. 188, 15 N.E.2d 856 (1938). To establish forgery as a ground to invalidate a will, the contestant may show that (1) the witnesses to the will were unworthy of belief, or (2) the testator could not have been present at the time and place he was alleged to have signed the will, or (3) that the will was not signed in the testator's handwriting. Sellers v. Kincaid, 303 Ill. 216, 135 N.E. 429 (1922). The general rule is that when forgery and fraud are alleged, "courts permit evidence to take a wide range and every fact and circumstance, no matter of how little probative value, which throws any light on the issue, is admissible." *Shelby Loan & Trust Co. v. Milligan*, 372 Ill. 397, 24 N.E.2d 157 (1939). Fraud cannot be established on mere suspicion. It must be affirmatively proved by

clear and convincing evidence. *In re Gray's Estate*, 39 Ill.App.2d 239, 188 N.E.2d 379 (2d Dist.1963).

4. Revocation

Revocation is one ground that may be asserted for the purpose of invalidating an instrument. *Roeske v. First Nat'l Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 46 Ill.Dec. 36 (2d Dist.1980). A will may be revoked only by (1) burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (2) the execution of a later will declaring the revocation, (3) execution of a later will to the extent that it is inconsistent with the prior will, or (4) execution of an instrument declaring the revocation and signed and attested in the manner required for the signing and attestation of a will. 755 ILCS 5/4-7(a) (1994). However, the commission of one of the requisite acts of revocation, standing alone, is ineffectual unless accompanied by an intent to revoke. *In re Estate of Minsky*, 46 Ill.App.3d 394, 360 N.E.2d 1317, 4 Ill.Dec. 884 (1st Dist.1977).

A will last known to have been in the possession of the testator which cannot be found upon his death is presumed to have been destroyed by the testator with the intention of revoking it, and under these circumstances the burden is on the proponent to prove that the proffered will was valid at the time of the testator's death. *In re Estate of Marsh*, 31 Ill.App.2d 101, 175 N.E.2d 633 (1st Dist.1961). Factors to be considered in addressing the rebuttal of the presumption include (1) evidence as to statements from the testator that he did not intend to revoke the will, (2) evidence that he entertained a kind and loving attitude toward the proposed beneficiary under the will up to the time of death, and (3) evidence of other persons' access to the will prior to death. *In re Estate of Strong*, 194 Ill.App.3d 219, 550 N.E.2d 1201, 141 Ill.Dec. 155 (1st Dist.1990).

Where a will remains in the testator's possession until his death and is then found among his papers with erasures, alterations, cancellations, or tearings, the presumption is that such act, manifest upon the will, was done by the testator with the intention of revoking the will. *In re Estate of Deskins*, 128 Ill.App.3d 942, 471 N.E.2d 1018, 84 Ill.Dec. 252 (2d Dist.1984).

5. Ignorance of Contents of Will

Where a will is prepared for a testator, and he is not given an opportunity to read it, or if he is unable to read and its contents have not been explained to him, such an instrument will not, on contest, be sustained as his will. *Pepe v. Caputo*, 408 Ill. 321, 97 N.E.2d 260 (1951); *Downey v. Lawley*, 377 Ill. 298, 36 N.E.2d 344 (1941). It is likewise the rule that where the testator is shown to have executed an instrument as his will, it will be presumed, in the absence of evidence of fraud, imposition or mental incapacity, that he was aware of the content, and his signature is *prima facie* evidence of his having understandingly executed it. *Pepe v. Caputo*, *supra*; *Downey v. Lawley*, *supra*; *Sheer v. Sheer*, 159 Ill. 591, 43 N.E. 334 (1895). Where a will is shown to have been prepared at the request of the testator, though under general directions, and he afterwards executes the same in the manner provided by the law, it may not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact.

Pepe v. Caputo, *supra*; *Downey v. Lawley*, *supra*; *Sheer v. Sheer*, 159 Ill. 591, 43 N.E. 334 (1895); Compher v. Browning, 219 Ill. 429, 76 N.E. 678 (1906).

6. Partial Invalidation of Will

A will can be partially invalidated in certain circumstances. If a portion of a will is invalidated on any ground and if the remaining portion of the will can be enforced "without defeating the testator's intent or destroying the testamentary scheme," then the remaining portion of the will is enforceable. *See Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 804, 39 Ill.Dec. 820, 825 (1980). If, however, a portion of the will is invalidated and the remainder of the will cannot be enforced without violating the testator's overall testamentary intent, then the entire will must be invalidated. *Id.*

D. Tortious Interference With Expectancy

At times, certain activities that give rise to grounds to invalidate a will can also serve as the basis for a cause of action for intentional interference with an expectancy. The practitioner should be aware that when this tort action involves the validity of a will, the plaintiff must likewise file this action within the six-month period provided for contesting a will. For further discussion of this issue, see the introduction to IPI Chapter 205, Tortious Interference With Expectancy.

E. Notes on Use

The following instructions are for use when there is a will contest. These instructions anticipate the simple situation where the challenged will consists of one document. Where there is a more complex factual situation (i.e., a will with one or more codicils), the instructions will have to be modified accordingly.

200.01A Will Contest—Issues Made by the Pleadings—Entire Will Claimed Invalid

The plaintiff, _____ claims that the document in question is not the valid last will of
plaintiff's name
_____ because:
decedent's name

[Set forth in simple form, without undue emphasis or repetition, those alleged grounds of invalidity which are supported by the evidence.]

The defendant, _____ denies the claim[s] of the plaintiff and contends that the
defendant's name,
document is the valid last will of _____
decedent's name .

You are to determine by your verdict whether the document is the valid last will of
_____
decedent's name .

Notes on Use

This instruction should be given in every will contest case, except where IPI 200.01B is applicable. The statement of alleged grounds of invalidity used to complete this instruction must meet the standards of Signa v. Alluri, 351 Ill. App. 11, 19-20, 113 N.E.2d 475, 479 (1st Dist. 1953), which held that the issues must be concisely stated without characterization or undue emphasis. See Schulz v. Rockwell Manufacturing Co., 108 Ill.App.3d 113, 438 N.E.2d 1230, 1233-1234; 63 Ill.Dec. 867, 870-871, (2d Dist.1982). In Williams v. Crickman, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), our Supreme Court held that if the entire instrument was not procured by undue influence, it is proper for a trial court to invalidate only a portion of a will and to allow the remaining portions of the will to stand if the invalid provisions could be separate without defeating the testator's intent or destroying the testamentary scheme. The ultimate issue in a will contest case is "whether or not the instrument produced is the will of the testator" (755 ILCS 5/8-1(c) (1994)), and until the Williams decision the cases had generally held that courts could rule on the instrument as a whole and could not invalidate one provision only. If a contestant is attempting to invalidate the entire will by attacking the validity of one or more provisions only, that situation would be covered by this instruction. For example, in case of multiple allegations of invalidity, the instruction might read:

> "... because (a) the document was executed as a result of undue influence, and/or (b) [decedent's name] lacked the mental capacity to make a will and/or (c) a provision of the will was invalid and the remaining provisions of the will cannot be considered valid without defeating the testator's intent or destroying the testamentary scheme."

If the contestant was seeking to invalidate one or more provisions but otherwise sustain the will, IPI 200.01B would be used rather than this instruction.

200.01B. Will Contest--Issues Made By The Pleadings— Partial Invalidity Claimed

The plaintiff, [plaintiff's name], claims that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid because:

> [*Set forth in simple form, without undue emphasis or repetition, those alleged grounds of invalidity which are supported by the evidence*.]

[The plaintiff further claims that the remaining provisions of the will are valid because they carry out [decedent's name] overall testamentary intent and scheme.]

The defendant, [defendant's name], denies that the challenged provision is invalid and agrees that the remaining provisions of the will are valid [but contends that if such provision is invalid then the entire will is invalid because the remaining provisions do not carry out [decedent's name] overall testamentary intent and scheme].

You are to determine by your verdict whether the challenged provision is valid [and, if it is not, whether the remaining provisions of the document are the valid last will of [decedent's name].

Notes on Use

This instruction covers the situation where a contestant is attempting to invalidate only a portion of the will. In *Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), the Illinois Supreme Court held that a trial court can invalidate only a portion of the will and allow the remaining portions of the will to stand if the invalid provisions could be separated without defeating the testator's intent or destroying the testamentary scheme. IPI 200.01A should be given in all other cases.

In the first paragraph, the title of the provision (e.g., "Paragraph I" or "Article One" or "the codicil dated April 1, 1990") will be inserted for the "designation of provision." If more than one provision is challenged, then that paragraph will have to be modified to include a designation and description of all provisions challenged on the same ground. If different provisions are challenged on different grounds, then this paragraph will have to be repeated for each such provision.

If there is no dispute over the validity of the non-challenged provisions, then the second paragraph and the bracketed portions of the third and fourth paragraphs would not be used.

200.02A. Will Contest--Burden of Proof--Entire Will Claimed Invalid

The plaintiff has the burden of proving [one of] the claimed ground[s] of invalidity. [That] [Those] claimed ground[s] [has] [have] been stated to you elsewhere in these instructions.

If you find from your consideration of all the evidence that [any one of] the claimed ground[s] has been proved, then you should find that the document is not the valid last will of [decedent's name]. On the other hand, if you find from your consideration of all the evidence that [the claimed ground has not] [none of the claimed grounds has] been proved, then you should find that the document is the valid last will of [decedent's name].

Notes on Use

This instruction should then be preceded by IPI 200.01A. If the entire instrument is otherwise valid, it is proper for a trial court to invalidate only a portion of a will and to allow the remaining portions of the will to stand if the invalid provisions can be separated without defeating the testator's intent or destroying the testamentary scheme. *See Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980). A party seeking to invalidate the entire will might allege that "Provision A is invalid and the remaining provisions of the will cannot be considered valid without defeating the testator's intent or destroying the testamentary scheme," in which case this burden of proof instruction would be used. If the contestant was seeking to invalidate one or more provisions but otherwise to sustain the will, then IPI 200.01B and 200.02B would be used.

IPI 21.01 defining burden of proof must be given with this instruction.

Comment

A will contest is purely statutory, having its purpose of determining whether the writing proffered is in fact the will of the testator. *Roeske v. First National Bank*, 90 Ill.App.3d 669, 413 N.E.2d 476, 46 Ill.Dec. 36 (2d Dist.1980). An action to set aside a will is against the will itself and not the beneficiaries. *Merrick v. Continental Illinois Nat. Bank & Trust Co.*, 10 Ill.App.3d 104, 293 N.E.2d 767 (1st Dist.1973). It has been stated that a will contest is a *quasi in rem* proceeding, and not an action against any person to secure a personal judgment. *Estate of Mears*, 110 Ill.App.3d 1133, 443 N.E.2d 289, 66 Ill.Dec. 606 (4th Dist.1982). For this reason, references to the verdict contained in these instructions refer to verdicts either in favor of or against the validity of the decedent's will.

200.02B. Will Contest--Burden of Proof--Partial Invalidity Claimed

The plaintiff has the burden of proving that the challenged provision of the document is not valid. The claimed ground[s] of invalidity of the challenged provision [has] [have] been stated to you elsewhere in these instructions.

If you find from your consideration of all the evidence that the challenged provision is not valid, [but that the remaining provisions of the will carry out the decedent's overall testamentary intent and scheme,] then you shall find that the will, except for the challenged provision, is valid.

If you find from your consideration of all the evidence that the challenged provision is valid, then the entire will is valid.

[If you find from your consideration of all the evidence that the challenged provision is not valid and that the remaining provisions of the document do not carry out the decedent's overall testamentary intent and scheme, then you shall find that the entire will is not valid.]

Notes on Use

See Notes on Use to IPI 200.01A, 200.01B, and 200.02A.

This instruction should be used where the contestant is challenging one or more provisions but attempts to otherwise sustain the will. IPI 21.01 defining burden of proof should be This instruction should be used where the contestant is challenging one of more provisions but attempts to otherwise sustain the will. IPI 21.01 defining burden of proof should be given with this instruction. The bracketed material in the second paragraph and the fourth paragraph would be used only where the defendant is claiming that if the challenged provision is held invalid, then the entire will is invalid.

200.03. Will Contest--Undue Influence Based Entirely On Unrebutted Presumption Arising From Fiduciary Relationship

To establish undue influence as a ground of invalidity, the plaintiff must prove each of the following propositions:

1. That there was a [(principal-agent) (attorney-client) ([other fiduciary relationship arising as a matter of law]) relationship between [beneficiary's name] and [decedent's name]] [relationship between [beneficiary's name] and [decedent's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name];

2. That [decedent's name] reposed trust and confidence in [beneficiary's name];

3. That [beneficiary's name] [prepared] [or] [caused the preparation of] the document purporting to be the last will of [decedent's name]; and

4. That [beneficiary's name] received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to [decedent's name]'s bounty.

If you find that each of these propositions has been proved, then your verdict should be that the document is not the valid last will of [decedent's name].

If you find that any of these propositions has not been proved, then your verdict should be that the document is the valid last will of [decedent's name] [unless the plaintiff has proved one of the other alleged grounds of invalidity].

Notes on Use

This instruction should be given only when (1) the plaintiff relies upon the presumption of undue influence as described in the Comment below, and (2) the trial court has ruled that:

a. There is sufficient evidence to submit to the jury on each of the three propositions; and

b. Defendant has not introduced sufficient evidence to rebut the presumption. Whether the presumption has been so rebutted is for the court to decide.

If the presumption has been rebutted, the presumption disappears from the case and no presumption instruction should be given.

This instruction should not be used if the plaintiff also relies upon proof of specific conduct alleged to constitute undue influence. In that case, use IPI 200.04.

If the plaintiff claims that one or more provisions of the will are invalid because of undue influence but that the will is otherwise valid, then the instruction will have to be modified accordingly.

IPI 200.02A and 200.09 should be given with this instruction. If there is not a fiduciary relationship as a matter of law, then IPI 200.03.05 should be used with this instruction.

Comment

Former IPI 200.03 is no longer accurate and has therefore been rewritten.

When the plaintiff proves (1) that an attorney-client relationship or other fiduciary relationship existed between the decedent and the beneficiary such that the beneficiary is the dominant party, (2) that the decedent reposed trust and confidence in the beneficiary, (3) that the beneficiary prepared or procured the preparation of the purported will, and (4) that the beneficiary would receive a substantial benefit under the document, the law raises a presumption of undue influence. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473 (1945) (the leading case). *Accord: Redmond v. Steele*, 5 Ill.2d 602, 610; 126 N.E.2d 619, 624 (1955); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960; 466 N.E.2d 977, 992; 81 Ill.Dec. 175, 190 (1st Dist.1984); *In re Estate of Mooney*, 117 Ill.App.3d 993, 997; 453 N.E.2d 1158, 1161; 73 Ill.Dec. 169, 172 (3d Dist.1983); *In re Estate of Stuhlfauth*, 88 Ill.App.3d 974, 979; 410 N.E.2d 1063, 1066-1067; 43 Ill.Dec. 930, 933-34 (3d Dist.1980); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413-414; 401 N.E.2d 247, 256; 36 Ill.Dec. 566, 575 (3d Dist.1980); *In re Basich's Estate*, 79 Ill.App.3d 997, 1002; 398 N.E.2d 1182, 1186; 35 Ill.Dec. 232, 236 (1st Dist.1979); *Estate of Letsche*, 73 Ill.App.3d 643, 646; 392 N.E.2d 612, 614; 29 Ill.Dec. 915, 917 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 436; 369 N.E.2d 1320, 1326; 12 Ill.Dec. 306, 312 (3d Dist.1977); *Herbolsheimer v. Herbolsheimer*, 46 Ill.App.3d 563, 565-566; 361 N.E.2d 134, 136; 5 Ill.Dec. 134, 136 (3d Dist.1977); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99; 234 N.E.2d 91, 97 (2d Dist.1968).

Various relationships have been deemed to come within the rule. *See, e.g., Wiik v. Hagen*, 410 Ill. 158, 163; 101 N.E.2d 585, 587 (1951):

> A fiduciary relation exists in all cases where trust and confidence are reposed on one side and there is a resulting superiority and influence on the other. *Krieg v. Felgner*, 400 Ill. 113, 79 N.E.2d 60; *Brod v. Brod*, 390 Ill. 312, 61 N.E.2d 675. The relationship may exist as a matter of law, as between guardian and ward, principal and agent or the like, or it may be moral, social, domestic or even personal in its origin. *Stone v. Stone*, 407 Ill. 66, 94 N.E.2d 855; *Kester v. Crilly*, 405 Ill. 425, 91 N.E.2d 419. Where a fiduciary relation exists between the testator and a devisee or legatee receiving a substantial benefit under the will and the will is written or its preparation procured by that beneficiary, proof of these facts establishes *prima facie* the charge that the will resulted from undue influence exercised by the beneficiary. *Tidholm v. Tidholm*, 391 Ill. 19, 62 N.E.2d 473; *Donnan v. Donnan*, 256 Ill. 244, 99 N.E. 931 (1912).

If a fiduciary relationship does not exist as a matter of law, then there must be clear and convincing evidence establishing a dominant-subservient relationship. *See Chicago Land Clearance Com'n v. Yablong*, 20 Ill.2d 204, 170 N.E.2d 145 (1960); *In re Estate of Kieras*, 167 Ill.App.3d 275, 521 N.E.2d 263, 118 Ill.Dec. 195 (3d Dist.1988). Factors to be taken into consideration when determining the existence of a fiduciary relationship include the degree of kinship; disparity in age, health, mental condition, education, and business experience between the parties; the extent to which a party entrusts

the handling of business and financial affairs to the other party; and the degree of faith and confidence that one party bestows on the other. 167 Ill.App.3d at 283-284, 521 N.E.2d at 268, 118 Ill.Dec. at 200.

The strength of the presumption and amount of evidence necessary to rebut the presumption depends upon the circumstances of each case. *Wunderlich v. Buerger*, 287 Ill. 440, 122 N.E. 827 (1919).

> The amount of evidence that is required from an adversary to meet the presumption is not determined by any fixed rule. A party may simply have to respond with substantial evidence. If a strong presumption arises, the weight of the evidence brought in to rebut it must be great.

Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452, 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983). *See also In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 115 Ill.Dec. 770 (1st Dist.1987); *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 960, 466 N.E.2d 977, 992, 81 Ill.Dec. 175, 190 (1st Dist.1984).

In the case of an attorney-client relationship, the presumption has been defined as a strong presumption, which can be rebutted only by "clear and convincing" evidence that the transaction was fair, equitable and just and that the benefit did not proceed from undue influence. *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989).

Procedural Effect. For most presumptions, including this one, Illinois has adopted the Thayer-Wigmore "bursting bubble" theory. *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983); *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989). Under this view, the plaintiff must first produce sufficient evidence to make a submissible case on each of the elements necessary to give rise to the presumption. *Powell v. Weld*, 410 Ill. 198, 204; 101 N.E.2d 581, 584 (1951). (These elements are sometimes called the "basic facts.") Having done so, the burden of going forward with the evidence (but *not* the burden of persuasion) shifts to the defendant. The defendant can attack either the basic facts, the presumed fact, or both.

If the defendant attacks *only* the basic facts (for example, claiming that there was no attorney-client relationship at the time of the transaction in question), then the case is submitted to the jury with this instruction. If the jury finds the basic facts in plaintiff's favor, then the presumption requires the jury to find in favor of the plaintiff.

If the defendant attacks the *presumed* fact (that is, produces evidence that he did not exert undue influence over the decedent), then the court must determine whether the presumption remains. Whether the presumption has been overcome is always a question for the court. *In re Estate of Berry*, 170 Ill.App.3d 454, 524 N.E.2d 689, 694; 120 Ill.Dec. 659, 664 (4th Dist.1988). If the court determines that the defendant has produced sufficient evidence to overcome the presumption, then the "bubble bursts" and the presumption disappears from the case. The plaintiff must then rely on specific evidence of actual undue influence or some other theory of invalidity. The jury is given the usual issues and burden of proof instructions, but the presumption is gone and the jury is told nothing about the presumption.

If the defendant's evidence is insufficient to rebut the presumption, then the presumption remains operative. If the defendant has not attacked the basic facts or if the evidence of If If the defendant's evidence is insufficient to rebut the presumption, then the presumption remains operative. If the defendant has not attacked the basic facts or if the evidence of the basic facts is so favorable to the plaintiff that it satisfies the *Pedrick* standard, then the court will direct a verdict for the plaintiff. Otherwise, the case will be submitted to the jury under this instruction for the jury to determine the basic facts.

200.03.05. Meaning of Burden of Proof--Presumption of Undue Influence—Fiduciary Relationship Must Be Proved

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide," I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

In this case, however, the plaintiff has the burden of establishing that there was a relationship between [decedent's name] and [beneficiary's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name]. To establish this relationship, the proof must be clear and convincing.

Notes on Use

Use this instruction with IPI 200.03 or 200.04 in those situations where the fiduciary relationship must be proved, as opposed to those in which a fiduciary relationship exists as a matter of law (e.g., attorney-client relationship).

Comment

A plaintiff seeking to raise the presumption of undue influence must establish, among other elements, the existence of a fiduciary relationship between the decedent and the beneficiary. In *Wiik v. Hagen*, 410 Ill. 158, 101 N.E.2d 585 (1951), the Illinois Supreme Court provided guidance on how to prove such a relationship:

> A fiduciary relation exists in all cases where trust and confidence are reposed on one side and there is a resulting superiority and influence on the other [citations omitted]. The relationship may exist as a matter of law, as between guardian and ward, principal and agent or the like, or it may be moral, social, domestic or even personal in its origin.

410 Ill. at 163, 101 N.E.2d at 587.

If a fiduciary relationship does not exist as a matter of law, then there must be clear and convincing evidence establishing the dominant-subservient relationship. *See Chicago Land Clearance Com'n v. Yablong*, 20 Ill.2d 204, 170 N.E.2d 145 (1960); *In re Estate of Kieras*, 167 Ill.App.3d 275, 521 N.E.2d 263, 118 Ill.Dec. 195 (3d Dist.1988). That is the reason why this instruction would be given in conjunction with IPI 200.03 or 200.04 where there is no fiduciary relationship as a matter of law.

This situation, where the plaintiff must present clear and convincing proof of a fiduciary relationship in order to raise the presumption of undue influence, should not be confused with a different factual situation where there is also a standard of clear and convincing proof--the evidence necessary to rebut the presumption of undue influence that exists when the presumption is a strong one (e.g., in an attorney-client relationship). *Klaskin v. Klepak*, 126 Ill.2d 376, 534 N.E.2d 971, 128 Ill.Dec. 526 (1989). Whether the evidence is sufficient in that situation is a matter of law for the court (*see* Comment to IPI 200.03), and the jury obviously need not be given any instructions for that factual situation.

200.04. Will Contest--Undue Influence--Proof of Specific Conduct And Presumption From Fiduciary Relationship

The plaintiff may establish undue influence as a ground of invalidity in two ways.

First, he may introduce proof of specific conduct alleged to constitute undue influence. If you find that the plaintiff has proved undue influence by evidence of specific conduct, then your verdict should be that the document is not the valid last will of [decedent's name].

Second, he may establish undue influence as a ground of invalidity by proving each of the following propositions:

1. That there was a [(principal-agent) (attorney-client) ([other fiduciary relationship arising as a matter of law]) relationship between [beneficiary's name] and [decedent's name]] [relationship between [beneficiary's name] and [decedent's name] whereby [beneficiary's name] exercised dominance over [decedent's name] and [decedent's name] was dependent upon [beneficiary's name]];

2. That [decedent's name] reposed trust and confidence in [beneficiary's name];

3. That [beneficiary's name] [prepared] [or] [caused the preparation of] the document purporting to be the last will of [decedent's name]; and

4. That [beneficiary's name] received a substantial benefit under the terms of the document, when compared to other persons who have an equal claim to [decedent's name]'s bounty.

If you find that each of these propositions has been proved, your verdict should be that the document is not the valid last will of [decedent's name].

If you find that the plaintiff has not proved undue influence by evidence of specific conduct, and if you further find that any of these propositions has not been proved, then your verdict should be that the document is the valid last will of [decedent's name] [unless the plaintiff has proved one of the other alleged grounds of invalidity].

Notes on Use

This instruction should be given only when (1) the plaintiff relies both upon evidence of specific conduct alleged to constitute undue influence and the presumption of undue influence as described in the Comment to IPI 200.03, and (2) the trial court has ruled that:

a. There is sufficient evidence to submit to the jury on each of the three propositions; and

b. Defendant has not introduced sufficient evidence to rebut the presumption. Whether the presumption has been so rebutted is for the court to decide.

If the presumption has been rebutted, then the presumption disappears from the case and no presumption instruction should be given.

This instruction should be used only if the plaintiff relies both upon specific proof of undue influence and on the presumption. If the plaintiff relies on the presumption alone, then use IPI 200.03.

If the plaintiff claims that one or more provisions of the will are invalid because of undue influence but that the will is otherwise valid, then the instruction will have to be modified accordingly.

IPI 200.02A and 200.09 should be given with this instruction. If there is not a fiduciary relationship as a matter of law, then IPI 200.03.05 must be used with this instruction.

Comment

Former IPI 200.04 is no longer accurate and has therefore been rewritten. *See* Comment to IPI 200.03.

200.05. Will Contest--Testamentary Capacity--Definition

A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:

(1) The ability to know the nature and extent of his property;
(2) The ability to know the natural objects of his bounty; and
(3) The ability to make a disposition of his property in accordance with some plan formed in his mind.

It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them.

Notes on Use

The instruction defines testamentary capacity. This instruction should be given in every case in which the mental capacity of the decedent to make a will is in issue.

This instruction does not relate to a challenge to the validity of a will on the ground that, because of fraud or mistake, the testator did not know that he was executing a will, or did not know its contents or effect. A will might be challenged on those grounds even though the testator did have testamentary capacity. If such a challenge is made, an appropriate instruction should be drafted.

IPI 200.08 should be used with this instruction.

Comment

Testamentary capacity has been defined many times in substantially these terms, e.g., *England v. Fawbush*, 204 Ill. 384, 398-400; 68 N.E. 526, 531, 532 (1903); *Sloger v. Sloger*, 26 Ill.2d 366, 370, 186 N.E.2d 288, 290 (1962); *Quellmalz v. First Nat'l Bank of Belleville*, 16 Ill.2d 546, 158 N.E.2d 591 (1959); *In re Estate of Jones*, 159 Ill.App.3d 377, 512 N.E.2d 1050, 1053; 111 Ill.Dec. 509, 512 (1987); *In re Estate of Dossett*, 159 Ill.App.3d 466, 512 N.E.2d 807, 811; 111 Ill.Dec. 418, 422 (1987); *In re Kietrys' Estate*, 104 Ill.App.3d 269, 273; 432 N.E.2d 930, 933-34, 60 Ill.Dec. 31, 34-35 (1st Dist.1982); *Kelley v. First State Bank*, 81 Ill.App.3d 402, 413; 401 N.E.2d 247, 255; 36 Ill.Dec. 566, 574 (3d Dist.1980); *Estate of Veronico*, 78 Ill.App.3d 379, 386-387, 396 N.E.2d 1095, 1100; 33 Ill.Dec. 371, 376 (1st Dist.1979); *Beyers v. Billingsley*, 54 Ill.App.3d 427, 437; 369 N.E.2d 1320, 1328; 12 Ill.Dec. 306, 314 (3d Dist.1977). The requirement is that the testator had the capacity to know the elements mentioned in the instruction, not that he actually knew them. *George v. Moorhead*, 399 Ill. 497, 503; 78 N.E.2d 216, 219 (1948); *Down v. Comstock*, 318 Ill. 445, 453; 149 N.E. 507, 511 (1925); *Turnbull v. Butterfield*, 304 Ill. 454, 460-461; 136 N.E. 663, 666 (1922). *See also Akerman v. Trosper*, 95 Ill.App.3d 1051, 420 N.E.2d 1148, 51 Ill.Dec. 590 (1981) (comparing degrees of mental capacity).

200.06. Testimony of A Physician

During the course of this trial [a] physician[s] and [a] layman [laymen] have testified concerning the mental capacity of [decedent's name]. The testimony of the physician[s] is not entitled to any greater weight solely because [he] [they] is [are] [a] physician[s].

Notes on Use

This instruction must be used where a physician and a layman give conflicting testimony on the question of mental capacity of the testator. It should not be used where there is no conflict between the testimony of a physician and a lay witness.

Comment

Instructions which single out evidence or comment upon particular kinds of witnesses should be avoided. However, *Both v. Nelson*, 31 Ill.2d 511, 514-515; 202 N.E.2d 494, 496, 497 (1964), held it to be reversible error to refuse an instruction in substantially this language in a will contest case where a hospital intern and the family doctor testified. *See also Estate of Veronico*, 78 Ill.App.3d 379, 385; 396 N.E.2d 1095, 1099; 33 Ill.Dec. 371, 376 (1st Dist.1979), where the court held that an instruction indicating that the testimony of a physician is not entitled to any greater weight than that of a layman, is proper.

In *In re Estate of Clements*, 152 Ill.App.3d 890, 505 N.E.2d 7, 10; 105 Ill.Dec. 881, 884 (5th Dist.1987), where the administrator of the decedent's estate challenged pre-death transfers of property, the court noted that the testimony of physicians on the issue of mental capacity is not entitled to any greater weight than that of laymen. Instead, the value of an opinion on competency is measured by the facts and circumstances which form the basis of the evaluation. *Id.*

200.07. Testator's Right To Dispose of Property

Elsewhere in these instructions I have defined the term[s] ["mental capacity to make a will"] [and] ["undue influence."]

If [[decedent's name] had the mental capacity to make a will] [and] [the document in question was not executed as a result of undue influence], then you must not concern yourselves with the question of whether the decedent made a reasonable or wise disposition of his property. Every person has a legal right to dispose of his property as he sees fit.

However, you may consider the nature of the disposition for the limited purpose of determining [whether [decedent's name] had the mental capacity to make a will] [and] [whether the document in question was executed as a result of undue influence].

Comment

Although it is proper for the jury to consider the nature of the testamentary disposition as a circumstance bearing upon mental capacity and undue influence (*Catt v. Robins*, 305 Ill. 76, 83-85; 137 N.E. 101, 104-05 (1922); *Huffman v. Graves*, 245 Ill. 440, 446; 92 N.E. 289, 291 (1910); *Dowie v. Sutton*, 227 Ill. 183, 201, 202, 203; 81 N.E. 395, 402, 403 (1907) (instruction given); *England v. Fawbush*, 204 Ill. 384, 394; 68 N.E. 526, 529, 530 (1903) (instruction given); *Webster v. Yorty*, 194 Ill. 408, 419; 62 N.E. 907, 911 (1902)), the jury is not entitled to set aside the will simply because they disagree with the disposition made. *In re Bonjean's Estate*, 90 Ill.App.3d 582, 584, 586-587; 413 N.E.2d 205, 206-207; 45 Ill.Dec. 872, 873-874 (3d Dist.1980) (court held that the burden of proof was not met to set aside the will where testator disinherited her family); *In re Fordyce's Estate*, 130 Ill.App.2d 755, 758; 265 N.E.2d 886, 888-889 (4th Dist.1971) (alleged unequal distribution of estate to common heirs would not have any effect on validity of will attacked on testamentary capacity grounds); *Allen v. North*, 271 Ill. 190, 193; 110 N.E. 1027, 1028 (1915); *Brainard v. Brainard*, 259 Ill. 613, 631-632; 103 N.E. 45, 52 (1913).

200.08. Natural Objects of Bounty--Definition

When I refer to the natural objects of one's bounty, I mean those persons who might reasonably be expected to be his beneficiaries because of family relationship or ties of gratitude or affection.

Notes on Use

This instruction should be given in any case in which IPI 200.05 is given.

Comment

In *Hockersmith v. Cox*, 407 Ill. 321, 331-332; 95 N.E.2d 464, 470 (1950), the Court rejected the contention that the natural objects of a decedent's bounty are limited to his heirs-at-law and approved instructions to the effect that "the natural objects of a testator's bounty are those who have some natural claim upon his benevolence, affection or consideration" and that "the natural objects of the bounty of a person making a will are not necessarily confined to her legal heirs but may be those, who by reason of kinship may reasonably be supposed to have some claim on her." *See also Kalnis v. Waitek*, 347 Ill. 253, 257; 179 N.E. 860, 861 (1932); *Brace v. Black*, 125 Ill. 33, 35; 17 N.E. 66, 67 (1888).

200.09. Undue Influence--Definition

When I use the expression "undue influence," I mean influence exerted at any time upon the decedent which causes him [her] to make a disposition of his [her] property that is not his [her] free and voluntary act.

Notes on Use

This instruction should be given whenever undue influence is an issue in the case.

Comment

A definition of undue influence from *Peters v. Catt*, 15 Ill.2d 255, 263; 154 N.E.2d 280, 285 (1958), is as follows:

> The undue influence which invalidates a will must be directly connected with the execution of the instrument and operate at the time it is made. It must be specifically directed toward procuring the will in favor of a particular party or parties and must be such as to prevent the testator from exercising his own will in disposition of his estate.

For similar expressions, *see Butler v. O'Brien*, 8 Ill.2d 203, 212; 133 N.E.2d 274, 279 (1956); *Hockersmith v. Cox*, 407 Ill. 321, 325; 95 N.E.2d 464, 467 (1950). For a further definition of undue influence *see* the cases cited in IPI 200.03 and 200.04. *See also Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill.2d 452, 460; 448 N.E.2d 872, 877; 69 Ill.Dec. 960, 965 (1983); *In re Estate of Osborn*, 128 Ill.App.3d 453, 455; 470 N.E.2d 1114, 1117; 83 Ill.Dec. 694, 697 (5th Dist.1984); *In re Estate of Shedrick*, 122 Ill.App.3d 861, 867; 462 N.E.2d 581, 586; 78 Ill.Dec. 462, 467 (1st Dist.1984); *In re Estate of Veronico*, 78 Ill.App.3d 379, 386; 396 N.E.2d 1095, 1101; 33 Ill.Dec. 371, 377 (1st Dist.1979); *Swenson v. Wintercorn*, 92 Ill.App.2d 88, 99-100; 234 N.E.2d 91, 96-97 (2d Dist.1968); *In re Estate of Woodruff*, 164 Ill.App.3d 791, 518 N.E.2d 295, 296; 115 Ill.Dec. 770, 771 (1st Dist.1987).

The phrase "at any time" is included in the instruction to make clear that the influence need not have been exerted at the time the document was signed in order to have caused its execution. It is necessary only that the influence be operative at the time the document is executed. *Wilbur v. Wilbur*, 138 Ill. 446, 450; 27 N.E. 701, 702 (1891); *Reynolds v. Adams*, 90 Ill. 134, 139 (1878).

This instruction embodies the elements of undue influence in simple language. There is no need to include the requirement that the influence be "directly connected" with the execution of the instrument since, if the influence were not so connected, it could not cause the challenged disposition. Also, it is unnecessary, and in some cases it would be inaccurate, to specify that the influence must be directed toward procuring the will in favor of a "particular person."

In *Williams v. Crickman*, 81 Ill.2d 105, 405 N.E.2d 799, 39 Ill.Dec. 820 (1980), the Illinois Supreme Court held that a trial court can invalidate only a portion of the will and allow the remaining portions of the will to stand if the invalid provisions could be separated without defeating the testator's intent or destroying the testamentary scheme.

200.10. Testamentary Capacity--Personal Characteristics of Decedent

If you believe that [decedent's name] [was unable to transact his ordinary business affairs] [had insane delusions] [was eccentric] [held radical or extreme notions or beliefs] [used in toxicating liquor to excess] [used drugs to excess] [had limitations due to advanced age] [suffered from a (psychosis) (or) (neurosis)] at the time he executed the document purporting to be his last will, you may consider this together with all the other evidence in determining whether [decedent's name] had the mental capacity to make a will.

However, if you find that [decedent's name] did have the mental capacity to make a will at the time the document in question was executed, then the fact that he might [insert pertinent characteristics] would not make the document invalid.

Comment

Even though it comments on particular evidence, this instruction is necessary because the jury could assume that evidence of any of these characteristics is, of itself, sufficient proof of a lack of testamentary capacity. Instructions of this kind have been approved: *DeMarco v. McGill*, 402 Ill. 46, 59; 83 N.E.2d 313, 320 (1948) (inability to transact ordinary business affairs); *Brace v. Black*, 125 Ill. 33, 38-39; 17 N.E. 66, 67 (1888) (delusion); *Schneider v. Manning*, 121 Ill. 376, 386; 12 N.E. 267, 270 (1887) (eccentricities or peculiarities); *American Bible Society v. Price*, 115 Ill. 623, 634; 5 N.E. 126, 128 (1886) (radical or extreme notions or beliefs); *Gilbert v. Oneale*, 371 Ill. 427, 433-434; 21 N.E.2d 283, 285 (1939) (intoxicating liquor); *Johnson v. First Union Trust & Savings Bank*, 273 Ill.App. 472, 506 (1st Dist.1934) (drugs); *Buerger v. Bue*rger, 317 Ill. 401, 415-416, 148 N.E. 274, 280 (1925) (age, sickness, debility of body); *Quellmalz v. First Nat. Bank of Belleville*, 16 Ill.2d 546, 548-549, 554-555; 158 N.E.2d 591, 592, 595 (1959) (eccentricity, age, feebleness, miserly habits); *Shevlin v. Jackson*, 5 Ill.2d 43, 47; 124 N.E.2d 895, 897 (1955) (intoxicating liquor); *Manning v. Mock*, 119 Ill.App.3d 788, 805; 457 N.E.2d 447, 456; 75 Ill.Dec. 453, 462 (4th Dist.1983) (inability to transact ordinary business affairs); *In re Estate of Kietrys*, 104 Ill.App.3d 269, 274; 432 N.E.2d 930, 934; 60 Ill.Dec. 31, 35 (1st Dist.1982) (intoxicating liquor); *In re Bonjean's Estate*, 90 Ill.App.3d 582, 584-585, 587; 413 N.E.2d 205, 207, 209; 45 Ill.Dec. 872, 874, 876 (3d Dist.1980) (depression, neurosis, suicide, insane delusions); *Kelley v. First State Bank of Princeton*, 81 Ill.App.3d 402, 408-409, 413; 401 N.E.2d 247, 252, 255; 36 Ill.Dec. 566, 569 (3d Dist.1980) (depression, drugs, physical disorders, inability to transact ordinary business affairs); *In re Jacobson's Estate*, 75 Ill.App.3d 102, 104, 107; 393 N.E.2d 1069, 1071, 1073; 30 Ill.Dec. 722, 724 (5th Dist.1979) (inability to transact ordinary business affairs); *In re Fordyce's Estate*, 130 Ill.App.2d 755, 758; 265 N.E.2d 886, 888 (4th Dist.1971) (age, feeble health); *Ennis v. Illinois State Bank of Quincy*, 111 Ill.App.2d 71, 79-80; 248 N.E.2d 534, 538 (4th Dist.1989) (eccentricity, uncleanliness); *Both v. Nelson*, 46 Ill.App.2d 69, 72, 196 N.E.2d 530, 532 (1st Dist.1964), *rev'd on other grounds*, 31 Ill.2d 511, 202 N.E.2d 494 (1964) (eccentricity, age, peculiarities, feebleness, miserly habits); *In re Gray's Estate*, 39 Ill.App.2d 239, 245-246; 188 N.E.2d 379, 382 (2d Dist.1963) (age, feebleness, memory); *Malone v. Malone*, 26 Ill.App.2d 291, 299-300; 167 N.E.2d 703, 707-708 (1st Dist.1960) (eccentricity, age, peculiarities, feebleness, miserly habits).

An “insane delusion” is present where a testator, without evidence of any kind, imagines or conceives something to exist which does not exist in fact, and which no rational person would, in the absence of evidence, believe to exist. *In re Bonjean's Estate*, 90 Ill.App.3d 582, 413 N.E.2d 205, 45 Ill.Dec. 872 (3d Dist.1980).

In a case where the administrator of the decedent's estate challenged the validity of a pre-death transfer of property, the court noted that "[i]llness and impairment of the mind incident to old age do not necessarily indicate so great a deterioration of capacity that an individual is unable to understand the nature and effect of the transaction or to protect his own interests." *In re Estate of Clements*, 152 Ill.App.3d 890, 505 N.E.2d 7, 9; 105 Ill.Dec. 881, 883 (5th Dist.1987). The court held that the decedent lacked the mental capacity of make a gift where the decedent's condition frequently fluctuated, being confused and combative one day, and quiet the next. The decedent also suffered from hallucinations and memory loss, all symptoms of organic brain disorder.

200.11. Testamentary Capacity--Effect of Prior Adjudication of Mental Incapacity

[A person who has been declared by a court (to be incompetent) (to be in need of mental treatment) (to be mentally retarded) (to be disabled)] [or] [a person who has had a (guardian) (conservator) appointed for him] can still make a valid will if he has the mental capacity to do so. The tests for mental capacity to make a will are stated elsewhere in these instructions.

Notes on Use

This instruction should be used only in that unusual case where evidence of a prior adjudication of incompetency or insanity or disability is before the jury. Although there are no longer "incompetents" in Illinois (P.A. 80-1415 §2, effective January 1, 1979, repealed 755 ILCS 5/11-2, defining incompetents), the term may remain because the will may have been drafted in another jurisdiction or an adjudication may have been made under the prior statute. *See* Comment.

IPI 200.05 must be given with this instruction.

Comment

Proof of prior adjudication of insanity or incompetency should not be admitted. *See, e.g., Pittard v. Foster*, 12 Ill.App. 132, 139-141 (2d Dist.1882); *Lewandowski v. Zuzak*, 305 Ill. 612, 614; 137 N.E. 500, 501 (1922). The adjudication, as distinguished from evidence of facts leading to the adjudication, is not relevant to the issue of mental capacity to make a will and constitutes hearsay.

However, there is some authority for the view that a prior adjudication of incompetency or insanity is admissible in a will contest "for what it is worth." *Holliday v. Shepherd*, 269 Ill. 429, 434-435; 109 N.E. 976, 978-979 (1915); *Belz v. Piepenbrink*, 318 Ill. 528, 535; 149 N.E. 483, 485-486 (1925); *see also Pendarvis v. Gibb*, 328 Ill. 282, 292; 159 N.E. 353, 357 (1927). The appointment of a conservator is not conclusive as to whether a person possesses sufficient mental capacity to execute a will, but it may be considered as evidence. *In re Basich's Estate*, 79 Ill.App.3d 997, 1001; 398 N.E.2d 1182, 1186; 35 Ill.Dec. 232, 236 (1st Dist.1979); *In re Estate of Letsche*, 73 Ill.App.3d 643, 392 N.E.2d 612, 29 Ill.Dec. 915 (1st Dist.1979).

This instruction is included for use only in the situation where the jury has learned of the prior adjudication.

200.12. Instruction On Verdict Forms--Entire Invalidity Claimed

When you return to the jury room, you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by this court.

If you decide that the document in question is the valid last will of [decedent's name], then you should use Verdict Form A.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

If you decide that the document in question is not the valid last will of [decedent's name], then you should use Verdict Form B

.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

200.13. Verdict Form A--For the Will— Entire Invalidity Claimed But Not Found

Verdict Form A

We, the Jury, find that the document in question is the valid last will of [decedent's name].

[*Signature Lines*]

200.14. Verdict Form B--Against the Will—Entire Invalidity Found

Verdict Form B

We, the Jury, find that the document in question is not the valid last will of [decedent's name].
[*Signature Lines*]

200.15. Instruction On Verdict Forms--Partial Invalidity

When you return to the jury room, you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by this court.

If you decide that [the contested provision is] [one or more of the contested provisions are] invalid, [but that the remaining provisions carry out the decedent's overall testamentary intent and scheme,] then you should use Verdict Form A.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

[If you decide that (the contested provision is) (one or more contested provisions are) invalid, and that the provisions which remain, without the invalid portion, do not carry out the decedent's overall testamentary intent and scheme, then you should use Verdict Form B.]

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

If you decide that [the contested provision is] [all of the contested provisions are] valid, then you should use Verdict Form [B] [C].

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

200.16. Verdict Form--Partial Invalidity Found

Verdict Form ____

[We, the Jury, find that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid.]

[We, the Jury, find the following contested provision or provisions invalid: (*Instructions to Jury: On the blank lines below, describe the provision or provisions that you have found invalid.*)

_____
_____]

[We further find that the remaining provisions carry out the decedent's overall testamentary intent and scheme and represent the valid last will of ([decedent's name]).]

[*Signature Lines*]

Notes on Use

The first two bracketed paragraphs are alternates. Use the first bracketed paragraph when only one provision is contested. Insert the same description of that provision as is contained in the issues instruction (IPI 200.01B). If more than one provision is contested, use the second bracketed paragraph.

The third paragraph should be used only when a party claims that if the challenged provision is found invalid, then the entire will is invalid. In that case, IPI 200.17 should also be given.

200.17. Verdict Form--Partial Invalidity Found--Will Invalid

Verdict Form ____

[We, the Jury, find that [designation of provision], [quote, paraphrase or describe challenged provision], is not valid.]

[We, the Jury, find the following contested provision or provisions invalid: (*Instructions to Jury: On the blank lines below, describe the provision or provisions that you have found invalid.*)
_____]

[We further find that the remaining provisions do not carry out the decedent's overall testamentary intent and scheme and do not represent the valid last will of ([decedent's name]).]

[*Signature Lines*]

Notes on Use

This verdict form (together with IPI 200.16) should be given only when a party claims that if the challenged provision(s) is found invalid, the decedent's overall testamentary intent and scheme are destroyed and the entire will is therefore invalid. If no one claims that the invalidity of the contested provision(s) invalidates the remainder of the will, then use only IPI 200.16 without the last paragraph.

The two bracketed paragraphs are alternates. Use the first bracketed paragraph when only one provision is contested. Insert the same description of that provision as is contained in the issues instruction (IPI 200.01B). If more than one provision is contested, then use the second bracketed paragraph.

200.18. Verdict Form--Partial Invalidity Claimed But Not Found

Verdict Form ____

We, the Jury, find that the contested provision[s] [is] [are] valid.

[*Signature Lines*]

205.00

TORTIOUS INTERFERENCE WITH EXPECTANCY

Introduction

The tort of intentional interference with an expectancy was first discussed with favor in *Lowe Foundation v. Northern Trust Co.*, 342 Ill.App. 379, 96 N.E.2d 831 (1st Dist.1951). Since that time, the existence of this cause of action has been generally accepted by the courts in this state. *Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill.Dec. 14 (1st Dist.1981), *appeal after remand*, 125 Ill.App.3d 938, 466 N.E.2d 977, 81 Ill.Dec. 175 (1st Dist.1984); *Robinson v. First State Bank of Monticello*, 97 Ill.2d 174, 454 N.E.2d 288, 73 Ill.Dec. 428 (1983); *In re Estate of Knowlson*, 154 Ill.App.3d 249, 507 N.E.2d 28, 107 Ill.Dec. 364 (1st Dist.1987); *In re Estate of Jeziorski*, 162 Ill.App.3d 1057, 516 N.E.2d 422, 114 Ill.Dec. 267 (1st Dist.1987). To recover on this theory, the plaintiff must prove the existence of an expectancy; that the defendant interfered with his expectancy; that the interference involved conduct that is tortious in itself such as fraud, duress or undue influence; that there is a reasonable certainty that the expectancy would have been realized but for defendant's interference; and damages. *Nemeth v. Banhalmi*, 99 Ill.App.3d at 499; *In re Estate of Knowlson*, 154 Ill.App.3d 249, 507 N.E.2d 28, 31, 107 Ill.Dec. 364, 367 (1st Dist.1987). The plaintiff's expectancy would include any devise or bequest that would otherwise have been made under a testamentary instrument or any property that would have passed to the plaintiff by intestate succession. *Nemeth v. Banhalmi*, in *supra*, 99 Ill.App.3d at 498-499.

The availability of this tort action may depend upon the availability of a will contest remedy under the provisions of the Illinois Probate Code. 755 ILCS 5/8-1 and 8-2 (1994). If the tort action is premised upon the invalidity of a will, the plaintiff must contest the will within the six-month period provided by the Probate Code. Unless a will contest is filed, an action for tortious interference with an expectancy will be considered an impermissible collateral attack upon the probate proceedings and will not be available to the injured party. *Robinson v. First State Bank of Monticello*, 97 Ill.2d 174, 454 N.E.2d 288, 73 Ill.Dec. 428 (1983). Further, an action for tortious interference will not lie if the actual damages recoverable under the tort action are the same as under a will contest. *In re Estate of Hoover*, 160 Ill.App.3d 964, 513 N.E.2d 991, 992; 112 Ill.Dec. 382, 383 (1st Dist.1987). The availability of punitive damages for tortious interference is not considered grounds in itself to allow the plaintiff to pursue this tort action when a will contest remedy would otherwise provide adequate relief. *Id.*

If additional relief is possible under an action for tortious interference which is not available in a will contest, then the tort remedy is cognizable under limited circumstances. *In re Estate of Knowlson*, 154 Ill.App.3d 249, 507 N.E.2d 28, 31; 107 Ill.Dec. 364, 367 (1st Dist.1987) ("tort action is appropriate where the tort has made it impossible to probate a prior will"); *In re Estate of Jeziorski*, 162 Ill.App.3d 1057, 516 N.E.2d 422, 114 Ill.Dec. 267 (1st Dist.1987) (where plaintiff alleges fraudulently induced *inter vivos* transfers depleting the probate estate, a will contest will not provide adequate relief). In determining whether an injured party has an adequate remedy under the Probate Act, the plaintiff is not required to probate the earlier will upon which

plaintiff bases his claim to an expectancy. *Nemeth v. Banhalmi*, 125 Ill.App.3d 938, 466 N.E.2d 977, 991; 81 Ill.Dec. 175, 189 (1st Dist.1984). However, under these circumstances, the tort action should likewise be filed within the six-month period provided to contest a will.

In the event that a will is probated, an action for tortious interference with an expectancy should be consolidated with the will contest action. *In re Estate of Jeziorski*, 162 Ill.App.3d at 1062, 114 Ill.Dec. 267, 516 N.E.2d at 426. However, the trial court will retain discretion to sever issues for trial, "based upon an appraisal in each case of administrative convenience and the possible prejudice to substantial rights of litigants in light of particular problems which may arise at trial." *In re Estate of Knowlson*, 507 N.E.2d at 32.

The following instructions are for use when there is a claim for tortious interference with an expectancy of an inheritance. Since the same fundamental principles apply to a claim of tortious interference with an expectancy of a gift, these instructions can be used for that claim also if modified accordingly, i.e., substitute "gift" for "inheritance."

205.01 Tortious Interference With Expectancy— Issues Made by the Pleadings

The issues to be decided by you under [Count ____ of] the plaintiff's complaint are as follows:

[1]. The plaintiff claims that he had an expectation that he would receive an inheritance from the decedent upon the decedent's death;

[2]. The plaintiff further claims that the defendant, through [fraud,] [duress,] [or] [undue influence], intentionally interfered with plaintiff's expectation in one or more of the following ways:

> [Set forth in simple form, without undue emphasis or repetition, those alleged grounds of intentional interference which are supported by the evidence.]

[3]. The plaintiff further claims that there was a reasonable certainty that the plaintiff's expectancy would have been realized but for the defendant's interference;

[4]. The plaintiff further claims that he has suffered damages as a result of the loss of inheritance.

The defendant denies [that there was a reasonable certainty that the plaintiff would receive an inheritance from the decedent] [that he interfered with the plaintiff's expectancy in any manner claimed by the plaintiff] [that he did any of the things claimed by the plaintiff] [that the plaintiff suffered damages as a result of the loss of the inheritance].

Notes on Use

Use IPI 205.02 with this instruction.

Comment

The court in *Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 425 N.E.2d 1187, 55 Ill.Dec. 14 (1st Dist.1981), adopted the Restatement (Second) of Torts §774B approach to the tort of intentional interference with an expectancy. Section 774B states: “One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.” Comment *d* to §774B recognizes that the major causation problem is whether the plaintiff would have received the expectancy but for the tortious act. The normal remedy for intentional interference with an expectancy is an action in tort for the loss suffered by the one deprived of the legacy or gift. Restatement (Second) of Torts §774B, Comment *e* (1979).

“Inheritance” is defined in Restatement §774B, Comment *b*.

205.02 Tortious Interference With Expectancy— Burden of Proof

The plaintiff has the burden of proving each of the following propositions in [Count ____ of] his complaint:

First, that the plaintiff had an expectancy that he would receive an inheritance from the decedent upon the decedent's death;

Second, that the defendant intentionally interfered with the plaintiff's expectancy;

Third, that the interference involved [fraud,] [duress,] [undue influence] [or] [describe other tortious conduct charged];

Fourth, that there was a reasonable certainty that the inheritance to the plaintiff would have been received but for the defendant's interference; and

Fifth, that the plaintiff suffered damages as a result of the loss of the inheritance.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Notes on Use

Use IPI 205.01 with this instruction.

Comment

See IPI 205.00, *Introduction*, and IPI 205.01 for further discussion of the elements of tortious interference with expectancy.

"Inheritance" is defined in Restatement (Second) of Torts, §774B, Comment *b*, at 58 (1979), cited with approval in *Nemeth v. Banhalmi*, 99 Ill.App.3d 493, 425 N.E.2d 1187, 1190; 55 Ill.Dec. 14, 17 (1st Dist.1981).

205.03 Tortious Interference with Expectancy— Instruction on Verdict Forms

When you return to the jury room, you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by this court.

If you find for [plaintiff's name] and against [defendant's name], then you should use Verdict Form A.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

If you find for [defendant's name] and against [plaintiff' name], then you should use Verdict Form B.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the corresponding verdict form to the jury.]

205.04 Tortious Interference With Expectancy— Verdict Form A--Verdict for Plaintiff

Verdict Form A

[As to Count ____], We, the Jury, find for [plaintiff's name] and against defendant's name].

We assess [plaintiff's name]'s damages in the sum of ____$.

[*Signature Lines*]

205.05 Tortious Interference With Expectancy— Verdict Form B--Verdict for Defendant

Verdict Form B

[As to Count ____], We, the Jury, find against [plaintiff's name] and in favor of [defendant's name].

[*Signature Lines*]

250.00

Retaliatory Discharge

Introduction

ILLINOIS SUPREME COURT CASES

The tort of retaliatory discharge was first recognized by the Illinois Supreme Court in *Kelsey v. Motorola, Inc.,* 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978), where the plaintiff was terminated in retaliation for filing a workers' compensation claim. The court reasoned that workers' compensation law provided an efficient and expeditious remedy for an injured employee, and terminating an employee for filing a claim seriously undermined that scheme.

Later, in *Palmateer v. International Harvester Company,* 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981), the plaintiff claimed that he was discharged after sixteen years of employment for supplying information to law enforcement authorities that a company employee might be involved in criminal activity. The court again recognized an action for retaliatory discharge when an employee is fired in violation of an established public policy that favors citizen crime-fighters, and the dismissal of the plaintiff's complaint was reversed.

The Illinois Supreme Court again recognized a retaliatory discharge tort in Wheeler *v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 485 N.E.2d 372, 92 Ill.Dec. 561 (1985). In Wheeler, the plaintiff alleged he was discharged in violation of public policy for refusing to handle radioactive material as a part of his job duties allegedly in violation of the Nuclear Regulatory Rules applicable to the defendant employer.

In 1988, the court held that the right to recover for retaliatory discharge does not depend upon an analysis of the terms of any collective-bargaining agreement and is not preempted by such an agreement. This right is derived from Illinois public policy and is equally available to employees at will; it cannot be negotiated or bargained away. *Ryherd v. General Cable Company*, 124 Ill.2d 418, 530 N.E.2d 431, 125 Ill.Dec. 273 (1988). Additionally, the court held that employees could bring a tort action for retaliatory discharge even though they had not pursued contractual remedies pursuant to a collective-bargaining agreement. Midgett *v. Sackett-Chicago, Inc.,* 105 Ill.2d 143, 473 N.E.2d 1280, 85 Ill.Dec. 475 (1984). Further, in *Gonzalez v. Prestress Engineering Corporation*, 115 Ill.2d 1, 503 N.E.2d 308, 104 Ill.Dec. 751 (1986), the court held that a union member does not have to exhaust the grievance-arbitration procedure established in the collective-bargaining agreement to file a common law claim for retaliatory discharge.

In 1986, however, the Illinois Supreme Court held in Koehler *v. Illinois Central Gulf Railroad Co.*, 109 Ill.2d 473, 488 N.E.2d 542, 94 Ill.Dec. 543, that a suit for retaliatory discharge against a railroad was preempted by the Federal Railway Labor Act, 45 U.S.C.A. §§151-163. Therefore, the Illinois state courts had no jurisdiction to hear and resolve such wrongful discharge disputes. *See also Bartley v. University Asphalt Co.,* 111 Ill.2d 318, 489 N.E.2d 1367, 95 Ill.Dec. 503 (1986), wherein the court held that a discharged employee's cause of action

against a union for civil conspiracy based upon its alleged conspiracy with his employer to inadequately represent the employee on his claim of retaliatory discharge, was preempted by federal labor law. When the plaintiff's claim for wrongful discharge is based upon age, the court held that such a claim is preempted by the Illinois Human Rights Act. *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985).

In *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill.2d 526, 519 N.E.2d 909, 116 Ill.Dec. 694 (1988), the court upheld the worker's retaliatory discharge claim when she alleged that she had been discharged for asserting her rights for medical attention when the worker alleged she was forced to sign a "voluntary resignation" form or be fired which the court held sufficient to support a finding that she was "discharged." There is no cause of action for retaliatory discharge, however, predicated on an employer's alleged demotion of or discrimination against an employee in retaliation for the assertion of rights under the Workers' Compensation Act. There must be an actual discharge. *Zimmerman v. Buchheit of Sparta, Inc.,* 164 Ill.2d 29, 645 N.E.2d 877, 206 Ill.Dec. 625 (1994).

In workers' compensation discharge cases, the plaintiff may only bring a retaliatory discharge action against his employer, as compared to the employee or agent of his employer who caused the discharge on behalf of the employer. *Buckner v. Atlantic Plant Maintenance, Inc.,* 182 Ill.2d 12, 694 N.E.2d 565, 230 Ill.Dec. 596 (1998).

In retaliatory discharge cases, an employer is not required to come forward with an explanation for an employee's discharge, and it remains the plaintiff's burden to prove the elements of the cause of action; however, an employer may choose to offer an explanation if it desires. *Clemons v. Mechanical Devices Company*, 184 Ill.2d 328, 704 N.E.2d 403, 235 Ill.Dec. 54 (1998). Such cases should use traditional tort standards of proof, rather than the three-tier allocation of proof standard applied by federal courts in Title VII employment discrimination cases. *Id.*

Our supreme court has not recognized causes of action for retaliatory discharge in *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 568 N.E.2d 870, 154 Ill.Dec. 649 (1991) (no public policy violation existed where a city employee sued the mayor because the state municipal code allowed the mayor to remove any officer that he appointed; therefore, allowing the plaintiff's claim would frustrate the mayor's discretionary authority over appointments), *Gould v. Campbell's Ambulance Service, Inc.,* 111 Ill.2d 54, 488 N.E.2d 993, 94 Ill.Dec. 746 (1986) (relevant statutory provisions and ordinance failed to show the existence of a clearly mandated public policy), and *Barr v. Kelso-Burnett Co.,* 106 Ill.2d 520, 478 N.E.2d 1354, 88 Ill.Dec. 628 (1985) (no public policy violation existed because the United States Constitution does not provide protection against private individuals or corporations who abridge free expression of others).

ILLINOIS APPELLATE COURT CASES

In *Stebbings v. University of Chicago*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000), the Illinois Appellate Court upheld the plaintiff's claim for retaliatory discharge when the plaintiff alleged that he was fired for insisting that the radon exposure to participants in a study at the university be reported to the institution that funded the project. In holding that the tort of retaliatory discharge protects whistle-blowers who report illegal or

improper conduct, the court reasoned that the fact that the reported conduct did not constitute a criminal act did not diminish the plaintiff's claim. The tort applies not only where criminal statutes are violated, but also where federal regulations are breached. *Id.*

Similarly, in *Johnson v. World Color Press, Inc.,* 147 Ill.App.3d 746, 498 N.E.2d 575, 101 Ill.Dec. 251 (5th Dist. 1986), a cause of action for retaliatory discharge was recognized when the plaintiff objected to certain company accounting practices which he believed violated federal securities laws. Likewise, in *Petrik v. Monarch Printing Corporation*, 111 Ill.App.3d 502, 444 N.E.2d 588, 67 Ill.Dec. 352 (1st Dist. 1982), the Illinois Appellate Court found that the plaintiff stated facts sufficient to survive a motion to dismiss when he alleged he was discharged for researching a financial discrepancy that he believed may have been due to criminal conduct. In *Mackie v. Vaughan Chapter-Paralyzed Veterans of America, Inc*., 354 Ill.App.3d 731, 820 N.E.2d 1042, 289 Ill.Dec. 967 (1st Dist. 2004), dismissal of a retaliatory discharge claim was reversed on appeal where the employee alleged that he was terminated after reporting what he believed was the theft of chapter property when a member of the chapter's board of directors downloaded the organization's mailing lists for use by a private business. The court held that those allegations stated a cause of action for retaliatory discharge under the citizen crime-fighter theory.

In contrast to these cases, the appellate court affirmed the dismissal of an employee's complaint when he alleged that he was discharged because of reporting suspected criminal activity to a supervisor. *Zaniecki v. P.A. Bergner and Company of Illinois*, 143 Ill.App.3d 668, 493 N.E.2d 419, 97 Ill.Dec. 756 (3rd Dist. 1986) (declining to follow *Petrik, infra*). No violation of public policy or illegal or improper criminal conduct was found where a plaintiff reported to his employer that a coworker committed suicide due to job-related pressures. *Lambert v. City of Lake Forest*, 186 Ill.App.3d 937, 542 N.E.2d 1216, 134 Ill.Dec. 709 (2nd Dist. 1989). The appellate court rejected the plaintiff's retaliatory discharge claim because even though the complaint stated a cause of action, the facts addressed at trial did not support the allegations. See also *Doherty v. Kahn*, 289 IllApp.3d 544, 682 N.E.2d 163, 224 Ill.Dec. 602 (1st Dist. 1997), wherein the plaintiff failed to state a cause of action for retaliatory discharge when plaintiff alleged conspiracy because public policies surrounding covenants not to compete and unfair competition do not affect the overall welfare of citizens. Additionally, in *Thompson v. Abbott Laboratories*, 193 Ill.App.3d 188, 549 N.E.2d 1295, 140 Ill.Dec. 423 (2nd Dist. 1990), a jury verdict for the employer was upheld on appeal despite the employee's assertion of error in the denial of a tendered instruction. The trial court denied a “mixed motive” jury instruction tendered by the plaintiff stating that there could be more than one factor or cause for discharge and if one of the factors related to the filing of a workers' compensation claim, then the worker was entitled to recover. The appellate court held that denial of this instruction was proper and did not deny the plaintiff a fair trial. Lastly, in *Cross v. City of Chicago*, 352 Ill.App.3d 1, 815 N.E.2d 956, 287 Ill.Dec. 312 (1st Dist. 2004), the employee brought a retaliatory discharge action against the city alleging that his discharge was in retaliation for exercising his rights pursuant to the Illinois Workers' Compensation Act. The appellate court held, however, that the city was immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act for the City Commissioner's decision to terminate a probationary employee.

SEVENTH CIRCUIT CASES APPLYING ILLINOIS LAW

In *Belline v. K-Mart Corporation*, 940 F.2d 184 (1991), the Seventh Circuit held that an employee, who alleged that he was fired in retaliation for reporting suspicious behavior on the part of his supervisor had a cause of action for retaliatory discharge, even though the employee did not report the matter to the police, as Illinois public policy protects vigilant employees who alert their employers to apparent criminal activity in the workplace. However, in *Long v. Commercial Carriers, Inc.,* 57 F.3d 592 (1995), a truck driver did not state a viable claim for retaliatory discharge when he was discharged as a result of his refusal to sign a lease which governed his employment on the ground that the lease violated Interstate Commerce Commission regulations. The alleged infractions were violations of agency regulations, not statutory law, and the regulations allegedly violated did not involve issues of health or safety of the general public or even of drivers, but instead involved allocation of expenses, responsibility for permits and insurance payments and compensation for drivers. *See also Bourbon v. K-Mart Corporation*, 223 F.3d 469 (2000), wherein summary judgment was affirmed on appeal for the employer when it was held that an employee's reporting of his supervisor's alleged acts of charging customers for unnecessary automobile repairs was not causally linked to the employee's termination. Here, the employee simply failed to establish a primary retaliatory discharge case under Illinois law because he could not offer any direct evidence that the recording was a cause of the termination and the close relation in time between the recording and his termination did not demonstrate any pretext.

CONCLUSION

In summary, retaliatory discharge claims have emerged under two theories: (1) a "clear mandate" action alleging that the complained of conduct contravenes a clearly mandated public policy, but not necessarily a law; and (2) a "citizen crime-fighter" theory. *Stebbings v. University of Chicago*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000). Citizen crime-fighter cases usually involve an employee terminated for "whistle-blowing" or reporting that a co-worker allegedly committed a crime; however, the crime does not have to be work-related. See *Belline*, 940 F.2d at 187; *Vorpagel v. Maxell Corp. of America*, 333 Ill.App.3d 51, 266 Ill.Dec. 818, 775 N.E.2d 658 (2nd Dist. 2002).

Stebbings described two layers of analysis that apply to a citizen crime-fighter case. First, statutes, constitutional provisions, or case law must mandate a public policy of reporting crime; the *Stebbings* court notes, however, that since *Palmateer*, "there is little question that such a policy has been clearly mandated and so this layer of law will rarely be at issue" in a citizen crime-fighter suit. Second, a law must prohibit the conduct that the employee reported or refused to engage in, and the employee must have a good-faith belief that the law prohibits the conduct in question. The plaintiff need only have a good-faith belief that the defendant was violating the law; the plaintiff need not conclusively show that the law was broken or the regulations in question were violated. *Stebbings*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000).

250.01 Retaliatory Discharge Issues Made by the Pleadings— One Plaintiff, One Defendant

[1]. The plaintiff claims that [he] [she] was an employee of the defendant [on] [during][between] ____.

[2]. The plaintiff claims that while employed by defendant [he] [she] *set forth in simple form without undue repetition or emphasis plaintiff's claimed reason(s) for the discharge or firing*.

[3]. The plaintiff further claims that one or more of the reason(s) stated in paragraph [2] above were a proximate cause of [his] [her] [discharge] [firing] and of plaintiff's claimed damages.

[4]. The defendant [denies that the plaintiff was [discharged] [fired] for the reason(s) claimed by the plaintiff], [[denies that the plaintiff's [discharge] [firing] was a proximate cause of the plaintiff's claimed damages]] [denies that plaintiff was damaged to the extent claimed.]

[5]. The defendant claims that the plaintiff was [fired] [discharged] because *set forth in simple form without undue repetition or emphasis defendant's claimed reason(s) for the discharge or firing*.

Notes on Use

This instruction is to be used when there are issues concerning the plaintiff's employment status, and the reason(s) why the plaintiff was terminated from his employment. If the defendant claims that the plaintiff voluntarily terminated his employment, the instruction may be modified accordingly.

If the defendant does not contest the plaintiff's damages, the double bracketed language in paragraph [4] should not be used.

In as much as employment at will is still the law in Illinois, the defendant may choose not to include paragraph [5].

Comments

The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason remains the law in Illinois, except when the discharge violates a clearly mandated public policy. *Kelsey v. Motorola, Inc.,* 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978); *Palmateer v. International Harvester Company*, 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981); *Barr v. Kelso-Burness Co*., 106 Ill.2d 520, 525; 478 N.E.2d 1354, 88 Ill.Dec. 628 (1985); *Fisher v. Lexington Health Care, Inc.,* 188 Ill.2d 455, 722 N.E.2d 1115, 243 Ill.Dec. 46 (1999).

Traditional tort law principles apply to the allocation of proof for retaliatory discharge cases. *See Netzel v. United Parcel Service, Inc.,* 181 Ill.App.3d 808, 812; 537 N.E.2d 1348, 130 Ill.Dec. 879 (1989); *Clemons v. Mechanical Devices Co.*, 184 Ill.2d 328, 704 N.E.2d 403, 235 Ill.Dec. 54 (1998).

If an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met. *Hartlein v. Illinois Power Co*., 151 Ill.2d 142, 160; 601 N.E.2d 720, 176 Ill.Dec. 22 (1992). Concerning the element of causation, the ultimate issue to be decided is the employer's motive in discharging the employee. *Hartlein*, 151 Ill.2d at 163, 601 N.E.2d 720, 176 Ill.Dec. 22.

250.02 Retaliatory Discharge Burden of Proof on the Issues— One Plaintiff, One Defendant

The plaintiff has the burden of proving each of the following propositions:

First, that the plaintiff was an employee of the defendant;

Second, that the plaintiff was [discharged] [fired] from [his] [her] employment with the defendant;

Third, that the plaintiff was [discharged] [fired] because [*set forth in simple form without undue emphasis or repetition the plaintiff's claimed reason(s) for the discharge*];

Fourth, that the plaintiff sustained damages as a result of [his] [her] [discharge] or [firing];

Fifth, that the reason(s) stated in paragraph ["Third"] above [was] [were] a proximate cause of [his] [her] [discharge][firing] and resulting damages.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the defendant.

Notes on Use

This instruction should be given with the issues instruction on Retaliatory Discharge.

Comments

This instruction is to be modified if there are no issues involving employment, or if there is an issue of whether the plaintiff was actually discharged. See Comments to Issues instruction.

300.00

EMINENT DOMAIN

INTRODUCTION

Eminent domain is the inherent power of a state to take or damage private property for a public use. In Illinois, it is subject to the constitutional limitation that, "Private property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. Art. 1, §15 (1970). Illinois has, by legislation, delegated similar powers to governmental units, public bodies and public service corporations.

There are two statutory procedures available to take private property for public use.[1] One is set forth in Article 7 of the Illinois Code of Civil Procedure, 735 ILCS 5/7-101 to 7-129 (1994). The other is set forth as part of local improvement procedures in connection with special assessments. Illinois Municipal Code, 65 ILCS 5/9-2-14 to 9-2-37 (1994). The rules of procedure and evidence under the two Acts differ.

Procedure Under Article 7

Under the provisions of Article 7, suit is commenced by the filing of a complaint setting forth the plaintiff's right to exercise the power, legally describing the property to be taken, the nature of the interest to be taken, and naming the parties of record. The complaint may also describe property not taken but which might be damaged as a result of the taking. The complaint must also state the purpose of the public use, its necessity, and that the compensation cannot be agreed upon, or that the owners are incapable of consenting, or are non-residents (&p;7-102).

All persons having an interest of record in the property or possessory rights are proper defendants. Thus, it may be desirable to investigate the rights of occupants, since questions may arise as to the taking or damaging of leaseholds that are not recorded.

The complaint is not to be answered and defendants are not defaulted. However, the complaint may be attacked by a motion to dismiss or traverse, to test the legal sufficiency of the proceeding in advance of trial. The motion may question the plaintiff's right to exercise the power of eminent domain, the propriety of the proposed use, its necessity, and whether a bona fide attempt to agree on compensation has been made. *See Lake County Forest Preserve Dist. v. First Nat. Bank*, 154 Ill.App.3d 45, 506 N.E.2d 424, 106 Ill.Dec. 717 (2d Dist.1987).

1

Under limited circumstances governmental land use decisions may constitute a "taking." (*See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *cf. MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986); *Foster & Kleiser v. City of Chicago*, 146 Ill.App.3d 928, 497 N.E.2d 459, 100 Ill.Dec. 481 (1st Dist.1986); *Suhadolnik v. City of Springfield*, 184 Ill.App.3d 155, 540 N.E.2d 895, 133 Ill.Dec. 29 (4th Dist.1989); *Mahoney Grease Service, Inc. v. City of Joliet*, 85 Ill.App.3d 578, 406 N.E.2d 911, 40 Ill.Dec. 708 (3d Dist.1980).) In such cases the landowner affected, rather than the governmental unit, is the plaintiff, and therefore this is known as "inverse condemnation." The instructions in this series have been drafted to cover the usual eminent domain proceedings brought by the governmental unit.

Any person not made a party may become such by filing an intervening petition, setting forth that the petitioner is the owner of or has an interest in the property which will be taken or damaged by the proposed work (&p;7-124). While the statute refers only to a "person not made a party," the cases and legislative history indicate that a party defendant may also file a petition (now a counterclaim) asserting that property not described in the complaint will be damaged by the taking of the described property. *See Department of Conservation v. Franzen*, 43 Ill.App.3d 374, 381; 356 N.E.2d 1245, 1248; 1 Ill.Dec. 912, 915 (1976); *Johnson v. Freeport & M.R.R. Co.*, 111 Ill. 413, 416, 417 (1884).

As far as a jury trial is concerned, the 1870 Constitution (Art. 2, §13) provided, in pertinent part (emphasis added):

> Private property shall not be taken or damaged for public use without just compensation. Such compensation, *when not made by the state* shall be ascertained by a jury, as shall be prescribed by law.

In *Department of Public Works & Bldgs. v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611 (1953), the Illinois Supreme Court was faced with the issue of whether there is a right to a jury trial in a condemnation proceeding where the compensation is to be paid by the State. The court concluded that where the sovereign state exercises its right of eminent domain, the right to a jury trial is not guaranteed by common law or the constitution nor is it required by any statute. The court also specifically said it was not holding or inferring that a jury trial would be prohibited, merely that there was no right "unless and until the General Assembly acts upon the subject." 415 Ill. at 223, 112 N.E.2d at 615.

The 1970 Illinois Constitution amended article 2, §13 of the 1870 constitution by eliminating the phrase "when not made by the state" and providing that:

> Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

Illinois Constitution of 1970, article 1, §15.

The eminent domain provisions of the Code of Civil Procedure (735 ILCS 5/7-101 et seq. (1994)), however, make a distinction between cases in which compensation is made by the state and cases in which the compensation is not made by the state. Section 7-101 provides, in relevant part (emphasis added):

> Private property shall not be taken or damaged for public use without just compensation, and in all cases in which compensation is *not* made by the state in its corporate capacity . . . such compensation *shall* be ascertained by a jury, as hereinafter prescribed. *Where compensation is so made by the state* ... any party upon application *may* have a trial by jury to ascertain the just compensation to be paid.

Quick Take

There is a special procedure concerning the taking of property by certain public bodies and for certain purposes specified in the statute (*see* 735 ILCS 5/7-103 (1994)) in which there is a preliminary hearing by the court without a jury. In that hearing the court determines an amount as preliminary just compensation. If it has not done so previously, the court passes upon the plaintiff's authority to condemn, its proper exercise of that authority, and whether the property to be taken is subject to the power of eminent domain. If the plaintiff deposits with the court the amount fixed as preliminary just compensation, the court then enters an order vesting title in the plaintiff. The preliminary just compensation deposited in court by the state may be withdrawn by the defendants, subject to a condition of reimbursement of any excess in the event that the final award of just compensation is less than the preliminary award (735 ILCS 5/7-106, 7-109, 7-123 (1994)). If the final award is greater than the preliminary compensation deposited, the condemning party must deposit the balance (§7-123) plus interest under certain circumstances (*see* §7-108 and *Department of Transp. v. Rasmus*sen, 108 Ill.App.3d 615, 439 N.E.2d 48, 64 Ill.Dec. 119 (1982); *Waukegan Port Dist. v. Kyritsis*, 128 Ill.App.3d 751, 471 N.E.2d 217, 83 Ill.Dec. 918 (1984)).

Trial

There are some special rules regarding the admissibility of evidence (*see* 735 ILCS 5/7-119 (1994)), but in general, the rules of evidence are the same as in other cases. The testimony consists mainly of opinions of persons having knowledge of values and proof of voluntary sales of similar property. The condemning body has the burden of introducing evidence as to the value of property taken. That evidence may be controverted by witnesses called for the defense. The defendants have the burden of proving that their property which is not taken will be damaged and have the further burden of introducing evidence as to the nature and extent of that damage. The burden of proceeding with the evidence and the right to open and close may shift under certain circumstances. *Department of Business & Economic Development v. Brummel*, 52 Ill.2d 538, 288 N.E.2d 392 (1972); *Department of Business & Economic Development v. Baumann*, 56 Ill.2d 382, 386-387, 308 N.E.2d 580, 582 (1974); *Department of Public Works & Bldgs. v. Roehrig*, 45 Ill.App.3d 189, 359 N.E.2d 752, 3 Ill.Dec. 893 (1976). Under §7-121, all evidence of value and the determination by the jury of just compensation must be made as of the date on which the complaint was filed. However, the property owners have the right to establish the amount of any depreciation in the value of their property which was proximately caused by the public improvement for which their property was taken. *City of Rock Island v. Moline National Bank*, 54 Ill.App.3d 853, 368 N.E.2d 1113, 11 Ill.Dec. 505 (1977). And in *Kirby Forest Industries, Inc. v. United States*lain , 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the Supreme Court said that if the owner of the property is given substantially less than the market value of his property at the time of the "taking" by the government, the fifth amendment is violated. Therefore, if an owner's property appreciates substantially between the time the complaint is filed and the time that payment is tendered, it is arguable that §7-121 may be subject to qualification or exception. There are presently no Illinois appellate decisions considering the effect of the *Kirby* decision on Illinois condemnation law and practices.

Either party has the right to have the jury view the premises (§7-118). This is true even though there has been a substantial alteration of the premises between the date of filing the petition and the time of the jury view. *Department of Public Works & Bldgs. v. Remmerie*, 29

Ill.2d 40, 192 N.E.2d 877 (1963). The view of the premises is in the nature of evidence and may be considered by the jury in their deliberations. *City of Chicago v. Chicago Title & Trust Co.,* 331 Ill. 322, 163 N.E. 17 (1928); *Rock Island & P. Ry. Co. v. Leisy Brewing Co.*, 174 Ill. 547, 51 N.E. 572 (1898). A verdict above the maximum or less than the minimum fixed by testimony will not be sustained. *Central Illinois Public Service Co. v. Rider*, 12 Ill.2d 326, 329; 146 N.E.2d 48, 50 (1957). The question of a petitioner's right to acquire property is one with which the jury has no concern, and it is improper to call the jury's attention to the fact that the land is being taken against the owner's will. *Waukegan Park Dist. v. First Nat. Bank*, 22 Ill.2d 238, 174 N.E.2d 824 (1961).

When the issue of apportionment is given to the jury in a proceeding involving a landlord and tenant, "it is the duty of the jury to first fix the fair cash market value of the entire property as between the petitioner and all the defendants, and then to divide the same according to the respective rights of the defendants." *Lambert v. Giffin*, 257 Ill. 152, 158; 100 N.E. 496, 499 (1913); *see also Chicago B. & Q. R. Co. v. F. Reisch & Bros.*, 247 Ill. 350, 353; 93 N.E. 383, 385 (1910); *City of Rockford v. Robert Hallen*, Inc., 51 Ill.App.3d 22, 25-26; 366 N.E.2d 977, 979; 9 Ill.Dec. 466, 468 (2d Dist.1977).

Whether the jury trial right extends to separate apportionment proceedings under 735 ILCS 5/7-123, 7-126, and 7-127, is unclear. Such separate, post-deposit apportionment proceedings are allowable because "[t]he statute does not make it mandatory that the jury shall apportion the award." *Commercial Delivery Service v. Medema*, 7 Ill.App.2d 419, 423; 129 N.E.2d 579, 580 (1st Dist.1955). No court has expressly ruled on the right to jury trial in such an apportionment proceeding. In *Chicago & N.W. Ry. Co. v. Miller*, 251 Ill. 58, 66; 95 N.E. 1027, 1030 (1911), the court found that two tenants of land taken by the railroad for a passenger station had a right to a jury trial on the assessment and awarding of damages due them from the owner of the fee. The court stated: "[s]uch a trial is a matter of right in a case of this kind." However, the right found by the supreme court to exist for the tenants was in the procedural context of the initial condemnation proceeding, not in a separate apportionment proceeding.

Local Improvement Proceedings

A local improvement proceeding is instituted by the adoption of an ordinance which provides for the taking or damaging of property for a specific improvement. A petition is filed in the name of the municipality to ascertain the just compensation for the property taken or damaged, the property to be benefited by the improvement, and the amount of those benefits. Commissioners are designated to prepare a report of the assessment of the cost of the improvement (735 ILCS 5/9-2-16 and 9-2-18 (1994)).

Questions concerning the value of property taken, the damage, and the benefits are heard by a jury. The commissioners' report is prima facie evidence of the correctness of the amounts assessed.

The court, in its discretion, may allow the jury to view the premises. 65 ILCS 5/9-2-29 (1994). However, the view is not evidence. *City of Chicago v. Koff*, 341 Ill. 520, 173 N.E. 666 (1930); *Rich v. Chicago*, 187 Ill. 396, 58 N.E. 306 (1900); *Chicago v. Van Schaack Bros. Chemical Works*, 330 Ill. 264, 161 N.E. 486 (1928).

Instructions

The following instructions have been drafted for use under the eminent domain provisions of article 7 of the Code of Civil Procedure.

The instructions may be used in a local improvement proceeding where appropriate although they will have to be modified. For example, the local improvement proceedings still are commenced by a "petition" rather than by a "complaint" as in eminent domain proceedings. In the instructions the party filing the complaint is referred to as "plaintiff" rather than "petitioner" or "condemnor."

300.01 Cautionary Instructions—Evidence to Be Considered

Evidence consists of testimony of the witnesses, exhibits admitted by the court and your view of the property.

Notes on Use

This instruction should be used in place of the third sentence of paragraph [3], IPI 1.01. It adds the element of the jury's view of the property.

Do not use this instruction in a proceeding under the Local Improvement Act.

Comment

At the request of either party to a condemnation suit, the jury shall go upon the land sought to be taken or damaged and examine it. 65 ILCS 5/9-2-29 (1994); 735 ILCS 5/7-118 (1994). The jury's view of the property is in the nature of evidence (*Union Electric Power Co. v. Sauget*, 1 Ill.2d 125, 132; 115 N.E.2d 246, 250 (1953); *Cook County v. North Shore Electric Co.*, 390 Ill. 147, 151; 60 N.E.2d 855, 856 (1945); *South Park Commissioners v. Ayer*, 237 Ill. 211, 221; 86 N.E. 704, 708 (1908); *Forest Preserve Dist. v. Kelley*, 69 Ill.App.3d 309, 317; 387 N.E.2d 368, 375; 25 Ill.Dec. 712, 719 (2d Dist.1979)), and is to be considered by the jury with the evidence in arriving at a verdict fixing the amount of compensation. City of Chicago v. Callender, 396 Ill. 371, 380; 71 N.E.2d 643, 648 (1947); Forest Preserve Dist. v. Eckhoff, 372 Ill. 391, 395-396; 24 N.E.2d 52, 55 (1939); *South Park Commissioners v. Ayer*, 237 Ill. at 211, 221; 86 N.E. at 708.

300.02 Jurors' Use of Their Own Knowledge of Land Values

The committee recommends that no instruction be given which states that jurors may rely upon their own knowledge of land values.

Comment

The jurors may weigh the evidence and judge the credibility of the witnesses on the basis of their observations and experiences in life. That rule is covered sufficiently by IPI 2.01 and IPI 1.04. Jurors may not ignore or go outside the evidence in determining land values. *See* IPI 300.61.

300.03 Expert Witness

The committee recommends that no instruction be given which comments on the weight of expert testimony.

Comment

Instructions concerning the weight to be given expert testimony are disapproved in the Comment to IPI 4.09 (former IPI 2.10), and the same principles apply in eminent domain cases. A new issue that arises in the area of eminent domain involves the Illinois courts' adoption of Rules 703 and 705 of the Federal Rules of Evidence in *Wilson v. Clark*, 84 Ill.2d 186, 417 N.E.2d 1322, 49 Ill.Dec. 308 (1981), *cert. denied,* 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981), and in *Department of Transp. v. Beeson*, 137 Ill.App.3d 908, 485 N.E.2d 511, 92 Ill.Dec. 700 (2d.Dist.1985). Evidence of sales of comparable property is admissible (*see* Comment to IPI 300.40), and thus can be relied upon by an expert witness in giving and supporting his opinion. As a result of the adoption of Rules 703 and 705, an expert witness is now also permitted to testify to, and rely upon, comparable sales *not admitted into evidence* as a basis for his or her opinion of value. *Department of Transportation v. Beeson, supra; City of Chicago v. Anthony*, 136 Ill.2d 169, 554 N.E.2d 1381, 144 Ill.Dec. 93 (1990).

The opposite party is entitled to a limiting instruction advising the jury to consider the underlying statements of comparable sales only to evaluate the basis of the expert's opinion, not as substantive evidence. *People v. Anderson*, 113 Ill.2d 1, 495 N.E.2d 485, 99 Ill.Dec. 104 (1986); *Department of Transp. v. Amoco Oil Co.*, 174 Ill.App.3d 479, 528 N.E.2d 1018, 124 Ill.Dec. 127 (2d Dist.1988). A limiting instruction should be given by the court at the time the evidence is introduced. When the jury is instructed, only Cautionary Instruction 1.01[7] should be used to remind the jury of the limited purpose of the testimony. If a limiting instruction other than IPI 1.01[7] is again given during jury instructions, it would be duplicative.

For an extensive discussion as to what underlying facts or data an expert can testify to in support of his opinion, *see City of Chicago v. Anthony, supra.*

300.04 Witnesses' Magnification or Minimization of Property Values

The committee recommends that no instruction be given which tells the jury that they may ignore testimony which exaggerates or minimizes the value of the property.

Comment

While instructions on this point have been given and held not to be error, *e.g. Forest Preserve Dist. v. Krol*, 12 Ill.2d 139, 145 N.E.2d 599 (1957); *Jackson County v. Wayman*, 369 Ill. 123, 125; 15 N.E.2d 854, 855 (1938), it is the opinion of the committee that this type of instruction constitutes an argument on the evidence. IPI 1.01 [4] (former IPI 2.01) adequately covers the subject of credibility of witnesses.

300.05 Testimony of Owner

The committee recommends that no instruction be given which singles out the testimony of the owner.

Comment

The tests which are set forth in IPI 1.01 (former IPI 2.01) for weighing the testimony of witnesses are applicable to the witnesses of a party. The reasons for not singling out the testimony of a party are given in the comment of IPI 4.06 (former IPI 2.05).

300.10 Issues Made by Complaint—Fee Interest Taken —No Damage to Remainder Claimed

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

You must not concern yourselves with the right of plaintiff to take the property or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103.

Comment

Where no damage to remainder is claimed, the jury will consider and decide only the question as to what amount is just compensation to the defendant for the property which has been taken from him. Issues as to the power of the petitioner to take, or whether the taking is for a public use, are preliminary questions of law to be decided by the court. *City of Chicago v. Pridmore*, 12 Ill.2d 447, 451-452; 147 N.E.2d 54, 57 (1957); *St. Clair County Housing Authority v. Quirin*, 379 Ill. 52, 57; 39 N.E.2d 363, 365 (1942); *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16; 174 N.E. 862, 864 (1931); *Department of Public Works & Bldgs. v. Wilson & Co.*, 62 Ill.2d 131, 141-142, 145; 340 N.E.2d 12, 17, 19 (1975); *Department of Transp. v. Association of Franciscan Father*s, 93 Ill.App.3d 1141, 1145-1148; 418 N.E.2d 36, 39-41; 49 Ill.Dec. 392, 395-397 (2d Dist.1981); *Department of Transp. v. Janssen*, 34 Ill.App.3d 244, 252; 339 N.E.2d 359, 365 (2d Dist.1975).

300.11 Issues Made by Complaint and Counterclaim—Fee Interest Taken—Fact of Damage to Remainder Contested

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that the remainder [will be] [has been] damaged by the taking. Plaintiff denies that there [will be] [has been] any damage to the remainder.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, [will] [has] the remainder [be] [been] damaged by the taking and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103.

IPI 300.31 should be used with this instruction.

Comment

When the defendant files a counterclaim claiming damage to the remainder and the plaintiff contests the existence of any such damage, three issues are presented to the jury: (1) the amount of compensation which the defendant is entitled to recover for the property taken; (2) whether the remainder has been damaged by the taking; and, if so, (3) the extent of the damage to the remainder. *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16, 174 N.E. 862, 864 (1931); *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41; 49 Ill.Dec. 392, 397 (2d Dist.1981); *Department of Transp. v. Catholic Diocese of Belleville*, 63 Ill.App.3d 683, 691; 379 N.E.2d 1343, 1349; 20 Ill.Dec. 275, 281 (5th Dist.1978).

This instruction was approved in *Oak Brook Park Dist. v. Oak Brook Development Co.*, 170 Ill.App.3d 221, 524 N.E.2d 213, 120 Ill.Dec. 448 (2d Dist.1988) (error to refuse instruction when plaintiff denied damage to the remainder).

300.12 Issues Made by Complaint and Counterclaim—Fee Interest Taken—Fact of Damage to Remainder Admitted—Amount Contested

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim that the remainder [will be] [has been] damaged by the taking. Plaintiff denies damage in the amount claimed.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the remainder.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

If the plaintiff denies damages to the remainder, IPI 300.11, not 300.12, is the proper instruction. *Oak Brook Park Dist. v. Oak Brook Development Co.*, 170 Ill.App.3d 221, 524 N.E.2d 213, 120 Ill.Dec. 448 (2d Dist.1988).

Comment

When the defendant files a counterclaim claiming damages to the remainder and plaintiff admits the existence of damage but contests the amount of that damage there are two issues: (1) the amount of compensation which the defendant is entitled to recover for the property taken, and (2) the amount of money which the defendant is entitled to recover for damage to the remainder. *Department of Public Works & Bldgs. v. Lewis*, 344 Ill. 253, 260; 176 N.E. 345, 348 (1931); *Sanitary Dist. v. Johnson*, 343 Ill. 11, 16; 174 N.E. 862, 864 (1931); *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41; 49 Ill.Dec. 392, 397 (2d Dist.1981); *Department of Transp. v. Catholic Diocese of Belleville*, 63 Ill.App.3d 683, 691; 379 N.E.2d 1343, 1349; 20 Ill.Dec. 275, 281 (5th Dist.1978).

300.13 Issues Made By Complaint Which Also Describes Remainder—Fee Interest Taken—Fact of Damage to Remainder Contested—No Counterclaim Filed

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, [will] [has] the remainder [be] [been] damaged by the taking and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

This instruction should be used in cases where the plaintiff, while not admitting the existence of damage to the remainder, nonetheless describes the remainder as well as the part taken, thereby eliminating the necessity of filing a counterclaim.

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

IPI 300.31 should be used with this instruction.

300.14 Issues Made by Complaint Which Also Describes Remainder—Fee Interest Taken—Fact of Damage to Remainder Admitted—Amount Contested—No Counterclaim Filed

This is a proceeding in which the plaintiff, e.g., Department of Transportation of the State of Illinois, has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for the property which [will be] [has been] taken.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the remainder.

You must not concern yourselves with the right of plaintiff to take the property of the defendant or the need for the property or the wisdom of locating the proposed public use on defendant's property.

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

See Comment to IPI 300.12.

300.15 Issues Made By Complaint—Easement Strip—Underground Pipeline or able—No Damage to Remainder Claimed

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

You must not concern yourselves with the right of plaintif to acquire the easement, the need for the easement, or the wisdom of locating the e.g., pipeline on defendant's property.

Notes on Use

For overhead electric transmission line cases *see* IPI 300.18 through IPI 300.22.

Where there is competent evidence that the easement has caused no damage, this instruction should be modified to raise the issue of whether the owner is entitled to any compensation. *Midwestern Gas Transmission Co. v. Mason*, 31 Ill.2d 340, 343; 201 N.E.2d 379, 381 (1964).

300.16 Issues Made by Complaint and Counterclaim—Easement Strip—Underground Pipeline or Cable—Fact of Damage to Remainder Contested

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged by the taking. Plaintiff denies that the property outside the easement strip will be damaged.

You are to decide the following questions:

First, what is the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

Second, will the property outside the easement strip be damaged by the presence of the easement and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for that damage.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement or the wisdom of locating the e.g., pipeline on the defendant's property.

Notes on Use

IPI 300.32 should be used with this instruction.

300.17 Issues Made by Complaint and Counterclaim—Easement Taken—Fact of Damage to Remainder Admitted—Amount Contested

This is a proceeding in which the plaintiff, e.g., Public Gas Company, has filed a complaint to acquire a perpetual easement to operate and maintain a e.g., pipeline across the property of the defendant, by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged by the taking. Plaintiff denies damage in the amount claimed.

You are to decide the following questions:

First, what is the amount of money which will reasonably and fairly compensate the defendant for the damage within the easement strip caused by the presence of the easement.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for damage to the property outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement or the wisdom of locating the e.g., pipeline on defendant's property.

300.18 Issues Made by Complaint—Overhead Electric Transmission Line—Fact of Damage to Easement Strip Admitted—Amount Contested—No Damage to Remainder Claimed

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to that part of the easement strip which is not occupied by the structures.

Notes on Use

Use IPI 300.56 with this instruction. For underground wire cases, use IPI 300.15, 300.16 or 300.17.

Comment

In eminent domain suits involving the erection of overhead electrical transmission lines, the following issues may have to be determined by the jury: (1) the value of the land actually occupied by the structures supporting the power line; (2) whether the land inside the easement strip which is not occupied by the structures will depreciate in value and, if it will, (3) the amount of that depreciation; (4) whether the remainder of the tract outside the easement strip will be damaged; if so, (5) the amount of that damage. *Central Illinois Public Service Co. v. Montgomery*, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision); *Central Ill. Public Service Co. v. Lee*, 409 Ill. 19, 23; 98 N.E.2d 746, 749 (1951); *Illinois Power & Light Corp. v. Barnett*, 338 Ill. 499, 505; 170 N.E. 717, 720 (1930); *Illinois Power & Light Corp. v. Parks*, 322 Ill. 313, 319; 153 N.E. 483, 486 (1926). In order that an alleged element of damage is properly considered in determining the extent of the damage suffered, the damage must be direct and proximate, and not such as is merely possible or conceivable by the imagination. *Illinois Power & Light Corp. v. Peterson*, 322 Ill. 342, 349; 153 N.E. 577, 579 (1926); *Central Illinois Public Service Co. v. Montgomery*, *supra*.

IPI 300.18 through 300.22 undertake to assist the practitioner in drafting an issues instruction tailored to a number of different circumstances which may arise in a case involving the erection of overhead transmission lines. For example, if there is no damage to the remainder claimed, IPI 300.18 or IPI 300.19 will be appropriate. IPI 300.18 would be used if damage to the

easement strip is admitted, but the amount of damages is contested. Similarly, IPI 300.19 would be used if both damages to the easement strip and amount are contested. Likewise, IPI 300.20, 300.21 or 300.22 would be appropriate when damage to the remainder is claimed.

300.19 Issues Made by Complaint—Overhead Electric Transmission Line—Fact of Damage to Easement Strip Contested—No Damage to Remainder Claimed

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to take a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, will there be damage to the part of the easement strip not occupied by the structures and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to that part of the easement strip not occupied by the structures.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

Use IPI 300.55 with this instruction.

Comment

See Note on Use and Comment to IPI 300.18.

300.20 Issues Made by Complaint--Overhead Electric Transmission Line--Fact of Damage to Easement Strip and Remainder Admitted—Amount Contested

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

Plaintiff admits that the easement strip will be damaged and also admits that the property outside the easement strip will be damaged. The amount of damages is contested.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to his property outside the easement strip caused by the presence of the transmission line and structures and the use of the easement.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

Use IPI 300.56 and 300.58 with this instruction.

Comment

See Notes on Use and Comment to IPI 300.18.

300.21 Issues Made by Complaint--Overhead Electric Transmission Line--Fact of Damage to Easement Strip Admitted--Amount Contested--Fact of Damage to Remainder Contested

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

Plaintiff admits that the easement strip will be damaged but contests the amount of that damage.

The defendant has filed a counterclaim claiming that property outside the easement strip will be damaged. Plaintiff denies that the property outside the easement strip will be damaged.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Third, will the property outside the easement strip be damaged by the presence of the transmission line and structures and the use of the easement, and, if so, then,

Fourth, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the property outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

IPI 300.32, 300.56 and 300.57 should be used with this instruction.

Comment

See Comment to IPI 300.18.

300.22 Issues Made by Complaint--Overhead Electric Transmission Line--Damage Claimed to Easement Strip and Remainder--Both Contested

This is a proceeding in which the plaintiff, e.g., Public Electric Company, has filed a complaint to acquire a perpetual easement to construct, operate and maintain an electric transmission line across the property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant claims that the easement strip will be damaged and has also filed a counterclaim claiming that his property outside the easement strip will be damaged. The plaintiff denies that there will be any damage to the easement strip or to the property outside the easement strip.

You are to decide the following questions:

First, what is the amount of just compensation to be paid the defendant for that part of [defendant, his, her, its] property which is occupied by the structures supporting the transmission line.

Second, will there be damage to the part of the easement strip not occupied by the structures and, if so, then,

Third, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the part of the easement strip not occupied by the structures.

Fourth, will the property of the defendant outside the easement strip be damaged by the presence of the transmission lines, structures and the use of the easement, and, if so, then,

Fifth, what is the amount of money which will reasonably and fairly compensate the defendant for the damage to the property of the defendant outside the easement strip.

You must not concern yourselves with the right of plaintiff to acquire the easement, the need for the easement, or the wisdom of locating the transmission line on defendant's property.

Notes on Use

IPI 300.32, 300.55 and 300.57 should be used with this instruction.

Comment

See Comment to IPI 300.18.

300.23 Issues Made by Complaint of Tenant—Total Taking of Fee Interest—Total Taking of Leasehold Interest

This is a proceeding in which the plaintiff, [e.g., Department of Transportation of the State of Illinois], has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

The defendant, [landlord's name], is the owner of the property and is the landlord. The defendant, [tenant's name], is the tenant.

The tenant has filed a counterclaim asking that the value of [his, her, its] leasehold interest in the property be determined.

You are to decide the following questions:

First, what is the total amount of just compensation to be paid for the entire property.

Second, what part of that total is the fair rental value of the leasehold.

You must not concern yourselves with the right of plaintiff to take the property or the need for the property or the wisdom of locating the proposed public use on the property.

Comment

In the case of a dispute between a landlord and tenant who has filed for a separate award, the parties have the right to have a determination made as to their respective shares in the compensation awarded for the taking of the leased property. *Department of Public Works v. Bohne*, 415 Ill. 253, 113 N.E.2d 319 (1953).

When the issue of apportionment is given to the jury in a landlord-tenant dispute, "it is the duty of the jury to first fix the fair cash market value of the entire property as between the petitioner and all the defendants, and then to divide the same according to the respective rights of the defendants." *Lambert v. Giffin*, 257 Ill. 152, 158; 100 N.E. 496, 499 (1912); *see also Chicago B. & Q. R. Co. v. F. Reisch & Bros.,* 247 Ill. 350, 93 N.E. 383, 385 (1910); *City of Rockford v. Robert Hallen, Inc.*, 51 Ill.App.3d 22, 25-26; 366 N.E.2d 977, 979; 9 Ill.Dec. 466, 468 (2d Dist.1977). Aside from the situation where a tenant requests a separate finding for the value of a leasehold at the trial on the issue of just compensation, the statute also provides a separate procedure for distribution of the award of compensation for the acquisition of fee title. 735 ILCS 5/7-123 (1994).

Whether the jury trial right extends to a *separate* apportionment proceeding under 735 ILCS 5/7-123, 5/7-126, and 5/7-127, is unclear. Such separate, post-deposit apportionment proceedings are allowable because "[t]he statute does not make it mandatory that the jury shall apportion the award." *Commercial Delivery Service, Inc. v. Medema*, 7 Ill.App.2d 419, 129

N.E.2d 579 (1st Dist.1955). In *Chicago & N.W.R. Co. v. Miller*, 251 Ill. 58, 66; 95 N.E. 1027, 1030 (1911), the court found that two tenants of land taken by the railroad for a passenger station had a right to a jury trial on the assessment and awarding of damages due them from the owner of the fee. The court stated, "[s]uch a trial is a matter of right in a case of this kind." However, the right found by the supreme court to exist for the tenants was in the procedural context of the initial condemnation proceeding, not in a separate apportionment proceeding.

300.24 Issues Made by Complaint—Leasehold the Only Interest Taken—Tenant's Right to Compensation Contested

This is a proceeding in which the plaintiff, [e.g., Department of Transportation of the State of Illinois], has filed a complaint to take certain property of the defendant by exercising the power of eminent domain. Eminent domain is the power given by law to a [public body] [public service company] to take private property for a public use. The constitution of the State of Illinois provides that private property shall not be taken or damaged for public use without just compensation.

You are to decide the amount of just compensation to be paid for the taking of the leasehold interest.

You must not concern yourselves with the right of plaintiff to take the leasehold interest or the need for the leasehold interest or the wisdom of locating the proposed public use on the leased property.

Comment

This instruction covers the situation where the only interest taken is the entire leasehold. For example, a state agency might condemn the leasehold interest in office space occupied by a particular tenant. In that event, the obligation of the tenant to pay rent is extinguished. The landlord would receive the present value of the reserved rent for the remainder of the term, and the tenant would only be entitled to any "bonus" value of his lease. *See* discussion in *Department of Public Works v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 384-389, 192 N.E.2d 607, 610-613 (1st Dist.1963), and Comment to IPI 300.59.

300.30 Burden of Proof on Plaintiff

The committee recommends that no instruction be given on burden of proof on the plaintiff.

Comment

The burden upon the plaintiff-condemnor is to introduce evidence as to the value of the property which it seeks to take. *Chicago, B. & Q. R. Co. v. F. Reisch & Bros.*, 247 Ill. 350, 354, 93 N.E. 383, 385 (1910); *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 545; 152 N.E. 486, 488 (1926); *Cook County v. Holland*, 3 Ill.2d 36, 42; 119 N.E.2d 760, 763 (1954); *Department of Public Works & Bldgs. v. Finks*, 10 Ill.2d 15, 18; 139 N.E.2d 267, 269 (1956); *Department of Public Works & Bldgs. v. Dixon*, 37 Ill.2d 518, 520; 229 N.E.2d 679, 680 (1967); *Department of Transportation v. Schlechte*, 94 Ill.App.3d 187, 189; 418 N.E.2d 1000, 1001; 50 Ill.Dec. 6, 7 (5th Dist.1981); *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 252; 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 737 (2d Dist.1978); *Department of Transportation v. Zabel*, 47 Ill.App.3d 1049, 1052; 362 N.E.2d 687, 690; 6 Ill.Dec. 52, 55 (3d Dist.1977). If the plaintiff fails to introduce any competent evidence of that value, the complaint will be dismissed. *Mauvaisterre Drainage & Levee Dist. v. Wabash R. Co*., 299 Ill. 299, 317; 132 N.E. 559, 566; 22 A.L.R. 944 (1921); *Lake County Forest Preserve District v. Kerrigan*, 58 Ill.App.3d 249, 252; 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 736 (2d Dist.1978); *Department of Public Works & Bldgs. v. Dixon*, 68 Ill.App.2d 106, 110; 215 N.E.2d 449, 451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967). Moreover, where the only competent evidence of value is undisputed, then the court may direct a verdict on that evidence. *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 540; 182 N.E.2d 169, 180 (1962), *cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962).

A condemnation proceeding differs from the ordinary civil action. The opinions of the condemnor's witnesses will ordinarily differ as to value, and the defendant's witness may not agree with each other. The result is that the jury is not presented with an issue on opposed propositions of fact. They are not confronted with the necessity of finding a value or no value, of accepting the highest figure testified to or the lowest. A verdict is valid provided it falls anywhere within the range of testimony. *See* the Comment to IPI 300.61. The true burden is one of introducing evidence, and the decision on whether it has been met is for the court, not the jury. *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 374 N.E.2d 27, 15 Ill.Dec. 734 (1978) (court quoted committee comment in support of its decision).

An analysis of the decisions stating that the plaintiff-condemnor has the burden of proving the value of the land actually taken, e.g., *Department of Public Works & Bldgs. v. Dixon*, 37 Ill.2d 518, 520; 229 N.E.2d 679, 680 (1967); *Department of Transportation v. Schlechte*, 94 Ill.App.3d 187, 189; 418 N.E.2d 1000,1001; 50 Ill.Dec. 6, 8 (5th Dist.1981); *Lake County Forest Preserve Dist. v. Kerrigan*, 58 Ill.App.3d 249, 252, 374 N.E.2d 27, 29; 15 Ill.Dec. 734, 737 (2d Dist.1978); *Department of Transportation v. Zabel*, 47 Ill.App.3d 1049, 1052; 362 N.E.2d 687, 690; 6 Ill.Dec. 52, 53 (3d Dist.1977), indicated to the prior committee that in using the term, "burden of proof," the courts meant only the duty to introduce competent evidence of value. No Illinois case places a burden upon the plaintiff-condemnor to persuade the jury that its evidence of market value is more probably true than not true or that a particular value must be proved by a preponderance or greater weight of the evidence. An Ohio court has specifically considered the problem and stated: "It has been established in Ohio that with reference to compensation for land

taken there is no burden of proof." *In re Appropriation by the Director of Highways*, 201 N.E.2d 889, 120 Ohio App. 273 (1963).

However, the committee's initial evaluation has been subsequently questioned by the courts. In *Department of Public Works & Bldgs. v. Dixon*, 68 Ill.App.2d 106, 109-110; 215 N.E.2d 449, 450-451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967), the court noted that there was "considerable discussion" as to whether there is actually a burden of proof, as that term is ordinarily defined, in eminent domain proceedings. The court decided the case without deciding whether the burden was a burden of proof, "or as stated in IPI, the burden of introducing competent evidence . . . ."

And in *Department of Public Works & Bldgs. v. Tinsley*, 120 Ill.App.2d 95, 99; 256 N.E.2d 124, 126 (5th Dist.1970), the court cited language from the supreme court's decision in *Dixon (37 Ill.2d 518*, 229 N.E.2d 679 (1967)) and stated: "We are uncertain whether this indicates agreement with the Committee's Comments . . . ."

However, in *Department of Public Works & Bldgs. v. American Nat. Bank & Trust Co.*, 36 Ill.App.3d 439, 343 N.E.2d 686 (2d Dist.1976), the court concurred with the committee's recommendation not to give a burden of proof instruction.

300.31 Burden of Proof—Fee Interest Taken—Fact of Damage to Remainder Contested

The defendant has the burden of proving that the taking of a portion of [defendant, his, her, its] property [will cause] [has caused] damage to the remainder of [his] property. This means that, considering all the evidence in the case, you must be persuaded that it is more probably true than not true that the remainder [will be] [has been] damaged by the taking.

Notes on Use

This instruction should be used only where there is a fact question as to whether the remainder is damaged at all. The instruction should not be used where damage is conceded and only the amount is contested.

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

The burden upon the defendant is to come forward with competent evidence of the reduction in value of the remainder. *Trunkline Gas Co. v. O'Bryan*, 21 Ill.2d 95, 171 N.E.2d 45 (1960); *Department of Public Works & Bldgs. v. Bloomer*, 28 Ill.2d 267, 270, 191 N.E.2d 245, 248 (1963); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 911; 433 N.E.2d 736, 739; 60 Ill.Dec. 694, 698 (2d Dist.1982); *Department of Public Works v. Dixon*, 68 Ill.App.2d 106, 110; 215 N.E.2d 449, 451 (5th Dist.1966), *rev'd on other grounds*, 37 Ill.2d 518, 229 N.E.2d 679 (1967). Where there is a dispute as to whether the remainder has been damaged at all, the burden is then upon the defendant not only to introduce competent evidence of reduction in value, but also to persuade the jury that there has in fact been a reduction in value. *City of Chicago v. Provus*, 415 Ill. 618, 623, 114 N.E.2d 793, 795 (1953); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 911; 433 N.E.2d 736, 739; 60 Ill.Dec. 694, 698 (2d Dist.1982). However, there is no burden to establish any specific dollar amount of damage to the remainder.

Where there is no dispute that the remainder has been damaged, but the amount of the damage to the remainder is disputed, then the burden upon the defendant is only to come forward with evidence as to the amount of the damage and there will be no occasion to give this instruction. *See* Comment to IPI 300.30.

300.32 Burden of Proof—Easement Taken—Fact of Damage to Remainder Contested

This defendant has the burden of proving that subjecting a portion of [his] property to the easement [will cause] [has caused] damage to the remainder of [his] property. This means that, considering all the evidence in the case, you must be persuaded that it is more probably true than not true that the remainder [will be] [has been] damaged.

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provisions of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

Comment

See Comment to IPI 300.31.

300.40 Comparable Sales

The committee recommends that no instruction be given concerning comparable sales.

Comment

The value of condemned property may be established with evidence of sales of comparable property. *E.g.*, *Department of Conservation v. Dorner*, 192 Ill.App.3d 333, 548 N.E.2d 749, 139 Ill.Dec. 364 (1st Dist.1989).

Nonetheless, the committee recommends that no instruction be given that the jury may consider comparable sales. An instruction on this subject would single out a portion of the evidence, thus giving it improper emphasis. Instructions which emphasize particular items of evidence in condemnation cases are properly refused. *City of Chicago v. Provus*, 415 Ill. 618, 625; 114 N.E.2d 793, 796, 797 (1953); *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 495, 173 N.E.2d 448, 451 (1961).

See also the Comment to IPI 300.03.

300.41 Averaging Land Values

The committee does not recommend any instruction on the subject of averaging land values.

Comment

Jurors may properly compute the average of land values each believes should be awarded to see "how nearly the average ... suit the views of different jurors." *Groves & S.R.R. Co. v. Herman*, 206 Ill. 34, 37; 69 N.E. 36, 37 (1903). It is also proper for them to average the amounts testified to by the witnesses. *Peoria & R.I.R. Co. v. Birkett*, 62 Ill. 332, 336 (1872). However, it is not proper for jurors to agree in advance to accept the quotient as their verdict (*Peoria & R.I.R. Co. v. Birkett*, *supra*) on the ground that jurors may properly average the testimony if they do not agree in advance to be bound by the quotient. On the other hand, in *Groves & S.R.R. Co. v. Herman*, *supra*, it was held error to refuse an instruction "that in arriving at their verdict the jury should not average the testimony of the witnesses on the question of land damages and values." (The opinion does not quote the instruction involved.) The committee feels that an instruction on the point would lead to confusion and might, by suggesting the possibility, encourage the jury to arrive at a quotient verdict. Therefore, no instruction is recommended.

300.42 Measure of Damages—Loss of Business Profits

The committee recommends that no instruction be given on the loss of business profits resulting from the condemnation of business property.

Comment

While evidence that the property is being used for the conduct of a particular business is admissible on the question of market value, evidence of the volume of business or the profits earned in the business is ordinarily not admissible. *Forest Preserve District v. Hahn*, 341 Ill. 599, 602-603; 173 N.E. 763, 765 (1930); *City of Chicago v. Central National Bank*, 5 Ill.2d 164, 175-176; 125 N.E.2d 94, 100 (1955); *Citizens Utilities Company v. Metropolitan Sanitary District*, 25 Ill.App.3d 252, 258-59; 322 N.E.2d 857, 863 (1st Dist.1974); and *City of Chicago v. Budd*, 121 Ill.App.2d 51, 56; 257 N.E.2d 161, 163-64 (1st Dist.1970). *See also Department of Transportation v. Gallay*, 20 Ill.App.3d 32, 312 N.E.2d 759 (5th Dist.1974) (court properly refused to instruct jury that the law did not permit an award of damages for loss of business during construction).

The exception to the rule that evidence of business profits is not admissible occurs where the property's market value cannot be otherwise ascertained because it is put to a special use such as a cemetery, club house, or railroad terminal. In such cases "the law permits a resort to any evidence available to prove value including the net income from a business conducted on the property." *Chicago Land Clearance Commission v. Darrow*, 12 Ill.2d 365, 372; 146 N.E.2d 1, 5 (1957); *People ex rel. Department of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 618-620; 332 N.E.2d 21, 23-25 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976). The committee recommends that no instruction concerning business profits be given even in a case falling within this exception because such an instruction would emphasize one particular item of evidence.

Proof of rental income derived from the property, as distinguished from business income, is admissible. *Forest Preserve Dist. v. Krol*, 12 Ill.2d 139, 146; 145 N.E.2d 599, 603 (1957); City of Chicago v. Lord, 276 Ill. 357, 360, 115 N.E. 12, 14 (1916).

300.43 Measure of Damages—Present Use of Property

The committee recommends that no instruction be given on the present use of the property.

Comment

Evidence as to the use being made of the property at the time the condemnation petition is filed is relevant to the question of value and is admissible. *Housing Authority v. Kosydor*, 17 Ill.2d 602, 604; 162 N.E.2d 357, 358 (1959) (salvage yard); *City of Chicago v. Lord*, 276 Ill. 357, 360; 115 N.E. 12, 13 (1916) (rental property). This type of evidence might be introduced by way of testimony that the present use of the property is its highest and best use. *Housing Authority v. Kosydor*, *supra*. If the jurors view the property, as they usually do, they learn the general nature of its use.

The committee recommends that no instruction be given which informs the jurors that they may or should consider the present use being made of the land because it would only emphasize the obvious and would violate the general rule against singling out particular items of evidence for comment. *See City of Chicago v. Provus*, 415 Ill. 618, 625; 114 N.E.2d 793, 796, 797 (1953).

300.44 Measure of Damages—Property Taken to Be Considered as Part of the Whole Tract

In arriving at the fair cash market value of the property taken, you should determine its value considered as a part of the whole tract before the taking and not its value as a piece of property separate and disconnected from the rest of the tract.

Comment

Refusing an instruction of this type may be reversible error. *Forest Preserve Dist. v. Draper*, 387 Ill. 149, 157-159; 56 N.E.2d 410, 415 (1944). *Tri State Park Dist. v. First Nat. Bank of Cicero*, 33 Ill.App.3d 348, 351; 337 N.E.2d 204, 207 (2d Dist.1975), holds that property taken should be considered part of the whole tract. *See also Cook County v. LaSalle Nat'l Bank*, 1 Ill.App.3d 579, 582; 274 N.E.2d 919, 922 (5th Dist.1971).

In *Department of Transp. v. Association of Franciscan Fathers*, 93 Ill.App.3d 1141, 1148; 418 N.E.2d 36, 41-42; 49 Ill.Dec. 392, 399 (2d Dist.1981), the defendants argued that the denial of their tendered instruction to the jury, that they had a right to value the tract taken as a separate and distinct piece of property, rather than part of the whole, was in error. The court held it was not in error because "the only valuation theory presented by the Franciscans ... was based on the land as part of the whole." *Id.*

Compare Lake County Public Bldg. Commission v. La Salle Nat. Bank, 176 Ill.App.3d 237; 531 N.E.2d 110, 125 Ill.Dec. 931 (2d Dist.1988) (two parcels not so closely connected that they could be treated as a single property; error to give IPI 300.44).

300.45. Measure of Damages to Remainder—Fee Taken—Fact of Damage to Remainder Contested

If you find there [will be] [is] damage to the remainder caused by the taking, the measure of that damage [will be] [is] the difference between the fair cash market value of the remainder immediately before the taking and the fair cash market value of the remainder immediately after the taking.

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the remainder but also contests that the remainder will be damaged at all.

Comment

The measure of damages to the remainder is the difference between the fair cash market value of the property immediately prior to the taking, and the fair cash market value of the property immediately after the taking. *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 493; 173 N.E.2d 448, 450 (1961); *County of Winnebago v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 868-869 (2d Dist.1973).

The damage to the remainder must be the direct and proximate consequence of the taking. Depreciation suffered in common by all lands in the vicinity of improvement is not compensable. Aesthetic considerations, personal inconvenience and unsightliness of a public facility are not proper elements of damage and it is improper to instruct the jury to consider these elements. *Department of Public Works & Bldgs. v. Horejs*, 78 Ill.App.2d 284, 223 N.E.2d 207 (1st Dist.1966). Not all factors bringing about a reduction in value represent recoverable damages to land not taken. To sustain a claim for damages, the depreciation in value must be from a direct physical disturbance of a right the owner enjoys in connection with his property. *Department of Transp. v. Rasmussen*, 108 Ill.App.3d 615, 439 N.E.2d 48, 64 Ill.Dec. 119 (2d Dist.1982).

The expenditures made and costs incurred by the landowner in adapting the remainder to use after the taking are relevant, if reasonable and economical, as evidence of the depreciation in value, but not as recoverable items in themselves. *Department of Public Works v. Bloomer*, 28 Ill.2d 267, 191 N.E.2d 245 (1963). *Department of Transp. v. Jones*, 44 Ill.App.3d 592, 358 N.E.2d 402, 3 Ill.Dec. 235 (5th Dist.1976). This principle has been referred to as the "cost of cure" doctrine. *People ex rel. Department of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 332 N.E.2d 21 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976). On the other hand, it has been held that when the government condemns only a portion of a building, and the part not taken may be rehabilitated according to some feasible and economical plan, these costs can be recovered as damage to the remainder. In such cases, the measure of damage to the remainder is the cost of rehabilitation less the value recovered by such reconstruction. *See City of Chicago v. Callender*, 396 Ill. 371, 71 N.E.2d 643 (1947). In such cases, this instruction may have to be supplemented accordingly.

300.46 Measure of Damages to Remainder—Easement Taken—Fact of Damage to Remainder Contested

If you find there will be damage to the remainder caused by the presence of the easement, the measure of that damage is the difference between the fair cash market value of the remainder immediately before the easement is imposed and the fair cash market value of the remainder immediately after the easement is imposed.

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the remainder but also contests that the remainder will be damaged at all.

300.47 Measure of Damages to Remainder—Fee Taken—Fact of Damage Admitted—Amount Contested

The measure of damages to the remainder is the difference between the fair cash market value of the remainder immediately before the taking and the fair cash market value of the remainder immediately after the taking.

Notes on Use

This instruction should be used when the fact of damage to the remainder is not contested but the amount of the damage is contested.

300.48 Measure of Damages to Remainder—Easement Taken—Fact of Damage Not Contested—Amount Contested

The measure of damages to the remainder is the difference between the fair cash market value of the remainder immediately before the easement is imposed and the fair cash market value of the remainder immediately after the easement is imposed.

Notes on Use

This instruction should be used when the fact of damage to the remainder is not contested but the amount of the damage is contested.

300.49 Measure of Damages to Remainder—Benefit or Detriment From Proposed Use

In determining the fair cash market value of the remainder after the taking, you may consider [any] [benefits] [or] [detriments] from the proposed public use, proved by the evidence, which [increase] [or] [decrease] the fair cash market value of the remainder.

[However, the law does not permit an award of damages for the loss or reduction of traffic which may result from (the installation of a median or divider strip) (the establishment of a one-way traffic regulation), and you should not consider this factor in determining damages to the remainder.]

Notes on Use

This instruction should be used in connection with IPI 300.45, 300.46, 300.47, or 300.48. It should not be given unless evidence of benefit or detriment to the remainder from the proposed public use has been introduced.

The second paragraph of this instruction should be given, if requested by the plaintiff, where the proposed improvement involves a median strip or one-way traffic regulation and there is also evidence of compensable elements of detriment from the proposed use. In such a case, it is necessary to distinguish between those elements of detriment which are compensable and those which are not. *See* IPI 300.51. Where both paragraphs of the instruction are used, it will *not* be necessary to give IPI 300.51.

Comment

Special benefits accruing to the part not taken by reason of the improvement must be set off against the damage to the remainder. *People ex rel. Department of Transportation v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 624; 332 N.E.2d 21, 28 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976); *Cuneo v. City of Chicago*, 400 Ill. 545, 553, 554; 81 N.E.2d 451, 455, 456 (1948) (increased accessibility). Such benefits must, however, "be real and substantial, not chimerical or speculative, and must be capable of measurement and computation." *Department of Public Works & Bldgs. v. Divit*, 25 Ill.2d 93, 101; 182 N.E.2d 749, 753 (1962). General benefits are the general, intangible benefits which are supposed to flow to the public from a public improvement and the effects of which cannot be ascertained in monetary value. A recent decision has held that any benefits to the property which enhance its market value and are not conjectural or speculative are considered special rather than general benefits. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990) (instruction approved).

Illinois case law has established the rule that benefits to the remainder may be set off against damages to the remainder but not against the award for the part taken. Section 7-120 of the Act (735 ILCS 5/7-120 (1994)), the predecessor of which was enacted in 1967, presently provides:

> **Special Benefits.** In assessing damages or compensation for any taking or property acquisition under this Article, due consideration shall be given to any special benefit that

> will result to the property owner from any public improvement to be erected on such property. This Section shall be applicable to all private property taken or acquired for public use, and shall apply whether damages or compensation are fixed by negotiation, by a court, or by a jury.

It has been suggested that the traditional rule was changed by the passage of §7-120. *See* F. Righeimer, *Eminent Domain in Illinois*, §6.263, p. 193 (3d ed. 1986), and "Trial Procedure & Technique", *Illinois Eminent Domain Practice* §8.44 (IICLE 1989). However, since 1967 (when §7-120 was enacted) the traditional rule has been reaffirmed without reference to §7-120. *People ex rel. Dept. of Transp. v. Quincy Coach House, Inc.*, 29 Ill.App.3d 616, 332 N.E.2d 21, 28 (4th Dist.1975), *rev'd on other grounds*, 64 Ill.2d 350, 356 N.E.2d 13, 1 Ill.Dec. 13 (1976) ("Where there is an enhancement to the remainder occasioned by the improvement for which the condemnation was instituted, that enhancement must be offset against the damages to the remainder [citation omitted], but cannot be used to offset compensation for the land taken"). Further, one court has rejected an argument based on the Righeimer suggestion, noting that such an interpretation would conflict with §7-118 of the Code and could violate equal protection guarantees under the constitution. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

It is also proper to consider detriment to the remainder which is reasonably certain to result from the use to be made of the part taken. *Chicago, P. & M.R. Co. v. Atterbury*, 156 Ill. 281, 283-284; 40 N.E. 826-827 (1895) (discharge of cinders, ashes and smoke and creation of fire hazard by condemnor's trains); *Board of Trade Tel. Co. v. Darst*, 192 Ill. 47, 49-51; 61 N.E. 398, 399-400 (1901) (detriments caused by proximity of condemnor's telephone poles); *Sanitary District v. Baumbach*, 270 Ill. 128, 133-134; 110 N.E. 331, 333-334 (1915) (obstruction of light, air and view by spoil banks along canal); *Trunkline Gas Company v. O'Bryan*, 21 Ill.2d 95, 100-101; 171 N.E.2d 45, 48-49 (1960) (permanent interference with farming caused by an improvement). Detriments resulting from a median strip in the highway or a one-way traffic regulation are not proper elements of damage. *See* Comment to IPI 300.51. For a discussion of whether the detriment must be "special" to the property owner as opposed to the detriment sustained by the public generally, *see* the Comment to IPI 300.50.

300.50 Measure of Damages to Remainder—Only "Special" Detriments and Benefits to Be Considered

The committee recommends that no instruction be given limiting the jury to a consideration of "special" detriments or benefits.

Comment

Numerous cases contain language to the effect that the only damage to the remainder which is compensable is that which is "in excess of that sustained by the public generally." *E.g., County Board of School Trustees v. Elliott*, 14 Ill.2d 440, 446; 152 N.E.2d 873, 878 (1958); *Central Illinois Public Service Co. v. Lee*, 409 Ill. 19, 24; 98 N.E.2d 746, 750 (1951); *Citizens Utilities Company of Illinois v. Metropolitan Sanitary District of Greater Chicago*, 25 Ill.App.3d 252, 256-257; 322 N.E.2d 857, 861, 862 (1st Dist.1974). Such statements are usually found as part of a general discussion of damages, and there is no case which indicates clearly what constitutes damage sustained "by the public generally," or who is included in "the public generally." *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 548; 152 N.E. 486, 489 (1926), indicates, by way of dictum, that the depreciation of property by virtue of the building of a jail, police station or smallpox hospital in close proximity to the property may be the type of damage contemplated by the expression "damage not in excess of that sustained by the public generally." However, a reading of the cases cited in *Talbott* indicates that the real bases for the denial of damages in such instances are practical considerations of public policy, and not any technical distinction between special damages and those sustained by the public generally. *See, e.g., Frazer v. City of Chicago*, 186 Ill. 480, 57 N.E. 1055 (1900), where the court conceded that the property across the street from a smallpox hospital was damaged more than other property in the city, but still denied damages on grounds of public policy.

The real issue in these cases seems to be the type of damage claimed--whether it is remote or speculative, or a necessary consequence of a proper exercise of the police power--rather than whether it is sustained by a particular property owner in greater or lesser degree than the public generally. Clearly, the fact that the same damage is suffered by other property owners similarly situated does not make the damages non-compensable. (Consider, for example, the typical case involving the partial taking of many tracts for a road with each owner claiming--and recovering for--the identical type of damage to the part not taken.) The same is true of benefits:

> "Special benefits do not become general benefits because the benefits are common to other property in the vicinity. The fact that other property in the vicinity of the proposed railroad will also be increased in value by reason of the construction and operation thereof furnishes no excuse for excluding the consideration of special benefits to the particular property in determining whether it has been damaged, and if it has, the extent of the depreciation in value." *Peoria B. & C. Traction Co. v. Vance*, 225 Ill. 270, 273; 80 N.E. 134, 135 (1907).

In the *Vance* case *supra*, the court held it was reversible error to give, at the instance of the property owner, an instruction which informed the jury that, "Only such benefits as are special to this farm and not common to the other farms in the vicinity can be set off against damages to the land not taken."

In affirming the trial court's rejection of an instruction tendered by the property owner defining "special benefits," the court in *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990), held that IPI (Civil) 2d Nos. 300.47, 300.49, 300.80, and 300.81 accurately stated the law with regard to damages to the remainder.

300.51 Measure of Damages to Remainder—Factors Excluded—Median Strips in Highway—Traffic Regulations

The law does not permit an award of damages for the loss or reduction of traffic which may result from [the installation of a median or divider strip] [the establishment of a one-way traffic regulation], and you should not consider this factor in determining damages to the remainder.

Notes on Use

This instruction should be given, if requested by the plaintiff, whenever the jurors may have learned that the flow of traffic will be diminished by a median strip or a one-way traffic regulation. The instruction is especially appropriate where the property is devoted to a business use and the jury, in the absence of the instruction, would be likely to consider the question of lost business profits.

Comment

Compensation is not allowed for reduction of traffic. *Department of Public Works & Bldgs. v. Bloomer*, 28 Ill.2d 267, 273; 191 N.E.2d 245, 249 (1963) ("An owner had no vested property right in the flow of traffic past his land, and losses produced by the alternation of traffic flow or the installation of traffic control devices confer no right to compensation"); *Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973); *Department of Public Works & Bldgs. v. Mabee*, 22 Ill.2d 202, 205; 174 N.E.2d 801, 802 (1961) ("The diminution in the value of land or loss of business occasioned by a one-way traffic regulation that diverts a portion of the flow of traffic from in front of one's premises is the result of the exercise of the police power; it is not the taking or damaging of property within the meaning of our constitution; and it is not therefore compensable"); *Ryan v. Rosenstone*, 20 Ill.2d 79, 169 N.E.2d 360 (1960) (Injunction against Director of Public Works to remove portion of median strip denied).

Evidence of reduced value on account of a median strip or traffic regulation is inadmissible. *Department of Public Works & Bldgs. v. Mabee*, *supra*, at 205-206; *Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973). But the jurors will frequently learn of the divider or traffic regulation from other testimony in the case, from the construction plans, or from their view of the premises. This instruction is a safeguard against the improper allowance of damages based on this factor of reduced traffic.

Diminution of traffic must, of course, be distinguished from deprivation of material impairment of access, which is compensable. *Department of Public Works & Bldgs. v. Wolf*, 414 Ill. 386, 389; 111 N.E.2d 322, 323, 324 (1953); *Department of Public Works & Bldgs. v. Mabee, supra*, at 205, 174 N.E.2d at 802 ("The rule cannot be applied, however, where the property owner's free and direct access to the lane of traffic abutting on his property has not been taken or impaired"). On material impairment of access, which is compensable, *see Department of Public Works & Bldgs. v. Morse*, 3 Ill.App.3d 721, 279 N.E.2d 150 (5th Dist.1972) (substantial impairment of the ingress and egress of tractor-trailers which were necessary to defendants in maintenance of inventory would be compensable); *Department of Public Works & Bldgs. v. Wilson and Co., Inc.*, 62 Ill.2d 131, 140-141; 340 N.E.2d 12, 15 (1975); Department of

Transportation v. Shell Oil Co., 156 Ill.App.3d 304, 509 N.E.2d 596, 108 Ill.Dec. 900 (1st Dist.1987) (evidence of the decrease in gallons of gasoline pumped at gas station which lost part of its frontage to condemnation was relevant to a determination of the change in accessibility of the station); *Department of Transportation v. Rasmussen*, 108 Ill.App.3d 615, 621-622; 439 N.E.2d 48, 54-55; 64 Ill.Dec. 119, 125-126 (2d Dist.1982); *Streeter v. Winnebago County*, 44 Ill.App.3d 392, 396-397; 357 N.E.2d 1371, 1374; 2 Ill.Dec. 928, 932-933 (2d Dist.1976). *But see Winnebago County v. Rico Corp.*, 11 Ill.App.3d 882, 883; 296 N.E.2d 867, 869 (2d Dist.1973) (damage due to loss of access is not recoverable as damage to the remainder).

300.52 Measure of Damages To Remainder--Unilateral Stipulation Concerning Use of Planned Construction

The stipulation made by the plaintiff and read to you is a binding obligation which plaintiff-condemnor must perform. You are not to allow damages because of any possibility that the stipulation might not be performed.

Notes on Use

This instruction should be used when the plaintiff unilaterally agrees or "stipulates" to do the work in a certain way. For the case where the parties have reached a bilateral agreement, use IPI 300.53.

Comment

"The general rule has been announced in many cases that the filing in court of a stipulation by the petitioner in a condemnation proceeding, agreeing to do certain things which would reduce the injury to property not taken, subjects the estate acquired by the condemnation judgment to a condition of a perpetual and binding character, which cannot be evaded or denied." *East Peoria Sanitary Dist. v. Toledo, P. & W. R.R.*, 353 Ill. 296, 306; 187 N.E. 512, 516; 89 A.L.R. 870 (1933); *See also Midwestern Gas Transmission Co. v. Mason*, 31 Ill.2d 340, 343; 201 N.E.2d 379, 381 (1964); *Commonwealth Edison Co. v. Danekas*, 104 Ill.App.3d 907, 433 N.E.2d 736, 60 Ill.Dec. 694 (2d Dist.1982). In *Elgin, J. & E.R. Co. v. Fletcher*, 128 Ill. 619, 21 N.E. 577 (1889), the court approved an instruction the trial court had given to the effect that "[T]he jury in considering their verdict, have the right to assume that the proposal and agreement of the said petitioner [to erect fences by a certain date] will be carried out, and the jury, in fixing their verdict, should not take into account any failure of the petitioner to keep and observe its agreement ..." The case was reversed, however, because the trial court had also given, at the instance of the defendants-appellees, another instruction which informed the jurors that they could award damages for the items covered by the stipulation, "unless the jury further believe the petitioner railroad company has, in open court, stipulated that it will, on or before the first day of May, A.D. 1888, construct, and thereafter maintain, suitable fences along its right of way on the property of respondents." The court stated (128 Ill. at 625-626): "Whether the offer to fence, etc., is binding on appellant, is not a question of fact for the jury. It is purely a question of law, as the court treated it in the instruction quoted, given at the instance of appellant; and was therefore error to afterwards submit it, as was done by the instruction quoted, given on behalf of appellee, as a question of fact to the jury."

Attorneys for the condemning authority may bind the authority by stipulation even in the absence of a duly adopted resolution. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

300.53 Effect of Agreement With Respect To Damages

Plaintiff and defendant have agreed that plaintiff will pay and defendant will accept specific sums for the following items of damage which will be caused by construction of the proposed public improvement: [here list the items which have been stipulated to and are no longer elements in the case].

In arriving at your verdict you are not to include any amounts for these items. They will be paid for separately.

Notes on Use

Frequently plaintiff and defendant will agree on the amount of damages to be paid the defendant for such items as fencing, crop loss, soil compaction and drainage disruption. The foregoing instruction cautions the jury against including these items in their verdict.

Comment

A departure from a unilateral stipulation made by the condemnor would subject it to an action for damages (*see* Comment to IPI 300.52), "and the jury, in fixing their verdict, should not take into account any failure of the petitioner to keep and observe its agreement ...," *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619, 624; 21 N.E. 577, 578 (1889). *A fortiori*, the jury should not award defendant damages for items to which *both* parties have stipulated and agreed.

300.54 Measure of Damages--Easement Strip— Underground Pipeline Or Cable

The measure of damages to the property within the easement strip is the difference between the fair cash market value of the property immediately before the easement is imposed and the fair cash market value of the property immediately after the easement is imposed.

Comment

The measure of damages to the property within the easement strip in underground pipeline or cable cases is the diminution of the fair cash market value of the property burdened by the easement. *North Shore Sanitary District v. Schulik*, 12 Ill.2d 309, 312; 146 N.E.2d 25, 26 (1957); *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926); *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 532-533; 182 N.E.2d 169, 176-177 (1962), *appeal dismissed, cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962); *Lake County Forest Preserve District v. Frecska*, 85 Ill.App.3d 610, 616; 407 N.E.2d 137, 142; 40 Ill.Dec. 906, 912 (2d Dist.1980); and *Peoples Gas Light & Coke Co. v. Edgar County Bank & Trust Co.*, 32 Ill.App.3d 1005, 1008; 337 N.E.2d 80, 81-82 (4th Dist.1975). It may be appropriate to submit a special interrogatory when the existence of damages is contested. *North Shore Sanitary District v. Schulikr, supra.*

300.55 Measure of Damages To Easement Strip— Overhead Electric Transmission Line— Fact of Damage Contested

If you find there will be damage to that part of the easement strip not occupied by the structures, the measure of that damage is the difference between the fair cash market value of that part of the easement strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

[In arriving at the damages to that part of the easement strips which are not occupied by structures, you should take into consideration the fact that the owners will have and retain all the uses of said easement strips not inconsistent with the right to construct, operate and maintain the said transmission line.]

Notes on Use

This instruction should be used when the plaintiff not only contests the amount of damage to the easement strip but also contests that the easement strip will be damaged at all.

The bracketed paragraph must be used where the plaintiff has alleged in its petition for condemnation, and presents evidence, that the land owner will retain all uses of the easement not inconsistent with the plaintiff's use. *Central Ill. Public Service Co. v. Badgley*, 24 Ill.App.3d 294, 321 N.E.2d 26 (5th Dist.1974).

Comment

In an overhead electric transmission line case, the measure of damages to the easement strip is the depreciation in value caused by its subjection to the condemnor's superior right to use the strip for the transmission line. *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926).

Central Illinois Public Service Co. v. Montgomery, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision), holds that the measure of damages to remainder of property not taken is depreciation in the fair market value caused by a direct physical disturbance.

300.56 Measure of Damages To Easement Strip— Overhead Electric Transmission Line— Fact of Damage Admitted--Amount Contested

The measure of damages to that part of the easement strip not occupied by the structures is the difference between the fair cash market value of that part of the strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

[In arriving at the damages to that part of the easement strips which are not occupied by structures, you should take into consideration the fact that the owners will have and retain all the uses of said easement strips not inconsistent with the right to construct, operate and maintain the said transmission line.]

Notes on Use

This instruction should be used when the fact of damage to the easement strip is not contested but the amount of the damage is contested.

The bracketed paragraph must be used when the plaintiff alleges in its petition for condemnation and presents evidence that the land owner will retain all uses of the easement not inconsistent with the plaintiff's use. *Central Illinois Public Service Co. v. Badgley*, 24 Ill.App.3d 294, 321 N.E.2d 26 (5th Dist.1974).

Comment

In an overhead electric transmission line case, the measure of damages to the easement strip is the depreciation in value caused by its subjection to the condemnor's superior right to use the strip for the transmission line. *Illinois Power & Light Corp. v. Talbott*, 321 Ill. 538, 544; 152 N.E. 486, 488 (1926).

Central Ill. Public Service Co. v. Montgomery, 81 Ill.App.2d 289, 225 N.E.2d 412 (5th Dist.1967) (abstract decision), holds that the measure of damages to remainder of property not taken is depreciation in the fair market value caused by a direct physical disturbance.

300.57 Measure of Damages To Property Outside Easement Strip--Overhead Electric Transmission Line--Fact of Damage Contested

If you find that the property of the defendant outside the easement strip will be damaged by the presence of the transmission lines or structures, or the use of the easement, the measure of that damage is the difference between the fair cash market value of the defendant's property outside the strip immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

Comment

See Comments to IPI 300.18 and 300.45.

300.58 Measure of Damages To Property Outside Easement Strip--Overhead Electric Transmission Line--Fact of Damage Admitted--Amount Contested

The measure of damages to the property of the defendant outside the easement strip is the difference between the fair cash market value of the property immediately before the structures are in place and its fair cash market value immediately after the structures are in place.

Comment

See Comments to IPI 300.18 and 300.45.

300.59. Measure of Damages--Entire Fee Interest And Entire Leasehold Taken

In deciding whether the tenant is entitled to a share of the compensation to be paid for the entire property, you must first determine the fair rental value of the tenant's leasehold. If the fair rental value of the leasehold exceeds the rent agreed upon in the lease, the tenant is entitled to the excess. But if the fair rental value of the leasehold does not exceed the rent, the tenant is not entitled to any share of the compensation.

Notes on Use

IPI 300.23 should be used with this instruction.

Comment

The case of *Corrigan v. City of Chicago*, 144 Ill. 537, 548; 33 N.E. 746, 749 (1893) established the measure of damages where the entire leasehold is taken:

> The measure of the compensation for the estate of the tenant taken is the value of her leasehold estate, subject to the rent covenanted to be paid. If the value exceeds the rental she will be entitled to recover the excess. If it does not exceed the rent reserved, she will receive nothing.

In applying the Corrigan formula, the court in Yellow Cab Co. v. Howard, 243 Ill.App. 263 (1st Dist.1927) determined the lessee's interest as follows:

Fair rental value per year (20,160 sq. ft. @ 48¢) equals	$ 9,676.80
Lease had 1 3/4 years to run so $9,676.80 x 1.75 equals	16,934.40
Rent at $6,000 per year for 1.75 years equals	10,500.00
Difference between value and rent due tenant is	6,434.40

The reason the tenant is entitled only to the value of the leasehold in excess of the rent reserved is that, where the entire leasehold is taken, the tenant is relieved of the obligation to pay rent. *Ibid*.

In determining the excess of the fair rental value over the rent agreed upon in the lease, only "*the present value* of the rentals [that would be] required to discharge the rental obligations" shall be considered. *Department of Public Works & Bldgs. v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 389; 192 N.E.2d 607, 613 (1st Dist.1963) (emphasis added). Thus, in the *Metropolitan Life* case, the lessee was obligated by the terms of the lease to pay $67.60 semi-annually for the next ninety-five years. In calculating the amount of the lessee's damages, the court held that the present value of those rentals at the time of condemnation was "that amount which if placed in an account at compound interest of 5% would be sufficient to permit the lessee to draw out the sum of $67.60 semi-annually for ninety-five years for purposes of paying rental on the part taken, so that the account and the lease would terminate at the same time." 42 Ill.App.2d at 389-390.

Reduction to present cash value of the lump sum of the rents has long been recognized as

inherent in the measure of damages. *Corrigan v. City of Chicago*, 144 Ill. 537, 545; 33 N.E. 746, 748 (1893).

Where only a portion of the leased property is taken, leaving a part susceptible of occupation under the lease, the tenant is not relieved from the payment of the rent reserved for the full term. *Stubbings v. Village of Evanston*, 136 Ill. 37, 43-44; 26 N.E. 577, 578 (1891); *Yellow Cab Co. v. Stafford-Smith Co.*, 320 Ill. 294, 296; 150 N.E. 670, 671 (1926). In that event, the measure of the tenant's damages is the present worth of the reserved rental attributable to the portion of the leasehold estate taken plus any "bonus" attributable to that portion. *Department of Public Works & Bldgs. v. Metropolitan Life Ins. Co.*, 42 Ill.App.2d 378, 389; 192 N.E.2d 607, 612, 613 (1st Dist.1963). *See also Peoria, B. & C. Traction Co. v. Vance*, 234 Ill. 36, 41; 84 N.E. 607, 609 (1908).

Where the entire tract covered by the lease is not taken, but the part remaining is not susceptible of occupation for a purpose substantially similar to the one for which the property was leased, the rule is the same as if the entire tract were taken. *Yellow Cab Co. v. Howard*, 243 Ill.App. 263, 280 (1st Dist.1927).

In *Department of Public Works & Bldgs. v. Blackberry Union Cemetery*, 32 Ill.App.3d 62, 65; 335 N.E.2d 577, 579-580 (2d Dist.1975), the court held where there is a partial condemnation of a tenant's leasehold, that the test is the fair rental value of leasehold taken, less the rent.

300.60 Measure of Damages--Leasehold The Only Interest Taken— Tenant's Right To Compensation Contested

In deciding whether the defendant is entitled to compensation for the taking of his leasehold interest, you must first determine the fair rental value of the defendant's leasehold. If the fair rental value of the leasehold exceeds the rent agreed upon in the lease, the defendant is entitled to the excess. But if, on the other hand, the fair rental value of the leasehold does not exceed the rent, the defendant is not entitled to compensation.

Notes on Use

IPI 300.24 should be used with this instruction.

300.61 Range of Verdict

The amount of your verdict must be within the range of the evidence. It cannot be more than the highest figure nor less than the lowest figure testified to by the witnesses.

Comment

A verdict which exceeds the maximum amount of damages and compensation testified to by the witnesses or a verdict which is less than the minimum amount of damages and compensation testified to by the witnesses cannot stand even though the jury may have viewed the premises. *Peoria Gaslight & Coke Co. v. Peoria Terminal Ry. Co.*, 146 Ill. 372, 381; 383, 34 N.E. 550, 552 (1893) (instruction that permitted the jury to base its award on a view of the premises provided it had considered the other testimony in the case held to be reversible error); *Forest Preserve District v. Kelley*, 69 Ill.App.3d 309, 319; 387 N.E.2d 368, 376; 25 Ill.Dec. 712, 720 (2d Dist.1979) (where the verdict was within the range of the evidence and the jury had viewed the premises, the verdict was not a mistake); *Forest Preserve District v. Folta*, 377 Ill. 158, 36 N.E.2d 264 (1941) (verdict which exceeded range set aside); *Central Illinois Public Service Co. v. Rider*, 12 Ill.2d 326, 329; 146 N.E.2d 48, 50 (1957) (verdict which exceeded range set aside).

300.70 Instruction On Use of Verdict Forms--Just Compensation--Fact of Damage To Remainder Contested--Single Tract

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid for the property taken, you will complete Verdict Form A.

You will also decide whether there are damages to the remainder, and if you find there are damages to the remainder, then you will complete Verdict Form B.

If you find that there [is] [will be] no damage to the remainder, write the word "none" in the blank on the verdict form.

300.70.1 Forms of Verdict--Just Compensation--Fact of Damage to Remainder Contested--Single Tract

Verdict Form A

We, the jury, find the just compensation to be paid to the defendant for the taking of his property to be ____$.

[*Signature Lines*]

Verdict Form B

We, the jury, further find the damages to the remainder to be ____$.

[*Signature Lin*es]

300.71 Instruction On Use of Verdict Form--Just Compensation— Fact of Damage To Remainder Not Contested--Single Tract

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

A verdict form is supplied with these instructions. After you have reached your verdict, fill in and sign the verdict form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid for the property taken, you will complete the verdict form.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the verdict form to the jury.]

300.71.1 Form of Verdict--Just Compensation—Fact of Damage to Remainder Not Contested—Single Tract

Verdict Form ____

We, the jury, find the just compensation to be paid to the defendant for the taking of his property to be $____.

We further find the damages to the remainder to be $____.

[*Signature Lines*]

300.72 Instruction On Use of Verdict Forms--Just Compensation--Fact of Damage To Remainder Not Contested Or Contested—Multiple Tracts

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

You are to return a separate verdict form for each tract of property involved in this case. A separate verdict form for each tract will be furnished to you for that purpose. Each form will be marked with the name of the tract and the defendant to which the form applies.

When you have determined the just compensation to be paid for each tract taken, you will complete the appropriate verdict form.

You will also decide [whether there is] [the amount of the] damage to the remainder [, and if so, the amount of that damage]. You will then complete the appropriate verdict form for each remainder.

[If you find there (is) (will be) no damage to a remainder, write the word "None" in the blank on the appropriate form.]

300.72.1 Forms of Verdict--Just Compensation--Fact of Damage to Remainder Not Contested or Contested--Multiple Tracts

Verdict Form--Part Taken

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of his property [insert identifying name or number of part taken] to be $____.

[*Signature Lines*]

Verdict Form--Damage to Remainder

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the remainder of his property [insert identifying name or number of remainder] to be $____.

[*Signature Lines*]

300.73 Instruction On Use of Verdict Forms— Easement Strip--Underground Pipeline Or Cable--Damage To Land Outside Strip Not Contested Or Contested

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the damage to the property within the easement strip, you will complete the appropriate verdict form.

You will also decide [whether there is] [the amount of the] damage to the defendant's property outside the easement strip [, and if so, the amount of that damage].

[If you find there (is) (will be) no damage to the property outside the easement strip, write the word “None” in the blank on the appropriate form.]

300.73.1 Forms of Verdict--Easement Strip— Underground Pipeline or Cable--Damage to Land Outside Strip Not Contested or Contested

Verdict Form--Damage to Property Within the Easement Strip

We, the jury, find the damages to be paid to the defendant defendant's name for the damage to his property within the easement strip identify easement strip by name and number to be $____.

[*Signature Lines*]

Verdict Form--Damage to Property Outside the Easement Strip

We, the jury, find the damages to be paid to the defendant defendant's name for the damage to his property outside the easement strip identify property outside the easement strip by name and number to be $____.

[*Signature Lines*]

300.74 Instruction On Use of Verdict Forms— Overhead Electric Transmission Line Case— Damage To Easement Strip Not Contested Or Contested— Damage To Land Outside Strip Not Contested Or Contested

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the just compensation to be paid to the defendant for his part of the property which is occupied by the structures supporting the transmission lines, you will complete the appropriate verdict form.

> [When reading this instruction, the court should now say, "This verdict form reads as follows:" and should then read the corresponding verdict form to the jury.]

You will also decide [whether there is] [the amount of the] damage to that part of the easement strip not occupied by the structures [, and if so, the amount of that damage].

> [When reading this instruction, the court should now say, "This verdict form reads as follows:" and should then read the corresponding verdict form to the jury.]

[If you find there (is) (will be) no damage to that part of the easement strip not occupied by the structures, write the word "None" in the blank on the appropriate form.]

You will also decide [whether there is] [the amount of the] damage to the defendant's property outside the easement strip [, and if so, the amount of that damage].

> [When reading this instruction, the court should now say, "This verdict form reads as follows:" and should then read the corresponding verdict form to the jury.]

[If you find there (is) (will be) no damage to the defendant's property outside the easement strip, write the word "None" in the blank on the appropriate form.]

Notes on Use

Where there is no damage claimed to the land outside the easement strip, omit the paragraphs that deal with that type of damage.

Use the bracketed material in accordance with whether damage to the part of the easement strip not occupied by the structures and to the part of the property lying outside the easement strip is contested or not contested.

300.74.1 Forms of Verdict--Overhead Electric Transmission Line Case--Damage to Easement Strip Not Contested or Contested--Damage to Land Outside Strip Not Contested or Contested

Verdict Form--Property Occupied by Structures

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of that part of his property which is occupied by the structures supporting the transmission lines identify property occupied by structures by name and number to be $____.

[*Signature Lines*]

Verdict Form--Damage to Easement Strip Not Occupied by Structures

We, the jury, find the damages to be paid to the defendant [defendant's name] for the damage to that part of the easement strip which is not occupied by the structures supporting the transmission lines [identify part of easement strip not occupied by structures by name and number] to be $____.

[Signature Lines]

Verdict Form--Damage to Property Outside the Easement Strip

We, the jury, find the damages to be paid to the defendant [defendant's name] for the damage to his property outside the easement strip [identify property outside the easement strip by name and number] to be $____.

[Signature Lines]

300.75 Instruction On Use of Verdict Forms--Just Compensation— Total Taking of Fee--Total Taking of Leasehold— Tenant's Share Contested

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms and return them into court. Your verdicts must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

When you have determined the total just compensation to be paid for the property taken, you will complete the appropriate verdict form.

> [When reading this instruction, the court should now say, "This verdict form reads as follows:" and should then read the corresponding "total just compensation" verdict form to the jury.]

You will also decide whether the tenant is entitled to a share of that compensation, and, if so, the amount of the tenant's share. You will then complete the appropriate verdict form for the tenant.

> [When reading this instruction, the court should now say, "These verdict forms read as follows:" and should then read the corresponding tenant verdict forms to the jury.]

300.75.1 Forms of Verdict--Just Compensation--Total Taking of Fee--Total Taking of Leasehold--Tenant's Share Contested

Verdict Form--Total Just Compensation

We, the jury, find the just compensation to be paid to the defendant [defendant's name] for the taking of his property insert identifying name or number of property taken to be $____.

[*Signature Lines*]

Verdict Form--Tenant Entitled to Share Compensation

We, the jury, find that the tenant [tenant's name] is entitled to share in the total just compensation. We further find the tenant's share of the total just compensation to be $____, said amount to be deducted from the total just compensation to be paid to the defendant [defendant's name].

[Signature Lines]

Verdict Form--Tenant Not Entitled to Share Compensation

We, the jury, find that the tenant [tenant's name] is not entitled to share in the total just compensation.

[Signature Lines]

300.76 Instruction On Use of Verdict Form--Total Taking of Leasehold--Leasehold The Only Interest Taken

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

A verdict form is supplied with these instructions. After you have reached your verdict, fill in and sign the verdict form and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

You will decide whether the defendant [defendant-tenant's name] is entitled to compensation, and, if so, the amount of that compensation. You will then complete the verdict form.

> [When reading this instruction, the court should now say, "which reads as follows:" and should then read the verdict form to the jury.]

If you find that the defendant is entitled to compensation for the taking of his leasehold interest, insert the amount in the blank in the form. If you find that the defendant is not entitled to compensation for the taking of his leasehold interest, insert the word "None" in the blank in the form.

300.76.1 Form of Verdict--Just Compensation--Total Taking of Leasehold--Leasehold the Only Interest Taken

Verdict Form--Leasehold Interest Only

We, the jury, find the just compensation to be paid to the defendant [defendant-tenant's name] for the taking of his leasehold [insert identifying name or number of property taken] to be $____.

[Signature Lines]

300.80 Just Compensation Definition

When I use the words "Just Compensation" for the defendant's property which [will be] [has been] taken, I mean the fair cash market value of the property at its highest and best use [on insert filing date of complaint].

Notes on Use

The past tense should be used when the property has been taken under the "Quick Take" provision of the Eminent Domain Act, 735 ILCS 5/7-103 (1994).

There are two situations when the instruction might have to be modified: (1) when the property owner seeks to show depreciation in the value of the property prior to the filing which was proximately caused by the public improvement; and (2) when the property owner seeks to show a substantial appreciation in the value of the property between the time the complaint is filed and the time of trial. *See* the discussion of the *City of Rock Island* and *Kirby Forest Industries* cases in the Comment below.

Comment

The constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. Art. 1, §15 (1970). This requirement is repeated in the Eminent Domain Act. 735 ILCS 5/7-101 to 7-129 (1994). Definitions of "just compensation" have ranged from the "amount of money necessary to put him in as good condition financially as he was with the ownership of the property," *People ex rel. Director of Finance v. Young Women's Christian Ass'n*, 74 Ill.2d 561, 572; 387 N.E.2d 305, 311; 25 Ill.Dec. 649, 655 (1979), to a "sum of money that is the equivalent of the value of the property." *Chicago Land Clearance Comm'n v. Darrow*, 12 Ill.2d 365, 371-372; 146 N.E.2d 1, 5 (1957). But despite differences in definition, the applied measure of just compensation has been constant. The value to the owner of the property taken or damaged for his particular purposes, or its value to the condemnor for some special use, have been rejected in favor of the market value of the property at the highest and best use to which it is adapted. *City of Chicago v. Harrison-Halsted Building Corp.*, 11 Ill.2d 431, 143 N.E.2d 40 (1957); *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill.2d 520, 531-532; 182 N.E.2d 169, 176 (1962), *appeal dism'd, cert. denied*, 371 U.S. 185, 83 S.Ct. 266, 9 L.Ed.2d 227 (1962); *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 44 Ill.App.3d 49, 57-58; 360 N.E.2d 70, 77-78; 4 Ill.Dec. 323, 331-332 (1976), s24 *aff'd*, 69 Ill.2d 308, 314-19; 371 N.E.2d 616, 618-620; 13 Ill.Dec. 681, 683-85 (1977)

Defining just compensation for the jury in terms of the "richer or poorer" test is not recommended. *See* Comment to IPI 300.82.

This instruction is consistent with §7-121, under which all evidence of value and the determination of just compensation must be made as of the date on which the complaint was filed, and it was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974).

However, the property owners have the right to establish the amount of any depreciation

in the value of their property which was proximately caused prior to the filing by the public improvement for which their property was taken. *City of Rock Island v. Moline Nat. Bank*, 54 Ill.App.3d 853, 368 N.E.2d 1113, 11 Ill.Dec. 505 (1977). And in *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), the Supreme Court said that it is a violation of the fifth amendment to give the property owner substantially less than the market value of his property at the time of the "taking" by the government. Therefore, if an owner's property appreciates substantially between the time the complaint is filed and the time that payment is tendered, it is arguable that §7-121 may be subject to qualification or exception. There are presently no Illinois appellate decisions considering the effect of the *Kirby* decision on Illinois condemnation law and practice.

300.81 Fair Cash Market Value--Definition

When I use the words "fair cash market value" I mean that price which a willing buyer would pay in cash and a willing seller would accept, when the buyer is not compelled to buy and the seller is not compelled to sell.

Comment

In discussing just compensation, the Illinois Supreme Court has used the terms "fair cash market value" and "market value" interchangeably. *E.g., Crystal Lake Park Dist. v. Consumers' Co.*, 313 Ill. 395, 402; 145 N.E. 215, 218 (1924). However, it is cash market value which the jury must determine. *Forest Preserve District v. Barchard*, 293 Ill. 556, 563; 127 N.E. 878, 881, 882 (1920); *City of Chicago v. Mullin*, 285 Ill. 296, 300; 120 N.E. 785, 787 (1918); *Dady v. Condit*, 209 Ill. 488, 493; 70 N.E. 1088, 1090 (1904); *Department of Transportation v. Toledo, Peoria & W. R. Co.*, 59 Ill.App.3d 886, 889; 376 N.E.2d 88, 90-91; 17 Ill.Dec. 195, 198 (3d Dist.1978); *Department of Business and Economic Development v. Pioneer Trust & Savings Bank*, 39 Ill.App.3d 8, 10-11, 349 N.E.2d 467, 470-71 (2d Dist.1976). Although evidence of credit sales of comparable property and evidence of sales on deferred payments is admissible, it is for the jury to determine the weight to be given that evidence in determining the ultimate fact of fair cash market value. *Forest Preserve Dist. v. Barchard*, 293 Ill. 556, 127 N.E. 878 (1920); *City of Chicago v. Mullin*, 285 Ill. 296, 300; 120 N.E. 785, 787 (1918); *Dady v. Condit*, 209 Ill. 488, 493; 70 N.E. 1088, 1090 (1904); *Department of Conservation v. Aspegren Financial Corp.*, 72 Ill.2d 302, 310-313; 381 N.E.2d 231, 235-236; 21 Ill.Dec. 153, 157-158 (1978); *Department of Public Works & Bldgs. v. Klehm*, 56 Ill.2d 121, 125-126; 306 N.E.2d 1, 3-4 (1973).

This instruction was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974), and *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 196 Ill.App.3d 5, 552 N.E.2d 1151, 142 Ill.Dec. 410 (2d Dist.1990).

300.82 Just Compensation--Richer Or Poorer--Owner To Be Made Whole--Definition

The committee recommends that no instruction be given defining "just compensation" in terms of the "richer or poorer" test or on the basis that the owner should be "made whole."

Notes on Use

"Just compensation" is defined in IPI 300.80.

Comment

The Illinois Supreme Court has accepted fair cash market value as the standard for determining just compensation for land taken, *Housing Authority v. Kosydor*, 17 Ill.2d 602, 605-606; 162 N.E.2d 357, 359 (1959), and the difference between the value of the land before and after the taking, *County Board of School Trustees v. Elliott*, 14 Ill.2d 440, 444-446; 152 N.E.2d 873, 876-877 (1958), as the standard for determining the damages to land not taken. The application of these two standards does not necessarily result in making the property owner "whole," so that he will not be "poorer or richer" by reason of the property being taken. Consequently, the "richer or poorer" instruction does not define "just compensation" accurately and might confuse and mislead the jury. There are many financial losses which an owner may suffer as a result of the taking which the court has held to be noncompensable insofar as the law of eminent domain or the Illinois Constitution is concerned. Examples of such financial losses which are not compensable are (1) cost of moving personal property, *Housing Authority v. Kosydor*, 17 Ill.2d 602, 605-608; 162 N.E.2d 357, 359-361 (1959); (2) value of business and business income, *Chicago Land Clearance Commission v. Darrow*, 12 Ill.2d 365, 371-373; 146 N.E.2d 1, 5-6, 68 A.L.R.2d 532 (1957); (3) payments made by the owner for financing, appraisal and architects' fees for a proposed improvement on the property, *City of Chicago v. Provus*, 415 Ill. 618, 621; 114 N.E.2d 793, 794, 795 (1953); (4) loss of land for future expansion of the business, *City of Chicago v. Equitable Life Assurance Society*, 8 Ill.2d 341, 348; 134 N.E.2d 296, 300 (1956); (5) reduced traffic flow by virtue of a median strip, *Department of Public Works & Bldgs. v. Mabee*, 22 Ill.2d 202, 174 N.E.2d 801 (1961); and (6) loss of business during the time the improvement is being constructed, *Department of Public Works & Bldgs. v. Maddox*, 21 Ill.2d 489, 493-494; 173 N.E.2d 448, 450-451 (1961).

In *Housing Authority v. Kosydor*, 17 Ill.2d 602, 607; 162 N.E.2d 357, 360 (1959), the court held that "just compensation" does not include payment of moving expenses except where private property is taken only temporarily for public use. The court then made the following statement:

> Absent this exception, a condemnee's right of compensation is limited to the market value of the interest taken. "Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." *United States v. General Motors Corp.*, 323 U.S. 373, 379; 65 S.Ct. 357, 360; 89 L.Ed. 311.

In *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.*, 17 Ill.2d 570, 576-577; 162 N.E.2d 373, 377-378 (1959), the owner's counsel argued to the jury that, while the jury could not give the owner compensation for moving, for its inconvenience, or for the loss of goodwill in

that location, the jury could give the owner just compensation that would render it neither richer nor poorer, and that the jury would be so instructed by the court. Even though the condemnor did not object to that argument, the court held that making such an argument was reversible error.

300.83 Fair Rental Value--Definition

When I use the words "fair rental value" I mean that amount of rent which a tenant willing to rent would pay and an owner willing to lease would accept, when the tenant is not compelled to rent and the owner is not compelled to lease.

Comment

The basis for determining the damages a tenant has sustained is "fair rental value." *Commercial Delivery Service v. Medema*, 7 Ill.App.2d 419, 424; 129 N.E.2d 579, 581 (1st Dist.1955); *Department of Public Works & Bldgs. v. Blackberry Union Cemetery*, 32 Ill.App.3d 62, 65; 335 N.E.2d 577, 580 (2d Dist.1975). This instruction is patterned after the definition of fair cash market value, IPI 300.81. The word "cash" is not used because rent is usually paid in cash.

300.84 Highest and Best Use--Definition

When I use the expression "highest and best use" of property I mean that use which would give the property its highest cash market value on [insert date complaint was filed]. [This may be the actual use of the property on that date or a use to which it was then adaptable and which would be anticipated with such reasonable certainty that it would enhance the market value on that date.]

Notes on Use

The bracketed material should be used only where there is evidence of adaptability to other uses which may be anticipated with reasonable certainty.

Comment

The highest and best use of property includes "not only the actual uses of the land, but its capabilities insofar as they add to its market value." *Haslam v. Galena & S.W.R. Co.*, 64 Ill. 353, 355-356 (1872); *Housing Authority v. Kosydor*, 17 Ill.2d 602, 608; 162 N.E.2d 357, 360 (1959); *Department of Transp. v. Toledo, P. & W. R. Co.*, 59 Ill.App.3d 886, 889; 376 N.E.2d 88, 90-91; 17 Ill.Dec. 195, 198 (3d Dist.1978).

There must be a present capacity for a use which may be anticipated with reasonable certainty so that it enhances the market value of the property on the date of the complaint. *Pittsburgh, C., C. & St. L. Ry. Co. v. Gage*, 286 Ill. 213, 224; 121 N.E. 582, 586, 587 (1918); *Illinois Light & Power Co. v. Bedard*, 343 Ill. 618, 626-27; 175 N.E. 851, 854 (1931); *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 44 Ill.App.3d 49, 57-58; 360 N.E.2d 70, 77-78; 4 Ill.Dec. 323, 330-331 (2d Dist.1976), *aff'd*, 69 Ill.2d 308, 314-319; 371 N.E.2d 616, 618-620; 13 Ill.Dec. 681, 683-685 (1977).

This instruction was approved in *Department of Public Works & Bldgs. v. Guerine*, 19 Ill.App.3d 509, 311 N.E.2d 722 (2d Dist.1974).

See Comment to IPI 300.80.

300.85 Reasonable Probability of Rezoning

If you find that on insert date complaint was filed there was a reasonable probability of rezoning the property, then you may consider the effect of such rezoning in determining just compensation in this case.

Notes on Use

This instruction should only be used where there is evidence of a reasonable probability of rezoning and also should be used in conjunction with IPI 300.84.

Comment

The reasonable probability of rezoning is a proper factor to consider in determining the value of the property. *Department of Public Works & Bldgs. v. Rogers*, 39 Ill.2d 109, 233 N.E.2d 409 (1968); *Department of Transportation v. Western Nat. Bank*, 63 Ill.2d 179, 347 N.E.2d 161 (1976).

In *Department of Public Works & Bldgs. v. Association of Franciscan Fathers*, 69 Ill.2d 308, 371 N.E.2d 616, 13 Ill.Dec. 681 (1977), the Illinois Supreme Court reaffirmed the above rule and held that the trial court erred by failing to give the jury an instruction on the reasonable probability of rezoning. The court recommended giving a separate instruction in conjunction with IPI 300.84.

Lake County Forest Preserve Dist. v. Reliance Standard Life Ins. Co., 29 Ill.App.3d 145, 329 N.E.2d 344 (2d Dist.1975), held that under the conditions enumerated in the opinion, the doctrine of reasonable probability of rezoning may be extended to allow consideration of the reasonable probability of annexation. And in *Lake County Forest Preserve Dist. v. Petersen*, 93 Ill.App.3d 731, 417 N.E.2d 862, 49 Ill.Dec. 172 (2d Dist.1981), the court held that the doctrine of reasonable probability of rezoning may be extended to include the reasonable probability of obtaining an E.P.A. permit for operation of a sanitary landfill on the land to be condemned. If the trial court determines that the jury may consider evidence of the reasonable probability of these or other future events in determining the issue of just compensation, then this instruction should be modified accordingly.

300.86 Remainder--Definition--Fee Case

When I use the word "remainder" I mean the defendant's property which is not taken by the plaintiff and which the defendant claims is damaged by the taking.

Comment

This definition of "remainder" permits the use of a single word in these instructions to express the concept of "the defendant's property which is not taken by the plaintiff and which the defendant claims is damaged by the taking."

In a case involving an easement the instruction should be modified to read:

When I use the word "remainder" I mean the defendant's property outside the easement strip which defendant claims is damaged by the imposition of the easement.

Ordinarily an easement is not considered a taking of property.

300.87 Easement--Definition

When I use the term "easement," I mean the right to use the property of another for purpose.

Comment

For the purposes of condemnation cases an easement has been defined as the "subjection [of a part of defendant's property] to condemnor's superior right to use the land for the purpose for which it is condemned." *North Shore Sanitary Dist. v. Schulik*, 12 Ill.2d 309, 312; 146 N.E.2d 25, 26 (1957).

400.00

Strict Product Liability

Introduction

Strict product liability is imposed without regard to traditional questions of privity, fault, or the user's ordinary negligence. It was developed in response to the inadequacy of negligence and warranty remedies. Product liability cases based on negligence, warranties, or other contractually-related theories of liability are not covered by these instructions.

The Origins of Strict Liability

The evolution of strict product liability began with the imposition of liability on sellers of food when a special implied warranty theory was developed. *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853 (1918); *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339 (N.Y. 1815). Although a privity requirement persisted for a time, even in food cases, that requirement was eventually abolished and the right to recover was extended to the injured consumer. *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Patargias v. Coca--Cola Bottling Co*., 332 Ill.App. 117, 74 N.E.2d 162 (1st Dist. 1947); *Welter v. Bowman Dairy Co.*, 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

The special warranty in the case of food was gradually expanded to intimate items such as hair dye and soap. *See e.g.*, *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954). In 1960, the landmark decision of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), further extended the special warranty theory to all products. The *Henningsen* decision, although not employing the term "strict liability in tort," resolved the privity dilemma and articulated the rationale upon which the total transition from special warranty to strict liability in tort would ultimately be made:

> The burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . . .
>
> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity . . . .
>
> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial. *Henningsen v. Bloomfield Motors, Inc.*, *supra,* 32 N.J. at 379-384, 161 A.2d at 81-84.

After Chief Justice Traynor of the California Supreme Court authored the decision adopting strict liability in tort in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963), the American Law Institute adopted Section 402A of the Restatement (Second) of Torts in 1964 which embraced the theory of strict liability in tort for defective products. The Illinois Supreme Court's decision in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), soon followed. The *Suvada* decision is the touchstone of strict liability in Illinois, and, although refinements have been supplied by subsequent decisions, the basic element of the theory enunciated therein remains unchanged today:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not as assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products ... made clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by [its] defective products unless those rules also serve the purposes for which such liability is imposed. *Suvada v. White Motor Co.*, 32 Ill.2d at 621, 210 N.E.2d at 187 (citing *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701).

Strict liability in tort for defective products is not a doctrine of absolute liability which entitles a person injured while using a product to recover from any member of the chain of production or distribution; it does not make the manufacturer, distributor or retailer an insurer of the consumer's safety. *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 111, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983); *Artis v. Fibre Metal Prods.*, 115 Ill.App.3d 228, 450 N.E.2d 756, 71 Ill.Dec. 68 (1st Dist. 1983). "Fault," in the context of strict product liability, is the act of placing an unreasonably dangerous product in the stream of commerce.

Parties Subject to Strict Product Liability

At common law, in order to be subject to strict product liability, a defendant must be engaged in the business of placing such products in the stream of commerce. *Torres v. Wilden Pump & Eng'g Co.*, 740 F.Supp. 1370 (1990); *Timm v. Indian Springs Recreation Ass'n*, 187 Ill.App.3d 508, 543 N.E.2d 538, 135 Ill.Dec. 155 (4th Dist. 1989) (used golf cart, isolated sale; no liability). Any person in the chain of distribution of a product, including manufacturers, suppliers, distributors, wholesalers, retailers, and commercial lessors, could be held strictly liable for any defect. *Cruz v. Midland--Ross Corp.*, 813 F.Supp. 628 (1993); *Crowe v. Pub. Bldg. Comm'n*, 74 Ill.2d 10, 383 N.E.2d 951, 23 Ill.Dec. 80 (1978).

Legislation has modified the common law strict liability of non-manufacturers in the chain of distribution. The Distributor's Act, 735 ILCS 5/2-621, permits dismissal of strict liability claims against non-manufacturers not at the source of the chain of distribution in a product liability action. The dismissal must be based on an affidavit filed by the defendant that correctly identifies the manufacturer of the product. The court, however, cannot enter a dismissal if the plaintiff shows that the defendant filing the affidavit has exercised some significant control over

the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product, 735 ILCS 5/2-621(c) (1), or that the defendant had actual knowledge of the alleged defect, 735 ILCS 5/2-621(c) (2), or that the defendant created the alleged defect in the product, 735 ILCS 5/2-621(c) (3). Moreover, the plaintiff can move to vacate any order of dismissal if the statute of limitations has run against the manufacturer, 735 ILCS 5/2-621(b) (1), or if the manufacturer is not subject to personal jurisdiction in Illinois, 735 ILCS 5/2-621(b) (3).

Although strict product liability generally extends to sellers of all products, strict liability may not extend to sellers of used products under certain circumstances. Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill.2d 17, 329 N.E.2d 785 (1975) (seller of used car not strictly liable); *Timm v. Indian Springs Recreation Ass'n*, *supra*.

ELEMENTS OF PLAINTIFF'S CASE

Plaintiff's Prima Facie Case

To recover in strict product liability, a plaintiff must plead and prove that the injury or damage resulted from a condition of the product manufactured or sold by the defendant, that the condition was an unreasonably dangerous one, and that the condition existed at the time the product left the manufacturer's control. (*Coney*, *supra,* 97 Ill.2d at 111; *Hunt v. Blasius*, 74 Ill.2d 203, 210 (1978), *Suvada*, *supra,* 32 Ill.2d at 623; *Restatement Second of Torts, Section 402A*). The determination of whether a product is defective, and therefore unreasonably dangerous, is ordinarily a question of fact for the jury (*see Renfro v. Allied Indus. Equip. Corp.*, 155 Ill.App.3d 140, 155 (1987)), and, in making its determination, the credibility of the witnesses and the conflicts in the evidence are to be resolved by the jury. *Korando v. Uniroyal Goodrich Tire Co.*, 159 Ill.2d 335 (1994).

Although the defendant's role in commerce will seldom be an issue, the plaintiff may also be required to prove that the defendant was in the business of selling the product and not solely an installer. *Restatement (Second) of Torts* §402A (1965).

The plaintiff may create an inference that the product was unreasonably dangerous by direct or circumstantial evidence that there was no abnormal use of the product, that there was no reasonable secondary cause of the injury, and that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. *Tweedy v. Wright Ford Sales*, 64 Ill. 2d. 570 (1976); *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993); *see* IPI 400.01.01 and 400.02.01.

Meaning of "Unreasonably Dangerous"

See Comment to IPI 400.06 and 400.06A for a discussion of the case law defining "unreasonably dangerous."

Types of Defects

Products can be defective and unreasonably dangerous in any of three ways. First, a particular item may contain a manufacturing flaw. Second, the product may be defectively

designed. Third, the product may have an informational defect (inadequate warnings, directions, or instructions affixed to or accompanying the product).

Manufacturing Defects

A particular unit of a product may be defective because of an imperfection resulting from some miscarriage during the manufacturing process. *See*, *e.g.*, *Tweedy v. Wright Ford Sales*, Inc., 64 Ill.2d 570, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976) (automobile with defective brakes); *McKasson v. Zimmer Mfg. Co.*, 12 Ill.App.3d 429, 299 N.E.2d 38 (2d Dist. 1973) (imperfections in surgical rod); *Kappatos v. Gray Co.*, 124 Ill.App.2d 317, 260 N.E.2d 443 (1st Dist. 1970) (defective plastic spray painting hose).

Design Defects

A product may be defective because its design renders it unreasonably dangerous.

There are two tests that may be used to establish a design defect. The first, which goes back to the original *Restatement (Second) of Torts* §402A, is known as the "consumer expectation" test. Under this test, the danger must go beyond that which would be contemplated by the ordinary consumer with ordinary knowledge common to the community as to its characteristics. *Restatement (Second) of Torts* §402A Comment (I) (1965); *Riordan v. Int'l Armament Corp.*, 132 Ill.App.3d 642, 477 N.E.2d 1293, 87 Ill.Dec. 765 (1st Dist. 1985).

In addition to the consumer expectation test, the plaintiff may choose to prove a strict product liability case under the "risk-utility" test. Under this test, a product is unreasonably dangerous, subjecting a manufacturer to liability, if the design is a cause of the injuries and if the benefits of the challenged design are outweighed by the design's inherent risk of danger. *Lamkin v. Towner*, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990); *Palmer v. Avco Distrib. Corp.*, 82 Ill.2d 211, 412 N.E.2d 959, 45 Ill.Dec. 377 (1980). These principles were fully discussed by the Supreme Court in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai*, 224 Ill.2d 247 (2007); and *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329 (2008).

Inadequate Warnings and Instructions

A product also may be unreasonably dangerous because of a failure to adequately warn of a danger or a failure to adequately instruct on the proper use of the product. *Hammond v. N. Am. Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210, 73 Ill.Dec. 350 (1983). However, when a danger is obvious and generally appreciated, there is no duty to warn of that danger. *McColgan v. Envtl. Control Sys., Inc.*, 212 Ill.App.3d 696, 571 N.E.2d 815, 156 Ill.Dec. 835 (1st Dist. 1991); *Smith v. Am. Motors Sales Corp.*, 215 Ill.App.3d 951, 576 N.E.2d 146, 159 Ill.Dec. 477 (1st Dist. 1991).

A defendant has no duty to warn of risks of which it neither knew nor should have known at the time the product was manufactured. *Byrne v. SCM Corp.*, 182 Ill.App.3d 523, 538 N.E.2d 796, 131 Ill.Dec. 421 (4th Dist. 1989) (manufacturer of epoxy paint); *Salvi v. Montgomery Ward & Co.*, 140 Ill.App.3d 896, 489 N.E.2d 394, 95 Ill.Dec. 173 (1st Dist. 1986) (air gun manufacturer had no duty to warn of dangers of which it neither knew nor should have known);

Elgin Airport Inn, Inc. v. Commonwealth Edison Co., 89 Ill.2d 138, 432 N.E.2d 259, 59 Ill.Dec. 675 (1982) (supplier of electricity not strictly liable for failure to warn when it neither knew nor should have known about abnormal current); Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194, 37 Ill.Dec. 304 (1980) (pharmaceutical manufacturer can only be held liable for its failure to warn of those risks it knew or should have known at the time of manufacture).

Foreseeability

Both the person using the product and the use to which it is being put must be reasonably foreseeable. In *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974), the Illinois Supreme Court emphasized the foreseeability requirement:

> In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product, a position rejected by this Court in *Suvada*.

Id. at 11, 310 N.E.2d at 4; *see Woodill v. Parke Davis & Co.*, *supra*. Recognizing that "in retrospect almost nothing is entirely unforeseeable," *Mieher v. Brown*, 54 Ill.2d 539, 544, 301 N.E.2d 307, 309 (1973), the Supreme Court in *Winnett v. Winnett* and thereafter has interpreted foreseeability to mean "that which it is *objectively reasonable* to expect, not merely what might conceivably occur." *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 513 N.E.2d 387, 111 Ill.Dec. 944 (1987). Accordingly, a bystander may recover if injured by another's use of a defective product, so long as the presence of the bystander is reasonably foreseeable. *Schulz v. Rockwell Mfg. Co.*, 108 Ill.App.3d 113, 117, 438 N.E.2d 1230, 1232, 63 Ill.Dec. 867, 869 (2d Dist. 1982).

Damages

The plaintiff in a strict liability action may recover compensatory damages. Recovery in strict liability always has included damage to the product itself. *Suvada v. White Motor Co.*, *supra*. However, under the so-called "*Moorman*" doctrine (based on *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 61 Ill.Dec. 746 (1982)), a plaintiff cannot recover in tort for solely economic losses. In *Moorman*, the court defined economic loss as:

> damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits--without any claim of personal injury or damage to other property *** . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. 91 Ill.2d at 82, 435 N.E.2d at 449, 61 Ill.Dec. at 752.

The economic loss doctrine as stated in *Moorman* applies to negligence and strict liability cases. Accordingly, a homeowner cannot recover in tort for solely economic losses resulting from a homebuilder's negligence. *2314 Lincoln Park W. Condo. Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill.2d 302, 555 N.E.2d 346, 144 Ill.Dec. 227 (1990); *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill.2d 150, 449 N.E.2d 125, 70 Ill.Dec. 251 (1983) (condominium

owners cannot recover economic losses from developer); *Redarowicz v. Ohlendorf*, 92 Ill.2d 171, 441 N.E.2d 324, 65 Ill.Dec. 411 (1982).

The *Moorman* doctrine applies even in the absence of an alternative remedy in contract. *Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 115 Ill.2d 146, 503 N.E.2d 246, 104 Ill.Dec. 689 (1986).

AFFIRMATIVE DEFENSES

Plaintiff's Contributory Fault--Assumption of the Risk

One of the refinements to the *Suvada* decision was made in *Coney v. J.L.G. Indus.*, Inc., 97 Ill.2d 104, 454 N.E.2d 197, 73 Ill.Dec. 337 (1983). Since it was "demanded by today's society" and in order to produce "a more just and socially desirable distribution of loss" in negligence actions, Illinois adopted the concept of the "pure form" of comparative negligence in *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981). Adopting the same reasoning which supported its decision in *Alvis*, and after determining that the vast majority of jurisdictions have found comparative fault theories to be applicable to strict liability cases, the Supreme Court in *Coney* adopted comparative fault principles in strict product liability actions. The Court specifically found that the application of comparative fault principles in a product liability action would not frustrate the Court's fundamental reasons for adopting strict product liability as set out in *Suvada*. *Coney v. J.L.G. Indus., Inc.*, *supra* at 116.

However, plaintiff's fault is a defense only if it constitutes assumption of the risk. Plaintiff's ordinary contributory negligence is not a defense to strict product liability when that negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. *Coney v. J.L.G. Indus., Inc.*, *supra* at 118-119. A consumer's unobservant, inattentive, ignorant, or awkward failure to discover or guard against a defect, as opposed to assuming a known risk, is not a defense to a strict product liability claim. *Id*.

The affirmative defense of assumption of the risk requires the defendant to prove that the plaintiff knew of the specific product defect, understood and appreciated the risk of injury from that defect, and nevertheless used the product in disregard of the known danger. *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 426-427 (1970) A user may assume a product is safe; however, if the user finds a defect and proceeds to use the product, the user assumes the risk of injury or property damage. The test of whether the plaintiff has assumed the risk is subjective; the conduct and knowledge of the plaintiff is at issue. The jury considers the plaintiff's age, experience, knowledge, understanding, and the obviousness of the defect in considering assumption of the risk. *Williams v. Brown Mfg. Co.*, *supra* at 430-431; *see Hanlon v. Airco Indus. Gases*, 219 Ill.App.3d 777, 579 N.E.2d 1136, 162 Ill.Dec. 322 (1st Dist. 1991); *Calderon v. Echo, Inc.*, 244 Ill.App.3d 1085, 1091,614 N.E.2d 140 (1st Dist. 1993).

Comparative fault principles apply to the plaintiff's assumption of the risk. *Coney v. J.L.G. Indus., Inc.*, *supra*. If plaintiff's fault in assuming the risk is 50% or less of the total fault that proximately caused the injury or damage, plaintiff's damages are reduced by that percentage. But under legislation enacted in 1986, the plaintiff is barred from recovery if the plaintiff's assumption of the risk is "more than 50% of the proximate cause of the injury or damage for which recovery is sought." 735 ILCS 5/2-1116; *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d

292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993).

Misuse--Foreseeable and Unforeseeable

"Misuse" has been defined as the use of a product for a purpose neither intended nor objectively foreseeable by a reasonably prudent manufacturer. *E.g., King v. Am. Food Equip. Co.*, 160 Ill.App.3d 898, 513 N.E.2d 958, 965, 112 Ill.Dec. 349, 356 (1st Dist. 1987). *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 119 (1983), in a phrase that has provided confusion, stated: "[h]owever, the defenses of misuse and assumption of the risk will no longer bar recovery."

Prior to *Coney*, an *unforeseeable* misuse of the product by the plaintiff was not recognized as an affirmative defense. The issue of unforeseeable misuse usually "arise[s] in connection with [the] plaintiff's proof of an unreasonably dangerous condition or in proximate causation, or both." *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 425, 261 N.E.2d 305 (1970) ("plaintiffs who 'misuse' a product--use it for a purpose neither intended nor 'foreseeable' (objectively reasonable) by the defendant--may be barred from recovery").

In *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 393 (7th Cir. 1990), the Seventh Circuit noted:

> Under Illinois law, misuse of a product is not an affirmative defense; rather, absence of misuse is part of plaintiff's proof of an unreasonably dangerous condition or of proximate cause. *Schwartz v. American Honda Motor Co., Inc.,* 710 F.2d 378, 381 (7th Cir. 1983), citing *Ill. State Trust Co. v. Walker Mfg. Co.,* 73 Ill.App.3d 585, 589, 29 Ill.Dec. 513, 516, 392 N.E.2d 70, 73 (1979).

In *Coney v. J.L.G. Indus., Inc.*, *supra,* the Supreme Court, referring to its *Williams* decision, said that "misuse" was a defense, and went on to hold that "misuse" would no longer bar recovery but rather would be incorporated into the concept of comparative fault. Importantly, the decision did not define "misuse," but its reference to the *Williams* decision leads to the conclusion that the court was referring to *unforeseeable* misuse.

In contrast to *unforeseeable* misuse, *foreseeable* misuse has never been a defense to a strict product liability action at all, since such a misuse, being foreseeable, does not affect the defendant's responsibility. The manufacturer of a product has always had the duty to furnish a product which is safe for *foreseeable* misuses, as well as for its intended uses. Spurgeon v. Julius Blum, Inc., 816 F. Supp. 1317 (C.D. Ill.1993).

Thus, the appellate court cases decided since *Coney* appear to conclude that the former rule--that *unforeseeable* misuse goes to the liability issue--has been replaced by the rule that *unforeseeable* misuse constitutes comparative fault, a damage-reducing factor. Several appellate court decisions have noted that misuse--defined as using the product for a purpose which is *neither* intended *nor foreseeable*--is an affirmative defense which operates to reduce the plaintiff's damages. *Arellano v. SGL Abrasives*, 246 Ill.App.3d 1002, 1010, 617 N.E.2d 130, 136, 186 Ill.Dec. 891, 897 (1st Dist. 1993) (finding of "misuse" vacated); *Varilek v. Mitchell Eng'g*

Co., 200 Ill.App.3d 649, 666-667, 558 N.E.2d 365, 377, 146 Ill.Dec. 402, 414 (1st Dist. 1990) (JNOV should have been entered on finding of "misuse"); *Suich v. H & B Printing Mach., Inc.*, 185 Ill.App.3d 863, 873-874, 541 N.E.2d 1206, 1212-13, 133 Ill.Dec. 768, 774-75 (1st Dist. 1989) (trial court properly refused to allow misuse as a defense); *Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill.App.3d 1088, 537 N.E.2d 1332, 1343, 130 Ill.Dec. 863, 874 (4th Dist. 1989).

Wheeler held:

> The issue of misuse traditionally arises in Illinois in conjunction with plaintiff's duty to prove an unreasonably defective product or proximate causation of the injury. See *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970). Prior to *Coney,* misuse was a complete defense to a strict liability action (*Coney,* 97 Ill.2d at 119, 73 Ill.Dec. at 343, 454 N.E.2d at 203-04), although it was not technically considered an affirmative defense. *Illinois State Trust Co. v. Walker Mfg. Co.*, 73 Ill.App.3d 585, 29 Ill.Dec. 513, 392 N.E.2d 70 (1979). However, some courts recognized misuse as an affirmative defense under certain circumstances. *Genteman v. Saunders Archery Co.*, 42 Ill.App.3d 294, 355 N.E.2d 647 (1976).

Dicta in *Lamkin v. Towner*, 138 Ill.2d 510, 531, 563 N.E.2d 449, 458, 150 Ill.Dec. 562, 571 (1990) commented that "neither a retailer nor a manufacturer can be held strictly liable for injuries resulting from the misuse of its product."

Introduction revised December 2007.

400.01 Strict Product Liability--Issues

[1]. The plaintiff claims that he was injured [while using] [as a result of the use of] the [product name, e.g. the hammer]. Plaintiff claims that there existed in the [product name] at the time it left the control of the defendant a condition which made the [product name] unreasonably dangerous in one or more of the following respects:

[*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the conditions which are claimed made the product unreasonably dangerous and which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[2]. The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control];

[that any of the claimed conditions existed in the [product name] at the time it was in its control];

[that any claimed condition of the [product name] made it unreasonably dangerous];

[that any claimed condition of the [product name] was a proximate cause of plaintiff's injuries]; [and]

[that plaintiff was injured to the extent claimed.]

[4]. [The defendant also claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of the risk on his part was a proximate cause of his injuries.]

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction must be modified to fit the allegations of the pleadings. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used as they apply to the particular case. Whenever required, variations consistent with the pleadings and proof should be used.

In a case where the product is not "in use" at the time of the occurrence, the word "by" may be substituted for the bracketed material on use in paragraph [1].

In the event there is an issue as to whether the defendant was in the business of supplying the particular product involved, the instruction must be modified by adding that particular element to the specific issues included in the instruction.

Fill in the blanks with the name of the product. In some cases, the product may be a component part.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

An issues instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist. 1953), that the issues made by the pleadings be concisely stated without characterization and without undue emphasis.

The elements necessary to state a cause of action in strict product liability are set forth in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The plaintiff must prove that his injury and damage proximately resulted from a condition of the product, that the condition made the product unreasonably dangerous, and that the condition existed at the time the product left the defendant's control.

The term "condition" used in *Suvada* is employed in these instructions although some of the cases use the word "defect" instead of "condition." *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Wright v. Massey--Harris, Inc.*, 68 Ill.App.2d 70, 215 N.E.2d 465 (5th Dist. 1966); *Haley v. Merit Chevrolet*, 67 Ill.App.2d 19, 214 N.E.2d 347 (1st Dist. 1966). *Restatement (Second) of Torts* §402A (1965) speaks in terms of a "defective condition." The phrase "unreasonably dangerous" in the *Suvada* case is used in this instruction because it is conversational and free from any connotation of traditional concepts of fault that might arise from the use of the word "defect."

The phrase "unreasonably dangerous" has its origins in §402A of the *Restatement (Second) of Torts* (1965). Since the Illinois Supreme Court adopted the phrase in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), most Illinois reviewing courts have used that phrase. It is defined in IPI 400.06.

Dean Wade has suggested in Strict Tort Liability of Manufacturers, 19 S.W. L.J. 5, 15 (1965), that "the test of imposing strict liability is whether the product is unreasonably dangerous, to use the words of the Restatement. Somewhat preferable is the expression 'not reasonably safe.'" The Illinois Supreme Court in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 343, 247 N.E.2d 401, 403 (1969), quoted from Wade's article but did not adopt his suggestion. In *Rios v. Niagara Mach. & Tool Works*, 59 Ill.2d 79, 83, 319 N.E.2d 232, 235 (1974), the Court indicated that the terms "unreasonably dangerous" and "not reasonably safe" are interchangeable. However, the *Restatement*, and *Suvada* and all its progeny, furnish persuasive authority that the jury should be instructed that it is the "unreasonably dangerous" condition of the product which leads to liability. *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247, 250, 256, 259 (2007) again affirmed that the basis of strict product liability in Illinois is whether the product is "unreasonably dangerous."

400.01.01 Strict Product Liability--Issues--Non-Specific Defect

[1]. [Under Count __,] the plaintiff claims that he was injured [while using] [as a result of the use of] the [product name] and that there existed in the product at the time it left the control of the defendant a condition which made it unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road] the [product name] did not perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

[2]. The plaintiff further claims that the unreasonably dangerous condition of the [product] was a proximate cause of his injuries.

[3]. The defendant denies

[that the [product] was ever in its control;]

[that the [product] was in an unreasonably dangerous condition at the time it left the defendant's control;]

[that the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function;]

[that the plaintiff was using the [product] in a normal manner;]

[that there was no other reasonable cause of the product's failure to perform;]

[that any unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries], and

[that the plaintiff was injured to the extent claimed.]

[4]. [The defendant claims that the plaintiff assumed the risk of injury in one or more of the following respects:
(*Set forth in simple form without undue emphasis or repetition the affirmative allegations in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[5]. [The defendant also claims that one or more of the foregoing was a proximate cause of the plaintiff's injury.]

[6]. [Plaintiff denies that he assumed the risk of injury and also denies that any assumption of risk on his part was a proximate cause of his injuries.]

Instruction and Notes revised December 2007.

Notes on Use

IPI 400.01.01 (issues) and IPI 400.02.01 (burden of proof) should be given when the plaintiff does not allege a specific defect in the product but rather seeks to create the inference that the product was defective by direct or circumstantial evidence that the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. Under such circumstances, plaintiff must also prove that there was no abnormal use of the product and that there was no secondary cause of the product's failure to perform properly. *Tweedy v. Wright Ford Sales*, 64 Ill.2d 570, 574, 357 N.E.2d 449, 2 Ill.Dec. 282 (1976). The failure to instruct the jury about the plaintiff's burden to prove the absence of abnormal use and the absence of secondary causes has been held to be error. *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 378-379, 618 N.E.2d 909, 188 Ill.Dec. 339 (1st Dist. 1993).

See also the Notes on Use to IPI 400.01.

400.02 Strict Product Liability--Burden of Proof

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction is designed to be used with IPI 400.01.

See Notes on Use to IPI 400.01. The bracketed material in the introductory paragraph must be used when plaintiff claims, and there is evidence tending to show, that more than one condition rendered the product unreasonably dangerous.

IPI 21.01 (Meaning of Burden of Proof) should be given with this instruction.

In a wrongful death or survival action, substitute “decedent” (or “decedent's”) or decedent's name in place of “plaintiff” (or “plaintiff's”), “his,” “her,” or “its” whenever appropriate.

Comment

See Comment to IPI 400.01.

400.02.01 Strict Product Liability--Burden of Proof--Non-Specific Defect

[Under Count __], The plaintiff has the burden of proving each of the following propositions:

First, that there existed in the [product] a condition which made the [product] unreasonably dangerous because

(a) [describe the occurrence, e.g., "In running off the road"] the [product] failed to perform in the manner reasonably to be expected in light of its nature and intended function,

(b) he was using the [product] in a normal manner, and

(c) there was no other reasonable cause of the product's failure to perform.

Second, that the condition existed at the time the [product] left the control of the defendant;

Third, that the plaintiff was injured; and

Fourth, that the unreasonably dangerous condition of the [product] was a proximate cause of the plaintiff's injuries.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff. But if, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant.

Instruction and Notes revised December 2007.

Notes on Use

Use with IPI 400.01.01 and IPI 21.01.

B400.02.01 Strict Product Liability--Burden of Proof--Assumption of Risk

The plaintiff has the burden of proving each of the following propositions [as to any one of the conditions claimed by the plaintiff]:

First, that the condition claimed by the plaintiff as stated to you in these instructions existed in the [product];

Second, that the condition made the [product] unreasonably dangerous;

Third, that the condition existed at the time the [product] left the control of the defendant;

Fourth, that the plaintiff was injured;

Fifth, that the condition of the [product] was a proximate cause of plaintiff's injuries.

If you find from your consideration of all the evidence that any one of these propositions has not been proved, then your verdict should be for the defendant. But if, on the other hand, you find from your consideration of all the evidence that each of these propositions has been proved, then you must consider the defendant's claim that the plaintiff assumed the risk of injury.

As to that claim, the defendant has the burden of proving each of the following propositions:

A: That the plaintiff had actual knowledge of the condition which the plaintiff claims made the [product] unreasonably dangerous;

B: That the plaintiff understood and appreciated the risk of injury from that condition and [proceeded] [continued] to use the [product];

C: That the condition known to plaintiff was a proximate cause of the plaintiff's claimed [injury] [damage].

[However, the plaintiff's inattentive or ignorant failure to discover or guard against the unreasonably dangerous condition of the [product] does not constitute assumption of the risk.]

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has not proved all of the propositions required of the defendant, then your verdict should be for the plaintiff and the plaintiff's damages will not be reduced.

If you find from your consideration of all the evidence that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then your verdict should be for the defendant.

If you find from your consideration of all the evidence that the plaintiff has proved all the propositions required of the plaintiff and that the defendant has proved all of the propositions required of the defendant, and if you find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the [injury] [damage] for which recovery is sought, then your verdict should be for the plaintiff and the plaintiff's damages will be reduced by the percentage of the plaintiff's fault in assuming the risk.

If you find that the plaintiff's [injury] [damage] was proximately caused by an unreasonably dangerous condition of the product and if you also find that the plaintiff assumed the risk of his injury, you will determine the plaintiff's proportion or percentage of the total fault by comparing the extent to which the plaintiff's assumption of the risk and the conduct of [other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage]. If you determine the plaintiff's percentage of the total fault was 50% or less, you will write that percentage on the appropriate line on your verdict form.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This should be used with IPI 400.01 and IPI 21.01.

If there is no issue of assumption of risk, IPI 400.02 should be used instead of this instruction.

If the case involves an affirmative defense (other than assumption of risk), this instruction (as well as IPI 400.01) should be modified as appropriate to include that defense.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

The bracketed portion of the last paragraph should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

The bracketed paragraph following paragraph C should be used when there is evidence of the plaintiff's negligent failure to discover the defect and the court determines that the paragraph will assist the jury in its determination of this issue.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability, and therefore the jury must be instructed in accordance with §2-1107.1 (735 ILCS 5/2-1107.1) that the defendant shall be found not liable if the plaintiff's contributory fault (which includes assumption of the risk) exceeds 50% of the total fault proximately causing plaintiff's injury.

B400.03. Strict Product Liability--Assumption of Risk--Damage Reduction

If you find that the plaintiff's injury was proximately caused by an unreasonably dangerous condition of the [product], and if you also find that the plaintiff assumed the risk of his injury, and if you further find that the plaintiff's fault in assuming the risk was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, you must then determine the amount of damages to be awarded by you [under Count _] as follows:

First, determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if the plaintiff had not assumed the risk;

Second, determine what portion or percentage is attributable solely to the plaintiff's fault in assuming the risk, considering the extent to which the plaintiff's assumption of risk, [the conduct of other tortfeasors on the verdict form] and the unreasonably dangerous condition of the [product] each proximately contributed to the plaintiff's [injury] [damage];

Third, reduce the total amount of the plaintiff's damages by the proportion or percentage of plaintiff's assumption of the risk.

The resulting amount, after making such reduction, will be the amount of your verdict [under Count _].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction together with IPI B400.02.01 should be given in all cases where assumption of the risk of the plaintiff is an issue.

The bracketed portion of paragraph "Second" should be used if there is evidence of other tortious conduct which contributed to the plaintiff's injury that would be relevant to findings pursuant to 735 ILCS 5/2-1117.

In a wrongful death or survival action, substitute "decedent" (or "decedent's") or decedent's name in place of "plaintiff" (or "plaintiff's"), "his," "her," or "its" whenever appropriate.

Comment

In *Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993), the court held that §2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116) is applicable to assumption of the risk in a case based on strict product liability.

400.04 Strict Product Liability--Proximate Cause--Definition

When I use the expression "proximate cause," I mean [that] [a] [any] cause which, in natural or probable sequence, produced the injury complained of. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.]

Notes on Use

This instruction in its entirety should be used only when there is evidence of a concurring or contributing cause to the injury or death (other than acts or omissions of the plaintiff). In cases where there is no evidence of a concurring or contributing cause, the short version without the bracketed material should be used.

Comment

The unreasonably dangerous condition must be a proximate cause of the plaintiff's injury or damage. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965); Restatement (Second) of Torts §402A (1965). On proximate cause, *see* Comment to IPI 15.01.

400.05 Strict Product Liability--Assumption of Risk--Factors To Be Considered

The committee recommends that no instruction be given on the evidentiary factors to be considered in determining whether the plaintiff has assumed the risk.

Instruction and Comment revised December 2007.

Comment

The test to be applied in determining the question of whether a plaintiff had the requisite knowledge of the danger is fundamentally a subjective test. It is the knowledge, understanding and appreciation of the particular plaintiff which is in issue and not that of the "reasonable man."

In considering the propositions of whether the particular plaintiff knew of the condition, understood and appreciated the risk of injury, and proceeded to encounter the danger, the jury may consider evidence in addition to the plaintiff's own testimony as to his state of mind. The fact finder is not compelled to accept as true the statements of the plaintiff regarding his state of mind, but may consider all of the facts established by the evidence, including "the factors of the [plaintiff's] age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger it poses." *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d 64, 264 N.E.2d 170 (1970); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 431, 261 N.E.2d 305, 312 (1970).

However, an instruction which states that the law does not require the jury to rely upon the plaintiff's statements but may consider other factors should not be given because it unduly emphasizes certain evidence and is argumentative. Such an instruction would unnecessarily emphasize evidence relating to the user's age, experience, knowledge and understanding, as opposed to the plaintiff's testimony concerning his subjective state of mind.

While the user's age, experience, knowledge and understanding are relevant facts for the jury to consider, the subject is properly left to argument and to other instructions: IPI 3.04 (former IPI 1.04) instructs the jury as to the effect of circumstantial evidence; IPI 1.01 (former IPI 2.01) instructs the jury on the standards to be used in assessing credibility, advises the jurors that they are the triers of the facts, and advises them that they are to use common sense in evaluating what they see and hear during trial.

400.06 Strict Product Liability—Definition Of "Unreasonably Dangerous"

When I use the expression "unreasonably dangerous" in these instructions, I mean unsafe when put to a use that is reasonably foreseeable considering the nature and function of the [product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

In *Lamkin v. Towner*, 138 Ill.2d 510 (1990), the Supreme Court recognized an alternative test for plaintiff to prove a strict product liability test: the "risk-utility" test. The plaintiff has the option to prove the case under either the "consumer expectation" or the "risk-utility" test. *Lamkin v. Towner*, *supra* at 529; *Hansen v. Baxter Healthcare Corp.*, 309 Ill.App.3d 869, 885, *aff'd* 198 Ill.2d 420 (2002); *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007); *Mikolajczyk v. Ford Motor Co.*, 374 Ill.App.3d 646 (1st Dist. 2007), *rev'd & remanded*, 231 Ill.2d. 516, 327 Ill. Dec. 1, 901 N.E.2d 329, 2008 Ill. LEXIS 1424 (2008). In *Hansen*, *Mikolajczyk*, *and Carrillo v. Ford Motor Co.*, 325 Ill.App.3d 955 (1st Dist. 2001), the plaintiff opted to have the jury instructed using this instruction, what is commonly labeled the "consumer expectation" test. The instructions were approved in *Hansen*, *Mikolajczyk*, and *Carrillo*. An issue before the Supreme Court in *Mikolajczyk* was whether this instruction should be used in a strict liability design defect case.

Comment

The expression "unreasonably dangerous" first found acceptance in Illinois in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Court noted that its decision coincided with the views expressed in *Restatement (Second) of Torts* §402A. The phrase "unreasonably dangerous" has found common, though not universal, acceptance in subsequent decisions. *Winnett v. Winnett*, 57 Ill.2d 7, 310 N.E.2d 1 (1974); *Williams v. Brown Mfg. Co.*, 45 Ill.2d 418, 261 N.E.2d 305 (1970); *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969); *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967). Although arguments have been advanced that the phrase "not reasonably safe" is preferable to the term "unreasonably dangerous," the latter term has been employed in these instructions for the reasons discussed in the Comment to IPI 400.01.

The phrase "unreasonably dangerous condition" is used in these instructions instead of the words "defect" or "defective condition" because the phrase is more conversational and is less likely to suggest traditional concepts of fault to the jurors.

The clearest expression of the concepts involved in these terms appears in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 342, 247 N.E.2d 401, 403 (1969):

> Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.

See also Hepler v. Ford Motor Co., 27 Ill.App.3d 508, 517, 327 N.E.2d 101, 108 (5th Dist. 1975).

The correlation between "unreasonably dangerous" and "unsafe" was recognized in *Dunham v.*

Vaughan & Bushnell Mfg. Co., 42 Ill.2d 339, 247 N.E.2d 401 (1969) when the Court approved Dean Prosser's statement that a product is defective "if it is not safe for such a use that can be expected to be made of it." *Id.* at 343, 247 N.E.2d at 403. "Unsafe" has been used in this instruction to express the concepts of "dangerous" and "defective" used in the *Dunham* definition.

This instruction omits the word "intended" from the *Dunham* definition as a modifier of the product's function. It is clear that the test of the product's function is objective in nature and is not controlled by, or limited to, uses which the manufacturer intended. To use the word "intended" would invite the jury to apply a subjective standard. *See Winnett v. Winnett*, 57 Ill.2d 7, 11, 310 N.E.2d 1, 4 (1974).

Under this instruction a product can be "unreasonably dangerous" only when put to a use that is reasonably foreseeable. *Winnett v. Winnett*, *supra* at 11, 310 N.E.2d at 4. This instruction would bar recovery where the injury was proximately caused by the plaintiff's <u>unforeseeable</u> misuse of the product. "Misuse" is a use which is neither intended nor reasonably foreseeable. *Williams*, *supra* at 425, 261 N.E.2d at 309. *See* Comment, IPI 400.08.

An instruction defining "unreasonably dangerous" is needed because the concept is not generally understood by, nor within the common experience of, jurors. The term is comparable in complexity to "proximate cause" (IPI 15.01); "willful and wanton conduct" (IPI 14.01); "assumption of risk" (IPI 13.01, 13.02); "negligence" (IPI 10.01); and "ordinary care" (IPI 10.02). *Becker v. Aquaslide 'N Dive Corp.*, 35 Ill.App.3d 479, 490, 341 N.E.2d 369, 377 (4th Dist. 1975). *But see Pyatt v. Engel Equip., Inc.*, 17 Ill.App.3d 1070, 1074, 309 N.E.2d 225, 229 (3d Dist. 1974).

400.06A Strict Product Liability--Definition of "Unreasonably Dangerous"--Risk-Utility Test--Design Defects

When I use the expression "unreasonably dangerous," I mean that the risk of danger inherent in the design outweighs the benefits of the design when the product is put to a use that is reasonably foreseeable considering the nature and function of the product.

Instruction, Notes on Use and Comment created May 2009.

Notes on Use

This instruction is an alternative to IPI 400.06 for use in strict product liability trials. This instruction is new, and states the risk-utility test for proving a strict product liability design defect case.

The need for this instruction was required by the Supreme Court in *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516 (2008). The court held that if there is risk-utility evidence admitted in a design defect case, even if a party presents evidence to support the consumer expectation test, a risk-utility instruction should be given instead of IPI 400.06.

Comment

Since *Mikolajczyk* did not expressly overrule any prior decisions, the Committee has attempted to synthesize the opinion in *Mikolajczyk* with *Lamkin v. Towner*, 138 Ill.2d 510 (1990), *Hansen v. Baxter Healthcare Corporation*, 198 Ill.2d 420 (2002), and *Calles v. Scripto-Tokai* Corp., 224 Ill.2d 247 (2007). In the latter three cases, the Supreme Court recognized that the "risk-utility" test was an alternative to the "consumer expectation" test set forth in IPI 400.06.

Lamkin, *supra* at 529, Hansen, *supra* at 433, and *Calles*, *supra* at 255-256, specifically held:

> A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.

The Committee considered whether to list a number of factors for the jury to use in determining whether a product is unreasonably dangerous under the risk-utility test. The Committee declined to do so for a number of reasons. Most of the risk-utility factors discussed in various decisions have their genesis in law review articles authored by Professor John Wade. See *Calles v. Scripto-Tokai*, 224 Ill.2d 247, 264-265 (2007). Professor Wade addressed whether those factors should be listed in a jury instruction in *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 840 (1973) and said they should not, reasoning as follows:

> Should the jury be told about the list of seven factors which were set forth above? The answer should normally be no. The problem here is similar to that in negligence. The Restatement of Torts has analyzed negligence, described it as a balancing of the magnitude of the risk against the utility of the risk, and listed the factors which go into determining the weight of both of these elements. [citation omitted]. This analysis is most helpful and can be used with profit by trial and

> appellate judges, and by students and commentators. But it is not ordinarily given to the jury. Instead they are told that negligence depends upon what a reasonable prudent man would do under the same or similar circumstances.

See also Wade, *On Product Design Defects and their Actionability*, 33 Vand.L.Rev. 551, 573 (1980), "[t]he precise wording of the instruction is important and any list of abstract factors of different types is likely to confuse a jury."

Our decision not to list factors for the risk-utility test is also supported by the Oregon Supreme Court, *Phillips v. Kimwood Machine Co.*, 525 P.2d 1033, 1040 n.15 (1974); the Arizona Civil Jury Instructions Committee of the State Bar of Arizona, *RAJI (Civil) PLI 3 Use Note*; the Colorado Supreme Court Committee on Civil Jury Instructions, *Jury Instr. Civil 14:3 (4th ed.)*; *Turner v. General Motors*, 584 S.W.2d 844, 849-850 (Tex. 1979) and Florida, *JI-CIV-FL-CLE PL 5 (October 2004)*.

When it comes to determining liability issues in tort cases, it has long been the Committee's practice not to include a list of factors because doing so would unduly highlight certain aspects of the evidence in a case or would appear to argue for one side or the other. *IPI (Civil), Foreword to the 1st Edition, XXII (2006)*. Good examples of the Committee's practice in not listing factors in liability instructions that have been approved by Illinois courts are: 10.01, negligence, *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 285 (2002); 11.01, contributory negligence, *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 990-991 (1st Dist. 1985); 14.01, willful and wanton conduct, *Murray v. Chicago Youth Center*, 224 Ill.2d 213, 241 (2007); 180.16, having "charge of" the work under the Structural Work Act, *Larson v. Commonwealth Edison*, 33 Ill.2d 316, 321, 323 (1965) and *Thompson v. MCA Distributing Music Corp. of America*, 257 Ill.App.3d 988, 990 (5th Dist. 1994); 100.01, highest duty of care of common carrier, *Manus v. Trans States Airlines, Inc.*, 359 Ill.App.3d 665, 667 (5th Dist. 2005); 120.01, trespasser definition, *Eshoo v. Chicago Transit Authority*, 309 Ill.App.3d 831, 837 (1st Dist. 1999); and 150.15, intoxication, *Navarro v. Lerman*, 48 Ill.App.2d 27, 36 (1st Dist. 1964).

Evidence will determine what the risks and benefits of a design are. Counsel can argue all of the admissible risks and benefits to the jury and a list of factors would not be a helpful addition to the instruction. A list could also mislead or confuse a jury since the presence of one factor favoring one party can outweigh multiple factors that favor the other party. *Calles*, *supra* at 266-267. As the Court also noted, the lists of factors which courts may consider when assessing risk-utility are not exclusive. *Calles*, *supra* at 266.

400.07A Strict Product Liability--Duty

The Committee recommends that no instruction concerning the duty of strict product liability of defendants be given, except in cases where IPI 400.07B, 400.07C, or 400.07D are applicable.

Instruction and Comment revised December 2007.

Comment

In strict product liability cases, the focus of the liability question is the *condition of the product*, not the conduct of the defendant. *Cf.* IPI 400.01, 400.02. Instructing a jury on a defendant's duty in this context would distract the jury from its true role: to determine whether or not the condition of the product was unreasonably dangerous. "It is preferable to avoid reference to 'duty' and maintain the focus on the defective character of the product . . . ." *Lundy v. Whiting Corp.*, 93 Ill.App.3d 244, 252, 48 Ill.Dec. 752, 417 N.E.2d 154 (1st Dist. 1981); *accord Wilson v. Norfolk & W. Ry. Co.*, 109 Ill.App.3d 79, 97, 64 Ill.Dec. 686, 440 N.E.2d 238 (5th Dist. 1982); *Carillo v. Ford Motor Co*, 325 Ill.App.3d 955, 259 Ill.Dec. 619, 759 N.E.2d 99 (1st Dist. 2001).

400.07B Strict Product Liability--Duty To Warn--Learned Intermediary Doctrine

The [type of product, e.g. drug] involved in this case can only be obtained with a prescription from a physician. For this reason, the [type of defendant, e.g. manufacturer] has a duty to adequately warn only [the learned intermediary involved] of the [dangers][potential adverse reactions] of which it knew, or in the exercise of ordinary care should have known, at the time the [product] left the [defendant's] control. The [defendant] has no duty to warn the [consumer][user] directly.

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should be given only in cases involving prescription pharmaceuticals and other products to which the "learned intermediary" doctrine applies to limit the manufacturer's duty to warn. The manufacturer in such cases has only a duty to warn the "learned intermediary" such as a physician; it has no duty to warn the consumer directly. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

The learned intermediary doctrine was applied in *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill.2d 507, 523-524, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987) (drugs) and in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 432, 261 Ill.Dec. 744, 764 N.E.2d 35 (2002) (Luer-lock catheter). The learned intermediary doctrine was not applicable in *Friedl v. Airsource, Inc.*, 323 Ill.App.3d 1039, 257 Ill.Dec. 459, 753 N.E.2d 1085 (1st Dist. 2001) (hyperbaric oxygen chamber).

400.07C Strict Product Liability--Non-Delegable Duty

Defendant[s] [name[s]] has [have] the duty to manufacture and sell a product that is not in an unreasonably dangerous condition. That duty cannot be delegated to another. It is not a defense for the defendant[s] [name[s]] that another person [,including plaintiff's employer,] failed to make the product free from unreasonably dangerous conditions. When I use the phrase "cannot be delegated," I mean that the duty must be performed by defendant[s] [name[s]] and cannot be left to some other person or entity.

Instruction, Notes and Comment revised December 2007

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Notes on Use

This instruction may be used in cases where the product manufacturer seeks to avoid liability with evidence that the owner of the product, such as a plaintiff's employer, selected features of the product. No court of review has approved the use of this instruction in other contexts.

Comment

This instruction was approved in *Turney v. Ford Motor Co.*, 94 Ill.App.3d 678, 685, 50 Ill.Dec. 85, 418 N.E.2d 1079 (1st Dist. 1981).

400.07D Strict Product Liability--Duty To Warn--General

The [manufacturer] [other] has a duty to adequately warn [and instruct] the [consumer] [user] about the dangers of its product of which it knew, or, in the exercise of ordinary care, should have known, at the time the product left the [manufacturer's] [other's] control.

Instruction, Notes and Comment revised December 2007.

Notes on Use

In cases where this instruction applies, it is intended to be used with IPI 400.01 and 400.02. IPI 10.02, defining "ordinary care," should be given with this instruction.

Comment

This principle of law was established in *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 35, 37 Ill.Dec. 304, 402 N.E.2d 194 (1980). The Court has not retreated from its requirements since then.

400.08 Strict Product Liability--Personal Injury--Misuse

The committee recommends that no instruction on misuse of the product be given.

Instruction and Comment revised December 2007.

Comment

The committee's recommendation that no instruction be given on the question of misuse is predicated upon the committee's assumptions stated in the introduction to this 400 Series of instructions.

If subsequent case decisions prove that these assumptions of the committee are erroneous, then, in that event, instructions to the jury on the issue of misuse may be appropriate.

400.09 Strict Product Liability--Personal Injury--Liability of Non-Manufacturer

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense

[1]. [that the defendant, [name of seller, distributor, assembler, etc.], did not create the condition which rendered the [product, e.g. hammer] unreasonably dangerous] [and]

[2]. [that the condition of the [product, e.g. hammer] existed before the [product, e.g. hammer] came under the control of the defendant [name of seller, distributor, bailor, etc.].

Instruction, Notes and Comment revised December 2007.

Notes on Use

Use this instruction only in a case where a non-manufacturer, such as a retailer, distributor, assembler or other party intermediary between the creator of the condition and the plaintiff, is a defendant. Select the appropriate bracketed material. For example, use of the first bracketed paragraph is indicated when an assembler or a distributor of an unpackaged product is a defendant.

Comment

Sweeney v. Matthews, 94 Ill.App.2d 6, 236 N.E.2d 439 (1st Dist. 1968), *aff'd*, 46 Ill.2d 64, 264 N.E.2d 170 (1970), rejects the proposition that a retailer is not subject to the same liability as a manufacturer and embraces the rationale set forth in *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262, 391 P.2d 168, 171, 37 Cal.Rptr. 896, 899 (1964):

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citations omitted]. In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff . . . .

But see Introduction concerning statutory limitations on a retailer's liability, 735 ILCS 5/2-621.

400.10 Strict Product Liability--Due Care Not A Defense

If you decide that the plaintiff has proved all the propositions of his case, then it is not a defense [that the condition of the product could not have been discovered by the defendant] [or] [that care was used in the manufacture of the product].

Instruction, Notes and Comment revised December 2007.

Notes on Use

This instruction should not be given if plaintiff's claim of liability is failure to warn. *Cf.* IPI 400.07D. Use this instruction if the jury heard from suggestion, evidence, or argument that the defendant exercised care in the manufacturing process or could not discover the condition of the product.

Comment

The due care of the defendant, or the inability of the defendant to discover a dangerous condition in the product, is not a defense. *Cunningham v. MacNeal Mem'l Hosp.*, 47 Ill.2d 443, 266 N.E.2d 897 (1970); Gelsumino v. E.W. Bliss Co., 10 Ill.App.3d 604, 295 N.E.2d 110 (1st Dist. 1973).

400.11 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.

400.12 Strict Product Liability--Modified General Verdict Form--Assumption of Risk--Verdict For Plaintiff Against Some Defendants

[Withdrawn]

Instruction and Comment revised December 2007.

Comment

This verdict form has been withdrawn. Since assumption of risk in a strict product liability case is treated the same as contributory negligence in a negligence case (*see Gratzle v. Sears, Roebuck & Co.*, 245 Ill.App.3d 292, 613 N.E.2d 802, 184 Ill.Dec. 485 (2d Dist. 1993)), the verdict forms (and instructions on their use) applicable in negligence cases can be used for both strict product liability and negligence claims. *See* IPI Chapter 45 and IPI 600.14.

500.00
IMPLIED ("ACTIVE-PASSIVE") INDEMNITY

INTRODUCTION

History

The history of the Illinois version of implied indemnity or, as it is commonly known, the doctrine of "active-passive" negligence is described in Ferrini, *The Evolution From Indemnity to Contribution--A Question Of The Future, If Any, Of Indemnity*, 59 Chi. B. Rec. 254 (1978). The common law did not permit contribution, i.e. the sharing of the loss between tortfeasors and the circumstances under which it permitted indemnity, the shifting of the entire loss from one tortfeasor to another, were quite restricted. The indemnitee could not have actively participated in the wrongdoing. His liability could only be "technical" or "passive" in nature. Indemnity was permitted only where such a party was exposed to liability by the misconduct of another. *Gulf Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.,* 343 Ill.App. 148, 98 N.E.2d 783 (1st Dist.1951) summarized the circumstances in which indemnity was permitted:

(1) where a city was exposed to liability when a contractor or abutting owner breached his duty with respect to the public way;
(2) where a party was injured by a subcontractor or tenant and the contractor or owner was thereby exposed to liability;
(3) where one supplying goods or services, by his active negligence caused the liability of another;
(4) where one created a dangerous condition and the passive tortfeasor was exposed to liability upon his failure to discover and rectify that condition; and
(5) where the negligence of a third party caused the passive tortfeasor to be liable under the F.E.L.A. or Workers Compensation Act.

The doctrine is quasi-contractual in nature. In other words, there is an implied-in-law, as contrasted with an implied-in-fact, contract of indemnity. The active or primary tortfeasor has exposed the one who has not personally participated in the wrongdoing to liability and the law implies a contract of restitution. *Przybylski v. Perkins & Will Architects, Inc.,* 95 Ill.App.3d 620, 623; 420 N.E.2d 524, 527; 51 Ill.Dec. 110, 113 (1st Dist.1981).

The parameters of the doctrine changed in the 1960's in an apparent reaction to the prohibition against contribution. Indemnity evolved into a mere fault-weighing process. The tortfeasor who was prohibited from obtaining contribution could obtain full indemnity upon the theory that a stranger who happened to be a joint tortfeasor was guilty of conduct more culpable than that of the party seeking indemnity. Indemnity was thus allowed where there was no pre-tort relationship between the parties--and where the party seeking indemnity was personally at fault. *Reynolds v. Illinois Bell Tel. Co.,* 51 Ill.App.2d 334, 201 N.E.2d 322 (1st Dist.1964); *Sargent v. Interstate Bakeries, Inc.,* 86 Ill.App.2d 187, 229 N.E.2d 769 (1st Dist.1967).

The Reimposition of the Pre-Tort Relationship Requirement

The Illinois Supreme Court has held there can be no indemnity in the absence of a pre-tort relationship between the indemnitor and indemnitee. *Van Slambrouck v. Economy Baler Co.,* 105 Ill.2d 462, 475 N.E.2d 867, 86 Ill.Dec. 488 (1985); *Muhlbauer v. Kruzel,* 39 Ill.2d 226, 234 N.E.2d 790 (1968). By so ruling, the Court in effect reinstituted the concept that the obligation of restitution was to be imposed upon the indemnitor because he had, by breach of duty owed the indemnitee, exposed the indemnitee to liability to a third party. A summary of "pre-tort relationships" or "conditions" from which a duty to indemnify has been implied is set forth in Feirich, *Third Party Practice*, 1967 U. Ill. L.F. 236, 242-243. The essential ingredient appears to be a contractual or quasi-contractual relationship between the indemnitor and the indemnitee from which the courts imply a duty and a promise to indemnify.

The above-cited description of the circumstances under which indemnity would be implied closely approximates the circumstances under which indemnity was permitted at the time of *Gulf Mobile & Ohio R. Co. v. Arthur Dixon Transfer Co.,* 343 Ill.App. 148, 98 N.E.2d 783 (1st Dist.1951). Nevertheless, *Muhlbauer* was not viewed as mandating a return to the concept that indemnity would be afforded only those who were technically liable and not personally at fault; the doctrine continued to be applied under circumstances where there was a mere disparity in the culpability of the parties. *Mullins v. Crystal Lake Park Dist.,* 129 Ill.App.2d 228, 262 N.E.2d 622 (1970). Nevertheless, the authorities emphasized that there had to be a qualitative distinction between the conduct of the indemnitee and that of the indemnitor. *Harris v. Algonquin Ready Mix, Inc.,* 59 Ill.2d 445, 322 N.E.2d 58 (1974); *Chicago & Illinois Midland Ry. v. Evans Constr. Co.,* 32 Ill.2d 600, 602; 208 N.E.2d 573, 574 (1965); *Stach v. Sears, Roebuck & Co.,* 102 Ill.App.3d 397, 429 N.E.2d 1242, 57 Ill.Dec. 879 (1st Dist.1981).

The Impact of Contribution

The Illinois Supreme Court's decision in S*kinner v. Reed-Prentice Div. Package Machinery Co.,* 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977), *certiorari denied* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978), adopting comparative contribution, placed the continued existence of the doctrine of "active-passive" indemnity into question. Does contribution supplant "active-passive" indemnity? In *Heinrich v. Peabody Int'l Corp.,* 99 Ill.2d 344, 459 N.E.2d 935, 76 Ill.Dec. 800 (1984), the Court declined to decide the issue because the parties had not taken an adversarial position on it. Appellate Court decisions reached conflicting conclusions as to the viability of the doctrine. *Compare Van Jacobs v. Parikh,* 97 Ill.App.3d 610, 422 N.E.2d 979, 52 Ill.Dec. 770 (1st Dist.1981); *Lowe v. Norfolk & Western Ry.,* 124 Ill.App.3d 80, 463 N.E.2d 792, 79 Ill.Dec. 238 (5th Dist.1984), *appeal denied* 101 Ill.2d 547, 467 N.E.2d 582, 81 Ill.Dec. 711 (1984); *Allison v. Shell Oil Co.,* 133 Ill.App.3d 607, 479 N.E.2d 333, 88 Ill.Dec. 720 (5th Dist.1985); *Jethroe v. Koehring Co.,* 603 F.Supp. 1200 (S.D.Ill.1985); and *LeMaster v. Amsted Industries, Inc.,* 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982) ("active-passive" indemnity survives) with *Morizzo v. Laverdure,* 127 Ill.App.3d 767, 469 N.E.2d 653, 83 Ill.Dec. 46 (1st Dist.1984), *Heinrich v. Peabody Int'l Corp.,* 139 Ill.App.3d 289, 486 N.E.2d 1379, 93 Ill.Dec. 544 (1st Dist.1985), and *Holmes v. Sahara Coal Co.,* 131 Ill.App.3d 666, 475 N.E.2d 1383, 86 Ill.Dec. 816 (5th Dist.1985) ("active-passive" indemnity does not survive).

Finally, in *Allison v. Shell Oil Co.,* 113 Ill.2d 26, 495 N.E.2d 496, 99 Ill.Dec. 115 (1986), the Illinois Supreme Court held that "active-passive" indemnity would not longer be applied when contribution is available. However, other forms of indemnity may continue to exist.

Although "active-passive" indemnity does not apply to causes of action arising on or after March 1, 1978 (*see* Introduction to IPI 600.00, Contribution, *infra*), the instructions in this chapter have been retained and revised for use in cases arising prior to that date. In addition, some of them may apply to other types of indemnity actions.

The Basis of Active-Passive Indemnity

In *Miller v. DeWitt,* 37 Ill.2d 273, 226 N.E.2d 630 (1967), which was reaffirmed by the Supreme Court in *Doyle v. Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984), the Court described the circumstances under which the jury could find that the third-party plaintiff architect was a passive tortfeasor and third-party defendant contractor was an active tortfeasor. The architect would be entitled to indemnity if the injury had been directly caused by improper construction methods used by the contractor and the architect's liability was bottomed solely upon his failure to stop the work on the job. In other words, indemnity is permitted only where the indemnitee did not personally participate in the wrongdoing--where he was exposed to liability by the indemnitor's breach of a duty owed the indemnitee.

This strict construction of the basis of indemnity is also supported by the Supreme Court's analysis in *Doyle v. Rhodes, supra*, of the circumstances under which the third-party plaintiff was entitled to complete rather than partial contribution. The third-party defendant had been charged with violating the Road Construction Injuries Act, a safety statute. The Court stated that if the evidence at trial showed that the third-party defendant's compliance with the statute would have prevented the third-party plaintiff from engaging in her negligence, the third-party plaintiff would be entitled to complete contribution. Although the Court stated that contribution envisions a sharing of liability by the culpable defendants even where the liability of one is grounded on the special duties imposed by a safety statute, the Court further noted:

> If the evidence that emerges at trial shows that compliance by the road builder with the Road Construction Injuries Act would have prevented Rhodes from engaging in her "negligent" act or would have reduced its impact on Doyle to zero, Rhodes would not be guilty of comparative negligence under the Act and, contrary to what we understand was the holding of the appellate court, would be entitled to recover the entire award from Rein, Schultz & Dahl, as she urges. If, on the other hand, it is found that Rhodes' negligence would not have been deterred or prevented by compliance with the Act, or that her conduct fell sufficiently far short of acceptable driving practices as to amount to a misuse of the road under any condition, she would be entitled to recover in contribution only to the extent that the injury to Doyle is found to be the result of the failure of Rein, Schultz & Dahl to make its worksite safe rather than of her negligence.

The basis of indemnity was also described in *Van Slambrouck v. Economy Baler Co.,* 105 Ill.2d 462, 475 N.E.2d 867, 86 Ill.Dec. 488 (1985); *Van Jacobs v. Parikh,* 97 Ill.App.3d 610, 422

N.E.2d 979, 52 Ill.Dec. 770 (1st Dist.1981); and *LeMaster v. Amsted Industries, Inc.,* 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982). A qualitative distinction alone between the conduct of the parties does not present a sufficient basis for indemnity. There must additionally be a duty to indemnify which arises not from the relative culpability of the parties but from their pre-tort relationship and responsibilities *inter se*. The shift of the entire responsibility for the payment of damages is based on the fact that the indemnitee is only technically liable for damages and the indemnitor is truly culpable.

The foregoing decisions confirm that indemnity cannot continue to be applied in the unfettered fashion as was pre-Skinner indemnity. A mere disparity in the culpability of the parties is a basis for contribution and not indemnity. The terminology previously used by this committee, i.e. major-minor fault, has never been expressly approved by the courts and the committee thus uses the "active-passive" language which the courts have adopted.

The Instructions

In view of the foregoing, the committee has amended the instructions. Those instructions follow the Supreme Court's analysis in *Miller v. DeWitt, supra*, and *Doyle v. Rhodes, supra*.

The subject matter of "pre-tort" relationship is not covered in these instructions since it is a matter of law to be ruled upon by the court, not a question of fact to be decided by a jury. As stated in *Isabelli v. Cowles Chemical Co.,* 7 Ill.App.3d 888, 899; 289 N.E.2d 12, 19 (1st Dist.1972): "The right to indemnification exists as a matter of law and because of the relationship of the parties to the transaction." It will be up to the trial judge to determine whether or not the complaint contains sufficient allegations of the "requisite relationship." *See Muhlbauer v. Kruzel,* 39 Ill.2d 226, 234 N.E.2d 790 (1968).

The instructions presented here are not intended for use in cases involving contractual indemnity. Of course, where there is a contract of indemnity, the terms of the contract will govern the right to recovery. *Jackson v. Illinois Central Gulf R. Co.,* 18 Ill.App.3d 680, 309 N.E.2d 680, 690 (1st Dist.1974). *But see* 740 ILCS 35/1 (1994), prohibiting agreements holding one harmless or indemnifying one from one's own negligence in construction contracts.

Active-passive implied indemnity is not permitted in certain situations as a matter of public policy. *Wessel v. Carmi,* 54 Ill.2d 127, 295 N.E.2d 718 (1973) (one liable under Dram Shop Act may not secure indemnity); *McDonald v. Trampf,* 49 Ill.App.2d 106, 198 N.E.2d 537 (1st Dist.1964) (intoxicated driver may not seek indemnity from tavern operators); *St. Joseph Hospital v. Corbetta Const. Co.,* 21 Ill.App.3d 925, 960; 316 N.E.2d 51, 75 (1st Dist.1974) (one guilty of fraud may not seek indemnity from one that is careless).

Also, in the products liability area the original manufacturer may not recover indemnity from those who are down the distributive chain. *Burke v. Sky Climber, Inc.,* 57 Ill.2d 542, 316 N.E.2d 516 (1974) (indemnity not available to manufacturer against employer).

Costs and Attorney Fees

The court may add "properly taxable costs" to a judgment for indemnity. *Gatto v. Walgreen Drug Co.,* 23 Ill.App.3d 628, 320 N.E.2d 222 (1st Dist.1974), *reversed on other grounds,* 61 Ill.2d 513, 337 N.E.2d 23 (1975), *certiorari denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976). In the absence of statute or express contract, attorneys fees, costs of investigation and other costs may not be recovered in an action for indemnity. *Reese v. Chicago, B. & Q. R.R.,* 5 Ill.App.3d 450, 283 N.E.2d 517 (2d Dist.1972), *affirmed*, 55 Ill.2d 356, 303 N.E.2d 382 (1973).

Upstream Indemnity in a Products Case

The committee is of the opinion that upstream indemnity which a purveyor of a product might seek from the party who sold him the product or its components is not properly part of the "active-passive" doctrine, but rather may be based upon strict liability in tort, warranty, or other applicable theory. Accordingly, the subject is not addressed here.

500.01 General Statement of Law

One who [is required to pay] [may be required to pay] [has paid] damages for causing injury to another may be reimbursed for that sum from a third party under certain circumstances, which will be explained to you in the following instructions.

This is known as indemnity.

SPECIAL NOTE ON USE

For simplicity, all of the instructions have been drafted using primarily the masculine gender, the present tense, and the singular form of nouns. When the parties referenced are actually female or impersonal (e.g., corporations), or when the plural form or past tense is required, the instruction should be changed accordingly. Also, if the instruction applies to fewer than all counts, it should be so limited by an introductory phrase.

Notes on Use

This instruction should be given in every indemnity case.

500.02 Definition--"Active Conduct"--"Passive Conduct"

When I say that [name of third party plaintiff] claims that [name of third party defendant]'s conduct was "active," I mean he claims [name of third party defendant]'s conduct was the significant cause of [name of plaintiff]'s injury and that [name of third party defendant] thereby caused [name of third party plaintiff] to be liable to [name of plaintiff].

When I say that [name of third party plaintiff] claims that his conduct was passive, I mean he claims that his conduct was different from, and minor or technical when compared to, that of [name of third party defendant] and that he was exposed to liability to [name of plaintiff] primarily because of [name of third party defendant]'s conduct.

The difference in the conduct of the parties must be a difference in quality or nature, rather than in quantity.

Notes on Use

See Special Note on Use at 500.01.

If any instruction is given which contains the defined terms, "active" or "passive" this instruction must be given.

500.03 Issues Made By the Pleadings--All Causes of Action--Indemnitee and Indemnitor Are Both Named and Charged as Tortfeasors in Prime Complaint--Complaint and Claim For Implied (Active-Passive) Indemnity Tried Concurrently

[1] In addition to the claim[s] of [name of plaintiff] against [name of defendant] in this case, [name of counterplaintiff] claims he is entitled to indemnity from [name of counterdefendant] for any sum [name of counterplaintiff] may become liable to pay [name of plaintiff].

[2] [name of counterplaintiff] claims that if he is found liable to [name of plaintiff], he, [name of counterplaintiff], is entitled to indemnity because his liability, if any, was the result of his passive conduct and [name of counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim as to the conduct of the counterdefendant which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] [name of counterdefendant], [denies that he did any of the things claimed by [name of counterplaintiff]] [denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)]; [denies [name of counterplaintiff]'s conduct was passive in causing [name of plaintiff]'s (injuries) (damages)].

[4] [name of counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer to the counterclaim which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] [name of counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

An issues instruction appropriate for the prime case must be given with this instruction. Also, IPI 500.10 must be given with this instruction.

If the counterplaintiff alleges the counterdefendant is a tortfeasor under a cause of action or allegations of fault not alleged by the prime plaintiff, the instructions must be amended accordingly.

Only affirmative defenses should be set forth under the paragraph referring thereto.

Comment

Under the "all or nothing" requirement of indemnity, the amount to be recovered is fixed by the damages paid or assessed in the original suit. *Gatto v. Walgreen Drug Co.,* 23 Ill.App.3d 628, 640; 320 N.E.2d 222, 231 (1st Dist.1974), *reversed on other grounds*, 61 Ill.2d 513, 337 N.E.2d 23 (1975), *certiorari denied*, 425 U.S. 936, 96 S.Ct. 1669, 48 L.Ed.2d 178 (1976). The amount is automatically set at the same figure incurred by the indemnitee, and can be neither more nor less. (*But cf. Carver v. Grossman,* 6 Ill.App.3d 265, 272-273; 285 N.E.2d 468, 472-73 (1st Dist.1972), *reversed on other grounds*, 55 Ill.2d 507, 305 N.E.2d 161 (1973), where fraud or collusion may raise an exception. *See also LeMaster v. Amsted Industries, Inc.,* 110 Ill.App.3d 729, 442 N.E.2d 1367, 66 Ill.Dec. 454 (5th Dist.1982).)

Only affirmative defenses should be set forth under the paragraph referring thereto. *See* 735 ILCS 5/2-613(d) (1994). That statute also requires the pleading of other defenses which "... would be likely to take the opposite party by surprise." Such "special defenses" may or may not be "affirmative defenses" to which paragraph [4] of the instruction applies. The criterion to be applied in determining whether a defense is an "affirmative defense" is whether, by raising it, defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated. *Baylor v. Thiess,* 2 Ill.App.3d 582, 277 N.E.2d 154 (2d Dist.1971); *Horst v. Morand Bros. Beverage Co.,* 96 Ill.App.2d 68, 237 N.E.2d 732 (1st Dist.1968).

500.04 Issues Made by the Pleadings--All Causes of Action--Indemnitor Is Not Charged as a Tortfeasor in Prime Complaint--Complaint and Claim for Implied (Active-Passive) Indemnity--Tried Concurrently

[1] In addition to the claim[s] of [name of plaintiff] against [name of defendant] in this case, [name of third party plaintiff] claims he is entitled to indemnity from [name of third party defendant] for any sum [name of third party plaintiff] may become liable to pay [name of plaintiff].

[2] *[Set forth those portions of the IPI issues instruction which are appropriate to the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]*

[3] [Name of third party plaintiff] claims that if he is found liable to [name of plaintiff], he [name of third party plaintiff], is entitled to indemnity because his liability, if any, was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the [injury] [damages] to [name of plaintiff].

[4] [Name of third party defendant]

[Set forth the indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of plaintiff]'s (injury) (damage)].

[[Name of third party defendant] denies that [name of third party plaintiff]'s conduct was passive in causing [name of plaintiff]'s (injury) (damage)].

[5] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defense(s) in that third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

IPI 500.10 must be given with this instruction.

As noted in paragraph two, all pertinent paragraphs of the IPI issues instruction applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

In instructing the jury as to the theory of liability against the indemnitor, use the appropriate IPI instructions. For instance, in charging negligence, use IPI 10.01, 15.01, and/or other appropriate instructions.

500.05 Issues Made by the Pleadings--All Causes of Action--Separate or Third Party Complaint for Implied (Active-Passive) Indemnity Tried Separately to Different Jury

[1] A judgment has been entered requiring [name of third party plaintiff] to pay a sum of money to [name of plaintiff]. [name of third party plaintiff] now seeks indemnity for that sum from [name of third party defendant].

[2] *[Set forth those portions of the IPI issues instruction which are appropriate to the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]*

[3] [Name of third party plaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff].

[4] [Name of third party defendant]

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)];

[[Name of third party defendant] denies that [name of third party plaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[5] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

As noted in paragraph two, all pertinent paragraphs of the IPI issues instruction applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

In instructing the jury as to the theory of liability against the indemnitor, use the appropriate IPI instructions. For instance, in charging negligence, use IPI 10.01, 15.01, and/or other appropriate instructions.

This instruction should be used where a judgment against the third party plaintiff has been entered in a prior action. It should be used where the claim for indemnity was not tried in the original action and only when the third party defendant either participated or had an opportunity to participate in the original action.

If the indemnitor was not afforded that opportunity, the indemnitor is not bound by the injured party's judgment against the indemnitee and the statement of issues must be redrafted accordingly.

Comment

Where a party against whom indemnity is sought was tendered an opportunity to participate in the original action, but did not do so, he is bound by the judgment in the original action and is precluded under the doctrine of collateral estoppel from relitigating the issues of the original action. *Cowan v. Insurance Co. of North America,* 22 Ill.App.3d 883, 318 N.E.2d 315 (1st Dist.1974). He is not precluded, however, from raising issues concerning insurance policy coverage. *Id.*

Where there has been a trial after a proper tender, the indemnitee may not relitigate any issue that was necessary to reach the judgment in the original case. Accordingly, it has been held in *Security Ins. Co. v. Mato,* 13 Ill.App.3d 11, 17; 298 N.E.2d 725, 730 (2d Dist.1973), "An indemnitee ... is bound by all findings without which the judgment could not have been rendered; and if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, recovery is denied in the action over." *See also Radosta v. Chrysler Corp.,* 110 Ill.App.3d 1066, 443 N.E.2d 670, 66 Ill.Dec. 744 (1st Dist.1982). If the indemnitee's conduct has been found to be "major fault" in the original case, then the indemnitee cannot successfully maintain a suit for indemnity. *Village of Lombard v. Jacobs,* 2 Ill.App.3d 826, 277 N.E.2d 758 (2d Dist.1972).

If the original case is disposed of by judgment and both the indemnitee and the indemnitor were parties in that case, both are bound by the judgment as it relates to the indemnitor's conduct. *Radosta v. Chrysler Corp.,* 110 Ill.App.3d 1066, 443 N.E.2d 670, 66 Ill.Dec. 744 (1st Dist.1982). It has been held that a summary judgment in the original case in favor of the indemnitor finding that it was not primary in causing damages barred any action for indemnity. *Karon v. E. H. Marhoeffer, Jr., Co.,* 14 Ill.App.3d 274, 302 N.E.2d 478 (1st Dist.1973).

Where the indemnitor is not a party to the original case, his opportunity to participate in that case will determine the binding effect of that judgment on him. For example, where the indemnitee failed to tender the defense of the original suit to the indemnitor, the indemnitor is not bound by the result in the original case. *Kapiolani Estate v. Atcherley,* 238 U.S. 119, 35 S.Ct. 832, 59 L.Ed. 1229 (1915). Likewise, where the indemnitor is prevented from participating in the original case by an erroneous severance of the indemnity action, the indemnitor is not bound by the judgment in the original case. *Palmer v. Mitchell,* 57 Ill.App.2d 160, 206 N.E.2d 776 (1st Dist.1965).

On the other hand, if there has been a tender of defense by the indemnitee to the

indemnitor which is wrongfully refused, then the indemnitor is bound by the judgment in the original case and the only question left open to the indemnitor to litigate is whether or not he is liable to furnish indemnity. *Karas v. Snell,* 11 Ill.2d 233, 142 N.E.2d 46 (1957). *See also Illinois Bell Tel. Co. v. Dynaweld, Inc.,* 70 Ill.App.3d 387, 388 N.E.2d 157, 26 Ill.Dec. 533 (1st Dist.1979). Finally, if there is a tender of defense which is properly refused, then the judgment in the original action is not binding upon the indemnitor. *Sears, Roebuck & Co. v. Employers Mut. Liab. Ins. Co.,* 6 Ill.App.3d 10, 284 N.E.2d 386 (1st Dist.1972). The Illinois cases to date have not furnished any helpful basis for determining whether or not a particular refusal of a tender of defense is proper or wrongful. *See Sears Roebuck & Co. v. Employers Mut. Liab. Ins. Co., supra*.

Neither the indemnitee nor the indemnitor is bound by the result in the original action where that action is disposed of by settlement or by consent decree. *Mosley v. Northwestern Steel & Wire Co.,* 76 Ill.App.3d 710, 394 N.E.2d 1230, 31 Ill.Dec. 853 (1st Dist.1979). Recognizing that consent decrees do not constitute judicial findings, the courts have held that the indemnitor is free to litigate in the indemnity action all questions concerning its fault. *Sleck v. Butler Bros.,* 53 Ill.App.2d 7, 202 N.E.2d 64 (1st Dist.1964). *See also St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.,* 12 Ill.App.3d 165, 298 N.E.2d 289 (1st Dist.1973). Likewise, the indemnitor is free to litigate in the indemnity action all issues concerning all parties' conduct. *Carver v. Grossman,* 6 Ill.App.3d 265, 285 N.E.2d 468 (1st Dist.1972), *reversed on other grounds*, 55 Ill.2d 507, 305 N.E.2d 161 (1973).

500.06 Issues Made by the Pleadings--All Causes of Action--Indemnitee and Indemnitor Are Both Named and Charged as Tortfeasors in Prime Complaint--Complaint and Third Party Complaint For Implied (Active-Passive) Indemnity Tried Consecutively to Same Jury

[1] You have returned a verdict requiring [name of counterplaintiff] to pay a sum of money to [name of plaintiff]. [Name of counterplaintiff] now seeks indemnity for that sum from [name of counterdefendant].

[2] [Name of counterplaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim as to the conduct of the counterdefendant which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] [Name of counterdefendant] [denies that he did any of the things claimed by [name of counterplaintiff]]; [denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)]; [denies that [name of counterplaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[4] [Name of counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer to counterclaim which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[5] [Name of counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

Only affirmative defenses should be set forth under the paragraph referring thereto. *See* 735 ILCS 5/2-613(d) (1994).

Comment

735 ILCS 5/2-613(d) (1994) also requires the pleading of other defenses which "would be likely to take the opposite party by surprise." Such "special defenses" may or may not be "affirmative defenses" to which paragraph [4] of the instruction applies. The criterion to be applied in determining whether a defense is an "affirmative defense" is whether, by raising it, defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated. *Baylor v. Thiess,* 2 Ill.App.3d 582, 277 N.E.2d 154 (2d Dist.1971); *Horst v. Morand Bros. Beverage Co.,* 96 Ill.App.2d 68, 237 N.E.2d 732 (1st Dist.1968).

500.07 Issues Made By the Pleadings--All Causes of Action--Indemnitor Not Charged as a Tortfeasor in Prime Complaint--Separate or Third Party Complaint for Implied (Active-Passive) Indemnity--Tried Consecutively to Same Jury

[1] You have returned a verdict requiring [name of defendant] to pay a sum of money to [name of plaintiff]. [Name of third party or counterplaintiff] now seeks indemnity for that sum from [name of third party or counterdefendant].

[2] [Set forth those portions of the IPI issues instructions which support the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]

[3] [Name of third party or counterplaintiff] claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party or counterdefendant]'s conduct was active in causing the [injuries] [damages] to [name of plaintiff].

[4] [Name of third party or counterdefendant]

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party or counterdefendant] denies that his conduct was active in causing [name of plaintiff]'s (injuries) (damages)].

[[Name of third party or counterdefendant] denies that [name of third party or counterplaintiff]'s liability was passive in causing [name of plaintiff]'s (injuries) (damages)].

[5] [Name of third party or counterdefendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the indemnitor's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[6] [Name of third party or counterplaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

See Notes on Use for IPI 500.04.

500.08 Issues Made By the Pleadings--Complaint for Implied (Active-Passive) Indemnity Following Settlement--All Causes of Action

[1] [Name of third party plaintiff] claims that he is entitled to indemnity from [name of third party defendant] for a sum of money he, [name of third party plaintiff], has paid to [name of injured party].

[2] [Name of third party plaintiff] claims that the payment was made in reasonable anticipation of his liability to [name of injured party].

[3] [Set forth those portions of the IPI issues instruction which are appropriate to the indemnitee's allegation(s) that the indemnitor was a tortfeasor who injured the prime plaintiff.]

[4] [Name of third party plaintiff] further claims that he is entitled to indemnity because his liability was the result of his passive conduct and [name of third party defendant]'s conduct was active in causing the damages to [name of injured party].

[5] [Name of third party defendant] [denies that the payment was made in reasonable anticipation of liability];

[Set forth indemnitor's denial that he did the things charged, that his conduct was tortious and that that conduct proximately caused injury to the plaintiff.]

[[Name of third party defendant] denies that his conduct was active in causing [name of injured party]'s damages]; [and]

[[Name of third party defendant] denies that [name of third party plaintiff]'s liability was passive in causing [name of injured party]'s damages].

[6] [Name of third party defendant] also asserts the following affirmative defense[s]:

[Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[7] [Name of third party plaintiff] denies [that] [those] affirmative defense[s].

Notes on Use

See Special Note on Use at 500.01.

See Notes on Use for 500.04.

500.09 Burden of Proof on the Issues--All Causes of Action--Affirmative Defenses--Complaint and Third Party Complaint--Tried Concurrently or Consecutively to Same Jury, or Separately to Different Jury

[Name of third party plaintiff] has the burden of proving each of the following propositions:

First, that his conduct was passive;

Second,

[Set forth those portions of the IPI burden of proof instruction which are appropriate for the cause of action alleged against the indemnitor];

Third, that [name of third party defendant]'s conduct, in one or more of the ways that I have described to you in these instructions, was active.

[[Name of third party defendant] has asserted the affirmative defense(s) that:

(Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.)

[Name of third party defendant] has the burden of proving (this) (these) affirmative defense(s).]

If you find from your consideration of all the evidence that each of the propositions required of [name of third party plaintiff] has been proved, [and that (none of) [name of third party defendant]'s affirmative defense(s) has (not) been proved] then your verdict should be for [name of third party plaintiff].

If, on the other hand, you find from your consideration of all the evidence that any of the propositions required of [name of third party plaintiff] has not been proved, [or that (the) (any one of the) affirmative defense(s) of [name of third party defendant] has been proved] then your verdict should be for [name of third party defendant].

Notes on Use

See Special Note on Use at 500.01.

This instruction must be modified to fit the pleadings and the proof. Omit the references to affirmative defenses if they are inapplicable. As noted in paragraph "second," all pertinent paragraphs of the IPI burden of proof instructions applicable to the particular cause of action alleged in the complaint for indemnity must be set forth within this instruction.

500.10 Indemnity--Prime Complaint and Complaint for Indemnity Tried Concurrently--Absence of Liability to Original Plaintiff--No Occasion to Consider Indemnity

If you decide [name of third party or counterplaintiff] is not liable to [name of plaintiff], you will have no occasion to consider the question of indemnity.

500.11 Indemnity--Instruction on Use of Verdict Forms--One Third Party Plaintiff and One Third Party Defendant

[If you find for [name of plaintiff], also complete the appropriate verdict form relating to indemnity which is supplied with these instructions.] [Forms of verdict are supplied with these instructions.]

After you have reached your verdict, fill in and sign the appropriate form of verdict and return it to the court. The verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given you by the court.

If you find that [name of third party plaintiff] is entitled to indemnity from [name of third party defendant] then you should use the form of verdict which says:

> "We, the Jury, find that [name of third party plaintiff] is entitled to indemnity from [name of third party defendant]."

If you find that [name of third party plaintiff] is not entitled to indemnity from [name of third party defendant] then you should use the form of verdict which says:

> "We, the Jury, find that [name of third party plaintiff] is not entitled to indemnity from [name of third party defendant]."

Notes on Use

The first two sentences of this instruction are alternatives. The first bracketed sentence should be used when the action for indemnity and the original action are tried concurrently. When the original action was tried separately or was settled, use the second bracketed sentence.

500.12 Form of Verdict

We, the jury, find that [name of third party or counterplaintiff] is entitled to indemnity from [name of third party or counterdefendant].

[Signature Lines]

500.13 Form of Verdict

We, the jury, find that [name of third party or counterplaintiff] is not entitled to indemnity from [name of third party or counterdefendant].

[Signature Lines]

600.00

CONTRIBUTION

INTRODUCTION

Contribution cases fall into three general categories and these instructions follow those categories: (1) where contribution is sought in the same action, tried either concurrently with the main action or consecutively, but to the same jury; (2) where contribution is sought in a separate trial and to a separate jury; and (3) where contribution is sought after settlement. The contribution action is basically the same in each of the three categories. However, significant differences exist which require separate approaches in the instructions, as explained in the Notes on Use.

Contribution should not be confused with either indemnity or equitable apportionment. Although these instructions deal only with contribution, some of the distinctions that exist among these concepts are discussed later in this introduction.

CONTRIBUTION

Tort practice in Illinois was revolutionized by the Supreme Court's historic decision in *Skinner v. Reed--Prentice Div. Package Mach. Co.,* 70 Ill.2d 1, 374 N.E.2d 437, 15 Ill.Dec. 829 (1977), as modified March 1, 1978, *cert. denied*, 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978). That decision gave birth to a doctrine of contribution based on "equitable principles," in which the court held that "ultimate liability for plaintiff's injuries be apportioned on the basis of the relative degree to which the defective product and the employer's conduct proximately caused them." *Skinner*, 70 Ill.2d at 14, 374 N.E.2d at 442, 15 Ill.Dec. at 834. The opinion gave the doctrine prospective operation to "causes of action arising out of occurrences on and after March 1, 1978." *Skinner*, 70 Ill.2d at 17, 374 N.E.2d at 444, 15 Ill.Dec. at 836.

On September 14, 1979, "An Act in Relation to Contribution Among Joint Tortfeasors" became effective, retroactively applying to all causes of action on and after March 1, 1978. 740 ILCS 100/1-5 (1994).

Skinner and the contribution statute govern only the rights of tortfeasors inter se. They have no application to the liability of the tortfeasors to the injured plaintiff. 740 ILCS 100/4 (1994); *Henry v. St. John's Hosp.,* 138 Ill.2d 533, 542, 563 N.E.2d 410, 414, 150 Ill.Dec. 523, 527 (1990), *cert. denied*, 499 U.S. 976, 111 S.Ct. 1623, 113 L.Ed.2d 720 (1991). Those tortfeasors may, by third-party action, counterclaim, or in a separate suit, ask the trier of fact to apportion the plaintiff's damages among them in accordance with their "relative degree of fault." *Skinner, supra*; 740 ILCS 100/1-5 (1994).

Although *Skinner* was a strict product liability case, a subsequent decision applied the doctrine of contribution in a negligence case. *Erickson v. Gilden,* 76 Ill.App.3d 218, 394 N.E.2d 1076, 31 Ill.Dec. 758 (2d Dist. 1979). The contribution statute has expressly extended the doctrine to all cases "where two or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death." 740 ILCS 100/2(a) (1994). It has

been held that contribution can be based on a violation of the Road Construction Injuries Act (*Doyle v. Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984)) and on a violation of the now repealed Structural Work Act (*Wilson v. Hoffman Group, Inc.,* 131 Ill.2d 308, 546 N.E.2d 524, 137 Ill.Dec. 579 (1989)).

Intentional tortfeasors are not entitled to obtain contribution under the Act. *Gerill Corp. v. J. L. Hargrove Builders,* 128 Ill.2d 179, 206, 538 N.E.2d 530, 542, 131 Ill.Dec. 155, 167 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989). *Ziarko v. Soo Line R.R. Co.,* 161 Ill.2d 267, 641 N.E.2d 402, 204 Ill.Dec. 178 (1994), held that a tortfeasor whose willful and wanton conduct is "intentional" cannot obtain contribution, but a tortfeasor whose willful and wanton conduct is "reckless" can.

Punitive damages are not subject to contribution. *Hall v. Archer--Daniels--Midland Co.,* 122 Ill.2d 448, 455, 524 N.E.2d 586, 589, 120 Ill.Dec. 556, 559 (1988).

Employers may be subject to contribution but their liability is limited to the amount of their workers' compensation liability. *Kotecki v. Cyclops Welding Corp.,* 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1991).

The statute is entitled "An Act in Relation to Contribution Among Joint Tortfeasors" but it does not require that the tortfeasors' actions be joint in the sense that they acted simultaneously or in concert before contribution can be sought. *People v. Brockman,* 148 Ill.2d 260, 268-69, 592 N.E.2d 1026, 1029-30, 170 Ill.Dec. 346, 349-50 (1992). The only requirement is that the liability sought to be imposed arises out of the same injury. Liability in tort, governing the right of contribution among tortfeasors, is determined at the time of injury to the plaintiff. *Joe & Dan Int'l Corp. v. U.S. Fid. & Guar. Co.,* 178 Ill.App.3d 741, 750, 533 N.E.2d 912, 917, 127 Ill.Dec. 830, 835 (1st Dist. 1988).

The words "subject to liability in tort" mean that the persons from whom contribution is sought are potentially liable to the injured person. *People v. Brockman,* 143 Ill.2d 351, 371-72, 574 N.E.2d 626, 633-34, 158 Ill.Dec. 513, 520-21 (1991). For example, the Dramshop Act does not create tort liability for purposes of the Contribution Act because liability under the Dramshop Act does not arise in tort. *Hopkins v. Powers,* 113 Ill.2d 206, 497 N.E.2d 757, 100 Ill.Dec. 579 (1986). Likewise, an action for breach of fiduciary duty is not a tort for purposes of the Contribution Act. *American Environmental, Inc. v. 3--J Co.,* 222 Ill.App.3d 242, 247, 583 N.E.2d 649, 653, 164 Ill.Dec. 733, 737 (2d Dist. 1991). One liable for a breach of fiduciary duty is not subject to liability in tort under the Contribution Act because breach of fiduciary duty is controlled by the substantive laws of agency, contract and equity. *Giordano v. Morgan,* 197 Ill.App.3d 543, 549, 554 N.E.2d 810, 814, 143 Ill.Dec. 875, 879 (2d Dist. 1990).

Defenses which any tortfeasor might have against the injured person as a result of status or immunity do not necessarily bar an action for contribution against that tortfeasor. *People v. Brockman,* 143 Ill.2d 351, 373-74, 574 N.E.2d 626, 634-35, 158 Ill.Dec. 513, 521-22 (1991); *see also Wirth v. City of Highland Park,* 102 Ill.App.3d 1074, 430 N.E.2d 236, 58 Ill.Dec. 294 (2d Dist. 1981) (interspousal immunity not a bar to contribution); *Doyle v. Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984); *Kotecki v. Cyclops Welding Corp.,* 146 Ill.2d 155, 585 N.E.2d 1023, 166 Ill.Dec. 1 (1991) (status as employer not a bar to contribution but the amount of contribution is limited to the amount of the workers' compensation liability); *Larson v.*

Buschkamp, 105 Ill.App.3d 965, 435 N.E.2d 221, 61 Ill.Dec. 732 (2d Dist. 1982) (parental immunity not a bar to contribution); *Hartigan v. Beery,* 128 Ill.App.3d 195, 470 N.E.2d 571, 83 Ill.Dec. 445 (1st Dist. 1984) (same, contribution claim based on negligent supervision); *Stephens v. McBride,* 97 Ill.2d 515, 455 N.E.2d 54, 74 Ill.Dec. 24 (1983) (notice requirement of Local Governmental and Governmental Employees Tort Immunity Act does not apply in contribution action against municipality). Whether other statutory and common law immunities affect the contribution statute remains to be seen.

The right to seek contribution exists from the time of the initial injury, and "may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action." 740 ILCS 100/5 (1994). It is not necessary for judgment to be entered against any tortfeasor before that tortfeasor may bring an action seeking contribution. 740 ILCS 100/2(a) (1994). However, the Illinois Supreme Court has interpreted section 5 (740 ILCS 100/5 (1994)) to mean that, if there is an action brought by the injured person(s), then the contribution claim must be asserted by counterclaim or third-party claim in that action, or else it will be barred. *Laue v. Leifheit,* 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984).

Under section 2(b) (740 ILCS 100/2(b) (1994)), a tortfeasor's liability for contribution may not exceed his pro rata share of the common liability. "Pro rata" as used in this statute merely means the percentage share as assessed by the trier of fact. "Common liability" means the total sum of the liability of all persons who contributed as a cause to the plaintiff's injury, no matter how small each share of that liability might be. *Ziarko v. Soo Line R.R. Co.,* 234 Ill.App.3d 860, 602 N.E.2d 5, 176 Ill.Dec. 698 (1st Dist. 1992); *Mallaney v. Dunaway,* 178 Ill.App.3d 827, 831, 533 N.E.2d 1114, 1116, 128 Ill.Dec. 26, 28 (3d Dist. 1988). One tortfeasor may seek contribution from another, even though the one seeking contribution is more at fault. "Active" or "major" fault does not bar an action for contribution.

Under the Contribution Act, if a settlement is found to be in good faith, the settling party is discharged from liability for contribution to any other tortfeasors. 740 ILCS 100/2(c) & (d) (1994). A party who settles may seek contribution only from parties whose liability was extinguished by that same settlement. *Dixon v. Chicago & N.W. Transp. Co.,* 151 Ill.2d 108, 601 N.E.2d 704, 176 Ill.Dec. 6 (1992).

The pro rata share of each tortfeasor shall be determined in accordance with his relative culpability (740 ILCS 100/3 (1994)) and expressed as a percentage set by the trier of fact.

MODIFIED JOINT AND SEVERAL LIABILITY

At least one provision of the tort reform legislation passed in 1986 has a direct impact on the work of the jury in the contribution area. 735 ILCS 5/2-1117 (1994) provides for joint and several liability only for those parties whose "fault" is found to be 25% or more of the "total fault" attributable to certain parties. The statute originally permitted consideration of the total fault of the plaintiff, the defendants sued by the plaintiff, and any third-party defendant who could have been sued by the plaintiff. It was thereafter amended to exclude plaintiff's employer from the calculation. 735 ILCS 5/2-1117.

735 ILCS 5/2-1118 (1994) provides that this rule of limited joint and several liability does not apply to certain pollution actions nor to medical negligence actions. Both 2-1117 and

2-1118 are silent as to whether the jury should be instructed as to the effect of any percentage findings in this regard. It is the opinion of the Committee that the jury should not be instructed on the concept of joint and several liability, just as there is currently no instruction on that topic. *Accord, Mikolajczyk v. Ford Motor Co.,* 374 Ill.App.3d 646, 859 N.E.2d 201, 222 (1st Dist. 2007), *rev'd on other grounds,* 213 Ill.2d 516 (2008).

The instructions given to the jury must be as simple and direct as possible, consistent with the various rules of law which apply to determinations of relative fault. Furthermore, it is important to guard against inconsistency in verdicts. *See Hackett v. Equip. Specialists, Inc.,* 201 Ill.App.3d 186, 200, 559 N.E.2d 752, 761, 147 Ill.Dec. 412, 421 (1st Dist. 1990) (jury found the defendant to have been 55% at fault with respect to the plaintiff but not at fault at all with respect to this third-party defendant.)

The relative fault of the parties has relevance to a number of different issues, but the application of that fault may vary depending upon the use to which it is put. These issues include plaintiff's contributory negligence, joint and several liability, and contribution liability. 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 also deals with joint and several liability.

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.

IPI B45.03A, which informs the jury of the manner in which plaintiff's contributory negligence is to be determined, has been judicially approved. *Bofman v. Material Serv. Corp.,* 125 Ill.App.3d 1053, 1060, 466 N.E.2d 1064, 1069, 81 Ill.Dec. 262, 267 (1st Dist. 1984). The jury is instructed to "determine what proportion or percentage is attributable to that plaintiff or decedent of the total combined negligence of that plaintiff or decedent and the negligence ... of the defendant and of all other persons whose negligence ... proximately contributed to that plaintiff's injury ...." *Bofman*, at 1060. The jury is then instructed to reduce the total damages sustained by the plaintiff only by the percentage of negligence attributable to the plaintiff.

Including absent tortfeasors in the calculation for the purpose of arriving at the percentage of plaintiff's negligence serves to reduce the percentage of negligence attributable to the plaintiff. It does not, however, dilute or reduce the responsibility of the defendants for the entire portion of the damages otherwise not attributable to the plaintiff's negligence. "The purpose of considering the liability of nonparty tortfeasors is not ... to limit defendant's share of responsibility, but to determine the extent of plaintiff's responsibility for his own injuries." *Bofman*, at 1064, 81 Ill.Dec., at 270.

For the reasons discussed in this introduction, the committee has formulated new alternative forms of contribution verdict form, IPI 600.14 and 600.14A. In an appropriate case, by this form the jury reports all of the applicable percentages as part of its verdict. The trial court, with the assistance of the parties, is then to compute the percentages applicable for various purposes, e.g., joint and several liability and the contribution percentages. IPI 600.14 is identical to IPI B45.03A with the exception of the paragraph "Second." For cases involving contribution

claims among defendants, tried concurrently with the plaintiff's claim, use IPI B45.03A or B45.03A2 instead of IPI 600.14 or 600.14A. The Notes on Use found at IPI B45.03A contain illustrative examples and calculations. In those cases where a party has a role as both a plaintiff and a defendant, the percentage of negligence which is determined for that person's comparative negligence is not necessarily equivalent to the percentage of negligence found in the contribution equation. *Ogg v. Coast Catamaran Corp.,* 141 Ill.App.3d 383, 490 N.E.2d 111, 95 Ill.Dec. 638 (4th Dist. 1986); *Laue v. Leifheit,* 120 Ill.App.3d 937, 458 N.E.2d 622, 76 Ill.Dec. 222 (2d Dist. 1983), *rev'd on other grounds*, 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984); *Carter v. Chicago & Ill. Midland Ry. Co.,* 140 Ill.App.3d 25, 487 N.E.2d 1267, 94 Ill.Dec. 390 (4th Dist. 1986). The rationale behind those holdings is that an injured party's negligence relates only to a lack of due care for his own safety while the defendant's negligence relates to a lack of due care for the safety of others. The courts have stated that a defendant's negligence is tortious but that an injured party's contributory negligence is not.

Using IPI 600.14 or 600.14A(Verdict Form A in this series), the jury can find and report all applicable percentages and after the verdict the trial and appellate courts can calculate the appropriate results based upon the decisions made then as to the substantive law. *See Larsen v. Wis. Power & Light,* 120 Wis.2d 508, 355 N.W.2d 557 (1984).

Further caution is given that in an appropriate case, a defendant might attempt to be found only severally liable but yet not wish to seek contribution. Either B45.03A or B45.03A2 should be used in that situation.

Ready v. United/Goedecke Services, Inc., 232 Ill.2d 369, 385 (2008) held that the percentage fault of defendants who settled before trial is not part of the calculation of modified joint and several liability under 735 ILCS 5/2-1117: "We hold that section 21117 does not apply to good-faith settling tortfeasors who have been dismissed from the lawsuit." However, if the issue of plaintiff's contributory fault will be decided by the jury, parties who settled before trial should be listed on the verdict form because the settlors' percentage of fault must be considered to determine the extent of plaintiff's responsibility for his injuries. *Smith v. Central Ill. Pub. Serv. Co.,* 176 Ill.App.3d 482, 496 (4th Dist. 1988).

The necessity for and value of the use of computational verdict forms was strongly emphasized by the Appellate Court, Fourth District:

> Some prior decisions of this court and the appellate courts of other districts hold that failure to provide the jury with computational verdict forms in comparative negligence cases is not reversible error .... [However,] [t]he use of such verdict forms allows for the correction of jury errors, forces detailed consideration of the case by the jury, and enables the trial court to avoid using long, complicated jury instructions which would invite reversible error.
>
> Where, as in this case, counsel fail to tender proper computational verdict forms, the court should direct counsel to do so; if the court finds their product to be unsatisfactory, then it is the duty of the court *sua sponte* to provide the jury with such verdict forms. Further, in bench trials, we suggest that the trial court make the same findings on the record which are required by computational verdict forms. [Citation omitted]

> In suggesting the use of computational verdict forms in all jury cases where comparative fault is an issue, we are mindful that it generally is not incumbent upon the trial court to give jury instructions on its own motion. [Citation omitted] The Illinois Supreme Court has, however, recognized that there may be exceptions to this rule where "special circumstances" exist. [Citation omitted] The necessity of safeguarding the process of effective review of apportionment of fault is the type of "special circumstance" which justifies a departure from the principle that courts generally have no duty to instruct the jury in a manner not requested by any of the parties; this is likewise the basis of our suggestion that in bench trials comparable findings be made of record. *Johnson v. O'Neal*, 216 Ill.App.3d 975, 985-86, 576 N.E.2d 486, 493-94, 159 Ill.Dec. 817, 824-25 (4th Dist. 1991).

AVAILABILITY OF 100% CONTRIBUTION

In *Doyle v. Rhodes,* 101 Ill.2d 1, 461 N.E.2d 382, 77 Ill.Dec. 759 (1984), the court suggested that there may be instances in which one tortfeasor may receive indemnity or 100% contribution from another. The court indicated that a right of total contribution might exist under circumstances, not before the court in that case, where evidence shows that, if one of the tortfeasors had complied with a safety statute, compliance would have prevented the other tortfeasor from engaging in his "negligent" act. The court also suggested, in *American Nat'l Bank & Tr. Co. v. Columbus--Cuneo--Cabrini Med. Ctr.,* 154 Ill.2d 347, 353-54, 609 N.E.2d 285, 288-89, 181 Ill.Dec. 917, 920-21 (1992), that "in a true action for indemnification arising from vicarious liability, application of the theory of contribution should achieve a result identical to that of implied indemnity--apportionment to the indemnitor of 100% of the fault for the plaintiff's injuries." But, according to the court:

> The statutory contribution scheme is premised on fault-based considerations. As such, it is theoretically 'ill-suited to the task of addressing' quasi-contractual relationships (citation omitted). In cases of vicarious liability, there is only a basis for indemnity, not for apportionment of damages as between the principal and agent (citation omitted). Only the agent is at fault in fact for the plaintiff's injuries (citation omitted). The viability of implied indemnity in the quasi-contractual situation insures that a blameless principal cannot be found legally accountable. We therefore hold that common law implied indemnity was not abolished by the Contribution Act in quasicontractual relationships involving vicarious liability. *American Nat. Bank & Tr. Co. v. Columbus--Cuneo--Cabrini Medical Center*, 154 Ill.2d 347, 353-54, 609 N.E.2d 285, 288-89, 181 Ill.Dec. 917, 920-21 (1992).

Hackett v. Equip. Specialists, Inc., 201 Ill.App.3d 186, 559 N.E.2d 752, 147 Ill.Dec. 412 (1st Dist. 1990), held that 100% contribution was inappropriate under the circumstances of that case. In *Hackett,* the defendant manufacturer of a corn husking system which injured the plaintiff brought a third-party complaint seeking contribution from the plaintiff's employer who had failed to provide a safety guard. The jury found defendant liable to plaintiff, finding that plaintiff had assumed 45% of the risk, and attributing 55% of the fault to defendant. In resolving the third-party claim, the jury apportioned 100% liability to the third-party defendant employer and zero percent to the third-party plaintiff. The appellate court reversed and remanded the case for a new trial, explaining that a tortfeasor's liability is predicated upon his culpability to the plaintiff

and that culpability does not disappear when that tortfeasor proceeds against another. The verdicts were inconsistent, so a new trial was necessary.

INDEMNITY

Before Skinner, there were three types of indemnity in Illinois: (1) implied indemnity based on qualitative differences in the relative fault of the parties (i.e. "active-passive" or "major-minor" fault), which was the most common theory of third-party recovery; (2) indemnity by operation of law or quasi-contractual indemnity, such as where a principal may seek indemnity from an agent whose tortious conduct caused the principal to be vicariously liable; and (3) express indemnity--i.e., where the parties' contract expressly provides that one party will indemnify another under specified circumstances.

Common law implied indemnity was not abolished by the Contribution Act if the parties' liability to plaintiff is based solely upon vicarious liability. *American Nat'l Bank & Tr. Co. v. Columbus--Cuneo--Cabrini Med. Ctr.,* 154 Ill.2d 347, 609 N.E.2d 285, 181 Ill.Dec. 917 (1992); *Faier v. Ambrose & Cushing, P.C.,* 154 Ill.2d 384, 609 N.E.2d 315, 182 Ill.Dec. 12 (1993).

Examples of pre-tort relationships which give rise to a duty to indemnify include: lessor and lessee; employer and employee; owner and lessee; and master and servant. *Coleman v. Franklin Boulevard Hosp.,* 227 Ill.App.3d 904, 908, 592 N.E.2d 327, 329, 169 Ill.Dec. 840, 842 (1st Dist. 1992); *Kemner v. Norfolk & W. Ry.,* 188 Ill.App.3d 245, 250, 544 N.E.2d 124, 127, 135 Ill.Dec. 767, 770 (5th Dist. 1989).

The IPI instructions applicable in indemnity cases begin at 500.00.

EQUITABLE APPORTIONMENT

Equitable apportionment differs from both indemnity and contribution. While contribution deals with the apportionment of damages based on joint liability for the same injury, equitable apportionment focuses on liability for separate and distinct injuries to the injured person. The leading case illustrating this doctrine is *Gertz v. Campbell,* 55 Ill.2d 84, 302 N.E.2d 40 (1973), where the defendant responsible for the plaintiff's fractured leg sought reimbursement from a physician for that part of the plaintiff's damages attributable to the alleged negligence of the physician. Under applicable tort law, defendant was subject to liability for all of plaintiff's damages, including the amputation for which the doctor was responsible; therefore, the court held that the defendant, third-party complainant, had a right to bring an action against the physician for the damages to the plaintiff attributable to the malpractice under the doctrine of equitable apportionment. *See also Burke v. 12 Rothschild's Liquor Mart,* 148 Ill.2d 429, 437-38, 593 N.E.2d 522, 525-26, 170 Ill.Dec. 633, 636-37 (1992) (explaining that *Gertz* applies where there are separate and distinct injuries for which the defendants could not be held jointly liable.) It has been held that equitable apportionment is not available to an intentional tortfeasor. *Neuman v. City of Chicago,* 110 Ill.App.3d 907, 443 N.E.2d 626, 66 Ill.Dec. 700 (1st Dist. 1982).

Cram v. Showalter, 140 Ill.App.3d 1068, 489 N.E.2d 892, 95 Ill.Dec. 330 (2d Dist. 1986), extended the reasoning in *Gertz.* There, a release of one party responsible for the injury, did not, in the absence of specific language, preclude an equitable apportionment action by the injured party against a subsequent treating physician where the tortious conduct resulted in a separate

and distinct injury, and plaintiff had not been fully compensated for the injury. *But see O'Keefe v. Greenwald,* 214 Ill.App.3d 926, 574 N.E.2d 136, 158 Ill.Dec. 342 (1st Dist. 1991) (finding the injury by the physician not to be separate and distinct.)

In *Mayhew Steel Prod., Inc. v. Hirschfelder,* 150 Ill.App.3d 328, 331, 501 N.E.2d 904, 907, 103 Ill.Dec. 587, 590 (5th Dist. 1986), the Appellate Court, Fifth District, disagreed with the Cram court's statement that an original tortfeasor can bring an action to be indemnified for the damage attributable to a subsequent tortfeasor. According to the court, the Contribution Act replaces the common-law concept of equitable apportionment. *See also Cleggett v. Zapianin,* 187 Ill.App.3d 872, 543 N.E.2d 892, 135 Ill.Dec. 324 (1st Dist. 1989).

The medical malpractice statute of limitation and repose, 735 ILCS 5/13-212, 13212(a) (1994), applies to equitable actions in general and equitable apportionment in particular. In *Pederson v. West,* 205 Ill.App.3d 200, 562 N.E.2d 578, 150 Ill.Dec. 48 (1st Dist. 1990), the court found that it was immaterial whether the third-party complaint was for "contribution" or "equitable apportionment," and dismissed the complaint as time barred.

Introduction revised January 2010.

600.01 Apportionment of Responsibility--Contribution--General Statement of Law

One who [is required to pay] [may be required to pay] [has paid] money for causing injury to another may be entitled to contribution for a percentage of that sum from a third-party. The circumstances under which such contribution is permitted will be explained to you in the following instructions.

Notes and Comment revised January 2010.

Notes on Use

If this instruction applies to fewer than all counts, it should be so limited by an introductory phrase.

An action for contribution is available against alleged tortfeasors whose liability is based on theories other than, or in addition to, negligence--e.g., strict liability in tort. The following series of contribution instructions were drafted for use in tort cases. An intentional tortfeasor may not recover contribution, but a reckless tortfeasor may recover contribution. *Ziarko v. Soo Line R.R. Co.,* 161 Ill.2d 267, 280 (1994).

One of the modifications required will be the substitution of an appropriate term in lieu of the terms "negligence" and "fault," such as the term "responsibility" or "legal responsibility." Those terms were selected as alternatives to "negligence" and "fault" because they are broad and meet the problem described in the dissenting opinions in the *Skinner* decision. *See also Heinrich v. Peabody Int'l Corp.,* 99 Ill.2d 344, 349 (1984) and *Mikolajczyk v. Ford Motor Co.,* 373 Ill.App.3d 646, *rev'd on other grounds,* 231 Ill.2d 516 (2008).

> That strict liability is not based on fault is well recognized. In *Suvada v. White Motor Co.* (1965), 32 Ill.2d 612, 210 N.E.2d 182, where this State adopted the doctrine as well as section 402A of the Restatement (Second) of Torts (1965), such considerations as public interest in human life and health, the manufacturer's solicitations to purchase, and the justice of imposing liability on one who creates the risk and reaps the profit, are described as the motivating forces for the adoption of the doctrine.
>
> * * *
>
> Under strict liability, responsibility is imposed because of the character of the product, not because of fault. *Skinner v. Reed-Prentice Div. Package Mach. Co.,* 70 Ill.2d at 24-26, 15 Ill.Dec. at 839-40.

The committee concluded that the terms "responsibility" or "legal responsibility" are readily understandable and do not require definition.

In addition to this substitution, other modifications may be necessary to accommodate any other theory or theories.

If indemnity is also sought, see the indemnity instructions in the 500-series.

Comment

The amount of the settlement or the judgment determines the amount of the common liability to the plaintiff which will be allocated among the contribution parties. *Mallaney v. Dunaway,* 178 Ill.App.3d 827, 533 N.E.2d 1114, 128 Ill.Dec. 26 (3d Dist. 1988). Where there has been a post-verdict settlement, it is the good-faith settlement amount that represents the common liability, not the verdict amount. *Ziarko v. Soo Line R.R. Co.,* 161 Ill.2d 267, 286-288 (1994). Punitive damages are not subject to contribution. *Hall v. Archer-Daniels-Midland Co.,* 122 Ill.2d 448, 524 N.E.2d 586, 120 Ill.Dec. 556 (1988).

No Illinois court has as yet addressed the question of whether a contribution defendant's pro rata liability includes any fault attributable to an absent (non-party) tortfeasor. The Contribution Act makes the contribution defendant responsible only for his "pro rata share of the common liability." The instructions in this chapter may have to be modified depending upon the development of case law on this issue.

600.02 Apportionment of Responsibility--Complaint and Claims for Contribution Tried Concurrently (Same Issues)

If you find that [any of the defendants][the defendant] [are] [is] legally responsible for proximately causing plaintiff's [injuries] [damages], then you must apportion damages by determining the relative degree of legal responsibility of each [person] [and] [entity] named or described on the Verdict Form.

In making that determination, you should consider the degree to which the [condition of the product] [and] [person's] [and] [entity's] conduct proximately caused plaintiff's [injuries] [damages].

In your verdict form, you will state the percentage of legal responsibility of each of the [persons] [and] [entities] named on the verdict form. The total of these percentages must add up to 100%.

Notes and Comment revised January 2010.

Notes on Use

This instruction should be used for all cases where contribution actions are tried concurrently with plaintiff's primary suit. It should also be used in cases where issues arising under 735 ILCS 5/2-1117 need to be decided. This instruction can be used with complaints or third-party complaints having theories of liability other than negligence. Appropriate bracketed phrases should be utilized to reflect the legal theories at issue.

This instruction is intended for use in conjunction with a contribution form of verdict, IPI 600.14 or 600.14A. The trial court should determine as a matter of law which persons or entities should be named on the form of verdict for purposes of allocating fault. Under 735 ILCS 5/2-1117, fault can be allocated among plaintiff, defendant, and third-party defendants other than plaintiff's employer. *See* Comment to IPI 600.14 (form of verdict).

Issues and burden of proof instructions should be used to advise the jury of the claims of the parties and the respective burdens of proof.

Comment

This form of instruction is a change from the prior version. The changes were intended to simplify the instruction and to make the second paragraph consistent with case law concerning apportionment of fault.

This form of instruction was used in *Mikolajczyk v. Ford Motor Co.,* 369 Ill.App.3d 78, 859 N.E.2d 201 (1st Dist. 2006), *rev'd on other grounds,* 231 Ill.2d 516 (2008). It was drafted to conform to *Skinner v. Reed-Prentice,* 70 Ill.2d 1, 14 (1977) and *Heinrich v. Peabody,* 99 Ill.2d 344, 349 (1984).

If there is an action brought by an injured person, then the contribution claim *must* be asserted by counterclaim or third-party claim in that action. *Laue v. Leifheit,* 105 Ill.2d 191 (1984). *Laue* does not address the right to contribution when a suit is settled before defendant files a contribution action.

600.03 Apportionment of Responsibility--Complaint and Claims for Contribution Tried or Submitted Consecutively to Same Jury (Same Issues)

You have found that defendant(s) [is] [are] liable to ____. You must now apportion damages by determining, under the instructions already given you in ____ case, the relative degree of legal responsibility of [each of those defendant's][and] [any persons identified in the verdict form] for ____[injuries] [and] [damages].

In making that determination, you should consider the degree to which the [condition of the product] [and] [person's] [and] [entity's] conduct proximately caused plaintiff's [injuries] [damages].

In your verdict, you will state the percentage of fault of each person identified on the form of verdict and the total of those percentages must add up to 100%.

Instruction, Notes and Comment revised January 2010.

Notes on Use

This instruction should be used when any contribution claims--whether counterclaims between original defendants or third-party claims--are tried consecutively to the same jury which has awarded damages to the plaintiff. All relevant instructions from the primary action should be submitted to the jury.

The jury should receive new issues and burden of proof instructions on each counterclaim or third-party claim with appropriate supporting instructions as to the theories of liability presented.

This instruction is intended for use in conjunction with one of the contribution verdict forms, IPI 600.14 or 600.14A. The trial court should determine as a matter of law which parties (or non-parties) should be named on the form of verdict for purposes of allocating fault. See Comment to IPI 600.14.

Comment

This form of instruction is a change from the prior version. The changes were intended to simplify the instruction and to make the second paragraph consistent with case law concerning apportionment of fault under contribution law.

The language in the second paragraph of this instruction was used in *Mikolajczyk v. Ford Motor Co.,* 369 Ill.App.3d 78, 859 N.E.2d 201 (1st Dist. 2006), *reve'd on other grounds,* 231 Ill.2d 516 (2008). It was drafted to conform to *Skinner v. Reed-Prentice,* 70 Ill.2d 1, 14 (1977) and *Heinrich v. Peabody,* 99 Ill.2d 344, 349 (1984).

600.04 Issues--Apportionment of Responsibility--Third-Party Complaint Tried and Submitted Concurrently

[1] In addition to the claim of ____ against ____, ____ makes a claim against ____. ____ claims that if he is liable to ____ for damages, then he is entitled to contribution from ____ for a percentage of those damages.

[2] If you find [____] [one or more defendants] liable to ____, then you must consider the claim for contribution by [____] [each such defendant].

[3] ____ claims that _____ was negligent in one or more of the following respects:

[*Set forth in simple form, without undue emphasis or repetition, those allegations of the third-party complaint as to the conduct of the third-party defendant which have not been withdrawn or ruled out by the court and which are supported by evidence.*]

____ further claims that one or more of the foregoing was a proximate cause of ____'s [injuries] [and] [damages].

[4] ____ [denies that he did any of the things claimed by ____;] [denies that he was negligent (in doing any of the things claimed by ____);] [and denies that any claimed act or omission on the part of ____ was a proximate cause of ____'s (injuries) (and) (damages)].

[5] [____ also asserts the following affirmative defense(s):

(*Set forth in simple form without undue emphasis or repetition those affirmative defenses in the third-party answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[6] [____denies (that) (those) affirmative defense(s).]

Notes and Comment revised January 2010.

Notes on Use

This instruction is to be used where parties who were not sued by the plaintiff are brought into the suit in a claim for contribution.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. *See* Notes on Use to IPI 600.01.

As used in this instruction, the term "affirmative defense(s)" refers *only* to the traditional affirmative defenses that operate as a *complete bar* to recovery--for example, statute of limitations, release, and satisfaction. *See* 735 ILCS 5/2-613(d) (1994). Do *not* include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; neither has any effect on liability.

Comment

If there is an action brought by the injured person(s), then the contribution claim *must* be asserted by counterclaim or third-party claim in that action. *Laue v. Leifheit,* 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984). *Laue* does not address the right to contribution when a suit is filed but settled before judgment. *See* Introduction.

600.05 Issues--Apportionment of Responsibility--Separate or Third-Party Complaint Tried and Submitted Consecutively to Same Jury

[1] You have found that ____ [is] [are] liable to ____. You must now decide ____'s claim that he is entitled to contribution from ____ for a percentage of the damages awarded to ____.

[2] ____ claims that _____ was also negligent in one or more of the following respects:

[*Set forth in simple form, without undue emphasis or repetition, those allegations of the third-party complaint as to the conduct of the third-party defendant which have not been withdrawn or ruled out by the court and which are supported by the evidence.*]

____ further claims that one or more of the foregoing was a proximate cause of ____'s [injuries] [and] [damages].

[3] ____ [denies that he did any of the things claimed by ____;] [denies that he was negligent (in doing any of the things claimed by _____);] [and denies that any claimed act or omission on the part of ____ was a proximate cause of ____'s (injuries) (and) (damages)].

[4] [____ also asserts the following affirmative defense(s):

(*Set forth in simple form, without undue emphasis or repetition, those affirmative defenses in the third-party answer which have not been withdrawn or ruled out by the court and which are supported by the evidence.*)]

[5] [____denies (that) (those) affirmative defense(s).]

Notes and Comment revised January 2010.

Notes on Use

All relevant instructions submitted in the prime action should be resubmitted to the jury.

This instruction is to be used where parties who were not sued by the plaintiff are brought into the suit in a claim for contribution.

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. *See* Notes on Use to IPI 600.01.

In this instruction, use only the parties' names; do *not* refer to their pleading status (i.e., plaintiff, counterplaintiff, etc.).

As used in this instruction, the term "affirmative defense(s)" refers *only* to the traditional affirmative defenses that operate as a *complete bar* to recovery--for example, statute of limitations, release, and satisfaction. *See* 735 ILCS 5/2-613(d) (1994). Do *not* include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative

defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; neither has any effect on liability.

Comment

If there is an action brought by the injured person(s), then the contribution claim *must* be asserted by counterclaim or third-party claim in that action. *Laue v. Leifheit,* 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984). *Laue* does not address the right to contribution when a suit is filed but settled before judgment. *See* Introduction.

600.06 Burden of Proof--Apportionment of Responsibility--Third-Party Complaint Tried and Submitted Concurrently or Consecutively to the Same Jury

As to the claim of ____ against _____, ____ has the burden of proving each of the following propositions:

First, that ____ acted or failed to act in one of the ways claimed in these instructions, and that in so acting, or failing to act, ____ was negligent;

Second, that the negligence of ____ was a proximate cause of ____'s [injuries] [and] [damages].

If you find from your consideration of all the evidence that both of these propositions have been proved, then your verdict should be for ____ and against ____, and you should include ____ in [any] [the] apportionment of damages.

If, on the other hand, you find from your consideration of all the evidence that either one or both of these propositions has not been proved, then your verdict should be for ____ and you will have no occasion to consider the apportionment of damages against ____.

Comment revised January 2010.

Notes on Use

This instruction should be used in conjunction with the contribution verdict form, IPI 600.14.

A burden of proof instruction should be submitted as to each party who is claimed to be responsible for the plaintiff's injury and who the trial court determines should be named on the verdict form.

If more than one legal theory is alleged against any tortfeasor (e.g., negligence and strict products liability), this instruction must be modified to include the burden of proof for those causes of action and to state the burdens in the alternative.

This instruction should be given in conjunction with appropriate issues instructions as well as appropriate definitions, etc. It can be used in cases tried either concurrently or consecutively with the primary action.

Comment

The attribution of a percentage of fault to non-party tortfeasors may be sought by various parties in several different contexts. The plaintiff may seek to establish fault on the part of a non-party in order to reduce the plaintiff's percentage of comparative negligence. A third-party defendant tortfeasor, not subject to liability by judgment to the plaintiff, may seek to apportion fault to a non-party tortfeasor in order to limit the thirdparty defendant's proportionate share of fault to a lesser figure (this has not yet been approved or rejected under Illinois cases).

600.07 Apportionment of Responsibility--Complaint and Claims for Contribution Tried and Submitted Concurrently to the Same Jury--Third Party Complaint--Negligence

This instruction is replaced by IPI 600.02, which has been expanded to include both concurrent submissions of counterclaims for contribution and also third-party complaints. Those two situations were previously split between IPI 600.02 and IPI 600.07.

600.08 Apportionment Of Responsibility--Complaint And Claims For Contribution Tried And Submitted Consecutively To The Same Jury--Third Party Complaint--Negligence

IPI 600.08 has been withdrawn because its function has been superseded by modified IPI 600.03.

600.09 Issues--Contribution Following Settlement

[1] ____ has paid a sum of money to ____ in settlement of ____'s claim for his [injuries] [and] [damages]. ____ now claims that he is entitled to contribution from ____ for a percentage of that sum paid.

[2] [____ further claims that the payment was made in reasonable anticipation of his liability to ____.]

[3] ____ claims that ____ was negligent in one or more of the following respects:

[*Set forth in simple form, without undue emphasis, those allegations as to the conduct of the defendant which are set forth in the complaint for contribution which have not been withdrawn or ruled out by the court and are supported by the evidence.*]

[4] ____ further claims that one or more of the foregoing was a proximate cause of ____'s [injuries] [and] [damages].

[5] ____ [denies that the payment was made in reasonable anticipation of liability;] [denies that he did any of the things claimed by ____;] [denies that he was negligent (in doing any of the things claimed by ____);] [and denies that any claimed act or omission on the part of ____ was a proximate cause of ____'s (injuries) (and) (damages)].

[6] [____ also asserts the following affirmative defense(s):

(*Set forth in simple form, without undue emphasis or repetition, those affirmative defenses in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[7] [____denies (that) (those) affirmative defense(s).]

[8] [____(also) claims that ____was negligent in one or more of the following respects:

(*Set forth in simple form, without undue emphasis, those allegations as to the conduct of the plaintiff which have been set forth in the defendant's answer which have not been withdrawn or ruled out by the court and are supported by the evidence.*)]

[9] [____ further claims that one or more of the foregoing was (a) (the) proximate cause of ____'s (injuries) (and) (damages).]

[10] [____ (admits) (denies)

(*Set forth in simple form, without undue emphasis, the admissions, if any, and denials contained in plaintiff's reply to defendant's allegations.*)]

Notes and Comment revised January 2010.

Notes on Use

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. *See* Notes on Use to IPI 600.01.

The instruction presumes that there is no issue that payment was made. If an issue as to payment arises, the instruction should be modified.

Paragraphs 8, 9 and 10 should be used only if the defendant alleges in his pleadings specific acts or omissions of the plaintiff.

As used in this instruction, the term "affirmative defense(s)" refers *only* to the traditional affirmative defenses that operate as a *complete bar* to recovery--for example, statute of limitations, release, and satisfaction. *See* 735 ILCS 5/2-613(d) (1994). Do *not* include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; neither has any effect on liability.

Comment

Paragraph 2 is consistent with the requirement in indemnity cases that the plaintiff show that his payment was made in the reasonable anticipation of liability. *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.,* 12 Ill.App.3d 165, 298 N.E.2d 289 (1st Dist. l973); *Nogacz v. Procter & Gamble Mfg. Co.,* 37 Ill.App.3d 636, 347 N.E.2d 112, 122- 24 (1st Dist. l975); *N.E. Finch Co. v. R. C. Mahon Co.,* 54 Ill.App.3d 573, 370 N.E.2d 160, 12 Ill.Dec. 537 (3d Dist. l977); *Houser v. Witt,* 111 Ill.App.3d 123, 443 N.E.2d 725, 66 Ill.Dec. 799 (4th Dist. 1982). This paragraph has been held to be a required element of proof in all contribution actions following settlement. See *Patel v. Trueblood, Inc.,* 281 Ill.App.3d 197, 217 Ill.Dec. 109, 666 N.E.2d 778 (1st Dist. 1996).

If there is an action brought by the injured person(s), then the contribution claim *must* be asserted by counterclaim or third-party claim in that action. *Laue v. Leifheit,* 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984). *Laue* does not address the right to contribution when a suit is filed but settled before judgment. *See* Introduction.

600.10 Burden of Proof--Contribution Following Settlement

____ has the burden of proving each of the following propositions:

First, that ____ acted or failed to act in one of the ways claimed in these instructions, and that in so acting, or failing to act, ____ was negligent;

Second, that the negligence of ____ was a proximate cause of [the injury to ____] [and] [the damage to ____'s property][;][.]

[Third, that the payment ____ made was in reasonable anticipation of liability to ____.]

[____ has the burden of proving the affirmative defense(s) that:

(*Concisely state any affirmative defenses.*)]

If you find from your consideration of all the evidence that each of the propositions required of ____ has been proved [and that none of the affirmative defenses has been proved] [and that the affirmative defense has not been proved], then your verdict should be for ____ and you should apportion damages.

If, on the other hand, you find from your consideration of all the evidence that any of the propositions required of ____ has not been proved, [or that any one of the affirmative defenses has been proved,] [or that the affirmative defense has been proved,] then your verdict should be for ____and you will have no occasion to consider the apportionment of damages.

Notes and Comment revised January 2010.

Notes on Use

If the right of contribution is based on a theory other than negligence, the instruction should be modified as necessary. *See* Notes on Use to IPI 600.01.

As used in this instruction, the term "affirmative defense(s)" refers *only* to the traditional affirmative defenses that operate as a *complete bar* to recovery--for example, statute of limitations, release, and satisfaction. *See* 735 ILCS 5/2-613(d) (1994). Do *not* include comparative negligence or other comparative fault in the paragraphs referring to affirmative defenses, even if comparative negligence or comparative fault are referred to as affirmative defenses in the pleadings. Comparative negligence or comparative fault only reduces damages; neither has any effect on liability.

Comment

If there is an action brought by the injured person(s), then the contribution claim *must* be asserted by counterclaim or third-party claim in that action. *Laue v. Leifheit,* 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984). *Laue* does not address the right to contribution when a suit is filed but settled before judgment. *See* Introduction.

600.11 Apportionment of Responsibility--Contribution Following Settlement

To apportion damages, you must determine from all the evidence the relative degree of legal responsibility of [each party to this lawsuit] [of any persons identified in the verdict form] who proximately caused ____ [injuries] [damages].

In making that determination, you should consider the degree to which the [condition of the product] [and] [person's] [and] [entity's] conduct proximately caused plaintiff's [injuries] [damages].

In your verdict form, you will state the percentage of legal responsibility of each of these persons. The total of these percentages must add up to 100%.

Instruction, Notes and Comment revised January 2010.

Notes on Use

This instruction should be given in a suit for contribution following a complete settlement with the injured person(s). In cases tried and submitted concurrently (IPI 600.04) or consecutively (IPI 600.05) to the same jury, IPI 600.02 or 600.03 will be given.

If the right of contribution is based on a theory other than negligence, willful and wanton misconduct or product liability, the instruction should be modified as necessary. *See* Notes on Use to IPI 600.01.

For actions for contribution following settlement with the plaintiff by one or more tortfeasors, it is anticipated that consideration of the injured person's contributory negligence or other conduct, such as assumption of the risk, will not be necessary for the proper calculation of the contribution percentages. For that reason, reference to the fault of the injured person is not included in this instruction nor is it included within IPI 600.12. If, in the circumstances of a particular case, consideration of the injured person's fault becomes necessary, this instruction would need to be modified.

The committee recommends that a non-party not be included on the verdict form in contribution cases tried after settlement with the plaintiff. Non-party legal responsibility is only relevant if plaintiff's contributory fault is at issue. *Bofman v. Material Serv. Corp.,* 125 Ill.App.3d 1053 (1st Dist. 1984); *Smith v. Central Ill. Pub. Serv. Co.,* 176 Ill.App.3d 482 (4th Dist. 1988).

Comment

This form of instruction is a change from the prior version. The changes were intended to simplify the instruction and to make the second paragraph consistent with case law concerning apportionment of fault.

The language in the second paragraph of this instruction was used in *Mikolajczyk v. Ford Motor Co.,* 369 Ill.App.3d 78, 859 N.E.2d 201 (1st Dist. 2006), *rev'd on other grounds,* 231 Ill.2d 516 (2008). It was drafted to conform to *Skinner v. Reed-Prentice,* 70 Ill.2d 1, 14 (1977) and Heinrich v. Peabody, 99 Ill.2d 344, 349 (1984).

600.12 Apportionment of Responsibility--Instruction on Use of Verdict Forms--Contribution Following Settlement

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdicts must be unanimous.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms of verdict and return them to the court.

Each verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

The parties in this case are:

Plaintiffs:	[name of first plaintiff] [name of second plaintiff]
Defendants:	[name of first defendant] [name of second defendant]

You must fill in a percentage for each party. If you find in favor of [the defendant] [one or more defendants], then you must fill in zero percent for [that defendant] [or those defendants]. The total of the percentages must equal 100.

Instruction and Notes revised January 2010.

Notes on Use

See Note on Use at IPI 600.11. This instruction is to be used only in actions for contribution following settlement. Fill in the names of the parties before submitting this instruction to the jury.

600.13 Apportionment of Responsibility--Instruction on Use of Verdict Forms--Contribution Claims Tried Concurrently or Consecutively to Same Jury

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdicts must be unanimous.

Forms of verdict are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate forms of verdict and return them to the court.

Each verdict should be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

The parties in this case are:

Plaintiffs:	[name of first plaintiff] [name of second plaintiff]
Defendants-3rd Party Plaintiffs	[name of first defendant-3rd party plaintiff] [name of second defendant-3rd party plf.]
3rd Party Defendants	[Name of 3rd party defendant]

You must fill in a percentage for each party. If you find in favor of [the defendant] [one or more defendants], [or the third-party defendant], then you must fill in zero percent for [that defendant] [or those defendants] [or the third-party defendant]. The total of the percentages must equal 100.

Instruction and Notes revised January 2010.

Notes on Use

This instruction is to be used in any action in which contribution is sought, except actions for contribution following a settlement by one alleged tortfeasor that settles the liability of all. In that case, use IPI 600.12. Fill in the names of the parties before submitting this instruction to the jury. IPI 600.14 should be modified and used as the accompanying verdict form.

600.14. Contribution Verdict Form--Comparative Negligence an Issue--Verdict for Plaintiff

Verdict Form A

We, the jury, find for [plaintiff's name] and against the following defendant or defendants:

[name of defendant 1]	Yes __	No __
[name of defendant 2]	Yes __	No __

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the [negligence] [other damage reducing defense] of [name of plaintiff], if any, we find that the total amount of damages suffered by [name of plaintiff] as a proximate result of the occurrence in question is ____, itemized as follows:

List each category of damages, e.g.

The disfigurement resulting from the injury	$_____
Insert other damages categories from IPI 30.05, 30.05.01, 30.07, 30.08, 30.09 or as applicable	$_____
PLAINTIFF'S TOTAL DAMAGES	$_____

Second: As to the contribution claims brought by [third-party plaintiff's name], we find:

Against [third-party defendant 1]	Yes __	No __
Against [third-party defendant 2]	Yes __	No __

Third: Assuming that 100% represents the total combined legal responsibility of all [persons] [or] [entities] who [that] proximately caused [name of plaintiff] injury, we find the percentage of legal responsibility attributable to each as follows:

a) [plaintiff's name] ____%

b) [defendant #1 name] ____%

c) [defendant #2 name] ____%

d) [3rd party defendant 1 name] ____%

e) [3rd party defendant 2 name] ____%

f) [other name1]

1The Committee recommends that non-parties be excluded from 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 non-party. Assuming such is presented and if the jury will need to decide whether plaintiff was contributorily negligent, then the non-party should be listed on the verdict form based on *Bofman v. Material Serv. Corp.,* 125 Ill.App.3d 1053 (1st Dist. 1984) and *Smith v. Central Ill. Pub. Serv. Co.,* 176 Ill.App.3d 482 (4th Dist. 1988). For contribution cases in which plaintiff's contributory fault is not an issue, use IPI 600.14A.

(*Instructions to Jury: If you find that plaintiff was not [contributorily negligent] [other damage reducing defense], or if you find any other party listed on the verdict form was not legally responsible in a way that proximately caused plaintiff's injury, you should enter a zero (0)% as to that party.*)

Fourth: 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 award ____ recoverable damages in the amount of ____.

[Signature lines]

Verdict Form revised January 2010. Notes revised June 1, 2012.

Notes on Use

This verdict form is appropriate to use in cases where there are contribution claims involving one or more third-party complaints and where the issue of contributory fault will be decided by the jury. However, if the plaintiff suffers multiple, separable injuries and not all of the defeants are alleged to have caused each of the separable injuries then a modified verdict form may be necessary. *See Auten v. Franklin,* 404 Ill.App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec.297 (4th Dist. 2010). If there is no issue of contributory fault, use *IPI 600.14A.* This verdict form serves as a basis to determine all fact issues relating to comparative negligence, joint and several liability and contribution.

B45.03A is similar to this verdict form, except it lacks the paragraph "Second" providing for findings for or against third-party defendants. B45.03A is intended for use in cases involving contribution claims among defendants, tried concurrently with the plaintiff's claim.

600.14A Contribution Verdict Form--Comparative Negligence Not an Issue--Verdict for Plaintiff

Verdict Form A

We, the jury, find for _____ and against the following defendant or defendants:

	Yes	No
Defendant #1	__	__

	Yes	No
Defendant #2	__	__

We further find the following:

First: We find that the total amount of damages suffered by [name of plaintiff] as a proximate result of the occurrence in question is $_____, itemized as follows:

List each category of damages, e.g.

The disfigurement resulting from the injury	$_____
Insert other damages categories from IPI 30.05, 30.05.01, 30.07, 30.08, 30.09 or as applicable	$_____
PLAINTIFF'S TOTAL DAMAGES	$_____

Second: As to the contribution claims brought by [name of third-party plaintiff], we find:

		Yes	No
Against	Third-party defendant #1	__	__

		Yes	No
Against	Third-party defendant #2	__	__

Third: Assuming that 100% represents the total combined legal responsibility of all [persons] [or] [entities] [who] [that] proximately caused [plaintiff's name] injury, we find the percentage of legal responsibility attributable to each as follows:

a) Defendant #1's name	____%
b) Defendant #2's name	____%
c) Third-party defendant #1's name	____%
d) Third-party defendant #2's name	____%
TOTAL	100%

(*Instructions to Jury: If you find that any party listed on the verdict form was not legally responsible in a way that proximately caused plaintiff's injury, you should enter zero (0)% as to that party.*) *[Signature lines]*

Verdict Form and Notes adopted January 2010. Notes revised June 1, 2012.

Notes on Use

This verdict form is appropriate to use in cases where there are contribution claims involving one or more third-party complaints and where the issue of contributory fault will not be decided by the jury. However, if the plaintiff suffers multiple, separable injuries and not all of the defendants are alleged to have caused each of the separable injuries then a modified verdict form may be necessary. *See Auten v. Franklin,* 404 Ill. App.3d 1130, 942 N.E.2d 500, 347 Ill.Dec. 297 (4th Dist. 2010). If there is an issue of contributory fault, use IPI 600.14. This instruction serves as a basis to determine all fact issues relating to liability of the defendants, third-party defendants, joint and several liability and contribution.

B45.03A2 is similar to this verdict form, except it lacks the paragraph "Second" providing for findings for or against third-party defendants. B45.03A2 is intended for use in cases involving contribution claims among defendants tried concurrently with the plaintiff's claim.

If there is no issue of contributory negligence, the Committee recommends against including non-parties on the verdict form. *Compare Ready v. United/Goedecke Services, Inc.,* 232 Ill.2d 369, 385 (2008) *and Jones v. DHR Cambridge Homes, Inc.,* 381 Ill.App.3d 18, 31-32, 885 N.E.2d 330 (1st Dist. 2008) *with Bofman v. Material Serv. Corp.,* 125 Ill.App.3d 1053 (1st Dist. 1984) *and Smith v. Central Ill. Pub. Serv. Co.,* 176 Ill.App.3d 482 (4th Dist. 1988).

600.15 Verdict Form--Verdict for Defendant

IPI 600.15 has been withdrawn because its function has been superseded by the new verdict forms and by the direction to the jury to place a zero on the line for each contribution defendant which the jury finds to be not at fault.

600.16 Verdict Form--Apportionment of Responsibility--Contribution Following Settlement

We, the jury, apportion responsibility as follows:

Name of contribution plaintiff	%
Name of contribution defendant #1	%
Name of contribution defendant #2	%
TOTAL	100%

(Instruction to Jury: If you find that any person or entity was not legally responsible in a way that proximately caused the injured person's injury, then you should enter a zero (0)% as to that person or entity.)

[Signature Lines]

Verdict Form and Notes revised January 2010.

Notes on Use

Fill in the names of all parties to the contribution action, including the contribution plaintiff(s), before submitting this form to the jury.

As stated in the Notes on Use to IPI 600.11, it is anticipated that in contribution actions following settlement, the fault attributable to the injured person will not need to be considered to arrive at the contribution apportionment among the contribution parties.

If there is no issue of contributory negligence, the Committee recommends against including non-parties on the verdict form. *Compare Ready v. United/Goedecke Services, Inc.,* 232 Ill.2d 369, 385 (2008) and *Jones v. DHR Cambridge Homes, Inc.,* 381 Ill.App.3d 18, 31-32, 885 N.E.2d 330 (1st Dist. 2008) with *Bofman v. Material Serv. Corp.,* 125 Ill.App.3d 1053 (1st Dist. 1984) and *Smith v. Central Ill. Pub. Serv. Co.,* 176 Ill.App.3d 482 (4th Dist. 1988).

600.17 Apportionment of Responsibility--Treatment of Parties as a Unit

For the purposes of these instructions, you will consider ____ and ____ as one [defendant] [plaintiff] [party].

Notes revised January 2010.

Notes on Use

This instruction must be given when two or more parties are combined as a unit as described in 740 ILCS 100/3 (1994), which provides, "[i]f equity requires, the collective liability of some as a group shall constitute a single share."

When this instruction is used, place the names of both such parties on a single line of the apportionment verdict form, IPI 600.14, IPI 600.14A or IPI 600.16.

CONTRACTS

700.00
CONTRACTS

CONTRACTS
INTRODUCTION

These instructions deal with a cause of action for breach of contract when the plaintiff is seeking money damages. A cause of action for breach of a construction contract and/or the concept of substantial performance will be covered by future instructions. Employment contract disputes (including Wrongful or Retaliatory Discharge; Intentional Interference with Prospective Economic Advantage; Civil Conspiracy, and Breach of Fiduciary Duty) will be covered by future instructions. Particularized areas of contract law, such as the Uniform Commercial Code, warranty, and those with equitable relief such as recession, reformation or specific performance are not specifically covered by these instructions. Modification of these instructions will be required by court and counsel to instruct the jury on those areas of contract law not intended to be covered by these instructions.

I. GENERAL CONTRACT LAW

A contract is a promise or set of promises between two or more competent parties, supported by legal consideration, to do or not to do a particular act and for the breach of which the law recognizes a remedy. Steinberg v. Chicago Medical School, 69 Ill.2d 320, 371 N.E.2d 634, 639; 13 Ill.Dec. 699 (1977); Wagner Excello Foods v. Fearn International, Inc., 235 Ill.App.3d 224, 229; 601 N.E.2d 956, 176 Ill.Dec. 258 (1st Dist.1992); White v. Village of Homewood, 256 Ill.App.3d 354, 356-357; 628 N.E.2d 616, 618; 195 Ill.Dec. 152, 154 (1st Dist.1993).

The requirements of a valid contract are offer and acceptance, consideration, competent parties, legal purpose, and, if agreed to by the parties, a written agreement. Lal v. Naffah, 149 Ill.App.3d 245, 500 N.E.2d 699, 792; 102 Ill.Dec. 806 (1st Dist.1986).

A contract may be express or implied. Express contracts are those in which the terms of the contract are disclosed in the words or writings of the parties. Bull v. Mitchell, 114 Ill.App.3d 177, 448 N.E.2d 1016, 1023; 70 Ill.Dec. 138 (3d Dist.1983); Lampe v. Swan Corp., 212 Ill.App.3d 414, 415; 571 N.E.2d 245, 246; 156 Ill.Dec. 658, 659 (5th Dist.1991). Implied contracts are those where the agreement is inferred from the acts or conduct or course of dealings of the parties. In Re Estate of Brumshagen, 27 Ill.App.2d 14, 169 N.E.2d 112, 116 (2d Dist.1960); Dallis v. Don Cunningham and Associates, 11 F.3d 713, 716 (7th Cir.1993).

Certain contracts are required by the Statute of Frauds to be in writing. [740 ILCS 80/1, 80/2-formerly Ill.Rev.Stat.1991, ch. 59, §0.01--which references: an agreement to pay the debt of another; an agreement to sell an interest in land; an agreement made by the executor/administrator of an estate; an agreement to marry, plus an agreement that cannot be performed within one year from it's making; and cf. 810 ILCS 5/2-201- that references an agreement for sale of goods for $500.00 or more under the Uniform Commercial Code.] Although normally a question of law for the court, under certain circumstances factual issues relating to the applicability, or the satisfaction of the requirements, of the Statute of Frauds may be questions for the jury. Gaffney v. McCarron, 45 Ill.App.3d 944, 360 N.E.2d 508, 509; 4 Ill.Dec. 572 (1st Dist.1977); American College of Surgeons v. Lumbermens Mutual Casualty Co., 142 Ill.App.3d 680, 491 N.E.2d 1179, 1191; 96 Ill.Dec. 719 (1st Dist.1986). Otherwise, an oral contract with definite and certain terms is enforceable. Rybak v. Provenzale, 181 Ill.App.3d 884, 537 N.E.2d 1321, 1325; 130 Ill.Dec. 852 (2d Dist.1989); Kemp v. Bridgestone/Firestone, Inc., 253 Ill.App.3d 858, 865; 625 N.E.2d 905, 910; 192 Ill.Dec. 750, 755 (4th Dist.1993).

The burden of proving the existence of a contract rests on the party who seeks enforcement of the contract. C. Iber & Sons, Inc. v. Grimmett, 108 Ill.App.2d 443, 248 N.E.2d 131, 133 (3d Dist.1969). The plaintiff in a breach of contract action also has the burden of proving all of the material terms of the contract. Vandevier v. Mulay Plastics, Inc., 135 Ill.App.3d 787, 482 N.E.2d 377, 380, 90 Ill.Dec. 558 (1st Dist.1985); DeHeer-Liss v. Friedman, 227 Ill.App.3d 422, 427; 592 N.E.2d 13, 17; 169 Ill.Dec. 526, 530 (1st Dist.1991).

If there is no dispute as to the language used by the parties or the facts essential to a purported contract, the issue of the existence of a contract is a question of law to be decided by the court. Bank of Benton v. Cogdill, 118 Ill.App.3d 280, 454 N.E.2d 1120, 1125; 73 Ill.Dec. 871 (5th Dist.1983); Ogle v. Hotto, 273 Ill.App.3d 313, 320;, 652 N.E.2d 815, 819; 210 Ill.Dec. 13, 17 (5th Dist.1995). If there is a dispute as to the language used or the facts essential to a purported contract, the issues of whether a contract exists, the terms of the contract, and the intent of the parties concerning the contract formation are questions of fact for the jury. In re Estate of Kern, 142 Ill.App.3d 506, 491 N.E.2d 1275, 1280; 96 Ill.Dec. 815 (1st Dist.1986); Emmenegger Construction Co., Inc. v. King, 103 Ill.App.3d 423, 431 N.E.2d 738, 742; 59 Ill.Dec. 237 (5th Dist.1982); Mulliken v. Lewis, 245 Ill.App.3d 512, 516; 615 N.E.2d 25, 28; 185 Ill.Dec. 730, 733 (4th Dist.1993).

II. CONTRACT FORMATION

A. OFFER and ACCEPTANCE

An offer is an act by one person (offeror) which gives to another (offeree) the power to accept the offer according to its terms. McCarty v. Verson Allsteel Press Co., 89 Ill.App.3d 498, 411 N.E.2d 936, 942, 943; 44 Ill.Dec. 570 (1st Dist.1980); In re Marriage of Bennett, 225 Ill.App.3d 828, 832; 587 N.E.2d 577, 580; 167 Ill.Dec. 308, 311 (4th Dist.1992). The offer must be communicated to the offeree. Carroll v. Preferred Risk Insurance Co., 34 Ill.2d 310, 215 N.E.2d 801, 803 (1966). In order to create a contract, the offer must be accepted. Zinni v. Royal Lincoln-Mercury, Inc., 84 Ill.App.3d 1093, 406 N.E.2d 212, 214; 40 Ill.Dec. 511 (1st Dist.1980); Mike Schlemer, Inc. v. Pulizos, 267 Ill.App.3d 393, 395; 642 N.E.2d 200, 201; 204 Ill.Dec. 738,

739 (5th Dist.1994). The acceptance must be communicated to the offeror. Rosin v. First Bank of Oak Park, 126 Ill.App.3d 230, 466 N.E.2d 1245, 1249; 81 Ill.Dec. 443 (1st Dist.1984); Energy Erectors, Ltd. v. Industrial Com'n., 230 Ill.App.3d 158, 162; 595 N.E.2d 641, 644; 172 Ill.Dec. 280, 283 (5th Dist.1992); Cowger v. Industrial Com'n., 728 N.E.2d 789, 793; 245 Ill.Dec. 707, 711 (5th Dist.2000). The acceptance must comply strictly with the terms of the offer. Anand v. Marple, 167 Ill.App.3d 918, 522 N.E.2d 281, 283; 118 Ill.Dec. 826 (3d Dist.1988). Mutuality of assent may be established by conduct indicating agreement with the terms of the offer, even though subjective agreement is lacking. In re Marriage of Kloster, 127 Ill.App.3d 583, 469 N.E.2d 381, 383; 82 Ill.Dec. 847 (2d Dist.1984). Objective manifestation of intent, when present, controls the determination of mutual assent. Only when there is no objective indicia of intent or there is ambiguity in the description of the subject matter of the bargain, must the subjective intent of the parties be considered. Caporale v. Mar Les, Inc., 656 F.2d 242, 244 (7th Cir.1981); but see Robbins v. Lynch, 836 F.2d 330, 332 (7th Cir.1988).

In order to constitute a contract between the parties there must be mutual consent by the contracting parties on the essential terms and conditions of the subject matter of the contract. Bank of Marion v. Robert Fritz, Inc., 9 Ill.App.3d 102, 291 N.E.2d 836, 839, 840 (5th Dist.1973), aff'd, 57 Ill.2d 120, 311 N.E.2d 138 (1974). This mutual consent may be gathered from either the language used by the parties or be as manifested by the words and acts of the parties. Artoe v. Cap, 140 Ill.App.3d 980, 489 N.E.2d 420, 423; 95 Ill.Dec. 199 (1st Dist.1986). The issue of whether a contract is ambiguous is a question of law, and once so determined, the trier of fact determines the intent of the parties. A.W. Wendell & Sons, Inc. v. Qazi, 254 Ill.App.3d 97, 105; 626 N.E.2d 280, 287; 193 Ill.Dec. 247, 254 (2d Dist.1993); City of Northlake v. Illinois Fraternal Order of Police Labor Council, Lodge 18, 333 Ill.App.3d 329, 336; 775 N.E.2d 1013, 1020; 266 Ill.Dec. 941, 948 (1st Dist.2002); and Mayfair Construction Company v. Waveland Associates Phase 1 Limited Partnership, 249 Ill.App.3d 188, 197; 619 N.E.2d 144, 151; 188 Ill.Dec. 780, 787 (1st Dist.1993).

B. CONSIDERATION

Consideration is the promise or performance bargained for or given in exchange for the promise. Traditionally, any act or promise that is of benefit to one party or of detriment to another party may constitute sufficient consideration. Libertyville Township v. Woodbury, 121 Ill.App.3d 587, 460 N.E.2d 66, 71; 77 Ill.Dec. 270 (2d Dist.1984); In re Marriage of Bennett, 225 Ill.App.3d 828, 832; 587 N.E.2d 577, 580; 167 Ill.Dec. 308, 311 (4th Dist.1992). The essential element of consideration is a bargained-for exchange of promises or performances and may consist of a promise, act, forbearance, or the creation, modification, or destruction of a legal relation. Martin v. Federal Life Insurance Co., 109 Ill.App.3d 596, 440 N.E.2d 998, 1002, 1003; 65 Ill.Dec. 143 (1st Dist.1982); Aqua-Aerobic Systems, Inc. v. Ravitts, 166 Ill.App.3d 168, 172; 520 N.E.2d 67, 70; 117 Ill.Dec. 77, 780 (2d Dist.1988). If the requirement of consideration (Illinois courts deal with consideration and refer to its “the technical meaning”) is met, there is no additional requirement of a gain or benefit to the promissor, nor a loss or detriment to the promisee, nor equivalence in values exchanged, nor “mutuality of obligation.” Id.; Hamilton Bancshares, Inc. v. Leroy, 131 Ill.App.3d 907, 476 N.E.2d 788, 791, 792; 87 Ill.Dec. 86 (4th Dist.1985); F.H. Prince & Co., Inc. v. Towers Financial Corp., 275 Ill.App.3d 792, 798; 656 N.E.2d 142, 147; 211 Ill.Dec. 950, 955 (1st Dist.1995). The issue of whether there is

consideration is a question of law for the court. O'Neill v. DeLaney, 92 Ill.App.3d 292, 415 N.E.2d 1260, 1265; 47 Ill.Dec. 947 (1st Dist.1980); Lesnik v.Estate of Lesnik, 82 Ill.App.3d 1102, 403 N.E.2d 683, 687; 38 Ill.Dec. 452 (1st Dist.1980); Johnson v. Johnson, 244 Ill.App.3d 518, 528; 614 N.E.2d 348, 355; 185 Ill.Dec. 214, 221 (1st Dist.1993).

C. COMPETENCY

All parties to a contract must be competent at the time the contract is made. A contract, other than for necessities, is voidable if one party lacks competency due to minority. Iverson v. Scholl Inc., 136 Ill.App.3d 962, 483 N.E.2d 893, 897; 91 Ill.Dec. 407 (1st Dist.1985); Sheller by Sheller v. Frank's Nursery & Crafts Inc., 957 F.Supp. 150, 153 (N.D.Ill.1997). A contract is also voidable if one party is incompetent due to insane delusions or other mental illness. Eubanks v. Eubanks, 360 Ill. 101; 195 N.E. 521, 526 (1935). The requirements necessary to render a party incompetent due to mental illness, include that the party must be incapable of comprehending the nature of the transaction and incapable of protecting his or her own interests plus there must be a showing of a degree of mental weakness affecting that person's ability to comprehend the nature of the transaction and to protect his or her interest. Estate of Gruske, 179 Ill.App.3d 675; 534 N.E.2d 692, 695; 128 Ill.Dec. 510 (3d Dist.1989). Persons of mature age are presumed to be mentally competent; their incompetence cannot be inferred merely from old age, physical illness, or defective memory. Impairment of the mind incident to old age and disease will not invalidate a transaction so long as the person in question was able to comprehend the nature of the transaction and to protect his or her interest. *Estate of Gruske*, 179 Ill.App.3d at 678, 534 N.E.2d at 695, 128 Ill.Dec. at 513.

D. LEGAL PURPOSE

A contract designed to accomplish an unlawful purpose is illegal and void. Merchandise National Bank of Chicago v. Kolber, 50 Ill.App.3d 365, 365 N.E.2d 688, 692; 8 Ill.Dec. 450 (1st Dist.1977) (agreement to defraud); American Buyers Club of Mt. Vernon, Illinois, Inc. v. Grayling, 53 Ill.App.3d 611, 368 N.E.2d 1057, 1059; 11 Ill.Dec. 449 (5th Dist.1977) and Swavely v. Freeway Ford Truck Sales, Inc., 298 Ill.App.3d 969, 976; 700 N.E.2d 181, 187; 233 Ill.Dec.80, 86 (1st Dist.1998) (contracts in violation of either federal or Illinois statute); O'Sullivan v. Conrad, 44 Ill.App.3d 752; 358 N.E.2d 926, 929; 3 Ill.Dec. 383 (5th Dist.1976) (contract in restraint of trade or profession). A contract is also void if it violates some public policy. Laughlin v. France, 241 Ill.App.3d 185, 607 N.E.2d 962, 971; 180 Ill.Dec. 662 (2d Dist.1993) (contract to make a will) Corti v. Fleisher, 93 Ill.App.3d 517, 417 N.E.2d 764, 775, 776; 49 Ill.Dec. 74 (1st Dist.1981) (agreement between attorney and former employer to transfer files without clients permission). Whether a contract is illegal or violates public policy is a question of law for the court. Huszagh v. City of Oakbrook Terrace, 41 Ill.2d 387, 243 N.E.2d 831, 833 (1968).

E. AFFIRMATIVE DEFENSES TO CONTRACT ENFORCEMENT

Affirmative defenses such as lack of capacity, duress, fraud, misrepresentation, undue influence, and mistake of fact all relate to the issue of mutual consent and make a contract

voidable. The burden of pleading and proving such defenses rests on the party asserting them. 735 ILCS 5/2-613(d) (1994); Stoltze v. Stoltze, 393 Ill. 433, 66 N.E.2d 424, 428 (1946).

1. DURESS

Duress exists when a party is compelled to enter into a contract by the wrongful acts or threats of another under circumstances depriving that party of the exercise of his or her own free will. First Security Bank of Glendale Heights v. Bawoll, 120 Ill.App.3d 787, 458 N.E.2d 193, 198; 76 Ill.Dec. 54 (2d Dist.1983); Enslen v. Village of Lombard, 128 Ill.App.3d 531, 470 N.E.2d 1188, 1190; 83 Ill.Dec. 768 (2d Dist.1984); Kathy O. v. Counseling and Family Services, 107 Ill.App.3d 920, 438 N.E.2d 695, 700; 63 Ill.Dec. 764 (3d Dist.1982). Duress is a question of fact. First Security Bank of Glendale Heights v. Bawoll, 120 Ill.App.3d 787, 458 N.E.2d 193, 198; 76 Ill.Dec. 54 (2d Dist.1983). In certain circumstances, the duress may be exerted by one not a party to the dispute. Restatement (2d) of Contracts, §§175(2) and 177(3); Regenold v. Baby Fold, Inc., 68 Ill.2d 419, 369 N.E.2d 858, 867, 868; 12 Ill.Dec. 151 (1977).

2. UNDUE INFLUENCE

Undue influence exists when one person wrongfully exercises control over another so as to substitute that person's will for the will of the other. Britton v. Esson, 260 Ill. 273, 103 N.E. 218 (1913). In certain circumstances, the undue influence may be exerted by one not a party to the dispute. Restatement (2d) of Contracts §177(3). Undue influence cases involve the existence of a fiduciary relationship (arising as a matter of law or fact) when a special confidence is reposed in one who in equity and conscience is bound to act in good faith and with due regard to the interest of the other party. A fiduciary relationship exists as a matter of law between attorney and client, guardian and ward, principal and agent, and may exist in other cases where one party is heavily dependent upon the advice of another. Carey Electric Contracting, Inc. v. First National Bank of Elgin, 74 Ill.App.3d 233, 392 N.E.2d 759, 763; 30 Ill.Dec. 104 (2d Dist.1979); Oil Exp. Nat., Inc. v. Burgstone, 958 F.Supp. 366, 370 (N.D.Ill.1997). Once a fiduciary relationship has been established, there is a presumption that any transaction that benefits the dominant party at the expense of the other party is the result of undue influence. Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); Brown v. Commercial National Bank of Peoria, 42 Ill.2d 365, 247 N.E.2d 894, 896 (1969); Turner v. Black, 19 Ill.2d 296, 166 N.E.2d 588, 593 (1960); Works v. McNeil, 1 Ill.2d 47, 115 N.E.2d 320, 322 (1953).

3. FRAUD and MISREPRESENTATION

Fraud may be a defense to contract enforcement at the option of the injured party. Grane v. Grane, 143 Ill.App.3d 979, 493 N.E.2d 1112, 1116; 98 Ill.Dec. 91 (2d Dist.1986). In order to establish fraud by clear and convincing evidence, there must be a showing of a misrepresentation of a material fact, made for the purpose of inducing the other party to act; it must be known by the maker to be false, or be made in reckless disregard of its truth or falsity; but it must be reasonable to have believed it and it must be relied upon by the other party. Central States Joint Board v. Continental Assurance Company, 117 Ill.App.3d 600, 453 N.E.2d 932, 935; 73 Ill.Dec. 107 (1st Dist.1983); Century Universal Enterprises, Inc. v. Triana Development Corp., 158

Ill.App.3d 182, 510 N.E.2d 1260, 1271; 110 Ill.Dec. 229 (2d Dist.1987); Warner v. Lucas, 185 Ill.App.3d 351, 353, 541 N.E.2d 705, 706; 133 Ill.Dec. 494, 495 (5th Dist.1989); Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201, 1207 (7th Cir. (Ill.) 1998); Douglass v. Wones, 120 Ill.App.3d 36, 458 N.E.2d 514, 521; 76 Ill.Dec. 114 (2d Dist.1983); Gerill Corporation v. Jack L. Hargrove Builders, 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155 (1989); City of Chicago v. Michigan Beach Housing Co-op., 297 Ill.App.3d 317, 323; 696 N.E.2d 804, 809; 231 Ill.Dec. 508, 513 (1st Dist.1998). Buechin v. Ogden Chrysler-Plymouth, Inc., 159 Ill.App.3d 237, 511 N.E.2d 1330, 1335, 1336; 111 Ill.Dec. 35 (2d Dist.1987); Chapman v. Hosek, 131 Ill.App.3d 180, 475 N.E.2d 593, 598; 86 Ill.Dec. 379 (1st Dist.1985).

Usually there is no misrepresentation of a material fact when the representation relates to an expression of: (1) opinion [Wilkinson v. Appleton, 28 Ill.2d 184, 190 N.E.2d 727, 730 (1963)]; (2) a matter of law [Hooker v. Midland Steel Co., 215 Ill. 444, 448; 74 N.E. 445 (1905)]; or (3) a statement of value [Johnson v. Miller, 299 Ill. 276, 132 N.E. 490, 492 (1921)].

An innocent misrepresentation of a material fact may serve as a defense to contract enforcement, provided the fact was relied upon in entering into the contract. Puskar v. Hughes, 179 Ill.App.3d 522, 533 N.E.2d 962, 966; 127 Ill.Dec. 880 (2d Dist.1989); Geist v. Lehmann, 19 Ill.App.3d 557, 312 N.E.2d 42, 45 (2d Dist.1974).

4. MISTAKE

Under certain circumstances mistake of fact can provide the basis for equitable relief, such as rescission or reformation of a contract. Keller v. State Farm Ins. Co., 180 Ill.App.3d 539, 536 N.E.2d 194, 200; 129 Ill.Dec. 510 (5th Dist.1989); Village of Oak Park v. Schwerdtner, 288 Ill.App.3d 716, 718; 681 N.E.2d 586, 588; 224 Ill.Dec. 271, 273 (1st Dist.1997); Wil-Fred's Inc. v. Metropolitan Sanitary Dist. of Greater Chicago, 57 Ill.App.3d 16, 372 N.E.2d 946, 953; 14 Ill.Dec. 667 (1st Dist.1978); People ex rel. Department of Public Works and Bldgs. v. South East Nat. Bank of Chicago, 131 Ill.App.2d 238, 266 N.E.2d 778, 780 (1st Dist.1971).

700.01 Breach of Contract--Terms of Contract Not in Dispute

Plaintiff [plaintiff's name] claims [defendant's name] breached a contract between [the two parties] [them].

The terms of the contract are as follows:

[describe the contract]

[plaintiff's name] has the burden of proving [defendant's name] breached the contract in the following way(s):

[state here the plaintiff's contract claims]

[defendant's name] [denies][deny][he][she][it][they] breached the contract[.][and][claims and has the burden of proving] [he][she][it][they] did not have to perform under the contract because [he][she][it][they] has [have] the following affirmative defenses(s) which excuse(s) performance:

[identify here the affirmative defenses]

[plaintiff's name] denies [defendant's name] affirmative defense(s).

Affirmative defenses will be explained in further detail in the following instructions.

Notes on Use

This instruction is an introduction to the contract dispute in question. It may be given in all cases where there is no factual dispute as to the formation of a contract and no dispute as to its material terms.

The material terms to be inserted in the instruction are those terms agreed to by the parties or as construed by the court. The bracketed portions concerning defendant's affirmative defenses are only to be used when the defendant has asserted affirmative defenses. Contract cases often included multiple defendants who should all be added by name to this instruction.

The name of the affirmative defenses are inserted as they are identified in instructions 700.12 A-G as appropriate. It is not intended that those entire instructions be inserted in this instruction. The set of instructions must end with 700.18V.

700.01V Questions for Verdict Form Breach of Contract Issues--(Contract Formation Not in Dispute)

[--] Did [plaintiff's name] prove [he] [she] [it] performed [his] [her] [its] obligations under the contract?

YES __ NO __

OR

Did [plaintiff's name] prove [he][she][it] had a valid excuse for not performing the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by [his][her][its][their] failure to perform [his][her][its][their] obligations under the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] sustained damages resulting from the _____'s breach?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [defendant's name] prove [he][she][they][it] had an affirmative defense for not performing the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

Use this verdict form in conjunction with Instruction 700.01. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form.

Question number 4 should only be used if the defendant has asserted affirmative defenses.

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

700.02 Breach of Contract Dispute as to Contract Formation

INSTRUCTION 1

[Under Count] [plaintiff's name] claims [he] [she] [it] is entitled to recover contract damages from [defendant's name] for breach of contract. [plaintiff's name] has the burden of proving:

[1] The existence of [a] [an] [contract] [enforceable promise] between [plaintiff's name] and [defendant's name].

[2] Performance by [plaintiff's name] [.] [of] [a] [all] [the] [obligation(s)] [condition(s)].

[or the occurrence of a condition] [.] [A valid reason why [plaintiff's name] did not have to perform [a] [all] [the] condition(s)].

[3] [defendant's name]'s(s') failure to [adequately] perform [his] [her] [its] [their] obligations under the contract.

[4] Resulting damage to [plaintiff's name].

I will explain and define these legal terms elsewhere in these instructions.

If you find from your consideration of all the evidence that one or more of these elements has not been proven, you must find in favor of [defendant's name]. [If you find from your consideration of all the evidence that each of the above elements has been proven then you must find in favor of [plaintiff's name], and consider the amount of damages to be awarded.]

[If you find that each of the above elements has been proved, then you must consider [defendant's name] claim(s) of an affirmative defense(s)].

[defendant's name] [claims] [claim] and has [have] the burden of proving the following affirmative defense(s):

[identify the appropriate affirmative defenses]

[plaintiff's name] denies [defendant's name]'s affirmative defense(s).

If you find from your consideration of all the evidence that [plaintiff's name] has proven all the elements of [his] [her] [its] [their] case and [defendant's name] has not proven the affirmative defense, you must find in favor of [plaintiff's name], and consider the amount of damages to be awarded. If [defendant's name] [proves] [prove] [one of] [his] [her] [its] [their] affirmative defense(s), then [he] [she] [it] [they] [is] [are] relieved of [his] [her] [its] [their] obligations under the contract and you must find in favor of the [defendant's name].]

Notes on Use

This is a combined issues and burden instruction. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It should be given with Instruction 700.03 and should only be used where there is a dispute as to contract formation. The bracketed material should only be used where there is evidence to support the affirmative defenses of the defendant. The affirmative defenses are inserted from instruction 700.12. The name of the affirmative defenses are inserted as they are identified in instructions 700.12 A-G as appropriate. It is not intended that those entire instructions be inserted in this instruction. If there is no affirmative defense, the instruction ends in the fourth paragraph which becomes one sentence long. Contract cases often include multiple defendants who should all be added by name to this instruction.

If this instruction is given, instructions 700.03, 700.10, 700.12 et seq. and the appropriate damages instruction should also be given.

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

700.02V Questions for Verdict Form (to be used in conjunction with 700.02 Breach of Contract--Dispute as to Contract Formation)

[--] Did [plaintiff's name] prove there was a contract [enforceable promise]?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] performed [his][her][its] obligations under the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] had a valid excuse for not performing the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by [his][her][its][their] failure to perform [his][her][its][their] obligations under the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] sustained damages resulting from the _____'s breach?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] sustained damages resulting from the _____'s breach?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

Use this in conjunction with Instruction 700.02. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form.

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

700.03 Proof of Formation of Contract

As stated in Instruction 1, the first element of a contract claim [plaintiff's name] must prove is the existence of a contract. There is a contract if [plaintiff's name] proves there was an offer by one party, acceptance by the other party [parties] and consideration between the parties.

[plaintiff's name] claims the parties entered into a contract which had the following terms:

[state material terms of alleged contract]

To prove the existence of a contract between [among] [plaintiff's name] and [defendant's name], [plaintiff's name] has the burden of proving each of the following propositions:

First [plaintiff's name] must make or have made an offer to [name of offeree].

An *"offer"* is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

[1] the communication must have included a definite promise by the person making the communication, showing a willingness to make an agreement;

[2] the important and necessary terms must be definite;

[3] the terms must be communicated by words or conduct to the other party [parties]; and

[4] the communication must give the other party [parties] the power to agree to its terms.

Second [name of offeree] accepted the offer made by [name of offeror].

"Acceptance" of an offer is a communication of agreement to the terms of the offer. For the acceptance to be valid:

[1] [name of offeree] must agree to all of the material terms in the offer; and

[2] [name of offeree] must have communicated agreement to [name of offeror].

[according to the terms specified in the offer][by writing, spoken words, actions or any other conduct that would indicate agreement to a reasonable person] [performed the act(s) specified by the offer], or [performed the act(s) that the offer specified.]

Third the agreement included an exchange of promises or value, which is known as consideration. There is sufficient consideration if [plaintiff's name] can prove that something of value was bargained for by the parties and given by one party in exchange for the other's promise. "Something of value" may consist of a promise, an act, a promise to act or not act, or any payment that was of benefit to one party or a disadvantage to the other.

You will address these issues in questions ____ and ____ on your verdict.

Notes on Use

This instruction should be given when there is a dispute as the formation of the contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It should be given in conjunction with Instruction 700.02. The appropriate question number on the Verdict shall be filled in. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

700.03V Questions for Verdict Form (Proof of Formation of Contract)

[--] Did [plaintiff's name] prove there was an offer?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove there was an acceptance?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove there was consideration?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants.

Comment

With these questions on the verdict, the jury makes factual findings as to whether or not the plaintiff's claims are proved. The logical sequence of these instructions should result in a complete general verdict. 75B AmJur2d, Trials, §1751,p. 518; Blacks Law Dictionary, 6th Ed., p. 1108. The verdict also satisfies, as nearly as possible, the requirement of 735 ILCS §5/2-1108 that the jury render a general verdict "unless the circumstances of the case require otherwise." The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V.

The Illinois Supreme Court has recognized that any special verdict form which clearly indicates the finding of facts by the jury suffices as a verdict on which judgment may be entered.

Sangster v. Van Hecke, 67 Ill.2d 96, 364 N.E.2d 79, 7 Ill.Dec. 92 (1977); Western Springs Park Dist. v. Lawrence, 343 Ill. 302, 175 N.E. 579 (1931).

In addition, the courts have approved verdict forms combining general and special findings as an appropriate means of reporting the jury's allocation of comparative fault. See Comment, IPI 45.07; Hunter v. Sukkar, 111 Ill.App.3d 169, 443 N.E.2d 774, 66 Ill.Dec. 848 (4th Dist. 1982); Ruffiner v. Material Service Corp., 116 Ill.2d 53, 506 N.E.2d 581, 106 Ill.Dec. 781 (1987); Levin v. Welsh Bros. Motor Service Inc., 164 Ill.App.3d 640, 518 N.E.2d 205, 115 Ill.Dec. 680 (1st Dist. 1987).

700.04 Promissory Estoppel

Plaintiff claims an enforceable promise existed between the parties because plaintiff justifiably relied on a promise made by defendant. Plaintiff has the burden of proving:

[1] [defendant's name] promised [plaintiff's name] that [he][she][it] would [insert terms alleged by plaintiff].

[2] [plaintiff's name] [state what plaintiff claims he did or refrained from doing based upon the promise].

[3] [defendant's name] expected [or reasonably should have expected] that the promise would cause [plaintiff's name] to [state what plaintiff claims he did or refrained from doing based upon the promise].

[4] [plaintiff's name] was damaged because [he][she][it] relied on [defendant's name]'s promise.

You will address these issues in questions ____, ____, ____, and ____ on your verdict.

Notes on Use

This instruction should only be given when there is a dispute as to the formation of the contract and there is no written contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. It should be given in conjunction with Instruction 700.02. The instruction should be used as an alternative to Instruction 700.03 in those cases in which the doctrine of promissory estoppel is used to establish an enforceable contract. If the case includes multiple defendants, they should all be added by name to this instruction, and the text of the instruction will have to be modified by Court and counsel. The set of instructions must end with 700.18V.

700.04V Questions for Verdict Form (Promissory Estoppel)

[--] Did [plaintiff's name] prove [defendant's name] promised [plaintiff's name] that [he][she][it] would [insert terms alleged by plaintiff]?

YES ____ NO ____

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [state what plaintiff claims he did or refrained from doing based upon the promise] in reliance on [defendant's name]'s promise?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [defendant's name] expected [or reasonably should have expected] that the promise would cause [plaintiff's name] to [state what plaintiff claims he did or refrained from doing based upon the promise]?

YES ____ NO ____

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [he][she][it] was damaged because [he][she][it] relied on [defendant's name]'s promise?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

Each issue to be decided by the jury will have a question (found in those instructions with a “V” in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants.

700.05 Contract--Validity of Oral and Partly Oral Contracts

[An oral][A partly oral and partly written] contract is as valid and enforceable as a written contract.

Notes on Use

This instruction may be used in all cases where there is evidence of an oral or a partly oral and partly written agreement, unless there is a factual issue for determination by the jury relevant to a defense based on the Statute of Frauds.

700.06 Contracts--Several Documents

A written contract may consist of more than one document.

Notes on Use

This instruction should be used only when two or more writings constitute the contract at issue in the case.

700.07 Performance by Plaintiff

As stated in Instruction 1, as the second element of a contract claim, [plaintiff's name] must prove is [he][she][it] [performed all obligation(s)] [condition(s)] [the occurrence of a condition] required of [him][her][it] under the contract. To recover on [his][her][its] claim, [plaintiff's name] must prove [he][she][it] did what the contract required [him][her][it] to do or [had a valid excuse for not doing so], as follows:

[state what the plaintiff claims he/she performed under the contract or state the valid excuse for not performing]

You will address this issue in question ____ on your verdict.

Notes on Use

This instruction defines the second element that the plaintiff must prove in order to recover on a breach of contract claim: whether the plaintiff performed his/her/its obligations under the contract. It is inclusive of the holdings in Thilman & Company v. Esposito, 87 Ill.App. 289, 296; 408 N.E.2d 1014, 1020; 42 Ill.Dec. 305, 311 (1st Dist.1980) and assumes pleading compliance as contained in Illinois Supreme Court Rule 133(c). This instruction must be given in conjunction with 700.02, and the alternative 700.08 and 700.08V should be used when the evidence supports same. If the case includes multiple defendants they should all be added by name to this instruction, and the text of the instruction will have to be modified by court and Counsel. The set of instructions must end with 700.18V.

B700.07 Contract--Excuse of Performance--Prior Material Breach

[party's name] failure to keep [his][her][its] promise is excused, if [opposing party's name] committed a prior, material breach of contract.

When I use the phrase "material breach," I mean the failure to perform a contractual duty that is of such importance that the parties would not have entered into the contract without it. The test is whether the breach is so substantial and fundamental as to defeat the objectives of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement. The breach must be so important as to justify the injured party in treating the whole transaction as ended.

To excuse [party's name] failure to perform, [party's name] must prove that [opposing party's name] committed a prior material breach of contract in one or more of the following respects:

[State what the party claims was a material breach of the contract by opposing party]

You will address this issue in question _____ on your verdict.

Instruction, Notes, and Comment approved October 2007.

Notes on Use

This instruction should be given when a party claims that a prior material breach of contract excused his performance. It is given with IPI 700.02, since the contract at issue may be previously materially breached, and is given as an alternative to IPI 700.07 on Plaintiff's performance. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with IPI 700.18V.

Comment

The determination of whether a breach is material depends upon consideration of several factors, including the intent of the parties with respect to the disputed provision and the equitable factors and circumstances surrounding the breach of the provision. Maywood Proviso St. Bank & Trust Co., 252 Ill. App. 3d 164, 192 Ill. Dec. 123 (1st Dist. 1993); *Restatement (Second) of Contracts* §241 (1981); *see* Arnhold v. Ocean Atlantic Woodland Corp., 284 F.3d 693 (7th Cir. 2002).

"A breach is material where the covenant breached is one of such importance that the contract would not have been entered into without it." Wolfram P'ship, Ltd. v. LaSalle Nat'l Bank, 328 Ill.App.3d 207 (1st Dist. 2002). "Regardless of the language used by the parties, a breach, to justify a premature termination or forfeiture of a lease agreement, must have been material or substantial." The question of "whether a breach is material, thereby discharging the other party's duty to perform, is based on the inherent justice of the matter. The determination of

‘materiality’ is a complicated question of fact, involving an inquiry into such matters as whether the breach worked to defeat the bargained-for objective of the parties or caused disproportionate prejudice to the non-breaching party, whether custom and usage considers such a breach to be material, and whether the allowance of reciprocal nonperformance by the non-breaching party will result in his accrual of the unreasonable or unfair advantage.” Kel-Keef Enters. Inc. v. Quality Components Corp., 316 Ill.App.3d 998, 250 Ill.Dec. 308 (1st Dist. 2000).

Intent of the parties is determined by the language used and the circumstances surrounding the agreement. Anest v. Bailey, 198 Ill.App.3d 740, 144 Ill.Dec. 813 (2nd Dist. 1990). The totality of the circumstances should include a determination of the proportionality of prejudice and comparison of the relative burdens that each side would suffer if the contract were terminated. McBride v. Pennant Supply Corp., 253 Ill.App.3d 363, 191 Ill.Dec. 457 (5th Dist. 1993); Chariot Holdings Ltd. v. Eastmet Corp., 153 Ill.App. 3d 50, 163 Ill.Dec. 285 (1st Dist. 1987).

A party is excused from performing his promises and may terminate or rescind a contract if the other party has committed a prior, material breach of contract. Stanley Gudyka Sales Co. v. Lacy Forest Prods. Co., 915 F. 2d 273 (7th Cir. 1990); Borys v. Rudd, 207 Ill.App.3d 610, 566 N.E.2d 310, 152 Ill.Dec. 623 (1st Dist. 1990). For a party to terminate or rescind a contract, the non-performance or breach by the other party must be substantial or material. The test is whether the breach is so substantial and fundamental as to defeat the objectives of the parties in making the agreement, or whether the failure to perform renders performance of the rest of the contract different in substance from the original agreement. Wright v. Douglas Furniture Corp., 98 Ill. App. 2d 137, 143, 240 N.E.2d 259, 262 (1968). The breach must be so material and important as to justify the injured party in treating the whole transaction as at an end. C. G. Caster Co. v. Regan, 88 Ill. App. 3d 280, 285, 410 N.E.2d 422, 426 (1980), quoting *A. Corbin, Contracts* §946, at 925 (1952); First Nat'l Bank of Evergreen Park v. Chrysler Realty Corp., 168 Ill. App. 3d 784, 522 N.E.2d 1298, 119 Ill. Dec. 439 (1988); Susman v. Cypress Venture, 187 Ill. App. 3d 312, 316, 543 N.E.2d 184, 187, 134 Ill. Dec. 901 (1989). A failure to perform is a material breach where the covenant not performed is of such importance that the contract would not have been made without it. Haisma v. Edgar, 218 Ill. App. 3d 78, 86, 578 N.E.2d 163, 168, 161 Ill. Dec. 36 (1991). The Illinois Supreme Court has applied the doctrine to commercial leases. Univ. Club v Deakin, 265 Ill. 257, 260-61, 106 N.E. 790, 791 (1914). “Under the material breach doctrine, ‘a party to a contract is discharged from duty to perform where there is a material breach of the contract by the other party.’” U.S. Fid. & Guar. Co. v. Old Orchard Ltd. P'ship, 284 Ill. App. 3d 765, 220 Ill. Dec. 59 (1st Dist. 1996).

700.07V Question for Verdict Form (Performance by Plaintiff)

[--] Did [plaintiff's name] prove [he][she][it] performed [his][her][its] obligations under the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants**.**

B700.07V Question for Verdict Form (Excuse of Performance--Prior Material Breach)

[__] Did [party's name] prove that [opposing party's name] committed a prior material breach of contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict Form B at the end of this verdict and sign it. If your answer to question is YES, you should then answer question ____.

Verdict and Notes approved October 2007.

Notes on Use

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The set of instructions must end with IPI 700.18V.

700.08 Anticipatory Breach of Contract by Repudiation

[plaintiff's name] failure to keep [his][her][its] promise is excused, if [defendant's name] indicated by [a] definite and unequivocal statement(s) or conduct before the performance was due [he][she][it] would not keep [his][her][its] promise when it became time to do so.

[plaintiff's name] claims [he] [she] [it] had a valid excuse and did not have to [pay, perform, etc.] because [defendant's name] indicated that [he] [she] [it] [they] would not keep [his][her][its][their] promise.

To excuse [plaintiff's name] failure to perform, [plaintiff's name] must prove [defendant's name]'s indication that [he][she][it][they] would not keep [his][her][its][their] promise before the time the performance was due was definite and unequivocal either from [defendant's name] statements or conduct.

You will address these issues in question ____ on your verdict.

Notes on Use

This instruction should be given when a party claims an anticipatory breach of contract as a valid excuse to his performance. It is given with 700.02, since the contract at issue may be anticipatorily breached, and is given as an alternative to 700.07 on Plaintiff's performance. Contract cases often include multiple defendants who should all be added by name to this instruction, and Court and counsel will need to further modify the text if the defendant claims the plaintiff repudiated. The set of instructions must end with 700.18V.

700.08V Questions for Verdict Form (Anticipatory Breach of Contract by Repudiation)

[--] Did [plaintiff's name] prove [defendant's name] indicated to [plaintiff's name] in [a] definite and unequivocal statement(s) or conduct [he] [she] [it][they] would not keep [his][her][its][their] promise before [defendant's name]'s performance was due?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73.

This form may have to be modified if there are multiple defendants, and will need modification if the defendant claims the plaintiff repudiated.

700.09 Existence &/or Failure of Condition Precedent--Conditional Promises

As stated in Instruction 1, the third element [plaintiff's name] must prove is [defendant's name] failure to perform the obligations under the contract. In this case [defendant's name] claims [claim] the parties agreed that [defendant's name] did not have to keep [his][her][its][their] promise unless [insert condition].

[plaintiff's name] has the burden of proving this condition was not part of the contract.

If you find this condition was part of the contract, you must then decide whether the [insert condition] occurred. If [insert condition] did not occur, then [plaintiff's name] cannot recover.

OR

[In order to recover, [plaintiff's name] claims and has the burden to prove both that the condition occurred and [defendant's name] did not do what the contract required [him] [her] [it] [them] to do.]

You will address these issues on questions ____, ____ on your verdict**.**

Notes on Use

This instruction should be given whenever the existence and/or failure of a condition precedent is at issue. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. It is inclusive of the holdings in Thilman & Company v. Esposito, 87 Ill.App. 289, 296; 408 N.E.2d 1014, 1020; 42 Ill.Dec. 305, 311 (1st Dist. 1980) and assumes pleading compliance as contained in Illinois Supreme Court Rule 133(c). It should be used in conjunction with Instruction 700.10. It may be an issue in conjunction with Instructions 700.02. Contract cases often include multiple defendants who should all be added by name to this instruction.

700.09V Questions for Verdict Form (Existence and/or Failure of Condition Precedent)

[--] Did [plaintiff's name] prove the condition claimed by [defendant's name] was not a part of the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove the condition to the contract occurred?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict form. Each issue to be decided by the jury will have a question (found in those instructions with a "V" in the number) which must be included in the single verdict form to be constructed by Court and counsel. The logical sequence of these instructions should result in a complete general verdict. The Court may consider special interrogatories which are not in conflict with these instructions. The set of instructions must end with 700.18V. A sample case with sample instructions and verdict using these instructions can be found at page 73**.**

700.10 Breach of Contract--No Dispute as to Contract Formation

Generally, if a party fails to perform its obligations according to the terms of the contract, the party has breached the contract. You must decide whether [defendant's name] failed to do what [he][she][it][they] was [were] required to do under the contract.

As stated in Instruction 1, the third element of a contract claim which [plaintiff's name] must prove is [defendant's name] breach of the contract. To recover on [his][her][its] claim, [plaintiff's name] has the burden to prove the defendant(s) failed to do something the contract required [him][her][it][them] to do. [plaintiff's name] claims and has the burden of proving that under the contract [defendant's name] was [were] required to do [or not do] the following:

[state what the plaintiff claims to be the defendant's breach]

[[defendant's name] claims [claim] [he][she][it][they] did not breach the contract because the parties agreed [defendant's name] did not have to keep [his][her][its][their] promise unless [insert condition][or state obligation]. [defendant's name] also claims [claim] [plaintiff's name] failed to [insert condition] [or state obligation]. The law regarding conditions will be explained in detail in a later instruction.]

You will address these issues in question ____ on your verdict.

Notes on Use

This instruction defines the third element that the plaintiff must prove in order to recover on a breach of contract claim--whether the defendant breached the contract by its failure to perform his/her/its/their obligations under the contract. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested it should be eliminated from this instruction and the corresponding verdict form. This instruction must be given in conjunction with 700.01. Contract cases often include multiple defendants who should all be added by name to this instruction.

The next to last paragraph regarding conditions precedent must be given where a defendant claims the existence and failure of a condition precedent. If this is used, instruction 700.09 must also be given.

700.10V Questions for Verdict Form (Breach of Contract)

[--] Did [plaintiff's name] prove [defendant's name] was [were] required to [state relevant contract term] under the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove there was no failure of a condition?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[--] Did [plaintiff's name] prove [defendant's name] breached the contract by failing to [state plaintiff's allegations]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. These questions for the verdict form should be used in conjunction with other questions found in 700.30VA or 700.30VB, whichever is appropriate. The set of instructions must end with 700.18V.

700.11 Damages to Plaintiff as a Result of Defendant's Breach

You must decide whether [plaintiff's name] sustained damages as a result of [defendant's name] breach of the contract.

As stated in Instruction 1, the fourth element of a contract claim is damages. [plaintiff's name] must prove [he][she][it] sustained damage resulting from [defendant's name]'s breach. To recover on [his][her][its] claim, [plaintiff's name] must prove that because of [defendant's name] failure to perform the contract, [he][she][it] has [been damaged][not received] the (benefits) (payment) (performance) to which [he][she][it] is entitled under the contract.

[defendant's name] denies [deny] [plaintiff's name] sustained damage [to the extent claimed.]

You will address the issues in question ____ on your verdict.

Notes on Use

This instruction defines the fourth element that the plaintiff must prove in order to recover on a breach of contract claim--that the defendant's breach caused damage to the plaintiff. This instruction must be given in conjunction with 700.02. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

700.11V Question for Verdict Form (for 700.11 Damages to Plaintiff as a Result of Defendant's Breach)

1. Did [plaintiff's name] prove [he][she][it] sustained damage as a result of [defendant's name]'s (s') breach of the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

These questions for the verdict form should be used in conjunction with other questions found in form 700.01V, whichever is appropriate.

The set of instructions must end with 700.18V.

700.12 Affirmative Defenses to Contract Enforcement

The law recognizes that sometimes, even though [plaintiff's name] has met [his][her][its] burden of proving that a contract exists, facts or circumstances may exist which would excuse [defendant's name] from being liable to [plaintiff's name]. These facts or circumstances are called affirmative defenses.

In this lawsuit, [defendant's name] has [have] raised and has [have] the burden to prove the following affirmative defense(s):

[insert whichever affirmative defense(s) 700.12A-700.12G is applicable]

700.12A [1] Incompetence:

The law provides if [defendant's name] is not competent because [he][she][they][is][are] a minor(s) or because [he][she][they] [is] [are] mentally ill or has insane delusions, then the contract cannot be enforced against [him][her][them].

[defendant's name] [claims] [claim] and [has] [have] the burden of proving at the time [he][she][they] entered into the contract, [he][she][they] did not have the mental competence or capacity to understand the nature and consequences of the agreement.

In order to be excused from performing the contract, [defendant's name] [has][have]the burden of proving one of the following:

at the time the contract was made [defendant's name] was under 18 years old.

OR

at the time the contract was made, [defendant's name] lacked the mental competence or capacity to understand the nature and consequences of the agreement and was unable to protect [his][her][their] own interests.

Plaintiff denies defendant's claim of incompetence.

You will address these issues in question ____ on your verdict.

700.12B [2] Duress:

The law provides that if one party forces another party to enter into a contract by wrongful acts or threats that deprive the other party of his own free will, the contract cannot be enforced against the forced party.

[defendant's name] [claims] [claim] and [has] [have] the burden of proving [he][she][it][they] was [were] compelled to enter into the contract by a wrongful act or threat that deprived [him][her][it][them] of the exercise of free will in entering into the contract.

Duress is intentional action by [plaintiff's name] [or a third party] presenting such a serious threat of loss or injury to [defendant's name] that [defendant's name] felt that [he][she][it][they] had no reasonable alternative or choice but to enter the contract.

[defendant's name] [claims][claim] and [has][have] the burden of proving that [he][she][it][they] entered into the contract only because [plaintiff's name] [third party] subjected [him][her][it] [them] to duress as follows:

[state the alleged incidents of duress]

In order to prove a defense based upon duress, [defendant's name] must prove both of the following by clear and convincing evidence:

[1] [he][she][it][they] entered into the contract only because [plaintiff's name] [third party] subjected [him][her][it][them] to the circumstances listed above; and

[2] the circumstances left [him][her][it][them] with no reasonable choice but to enter the contract.

Plaintiff denies defendant's claim of duress.

You will address these issues in question ____ on your verdict.

700.12C [3] Misrepresentation:

The law provides if one party fraudulently by misrepresentation of material facts convinced another to enter into the contract, then that party cannot enforce the contract against the other. The law also provides there is no misrepresentation of material fact when the representation relates to an expression of opinion, a matter of law, or a statement of value.

[defendant's name] [claims][claim] and [has][have] the burden of proving by clear and convincing evidence [he][she][it][they] reasonably relied to [his][her][its][their] detriment on a false representation created by words or conduct of [plaintiff's name] regarding a material fact(s), and if [defendant's name] had known the truth, [he][she][it][they] would not have entered into the contract.

[defendant's name] [claims][claim] and [has] [have] the burden of proving by clear and convincing evidence [he][she][it][they] [was][were] fraudulently convinced to enter into the contract as follows:

[State here the elements of misrepresentation, as indicated by the circumstances of the evidence, addressing:

[1] False statement of material fact,

[2] Made to induce defendant(s) to enter into contract,

\

[3] Reasonably relied upon by defendant(s), and

[4] Resulting in contract.]

[plaintiff's name] denies [defendant's name]'s claim of misrepresentation.

You will address these issues in questions ____, ____, ____, (etc.) on your verdict.

700.12D [4] Fraud:

Generally, the law provides if one party fraudulently by misrepresentation of material facts convinced another to enter into the contract, then that party cannot enforce the contract against the other. The law also provides there is no misrepresentation of material fact when the representation relates to an expression of opinion, a matter of law, or a statement of value.

[defendant's name] [claims][claim] and [has][have] the burden of proving by clear and convincing evidence that [he][she][it][they] reasonably relied to [his][her][its][their] detriment on a false representation created by words or conduct of [plaintiff's name] relating to a material fact, which was made by [plaintiff's name] with the intent to deceive and with knowledge of its falsity or with a reckless disregard of its truth or falsity, and, if [defendant's name] had known the truth, [he][she][it][they] would not have entered into the contract.

[defendant's name] [claims][claim] and [has][have] the burden of proving by clear and convincing evidence that [he][she][it][they] [was][were] fraudulently convinced to enter into the contract as follows:

[State here the elements of fraud, as indicated by the circumstances of the evidence, addressing:

[1] False statement of material fact,

[2] Known to be false by plaintiff,

[3] Made to induce defendant(s) to enter into contract,

[4] Reasonably relied upon by defendant(s), and

[5] Resulting in contract.]

Plaintiff denies defendant's claim of fraud.

You will address these issues in question ____ on your verdict.

700.12E [5] Frustration of Purpose; Impossibility of Performance:

The law excuses [defendant's name] ability to keep [his] [her] [its] [their] promise [if the purpose of the contract was frustrated] [if the promise was impossible to perform].

[defendant's name] [claims] [claim] and [has] [have] the burden of proving [his] [her] [its] [their] failure to keep [his] [her] [its] [their] promise was excused because [it was "impossible" to perform] [it was frustrated by a change in circumstances that destroyed the reason for the contract]

[defendant's name] [claims] [claim] and [has] [have] the burden to prove that [his] [her] [its] [their] performance [became impossible as follows: (state alleged circumstances of impossibility)] [was frustrated as follows (state how the value was frustrated)]. [plaintiff's name] denies this.

In order to prove a defense based upon [frustration of purpose] [impossibility of performance], [defendant's name] [has] [have] the burden of proving all three of the following facts:

[1] The circumstances described above occurred;

[2] The parties reasonably did not foresee the circumstances when they made the contract;

[3] [The circumstances made it impossible for [defendant's name] to keep [his] [her] [its] [their] promise [or] [the circumstances totally or nearly totally destroyed the benefits which [defendant's name] expected to receive from the contract.]

Plaintiff denies defendant's claim of [impossibility of performance] [or] [frustration of purpose].

You will address these issues in question ____ on your verdict.

700.12F [6] Undue Influence--Fiduciary Relationship Claimed:

The law provides if [defendant's name] entered into the contract only because a party subjected [defendant's name] to undue influence, the [plaintiff's name] cannot enforce the contract against [defendant's name].

[defendant's name] [claims][claim] and [has][have] the burden of proving by clear and convincing evidence there was a fiduciary relationship between the parties and the agreement upon which [plaintiff's name] relies is void because of undue influence by [plaintiff's name] [and][or][a third party].

In order to show a fiduciary relationship, [defendant's name] [has][have] the burden of proving [he][she][it][they] placed such trust and confidence in [plaintiff's name] that [plaintiff's name] opinion could overcome [defendant's name]'s own free will. To show a fiduciary relationship, [defendant's name] [has][have] the burden of proving by clear and convincing evidence all three of the of the following:

1. [defendant's name] placed trust and confidence in [plaintiff's name] [or third party]

2. [plaintiff's name] [or third party] actually or impliedly agreed to exercise [his][her][its] judgment on behalf of [defendant's name]

3. [plaintiff's name] [or third party] gained influence and superiority over [defendant's name]

If [defendant's name] proves [prove] a fiduciary relationship, [plaintiff's name] has the burden of proving the following by clear and convincing evidence in order to enforce the contract:

(1) the contract was fair; and

(2) the contract did not result from any undue influence over [defendant's name]; and

(3) [defendant's name] had independent advice.

Undue influence is more than just advice or persuasion or an appeal to [defendant's name]'s(s') own reasoning. In deciding whether there was undue influence, you may consider whether, before the contract was made, there was full disclosure to [defendant's name] of all the material circumstances surrounding the contract, whether the contract was fair, and whether [defendant's name] had the opportunity to obtain independent advice.

Plaintiff denies [that there was a fiduciary relationship present][and][denies that there was any undue influence exerted upon the defendant].

You will address these issues in question ____ on your verdict.

700.12G [7] Undue Influence--Fiduciary Relationship Arising Under Law:

The law provides, if [defendant's name] entered into the contract only because a party subjected [defendant's name] to undue influence, the [plaintiff's name] cannot enforce the contract against [defendant's name]. This court has decided [defendant's name] is a fiduciary.

[plaintiff's name] claims and has the burden of proving the following by clear and convincing evidence in order to enforce the contract:

(1) the contract was fair;

(2) the contract did not result from any undue influence over the defendant(s); and

(3) [defendant's name] had independent advice.

The law is that undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other.

Undue influence is more than just advice or persuasion or an appeal to [defendant's name]'s(s') own reasoning. In deciding whether there was undue influence, you may consider whether, before the contract was made, there was full disclosure to [defendant's name] of all the material circumstances surrounding the contract whether the contract was fair and whether [defendant's name] had the opportunity to obtain independent advice.

Plaintiff denies that there was any undue influence exerted upon defendant.

You will address these issues in question ____ on your verdict.

Notes on Use

The claimed affirmative defenses from these instructions must be inserted into Instruction 700.02. The instructions on Affirmative Defenses assume all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding questions on the Verdict forms. Contract cases often include multiple defendants who should all be added by name to this instruction.

Notes on use specific to 700.12F: This instruction should be used where the fiduciary relationship does not arise as a matter of law, and therefore must be proved by the plaintiff. If the relationship between the plaintiff and the defendant is such that the fiduciary relationship arises as a matter of law (e.g., attorney and client), use Instruction 700.12G instead.

In the rare case in which the undue influence is claimed to have been exerted by a third person, use proper names in the instruction wherever appropriate. The set of instructions must end with 700.18V.

Notes on use specific to 700.12G: This instruction should be used in cases where the fiduciary relationship arises as a matter of law (e.g., attorney and client). If the relationship between the plaintiff and the defendant is such that the fiduciary relationship must be proved by evidence, use Instruction 700.12F instead.

Comment

Undue influence exists where one person wrongfully exercises control over another so as to substitute that person's will for the will of the other. Britton v. Esson, 260 Ill. 273, 103 N.E. 218 (1913). Undue influence cases involve the existence of a fiduciary relationship (arising as a matter of law or fact) where a special confidence is reposed in one who in equity and conscience is bound to act in good faith and with due regard to the interest of the other party. A fiduciary relationship exists as a matter of law between attorney and client, guardian and ward, and principal and agent, and may exist in other cases where one party is heavily dependent upon the advice of another. Carey Elec. Contracting, Inc. v. First Nat'l Bank, 74 Ill.App.3d 233, 392 N.E.2d 759, 30 Ill.Dec. 104 (2d Dist. 1979). The existence of a fiduciary relationship that does not exist as a matter of law must be proven by clear and convincing evidence in order to establish a constructive trust. Ray v. Winter, 67 Ill.2d 296, 367 N.E.2d 678, 10 Ill.Dec. 225 (1977); Cunningham v. Cunningham, 20 Ill.2d 500, 170 N.E.2d 547 (1960); Kester v. Crilly, 405 Ill. 425, 91 N.E.2d 419 (1950). There are no cases, however, discussing the burden of proof of establishing a fiduciary relationship in the context of these instructions. Once a fiduciary relationship has been established, there is a presumption that any transaction that benefits the dominant party at the expense of the other party is the result of undue influence. The burden is then on the fiduciary to prove by clear and convincing evidence that the transaction was not the result of undue influence. Franciscan Sisters Health Care Corp. v. Dean, 95 Ill.2d 452, 448 N.E.2d 872, 69 Ill.Dec. 960 (1983); Brown v. Commercial National Bank, 42 Ill.2d 365, 247 N.E.2d 894 (1969); Turner v. Black, 19 Ill.2d 296, 166 N.E.2d 588 (1960); Works v. McNeil, 1 Ill.2d 47, 155 N.E.2d 320 (1953).

700.12V(A-D) Questions for Verdict Form (for 700.12, et seq. Affirmative Defenses to Contract Enforcement)

700.12VA Incompetence Questions:

[-] Did [defendant's name] prove [he][she][they][was][were] under the age of 18 when the contract was made?

YES __ NO __

OR

[-] Did [defendant's name] prove that [he][she][they] lacked the mental competence or capacity to understand the nature and consequences of the agreement at the time the contract was made?

YES __ NO __

If your answer to question ____ is YES, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is NO, you should then answer question ____.

Verdict Form revised September 14, 2012.

700.12VB Duress Questions:

[-] Did [defendant's name] prove [plaintiff's name] [third party] _____ subjected [defendant's name] to [have state the circumstances above]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove [plaintiff's name] [third party] left [defendant's name] with no reasonable choice but to enter into the contract?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

700.12V C & D Fraud and Misrepresentation Questions:

[-] Did [defendant's name] prove by clear and convincing evidence a false statement of material fact was made to [him][her][it][them] by [plaintiff's name] [third party] _____?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove by clear and convincing evidence [plaintiff's name] [third party] _____ knew the statement was false?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove by clear and convincing evidence the statement was made to induce [defendant's name] to enter into the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove by clear and convincing evidence [he][she][it][they] reasonably relied on the false statement?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove this resulted in a contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

700.12VE Frustration of Purpose/Impossibility of Performance Questions:

[-] Did [defendant's name] prove [insert the circumstances asserted]?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove the parties foresaw the circumstances when they made the contract?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

[-] Did [defendant's name] prove [the circumstances made it impossible for [defendant's name] to keep [its][his][her][their] promise] [the circumstances totally or nearly totally destroyed the benefits which [defendant's name] expected to receive from the contract]?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

700.12VF Undue Influence Questions (fiduciary relationship claimed)

1. Did [defendant's name] prove that [he][she][it] [they] _____ placed trust and confidence in the [plaintiff's name] [or third party]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

2. Did [defendant's name] prove [plaintiff's name] [or third party] actually or impliedly agreed to exercise [his][her][its][their] judgement on behalf of [defendant's name]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

3. Did [defendant's name] prove [plaintiff's name] [or third party] gained influence and superiority over [defendant's name]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

4. Did [plaintiff's name] prove by clear and convincing evidence the contract was fair?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

5. Did [plaintiff's name] prove by clear and convincing evidence [defendant's name] obtained independent advice?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

6. Did [plaintiff's name] prove by clear and convincing evidence the contract did not result from undue influence over [defendant's name]?

YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

700.12VG Undue Influence Questions (fiduciary relationship arising under law)

1. Did [defendant's name] prove by clear and convincing evidence the contract was fair?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

2. Did [defendant's name] prove by clear and convincing evidence the contract did not result from undue influence over [plaintiff's name]?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

3. Did [defendant's name] prove by clear and convincing evidence [plaintiff's name] obtained independent advice?
YES __ NO __

If your answer to question ____ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question ____ is YES, you should then answer question ____.

Notes on Use

The Affirmative defense verdict forms should be used in conjunction with the same numbered affirmative defense instructions. When necessary, Court and counsel should use IPI 200.03.05 as a guide to prepare an instruction to inform the jury on the burden of proof by clear and convincing evidence. The set of instructions must end with 700.18V.

700.13 Damages

If you find in favor of [plaintiff's name], you must then decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s (s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s (s') breach. In calculating [plaintiff's name]'s damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have been in if [both][the] [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

The [plaintiff's name] seeks an award of several different categories of contract damages.

[1] Direct damages for:

(Here insert the element of direct damages which have a basis in the evidence.)

"Direct Damages" are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract. You calculate the amount of this gain by determining the value of the contract benefits [plaintiff's name] did not receive because of [defendant's name]'s breach and then subtracting from that value, the amount you calculate the value of whatever expenses [plaintiff's name] saved because of the breach.

[2] *Special damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] Incidental damages for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

"Incidental Damages" are costs that were reasonably spent either in responding to [defendant's name]'s(s') breach of the contract or in securing the benefits [defendant's name] was [were] to have provided.

You will address these issues in questions ____, ____, (etc.) on your verdict.

Notes on Use

This general damages instruction should be given in all contract cases where none of the specific damages instructions, numbered 700.14 thru 700.16, are applicable. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. Instruction 700.17 on mitigation of damages may be given with this instruction if appropriate. The verdict form relating to this instruction provides the clear steps for the determination of a dollar amount to be awarded if applicable. Contract cases often include multiple defendants who should all be added by name to this instruction.

700.13V Questions for Verdict Form (For Damages--General)

[-] Did [plaintiff's name] prove [he][she][it] sustained damages?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] present evidence from which you can determine the fair and reasonable value of the loss?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] *To determine Direct Damages*:

[a] the value of the contract benefits [plaintiff's name] proved [he][she][it] should have received:

[a] = $_____

[b] the expenses [plaintiff's name] saved because of the the breach:

OR

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = $_____

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = $_____

[6 or -] *Special Damages*: the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[-] = $_____

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided.

[-] = $_____

[8 or -] TOTAL DAMAGES = [5] + [6] + [7]

[-] = $_____

WE, THE JURY, AWARD _____ $_____

Notes on Use

This general damages verdict form should be given whenever the related instruction 700.13 is read. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

700.14 Damages: Measure for Buyer's Breach

If you find in favor of [plaintiff's name], you must decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s(s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s(s') breach. In calculating [plaintiff's name] damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have in if [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

[plaintiff's name] seeks an award of several different categories of contract damages [insert whichever appropriate]:

[1] *Direct damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

"Direct Damages" are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time of the breach, minus any payments [defendant's name] already made.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

[2] Special damages for:

(Here insert the element of special damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] Incidental damages for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

"Incidental Damages" are costs that were reasonably spent either in responding to [defendant's name]'s(s') of the contract or in securing the benefits [defendant's name] was [were] to have provided.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time of the breach, minus any payments [defendant's name] already made.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

You will address these issues in questions ____, ____, (etc.) on your verdict.

Notes on Use

This instruction should only be used where the defendant is a buyer who has breached a contract to purchase property from plaintiff-seller. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. This instruction may be given in conjunction with Instruction 700.17, mitigation of damages, but cannot be used in conjunction with any other damages instruction. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

700.14V Questions for Verdict Form (For Damages--Buyer's Breach)

[-] Did [plaintiff's name] prove [he] [she] [it] sustained damages?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] present evidence from which you can determine the fair and reasonable value of the loss?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] *To determine Direct Damages*:

[a] the contract price [plaintiff's name] proved:

[a] = $_____

[b] the fair market value of the property at the time of defendant's breach

PLUS

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = $_____

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = $_____

[6 or -] *Special Damages*: the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[-] = $_____

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided].

[-] = $_____

[8] TOTAL DAMAGES = [5] + [6] + [7]

[-] = $_____

WE, THE JURY, AWARD _____ $_____

Notes on Use

This general damages verdict form should be given whenever the related instruction 700.13 is read. It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

700.15 Damages: Measure for Seller's Breach

If you find in favor of [plaintiff's name], you must decide how much money, if any, would fairly compensate [plaintiff's name] for the [defendant's name]'s(s') breach of contract. [plaintiff's name] has the burden of proving each element of damages claimed and that they occurred as a direct and natural result of [defendant's name]'s(s') breach. In calculating [plaintiff's name] damages, you should determine that sum of money that will put [plaintiff's name] in as good a position as [he][she][it] would have in if [plaintiff's name] and [defendant's name] had performed all of their promises under the contract.

[plaintiff's name] seeks an award of several different categories of contract damages [insert whichever appropriate]:

[1] *Direct damages* for:

(Here insert the element of direct damages which have a basis in the evidence.)

"Direct Damages" are the amount of gain [plaintiff's name] would have received if [both][the] parties had fully performed the contract.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time [plaintiff's name] was supposed to get the property, minus the contract price minus the unpaid portion of the contract price.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

[2] Special damages for:

(Here insert the element of special damages which have a basis in the evidence.)

Special damages are different from direct damages.

[plaintiff's name] must prove these damages were reasonably foreseeable by the parties when they entered into the contract.

[3] Incidental damages for:

(Here insert the element of incidental damages which have a basis in the evidence.)

Incidental damages are different from direct and special damages.

"Incidental Damages" are costs that were reasonably spent either in responding to [defendant's name]'s(s') of the contract or in securing the benefits [defendant's name] was [were] to have provided.

The measure of *direct damages* in this case is the contract price minus the fair market value of the property at the time [plaintiff's name] was supposed to get the property, minus the contract price minus the unpaid portion of the contract price.

The fair market value of the property is the amount a willing seller and buyer would agree upon for the property if both were fully informed about the property and neither of them was under any particular pressure to buy or sell.

You will address these issues in questions ____, ____, (etc.) on your verdict.

Notes on Use

This instruction should only be used where the defendant is a buyer who has breached a contract to purchase property from plaintiff-seller. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this instruction and the corresponding verdict forms. This instruction may be given in conjunction with Instruction 700.17, mitigation of damages, but cannot be used in conjunction with any other damages instruction. Contract cases often include multiple defendants who should all be added by name to this instruction. The set of instructions must end with 700.18V.

700.15V Questions for Verdict Form (Seller's Breach)

[-] Did [plaintiff's name] prove [he] [she] [it] sustained damages?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] prove these damages were caused by [defendant's name]'s breach of the contract?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] Did [plaintiff's name] show evidence from which you can determine the fair and reasonable value of the loss?
YES __ NO __

If your answer to question __ is NO, then your deliberations are complete. You should disregard the remaining numbered questions, and go to Verdict B at the end of this verdict and sign it. If your answer to question __ is YES, you should then answer question __.

[-] *To determine Direct Damages*:

[a] the fair market value of the property at the time of defendant's breach:

[a] = $_____

[b] the contract price:

PLUS

the amount of money [plaintiff's name] has actually received from [defendant's name]:

[b] = $_____

[5 or -] [plaintiff's name]'s Total Direct Damages (a minus b):

[-] = $_____

[6 or -] *Special Damages*: the amount of special damages [plaintiff's name] proved were reasonably foreseeable the contract was made:

[-] = $_____

[7 or -] *Incidental Damages*: the amount [plaintiff's name] proved were reasonably spent [responding to [defendant's name]'s breach of the contract] [securing the benefits [defendant's name] was to have provided.

[-] = $_____

[8] TOTAL DAMAGES = [5] + [6] + [7]

[-] = $_____

WE, THE JURY, AWARD _____ $ _____

Notes on Use

It is expected that each question will have its own number and they will be arranged logically and numbered in sequence. This general damages verdict form should be given whenever the related instruction 700.14 is read. The instruction assumes all of the itemized/numbered issues are contested, and, if an issue is not contested, it should be eliminated from this verdict form. Questions for the verdict form found at 700.17V on mitigation of damages may be given with this instruction if appropriate.

The set of instructions must end with 700.18V.

700.16 Damages: Measure When Regulated by Contract

In their contract, the parties agreed to the following:

[state here the contract terms regulating damages]

This agreement is binding, and in the course of applying these instructions, you must abide by this agreement in determining the amount of damages, if any, in this case.

You will address these issues in question ____ on your verdict.

Notes on Use

This instruction should be given where the contract at issue contains a provision-setting forth damages for breach of the contract. When this instruction is given, no other instruction on damages can be given. Each verdict must end with 700.18V.

700.16V Question for Verdict Form (Measure When Regulated by Contract)

[-] What amount of damages does the contract state [plaintiff's name] is entitled to?

$_____

Continue on with your verdict, and [answer question [ ]] or sign Verdict for A at the end of this Verdict.

Notes on Use

This should be used in connection with 700.16 when the evidence supports it. The set of instructions must end with 700.18V.

700.17 Determination of Damages--Mitigation of Damages

The law provides a party cannot recover damages [he][she][it][they] could have prevented by exercising ordinary care and diligence when [he][she][it][they] learned or should have learned of the breach.

The burden is on [defendant's name] to prove [plaintiff's name] failed to minimize [his][her][its] damages and that the damages should be reduced by a particular amount as a result.

In this case, [defendant's name] claim(s) and has the burden of proving that, with reasonable efforts and ordinary care, [plaintiff's name] could have avoided some losses in whole or in part, even though [his][her][its] losses originally resulted from the [defendant's name]'s(s') failure to keep [his][her][its] promise.

If [defendant's name] proves [prove] that [plaintiff's name] could have avoided some losses in whole or in part with reasonable efforts and ordinary care, you may not require [defendant's name] to pay the amount [plaintiff's name] could reasonably have avoided and you must subtract any such amount from the amount of damages you have found.

If you find [plaintiff's name] incurred costs in making a reasonable effort to avoid such losses, you must make an award to [plaintiff's name] for such costs.

You will address these issues in questions ____, ____ on your verdict.

Notes on Use

This damage instruction, when the evidence supports it use, may be given in conjunction with Instructions 700.13, 700.14, and 700.15. The set of instructions must end with 700.18V.

700.17V Questions for Verdict Form (Mitigation of Damages)

[-] How much money did [plaintiff's name] lose because of [defendant's name] breach of contract?

$_____

[-] Could [plaintiff's name] have avoided losing some of his money with reasonable effort and ordinary care?

YES __ NO __

If the answer to question [-] above is NO, the amount named in the first question above is the amount of damages that you should award to [plaintiff's name]. If the answer to question [-] above is YES, you should then answer question [-].

[-] How much money could [plaintiff's name] have saved if [he][she][it] had exercised reasonable effort and ordinary care?

$_____

[-] (-) minus (-) = amount of damages to be awarded [plaintiff's name].

$_____

WE, THE JURY, AWARD [plaintiff's name] $_____

Notes on Use

This should be used in connection with 700.17 when the evidence supports it. The set of instructions must end with 700.18V.

700.18V Concluding Question for Verdict Form

Continue on with your verdict and sign Verdict A at the end of this verdict.

Either Verdict A or Verdict B must be signed by each juror.

VERDICT A

WE, THE JURY, FIND FOR [plaintiff's name] AND AGAINST [defendant's name].

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

VERDICT B

WE, THE JURY, FIND FOR [defendant's name] AND AGAINST [plaintiff's name].

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

SAMPLE CONTRACT INSTRUCTIONS

These new contract instructions require the Court and counsel to construct a verdict form which contains all issues that could be the subject of a special interrogatory and provide a jury verdict on which the Court can enter judgment for the prevailing party. The set of instructions must end with IPI 700.18V. This example shows the proper use of these instructions along with the proper completed verdict form.

FACTS OF CASE

[These are modified and taken from <us>Fields v. Franklin Life Inc.</us>, 115 Ill.App.3d 954, 71 Ill.Dec. 776, 451 N.E.2d 950 (5th Dist. 1983)].

Plaintiff (hereinafter “P”) is the wife and named as a beneficiary by her husband (hereinafter “H”), who applied to Defendant Life Insurance Company (hereinafter “D”) for $100,000.00 life insurance and was issued a conditional premium receipt. The jury heard the following evidence:

Nov. 1976 --H begins to lose weight which continues over the next 18 months--during which time, H sees a Dr. Z on 2 occasions, who notices his goiter condition and advises H to get medical attention;

4-3-78 --H completes an application for life insurance and pays the requested premium and receives a “conditional premium receipt”;

From 4-4-78 till 5-18-78 --D tries on 3 separate occasions to set up physical examinations of H;

5-18-78 --Dr. W treats H with radioactive iodine;

5-20-78 --H is rushed to hospital and dies;

5-26-78 --D's letter to P says H's application is incomplete, denies a policy and tenders return of premium.

D alleges no insurance coverage because:

1) H did not submit to physical exam within 60 days after 4-3-78 as required by receipt;

2) H made a material misrepresentation when he failed to disclose his pre-existing medical condition on the application and if known to D, it would not have insured him; and

3) insurance agent advised H on 4-3-78 that physical exam of H was necessary before policy would issue.

INSTRUCTIONS USED

700.02, 700.03, 700.05, 700.06, 700.07, 700.09, 700.12, 700.12C, 700.16

VERDICT FORM A COMBINATION OF

700.09V, 700.07V, 700.3V, 700.16V, 700.12VC, and 700.18V

INSTRUCTION #1

P claims she is entitled to recover contract damages from D for breach of contract. P has the burden of proving:

[1] The existence of a contract between H and D.

[2] Performance by H of all conditions.

[3] D's failure to adequately perform its obligations under the contract.

[4] Resulting damage to P.

I will explain and define these legal terms elsewhere in these instructions.

If you find from your consideration of all the evidence that one or more of these elements has not been proved, you must find in favor of D.

If you find that each of the above elements has been proved, then you must consider

D's claim of an affirmative defense.

D claims and has the burden of proving the following affirmative defense:

H misrepresented his health history on the application.

P denies D's affirmative defense.

If you find from your consideration of all the evidence that P has proven all the elements of her case and D has not proved the affirmative defense, you must find in favor of P and consider the amount of damages to be awarded. If D proves its affirmative defense, then it is relieved of its obligations under the contract and you must find in favor of D.

IPI 700.02

Pltf's #1

As stated in Instruction 1, the first element of a contract claim P must prove is the existence of a contract. There is a contract if P proves there was an offer by one party, acceptance by the other party and consideration between the parties. P claims the parties entered into a contract which had the following terms:

H's life was insured against death for $100,000.00.

To prove the existence of a contract between H and D, P has the burden of proving each of the following propositions:

First D made an offer to H. An "offer" is a communication of a willingness to enter into a contract. The communication must satisfy four conditions:

[1] the communication must have included a definite promise by the person making the communication, showing a willingness to make an agreement;

[2] the important and necessary terms must be definite;

[3] the terms must be communicated by words or conduct to the other party; and

[4] the communication must give the other party the power to agree to its terms.

Second H accepted the offer made by D.

"Acceptance" of an offer is a communication of agreement to the terms of the offer. For the acceptance to be valid:

[1] H must agree to all of the material terms in the offer; and

[2] H must have communicated agreement to D according to the terms specified in the offer by writing, spoken words, actions or any other conduct that would indicate agreement to a reasonable person.

Third the agreement included an exchange of promises or value, which is known as consideration. There is sufficient consideration if P can prove that something of value was bargained for by the parties and given by one party in exchange for the other's promise. "Something of value" may consist of a promise, an act, a promise to act or not act, or any payment, that was of benefit to one party or disadvantage to the other.

You will address these issues in Questions [1], [2], [3] on your Verdict.

IPI 700.03

Pltf's #2

A partly oral and partly written contract is as valid and enforceable as a written contract.

IPI 700.05

Pltf's #3

A written contract may consist of more than one document.

IPI 700.06

Pltf's #4

As stated in instruction #1, the second element of a contract claim P must prove is H performed all obligations required of him under the contract. To recover on her claim, P has the burden to prove H did what the conditional premium receipt required him to do.

You will address this issue in Question [6] on your Verdict.

IPI 700.07

Pltf's #5

As stated in Instruction 1, the third element P must prove is D's failure to perform the obligations under the contract. In this case, D claims the parties agreed that D did not have to keep its promise unless H submitted to a physical exam by a physician chosen by D.

P has the burden of proving the condition was not a part of the contract.

If you find this condition was part of the contract, you must then decide whether the physical exam occurred. If the physical exam did not occur, then P cannot recover.

You will address these issues in Question [4] & [5] on your Verdict.

IPI 700.09

Pltf's #6

The law recognizes that sometimes, even though P has met her burden of proving that a contract exists, facts or circumstances may exist which would excuse D from being liable to P. These facts or circumstances are called affirmative defenses.

In this lawsuit, D has raised and has the burden to prove the following affirmative defenses:

H misrepresented his health history on the application.

The law provides if one party fraudulently by misrepresentation of material facts convinced another to enter into the contract, then that party cannot enforce the contract against the other. The law also provides there is no misrepresentation of material fact when the representation relates to an expression of opinion, a matter of law, or a statement of value.

D claims and has the burden of proving it reasonably relied to its detriment on a false representation created by words or conduct of H regarding a material fact, and if D had known the truth, it would not have entered into the contract.

D claims and has the burden of proving it was fraudulently convinced to enter into the contract as follows:

H failed to state on the application that he had a weight loss over an eighteen month period and had been told by a doctor to consult a doctor for treatment.

P denies D's claim.

You will address these issues in Questions [7], [8], [9], [10], [11], & [12] on your Verdict.

IPI 700.12 & 700.12C

Pltf's #7

In their contract, the parties agreed to the following:

the amount of the death benefit is $100,000.00

This agreement is binding, and in the course of applying these instructions, you must abide by this agreement in determining the amount of damages, if any, in this case.

You will address this issue in Question [13] on the Verdict Form.

IPI 700.16

Pltf's #8

VERDICT

Please answer the questions in the order they are numbered, starting with Question 1, and then follow the instructions appearing after your answer.

[1] Did P prove there was an offer?
YES __ NO __

If your answer to question 1 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 1 is YES, you should then answer question 2.

[2] Did P prove there was an acceptance?
YES __ NO __

If your answer to question 2 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 2 is YES, you should then answer question 3.

[3] Did P prove there was consideration?
YES __ NO __

If your answer to question 3 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 3 is YES, you should then answer question 4.

[4] Did P prove the condition claimed by D was not a part of the contract?
YES __ NO __

If your answer to question 4 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 4 is YES, you should then answer question 5.

[5] Did P prove the condition to the contract occurred?
YES __ NO __

If your answer to question 5 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 5 is YES, you should then answer question 6.

[6] Did P prove H performed his obligations under the contract?
YES __ NO __

If your answer to question 6 is NO, then your deliberations are complete. You should disregard the remaining numbered questions and, go to Verdict B at the end of this verdict and sign it. If your answer to question 6 is YES, you should then answer question 7.

[7] Did D prove a false statement of material fact was made by H to D?
YES __ NO __

If your answer to question 7 is NO, you should answer question 12 and skip questions 8, 9, 10 and 11. If your answer to question 7 is YES, you should then answer question 8.

[8] Did D prove H knew the statement was false?
YES __ NO __

If your answer to question 8 is NO, you should answer question 12 and skip questions 9, 10 and 11. If your answer to question 8 is YES, you should then answer question 9.

[9] Did D prove the statement was made to induce it to enter into the contract?
YES __ NO __

If your answer to question 9 is NO, you should answer question 12 and skip questions 10 and 11. If your answer to question 9 is YES, you should then answer question 10.

[10] Did D prove it reasonably relied on the false statement?
YES __ NO __

If your answer to question 10 is NO, you should answer question 12 and skip question 11. If your answer to question 10 is YES, you should then answer question 11.

[11] Did D prove this false statement resulted in a contract?
YES __ NO __

If your answer to question 11 is NO, you should then answer question 12. If your answer to question 11 is YES then your deliberations are complete. You should disregard the remaining question and go to Verdict B at the end of this service and sign it.

[12] What amount of damages does the contract state P is entitled to?

$____.

Continue on with your verdict and sign Verdict A at the end of this verdict.

Having answered the preceding questions, and signed either Verdict A or B, you have completed your verdict.

VERDICT A

We, the jury, find for P and against the D.

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

VERDICT B

We the jury, find for D and against P.

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

700.3V, 700.09V, 700.07V, 700.012VC, 700.16V, 700.12VD, & 700.18V

*The Committee believes this should be filled in by Court and counsel if there is no dispute in the evidence as to the terms of the contract regarding damages, as in this Sample Case. Sample Verdict revised November 2010.

710.00

LIABILITY INSURANCE

INTRODUCTION

A contract of liability insurance contains an implied covenant of good faith and fair dealing. *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 1029; 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *National Sur. Corp. v. Fast Motor Service,* 213 Ill.App.3d 500, 572 N.E.2d 1083, 157 Ill.Dec. 619 (1st Dist.1991) (workers' compensation insurance). The breach of this duty may give rise to a cause of action in tort.

In Illinois, under the majority view, causes of action against an insurer for breach of its duties under so-called "first party" insurance policies--life and casualty insurance (fire, theft, etc.), health insurance, and other similar policies that indemnify the insured's own losses--are preempted by a statutory cause of action, 215 ILCS 5/155 (1994). *E.g.*, *Mazur v. Hunt,* 227 Ill.App.3d 785, 592 N.E.2d 335, 169 Ill.Dec. 848 (1st Dist.1992); *contra*, *e.g.*, *Emerson v. American Bankers Ins. Co.,* 223 Ill.App.3d 929, 585 N.E.2d 1315, 166 Ill.Dec. 293 (5th Dist.1992).

Claims against *liability* insurers for bad faith refusal to settle are not preempted by the Illinois Insurance Code. *National Union Fire Ins. Co. v. Continental Ill. Corp.,* 673 F.Supp. 267, 270-72 (N.D.Ill.1987). Therefore, the instructions in this chapter are limited to bad faith claims against liability insurers for refusal to settle.

Duty of Insurer

The Illinois Supreme Court has yet to define the duty or the elements of this cause of action. A number of Appellate Court decisions have defined the cause of action essentially as follows: A liability insurer may be liable in tort for a judgment entered against its insured in excess of the limits of coverage if the insurer refused to settle a claim against its insured within the policy limits and the insurer's conduct amounted to fraud, negligence, or bad faith. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.,* 224 Ill.App.3d 1083, 587 N.E.2d 81, 167 Ill.Dec. 199 (5th Dist.1992); *Nicholson v. St. Anne Lanes, Inc.,* 158 Ill.App.3d 838, 512 N.E.2d 127, 128; 111 Ill.Dec. 223, 224 (3d Dist.1987); *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 648; 53 Ill.Dec. 854, 857 (1st Dist.1981); *LaRotunda v. Royal Globe Ins. Co.,* 87 Ill.App.3d 446, 408 N.E.2d 928, 935-936; 42 Ill.Dec. 219, 226-227 (1st Dist.1980); *Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 38 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.,* 35 Ill.App.3d 350, 342 N.E.2d 116, 120 (1st Dist.1975); *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Smiley v. Manchester Ins. & Indem. Co.,* 13 Ill.App.3d 809, 301 N.E.2d 19, 21 (2d Dist.1973); *Wolfberg v. Prudence Mut. Cas. Co.,* 98 Ill.App.2d 190, 240 N.E.2d 176, 179 (1st Dist.1968); *Powell v. Prudence Mut. Cas. Co.,* 88 Ill.App.2d 343, 232 N.E.2d 155 (1st Dist.1967); *Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.,* 325 Ill.App. 649,

60 N.E.2d 896, 906 (1st Dist.1945).

Fraud, negligence, and bad faith appear to be alternative bases of liability. An insurer may be held liable for negligence. *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.,* 325 Ill.App. 649, 60 N.E.2d 896, 906 (1st Dist.1945); *General Casualty Co. v. Whipple,* 328 F.2d 353, 356 (7th Cir.1964). A showing of fraud is not necessary to prove bad faith. *Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966).

The duty of good faith and fair dealing requires the insurer defending the insured to give the insured's interests consideration at least equal to its own interests when deciding whether to try or settle a claim. *Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 207; 216 N.E.2d 198, 204 (2d Dist.1966); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.,* 325 Ill.App. 649, 60 N.E.2d 896 (1st Dist.1945). The failure to so consider the insured's interests constitutes a breach of the duty of good faith. *Mid-America Bank v. Commercial Union Ins. Co.,* 224 Ill.App.3d 1083, 1087; 587 N.E.2d 81, 84; 167 Ill.Dec. 199, 202 (5th Dist.1992); *Sanders v. Standard Mutual Ins. Co.,* 142 Ill.App.3d 1082, 1084; 492 N.E.2d 917, 918; 97 Ill.Dec. 258, 259 (4th Dist.1986); *Edwins v. General Casualty Co.,* 78 Ill.App.3d 965, 968; 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Smiley v. Manchester Ins. & Indem. Co.,* 13 Ill.App.3d 809, 812; 301 N.E.2d 19, 21 (2d Dist.1973). The argument that the insurer should be required to give *paramount* consideration to the interests of the insured has been rejected. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 650; 53 Ill.Dec. 854, 859 (1st Dist.1981).

Breach of Duty--Standards and Proof

There is no *per se* liability for failure to settle within policy limits. *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 946; 338 N.E.2d 912, 915 (2d Dist.1975). The insurer's duty to its insured is not unlimited; the insurer is not required to disregard its own interests. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 650; 53 Ill.Dec. 854, 859 (1st Dist.1981).

A claim against an insurer for breach of its duty to its insured presupposes that the insurer had a reasonable opportunity to settle within the policy limits. *Brocato v. Prairie State Farmers Ins. Assoc.,* 166 Ill.App.3d 986, 520 N.E.2d 1200, 117 Ill.Dec. 849 (4th Dist.1988); *Van Vleck v. Ohio Cas. Ins. Co.,* 128 Ill.App.3d 959, 471 N.E.2d 925, 84 Ill.Dec. 159 (3d Dist.1984) (where only settlement demand was over 160% of the policy limits, insurer violated no duty by refusing to settle).

In *Kavanaugh v. Interstate Fire & Casualty Co.,* 35 Ill.App.3d 350, 356; 342 N.E.2d 116, 121 (1st Dist.1975), the Appellate Court made reference to two rules. First, it stated, "we cannot hold that the law imposes a duty on an insurance company to initiate negotiations to settle a case." *Id*. Next, it stated, "Illinois law does not demand that an insurer settle within the policy limits without exception or else invariably suffer the consequences of an excess liability judgment for breach of its fiduciary duty." *Id*. The opinion then goes on to state:

> There is a well recognized exception to the general principle when the probability of an adverse finding is great and the amount of probable damages would greatly exceed the policy limits.

Id. Thus, it is unclear whether the "exception" in that sentence was intended to state elements of the bad faith cause of action, applicable generally, or only to describe an exception to the rule that an insurer has no duty to initiate settlement negotiations.

Two subsequent cases adopted the factors stated by *Kavanaugh* as elements of the cause of action. *Phelan v. State Farm Mut. Auto. Ins. Co.,* 114 Ill.App.3d 96, 448 N.E.2d 579, 585; 69 Ill.Dec. 861, 867 (1st Dist.1983); *Van Vleck v. Ohio Cas. Ins. Co.,* 128 Ill.App.3d 959, 471 N.E.2d 925, 927; 84 Ill.Dec. 159, 161 (3d Dist.1984). This would mean that the insured would have to prove that when the insurer faced the decision of whether to settle, the probability of an adverse finding was great and the amount of probable damages would greatly exceed the policy limits.

However, two other decisions have cited the *Kavanaugh* exception in reference to the general rule that the insurer does not have to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 649; 53 Ill.Dec. 854, 858 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.,* 741 F.Supp. 716, 722 (N.D.Ill.1990). The general rule is that the insurer has no obligation to initiate settlement negotiations, as such a duty would put the insurer at a negotiating disadvantage. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 53 Ill.Dec. 854 (1st Dist.1981); *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Casualty Co.,* 35 Ill.App.3d 350, 356; 342 N.E.2d 116, 121 (1st Dist.1975). An insurer need not submit to demands for the policy limits simply because there is a risk of an excess verdict. And an insurer need not make settlement proposals when it reasonably believes it has a good defense to the claim. *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The fact that the plaintiff did not make a firm settlement demand may not be conclusive of the insurer's good faith. *Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 205 (2d Dist.1966). When the probability of an adverse finding on liability is considerable and the amount of probable damages would greatly exceed the insured's coverage, the insurer, to avoid a breach of the duty of good faith, may be required to initiate settlement negotiations. *Adduci v. Vigilant Ins. Co.,* 98 Ill.App.3d 472, 424 N.E.2d 645, 649; 53 Ill.Dec. 854, 858 (1st Dist.1981); *Ranger Ins. Co. v. Home Indem. Co.,* 741 F.Supp. 716, 722 (N.D.Ill.1990). An insurer is only required to settle within the policy limits if that is the honest and prudent course of action. *LaRotunda v. Royal Globe Ins. Co.,* 87 Ill.App.3d 446, 454; 408 N.E.2d 928, 936; 42 Ill.Dec. 219, 227 (1st Dist.1980). Similarly, the majority of jurisdictions require the insurer to consider the conflicting interests of itself and the insured with impartiality and good faith. That duty has been breached where the risk of an unfavorable result is out of proportion to the chances of a favorable outcome. *See, e.g.*, *Eastham v. Oregon Auto. Ins. Co.,* 273 Or. 600, 540 P.2d 364, 367 (1975).

Factors which have been considered by the courts in determining whether the insurer breached its duty to the insured include the insurer's willingness to negotiate (*Cernocky v. Indemnity Ins. Co.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 203 (2d Dist.1966)); the insurer's proper investigation of the claim (*Olympia Fields Country Club v. Bankers Indem. Ins. Co.,* 325 Ill.App. 649, 60 N.E.2d 896, 906 (1st Dist.1945); *Ballard v. Citizens Casualty Co.,* 196 F.2d 96, 103 (7th Cir.1952)); the insurer's consideration of the advice of its defense counsel (*Olympia Fields Country Club, supra; Bailey v. Prudence Mutual Cas. Co.,* 429 F.2d 1388, 1390 (7th Cir.1970)); whether the insurer informed the insured of the injured plaintiff's offer to settle within the limits

of coverage, the risks of litigation, and the insured's right to retain (at insured's personal expense) additional counsel of his or her choice (*Olympia Fields Country Club, supra; Bailey, supra*).

On the other hand, the insured likewise owes the insurer a duty of good faith and fair dealing, and the insured may be deemed to have breached that duty where the insured misleads the insurer as to the underlying facts or fails in some respect to cooperate in the presentation of the defense. *Sanders v. Standard Mutual Ins. Co.,* 142 Ill.App.3d 1082, 1084; 492 N.E.2d 917, 918; 97 Ill.Dec. 258, 259 (4th Dist.1986); *Waste Management, Inc. v. International Surplus Lines Ins. Co.,* 144 Ill.2d 178, 579 N.E.2d 322, 161 Ill.Dec. 774 (1991).

The conduct of the insurer is tested against an objective--not a subjective--standard. It is not sufficient that the insurer sincerely believes that its insured will not be held liable. Its refusal to settle will be judged upon review of those factors with which the insurer was faced at the time it decided to forego settlement. *Shearer v. Reed,* 286 Pa.Super. 188, 428 A.2d 635, 638 (1981). The fact that the injured person has refused to consider settlement, or that the insurer reasonably believes it has a good defense to the claim, are also important factors. *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976); *Kavanaugh v. Interstate Fire & Cas. Co.,* 35 Ill.App.3d 350, 342 N.E.2d 116, 121 (1st Dist.1975).

Where no reasonable person, upon consideration of the interests of the insurer and the insured and those factors which led to the insurer's decision, would decide that the insurer had an affirmative duty to settle within the policy limits, there is no liability as a matter of law. *General Casualty Co. v. Whipple,* 328 F.2d 353, 357 (7th Cir.1964).

Where there are multiple claimants against the same policy, so long as the insurer acts reasonably and in good faith, the insurer may settle fewer than all the claims and thereby exhaust the policy limits without incurring liability to the nonsettling claimants. *Haas v. Mid America Fire & Marine Ins. Co.,* 35 Ill.App.3d 993, 343 N.E.2d 36, 39 (3d Dist.1976).

The insurer's liability may arise from the negligence of its agent-attorney in the settlement negotiations. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.,* 224 Ill.App.3d 1083, 587 N.E.2d 81, 167 Ill.Dec. 199 (5th Dist.1992); *Smiley v. Manchester Ins. & Indem. Co.,* 71 Ill.2d 306, 375 N.E.2d 118, 16 Ill.Dec. 487 (1978). *Compare Steele v. Hartford Fire Ins. Co.,* 788 F.2d 441 (7th Cir.1986) (attorney's conduct as a matter of law was neither negligent nor bad faith).

In most cases, the insured will have suffered an excess judgment. However, in certain situations the insured may *settle* in excess of the policy limits, rather than suffer an excess judgment, and then recover the full amount of the settlement from the insurer. *National Union Fire Ins. v. Continental Ill. Corp.,* 673 F.Supp. 267, 272-274 (N.D.Ill.1987) (good discussion of this question).

Status of the Plaintiff

The insured is the party wronged by the insurer's breach; it is the insured that has sustained a judgment in excess of the policy limits, and the insured's assets and income are exposed to the excess liability.

The plaintiff in the underlying action may collect the excess part of the judgment from the insured, leaving the insured to maintain the bad faith action against the insurer. More often, however, the insured will assign the bad faith action to the original injured plaintiff in exchange for a covenant not to enforce, and the plaintiff will then maintain the bad faith action as the insured's assignee. Such assignments are valid *(Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 915-916 (2d Dist.1975); *Brown v. State Farm Mut. Auto. Ins. Ass'n,* 1 Ill.App.3d 47, 272 N.E.2d 261 (4th Dist.1971); *Bailey v. Prudence Mut. Cas. Co.,* 429 F.2d 1388 (7th Cir.1970)), and in fact may be ordered by the court. *See Nicholson v. St. Anne Lanes, Inc.,* 158 Ill.App.3d 838, 512 N.E.2d 127, 128; 111 Ill.Dec. 223, 224 (3d Dist.1987), and *Phelan v. State Farm Mut. Auto. Ins. Co.,* 114 Ill.App.3d 96, 448 N.E.2d 579, 69 Ill.Dec. 861 (1st Dist.1983), rejecting the contrary holding in *Roundtree v. Barringer,* 92 Ill.App.3d 903, 416 N.E.2d 675, 48 Ill.Dec. 402 (5th Dist.1981). As assignee of the insured, the plaintiff stands in the insured's shoes, and plaintiff's bad faith action is subject to any defenses that would have been available against the insured. *Sanders v. Standard Mut. Ins. Co.,* 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979).

Absent an assignment from the insured, the injured plaintiff in the original action has no claim against the defendant's liability insurer. The injured plaintiff is not a beneficiary of the insurance contract and does not have standing to maintain an action against defendant's insurer based upon the insurer's breach of a duty owed only to the insured. *Kennedy v. Kiss,* 89 Ill.App.3d 890, 412 N.E.2d 624, 629; 45 Ill.Dec. 273, 278 (1st Dist.1980); *Murphy v. Clancy,* 83 Ill.App.3d 779, 404 N.E.2d 287, 301; 38 Ill.Dec. 863, 867 (1st Dist.1980), *aff'd in part & rev'd in part on other grounds*, 88 Ill.2d 444, 430 N.E.2d 1079, 58 Ill.Dec. 828 (1981); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 721; 30 Ill.Dec. 682, 685 (1st Dist.1979); *Yelm v. Country Mut. Ins. Co.,* 123 Ill.App.2d 401, 259 N.E.2d 83 (3d Dist.1970). *See also Powell v. Prudence Mut. Cas. Co.,* 88 Ill.App.2d 343, 232 N.E.2d 155 (1st Dist.1967) (bad faith claim may not be litigated in garnishment action by plaintiff-judgment creditor against defendant's insurer).

Damages

The measure of damages includes at least the full amount of the judgment rendered against the insured, less any amount the plaintiff has been paid by the insurer, other tortfeasors, and any other allowable offsets. Also, since the insured's liability includes statutory post-judgment interest (735 ILCS 5/2-1303 (1994)), this is also recoverable. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.,* 224 Ill.App.3d 1083, 587 N.E.2d 81, 85-86; 167 Ill.Dec. 199, 203-04 (5th Dist.1992).

There are no Illinois cases directly on point on the issue of whether attorneys' fees, or any other damages, are recoverable in a bad faith action.

The very fact of the entry of the excess judgment against the insured itself constitutes the damages; the plaintiff need not allege payment of the excess judgment. *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979); *Browning v. Heritage Ins. Co.,* 33 Ill.App.3d 943, 338 N.E.2d 912, 916 (2d Dist.1975). It does not matter that

the judgment may be uncollectible at that time, or ever. *Edwins v. General Cas. Co.,* 78 Ill.App.3d 965, 397 N.E.2d 1231, 1232; 34 Ill.Dec. 274, 275 (4th Dist.1979) (insolvent estate); *Smiley v. Manchester Ins. & Indem. Co.,* 13 Ill.App.3d 809, 301 N.E.2d 19, 22 (2d Dist.1973) (same); *Wolfberg v. Prudence Mutual Cas. Co.,* 98 Ill.App.2d 190, 240 N.E.2d 176 (1st Dist.1968) (same). However, if the insured's entire personal liability has been contracted away, the excess judgment has caused the insured no damage that will support a bad faith claim. *Childress v. State Farm Mut. Auto. Ins. Co.,* 97 Ill.App.2d 112, 239 N.E.2d 492 (4th Dist.1968). *Accord*: *National Union Fire Ins. Co. v. Continental Ill. Corp.,* 673 F.Supp. 267, 274-275 (N.D.Ill.1987) (insureds not personally liable, so FDIC as insureds' assignee cannot maintain bad faith claim).

710.01 Insurance Bad Faith--Duty of Liability Insurer--Definition of Good Faith/Bad Faith--Definition of Ordinary Care

In handling the claim of [person] against [name of insured] under the insurance policy issued by [name of insurance company], it was the duty of [name of insurance company] to exercise [good faith] [and] [ordinary care] toward the interests of [name of insured].

["Good faith" means that [name of insurance company] was required to give as much consideration to [name of insured]'s interests as it gave to its own interests. A failure to exercise good faith is known as "bad faith."]

["Ordinary care" means that [name of insurance company] was required to exercise the care that a reasonably careful insurance company would use under circumstances similar to those shown by the evidence in giving as much consideration to [name of insured]'s interests as to its own interests.]

[A failure to exercise ordinary care is also known as negligence.]

Notes on Use

Bad faith and negligence are alternative bases of recovery; a plaintiff may seek recovery under either or both theories. The instruction should include the appropriate bracketed parts depending on which theory or theories are claimed.

Comment

See Introduction.

710.02 Insurance Bad Faith--Issues Made by the Pleadings

[The plaintiff claims that [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of insured] within the policy limits.]

The plaintiff [further] claims that in failing to settle [name of injured person]'s claim against [name of insured] within the policy limits, [name of insurance company] [was negligent] [or] [acted in bad faith] in one or more of the following respects:

[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the bad faith or negligence of the insurance company which have not been withdrawn or ruled out by the court and are supported by the evidence.]

The plaintiff further claims that one or more of the foregoing proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[Name of insurance company] [denies that it did any of the things claimed by the plaintiff,] denies that it was [negligent] [or] [acted in bad faith] in doing any of the things claimed by the plaintiff, and denies that any claimed act or omission on the part of [name of insurance company] proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[[Name of insurance company] also sets up the following affirmative defense(s):]

[Here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[The plaintiff denies that (summarize affirmative defense(s)).]

Notes on Use

The first paragraph of this instruction is bracketed because in many cases, there will be no fact issue for the jury as to whether the insurer had an opportunity to settle at or below the policy limits. If the trial court rules that this is a submissible issue, the first paragraph should be used.

Ordinarily, there will be no issue as to the dollar amount of the plaintiff's damages. If there is, the instruction should be modified to add an appropriate claim and denial.

If the plaintiff makes separate claims as to bad faith and negligent conduct, they may be stated in separate paragraphs.

The plaintiff in an insurance bad faith case must prove that the insurer's bad faith or negligent conduct proximately resulted in the judgment in excess of the policy limits. It is not enough to show that the insurer's conduct was only *one* of the reasons for the excess judgment. The issues and burden of proof instructions have been drafted accordingly. IPI 710.04, a definition of proximate cause for bad faith cases, should also be given.

710.03 Insurance Bad Faith--Burden of Proof

The plaintiff has the burden of proving all of the following propositions:

[First, that [name of insurance company] had a reasonable opportunity to settle [name of injured person]'s claim against [name of insured] within the policy limits.]

[First,] [Second,] that [name of insurance company] acted or failed to act in one of the ways claimed by the plaintiff as stated to you in these instructions and that in so acting, or failing to act, [name of insurance company] [was negligent] [or] [acted in bad faith] with respect to [name of insured]'s interests;

[Second,] [Third,] that [name of insurance company]'s [negligence] [or] [bad faith] proximately caused the judgment in excess of the policy limits to be entered against [name of insured].

[[name of insurance company] has asserted the affirmative defense that [summarize affirmative defense]. [name of insurance company] has the burden of proving this affirmative defense.]

If you find from your consideration of all the evidence that all of the propositions required of the plaintiff have been proved [and that the defendant's affirmative defense has not been proved], then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of the propositions required of the plaintiff has not been proved [or that [name of insurance company]'s affirmative defense has been proved], then your verdict should be for [name of insurance company].

Notes on Use

IPI 21.01 should also be given.

See Notes on Use to IPI 710.02.

710.04 Insurance Bad Faith--Proximate Cause--Definition

When I use the expression "proximate cause," I mean that cause which, in natural or probable sequence, resulted in the judgment against [name of insured] in excess of the policy limits.

Notes on Use

In an insurance bad faith case, this proximate cause instruction should be used. Do not use IPI 15.01.

710.05 Insurance Bad Faith--Factors to be Considered in Determining Breach of Duty

In determining whether [name of insurance company] [acted in bad faith] [or] [was negligent] in failing to settle [name of injured person]'s claim against name of insured within the policy limits, you may consider what the evidence shows concerning the following factors:

1. What [name of insurance company] [and its agent(s)] knew or should have known concerning the probability of a verdict in favor of [name of injured person] if [name of injured person]'s claim against [name of insured] was not settled, and what [name of insurance company] [and its agent(s)] knew or should have known concerning the amount by which such a verdict might or might not exceed the policy limits;

[2. The willingness of [name of insurance company]'s (and its agent's(s')) and [name of injured person] to negotiate;]

[3. The reasonableness of the negotiating parties' conduct during the negotiations;]

[4. The extent of [name of insurance company]'s (and its agent's(s')) investigation of [name of injured person]'s claim;]

[5. [name of insurance company]'s proper consideration of, or its failure to properly consider, the advice of counsel;]

[6. (*Insert here any other factor or factors which the court rules are supported by the evidence and are legally relevant to a determination of the insurer's bad faith or negligence.*)]

Notes on Use

The first factor will be appropriate in any action in which the insurer is charged with a bad faith or negligent failure to settle within the policy limits. Include any of the remaining factors which have support in the evidence. The wording of the factors may be modified as necessary to conform to the facts of each case.

If plaintiff's claim is based in whole or in part on the conduct of an agent of the insurance company, such as defense counsel, include the bracketed references to agents as appropriate. In such cases, IPI 50.02 may also be given.

Since the insurance company will be a corporation, IPI 50.11 may also be given.

710.06 Insurance Bad Faith--Status of the Plaintiff

The plaintiff in this case is [name of plaintiff]. [Name of plaintiff] brings this action as the assignee of [name of insured], who was the [person] [corporation] [[describe entity, e.g., partnership]] to whom [name of insurance company] issued the insurance policy in question. Therefore, you should decide the issues in this case just as if [name of insured] was the actual plaintiff.

Notes on Use

This instruction should be given whenever the plaintiff sues as assignee of the insured.

Comment

See Sanders v. Standard Mut. Ins. Co., 142 Ill.App.3d 1082, 492 N.E.2d 917, 97 Ill.Dec. 258 (4th Dist.1986); *Scroggins v. Allstate Ins. Co.,* 74 Ill.App.3d 1027, 393 N.E.2d 718, 720; 30 Ill.Dec. 682, 684 (1st Dist.1979).

710.07 Insurance Bad Faith--Measure of Damages

If you decide for the plaintiff on the question of liability, you must then award the amount of money which will compensate the plaintiff for the damages proved by the evidence to have resulted from [name of insurance company]'s negligence or bad faith. The plaintiff's damages are $[insert sum] [which is the amount of the judgment entered in favor of the plaintiff and against [name of insured] (minus the amount received by the plaintiff from [name of insurance company] under the policy) (and) (minus the amount received by the plaintiff from another insurance company) (and) (minus [describe any other allowable offset(s)])].

Notes on Use

In most cases, there will be no dispute as to the dollar amount of the damages to which the plaintiff is entitled if the insurance company is found liable, and this instruction has been drafted accordingly. This instruction also assumes that any additional damages to which the plaintiff may be entitled (such as interest) can be added to the verdict by the court and included in the judgment.

If the dollar amount of the damages is not calculable by simple addition and subtraction as shown in this instruction, then modify this instruction accordingly and use a verdict form such as IPI B45.01.A.

Whether the jury should be instructed as to how the sum claimed by the plaintiff was calculated is a matter left to the discretion of the court and counsel, and therefore the last part of this instruction is bracketed.

710.08 Insurance Bad Faith--Instruction on Use of Verdict Forms

When you retire to the jury room you will first select a foreperson. He or she will preside during your deliberations.

Your verdict must be unanimous.

Forms of verdicts are supplied with these instructions. After you have reached your verdict, fill in and sign the appropriate form of verdict and return it into court. Your verdict must be signed by each of you. You should not write or mark upon this or any of the other instructions given to you by the court.

If you find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company] then you should use Verdict Form A.

If you find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff] then you should use Verdict Form B.

710.09 Insurance Bad Faith--Verdict Forms

Verdict Form A

We, the jury, find for the plaintiff [name of plaintiff] and against the defendant [name of insurance company]. We assess plaintiff's damages in the sum of $_____.

[Signature lines]

Notes on Use

If the amount of the damages recoverable if the jury finds in favor of the plaintiff is a fixed sum, it may be inserted in place of the blank line "$_____."

Verdict Form B

We, the jury, find for the defendant [name of insurance company] and against the plaintiff [name of plaintiff].

[Signature lines]

800.00

FRAUD AND DECEIT

800.01 Fraud and Deceit--Fraudulent Misrepresentation--Issues Made by the Pleadings--Fraud--One Defendant

The plaintiff claims that the defendant made the following statement[s]:

[Here insert or paraphrase the allegedly fraudulent statement or statements that the defendant is claimed to have made.]

The plaintiff further claims that the statement[s] [was a] [were] false statement[s] of material fact[s].

The plaintiff further claims that the defendant [knew the statement(s) (was) (were) false] [or] [believed the statement(s) to be false] [or] [made the statement(s) in reckless disregard of whether (it was) (they were) true or false].

The plaintiff further claims that the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"].

The plaintiff further claims that he reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the truth of the statement[s].

The plaintiff further claims that he sustained damages as the result of his reliance.

The defendant [denies that he made (a) false statement(s) of (a) fact(s),] [denies that any (claimed) statement(s) (was) (were) material,] [denies that he (knew) (or) (believed) the (claimed) statement(s) to be false,] [denies that any (claimed) statement(s) (was) (were) made in reckless disregard of the statement('s) (s') truth or falsity,] [denies that he intended to induce the plaintiff to act ([describe what the plaintiff did, e.g., "buy the farm"]),] [denies that the plaintiff reasonably believed the claimed) statement(s) or (acted) ([describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the truth of the statement(s),] [and] [denies that damage resulted to the plaintiff from his reliance].

Notes on Use

This instruction must be modified to fit the allegations of the complaint and answer. The bracketed materials cover various contingencies that may be required by the pleadings. The pertinent phrases in brackets should be used only if they fit the particular case.

Where multiple plaintiffs allege different acts of misconduct, the instruction must be modified to set forth separately the allegations by each plaintiff.

If the defendant allegedly concealed or withheld facts, use IPI 800.08 instead of this

instruction.

Comment

An issues instruction must meet the standards of *Signa v. Alluri,* 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953), that the issues made by the pleadings be concisely stated without characterization and undue emphasis.

The elements of the tort of fraudulent misrepresentation are stated in *Gerill Corp. v. Jack L. Hargrove Builders,* 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155, 161 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989).

Fraud may be established where a party acted in culpable ignorance as to the truth or falsity of the assertion. *Perlman v. Time, Inc.,* 64 Ill.App.3d 190, 380 N.E.2d 1040, 1045; 20 Ill.Dec. 831, 836 (1st Dist.1978).

Justifiable reliance is an element of the tort of fraud and deceit. *Gerill v. Jack L. Hargrove Builders,* 128 Ill.2d 179, 538 N.E.2d 530, 536; 131 Ill.Dec. 155, 161 (1989). The expression "justifiable reliance" is thought to be synonymous with the expression "reasonable reliance," and in fact some courts use each expression in the same opinion. *Central States Joint Board v. Continental Assurance Co.,* 117 Ill.App.3d 600, 453 N.E.2d 932, 935-937, 73 Ill.Dec. 107, 110-112 (1st Dist.1983); *Warner v. Lucas,* 185 Ill.App.3d 351, 541 N.E.2d 705, 706; 133 Ill.Dec. 494, 495 (5th Dist.1989) (reasonably believed and justifiably relied upon).

Sometimes a court speaks only of "reliance" when discussing elements of fraudulent misrepresentation, but typically "justifiable reliance" will be found in the opinion. *Soules v. General Motors Corp.,* 79 Ill.2d 282, 402 N.E.2d 599, 601; 37 Ill.Dec. 597, 599 (1980).

There is an excellent discussion of the development of the law of fraud and deceit in the case of *Mother Earth, Ltd. v. Strawberry Camel, Ltd.,* 72 Ill.App.3d 37, 390 N.E.2d 393, 28 Ill.Dec. 226 (1st Dist.1979).

800.02A Fraud and Deceit--Burden of Proof on the Issues--Alternative One--Fraudulent Misrepresentation--One Plaintiff and One Defendant--Clear and Convincing Evidence Only as to Certain Elements

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant made [a] false statement[s] of [a] material fact[s];

Second, [the defendant (knew) (or) (believed) the statement(s) (was) (were) false] [or] [the defendant made the statement(s) in reckless disregard of whether (it was) (they were) true or false].

The plaintiff has the burden of proving that each of the following propositions is more probably true than not true:

Third, the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"];

Fourth, the plaintiff reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the truth of the statement[s];

Fifth, the plaintiff's damages resulted from his reliance.

If you find from your consideration of all the evidence that propositions First and Second have been proved by clear and convincing evidence and that propositions Third, Fourth, and Fifth are more probably true than not true, then your verdict should be for the plaintiff.

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved as required in this instruction, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that only the first two elements of the cause must be proved by clear and convincing evidence. If the court requires all elements to be proved by clear and convincing evidence, then use IPI 800.02B. The committee makes no recommendation with respect to which burden of proof instruction should be given.

IPI 21.01 (meaning of burden of proof) should not be given with this instruction; it is already included in it. No definition of "clear and convincing" has been prepared by the committee. *See* IPI 800.03.

This instruction should not be used where fraud is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

In *Parsons v. Winter,* 142 Ill.App.3d 354, 491 N.E.2d 1236, 1240; 96 Ill.Dec. 776, 780 (1st Dist.1986), the court held that a plaintiff must prove by clear and convincing evidence that the defendant made a statement of a material nature (as opposed to opinion); that the statement was untrue; and that the statement was known or believed to be untrue by the person making it, or made in culpable ignorance of its truth or falsity. To the same effect is *Gordon v. Dolin,* 105 Ill.App.3d 319, 434 N.E.2d 341, 345; 61 Ill.Dec. 188, 192 (1st Dist.1982). The court did not suggest an enhanced burden of proof with regard to the other elements.

A different result was reached in *Cole v. Ignatius,* 114 Ill.App.3d 66, 448 N.E.2d 538, 542; 69 Ill.Dec. 820, 826 (1st Dist.1983). There, the court held that proof of each element in an action for fraud must be by clear and convincing evidence. The same result was reached in *National Republic Bank v. National Homes Const. Corp.,* 63 Ill.App.3d 920, 381 N.E.2d 15, 18; 21 Ill.Dec. 80, 83 (1st Dist.1978).

For this reason, the committee has prepared two burden of proof instructions. IPI 800.02A was prepared for use in those cases where the trial court rules that only the first and second propositions of IPI 800.02A must be proved by clear and convincing evidence and the remaining elements require only proof by a preponderance or greater weight of the evidence.

IPI 800.02B has been prepared for use in those cases where the trial court rules that each element of the case must be proved by clear and convincing evidence.

800.02B Fraud and Deceit--Burden of Proof on the Issues--Alternative Two--Fraudulent Misrepresentation--One Plaintiff and One Defendant--Clear and Convincing Evidence

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant made [a] false statement[s] of [a] material fact[s];

Second, [the defendant (knew) (or) (believed) the statement(s) (was) (were) false] [or] [the defendant made the statement(s) in reckless disregard of whether (it was) (they were) true or false];

Third, the defendant made the statement[s] with the intent to induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"];

Fourth, the plaintiff reasonably believed the statement[s] and [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the truth of the statement[s];

Fifth, the plaintiff's damages resulted from his reliance.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that each element of the case must be proved by clear and convincing evidence. If the court rules that only the first two elements of the cause must be proved by clear and convincing evidence, then use IPI 800.02A. The committee makes no recommendation with respect to which burden of proof instruction should be given.

This instruction should not be used when fraud is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

See the comment to IPI 800.02A.

800.03 Fraud and Deceit--Clear and Convincing Evidence--Definition

The committee recommends that no definition of "clear and convincing evidence" be given.

Comment

The expression "clear and convincing" has sometimes been defined in terms of "reasonable doubt." However, such a definition seems to lack clarity and could easily be confused with criminal matters in the minds of a jury. Definitions are discussed in the case of *Parsons v. Winter,* 142 Ill.App.3d 354, 491 N.E.2d 1236, 1240; 96 Ill.Dec. 776, 780 (1st Dist.1986). That court, after discussing a definition of "clear and convincing" which included the words "reasonable doubt," concluded that "highly probably true" would be a clearer statement of the concept. The court also relied on *In re Estate of Ragen,* 79 Ill.App.3d 8, 13-14; 398 N.E.2d 198, 202-203; 34 Ill.Dec. 523, 527-528 (1st Dist.1979).

The committee considered both the terms "reasonable doubt" and "highly probably true." The conclusion the committee reached is that the expression "clear and convincing" is more understandable than any definition that could be framed using "reasonable doubt" or "highly probably true." The expression "clear and convincing" contains terms which are readily understandable and in common every day usage, and an effort to define those terms might very well create confusion and misunderstanding.

800.04 Fraud and Deceit--Material Fact--Definition

When I use the word "material" I mean the [misrepresented] [concealed] [withheld] fact[s] must have been an essential element to the transaction, and had the plaintiff been aware of the truth, he would have acted differently.

Notes on Use

This instruction should be used in every case of fraudulent misrepresentation or fraudulent concealment.

Comment

The Illinois Supreme Court has not defined the term "material." In *Foster v. Oberreich,* 230 Ill. 525, 82 N.E. 858 (1907), the court stated that the representation must be "calculated and intended to influence the plaintiff."

To be "material" the representation must relate to a matter upon which the plaintiff could be expected to rely in determining to engage in the conduct in question. *McPherson v. Hewitt,* 32 Ill.App.3d 435, 443; 335 N.E.2d 606, 612 (2d Dist.1975). It may not be an opinion (*Davis v. Nehf,* 14 Ill.App.3d 318, 302 N.E.2d 382 (1st Dist.1973)), nor a promise of future action (*Polivka v. Worth Dairy, Inc.,* 26 Ill.App.3d 961, 328 N.E.2d 350 (1st Dist.1974)). It may be actionable even if the misrepresentation was not the sole inducement (*Hicks v. Stevens,* 121 Ill. 186, 11 N.E. 241 (1887)). A misrepresentation is "material" and therefore actionable if it is such that had the other party been aware of it, the party would have acted differently. *Perlman v. Time, Inc.,* 64 Ill.App.3d 190, 197; 380 N.E.2d 1040, 1045; 20 Ill.Dec. 831, 836 (1st Dist.1978). The misrepresented condition must be an essential element to the transaction between the parties. *Mack v. Plaza Dewitt Limited Partnership*, 137 Ill.App.3d 343, 484 N.E.2d 900, 906; 92 Ill.Dec. 169, 175 (1st Dist.1985).

For a discussion of the development of the requirement that the misrepresentation be of a "material fact," *see Mother Earth, Ltd. v. Strawberry Camel, Ltd.,* 72 Ill.App.3d 37, 390 N.E.2d 393, 403; 28 Ill.Dec. 226, 236 (1st Dist.1979).

800.05 Fraud and Deceit--Measure of Damages

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted from the conduct of the defendant.

[Here insert the elements of recoverable damages which have a basis in the evidence.]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Comment

Damages are determined by assessing the difference between the actual value of the property and the value the property would have had if the representations had been true. *Gerill Corp. v. Jack L. Hargrove Builders,* 128 Ill.2d 179, 538 N.E.2d 530, 537-538; 131 Ill.Dec. 155, 162-163 (1989), *cert. denied*, 493 U.S. 894, 110 S.Ct. 243, 107 L.Ed.2d 193 (1989).

In addition to actual damages, certain consequential damages proximately resulting from the fraud are recoverable. *Home Savings & Loan Association v. Schneider,* 127 Ill.App.3d 689, 469 N.E.2d 585, 589; 82 Ill.Dec. 941, 945 (3d Dist.1984), *aff'd in part & rev'd in part on other grounds*, 108 Ill.2d 277, 483 N.E.2d 1225, 91 Ill.Dec. 590 (1985); Tan v. Boyke, 156 Ill.App.3d 49, 508 N.E.2d 390, 394; 108 Ill.Dec. 229, 233 (2d Dist.1987); Restatement (Second) of Torts § 549 (1977) (in a business transaction, additional damages to give plaintiff the benefit of his or her bargain may be recovered if properly proved).

See also Restatement (Second) of Torts § 549(1) (b) (1977) (expenses incurred in preparing to use property in a manner the defendant has represented as appropriate are recoverable).

800.06 Fraud and Deceit--Punitive/Exemplary Damages--Willful and Wanton Conduct--Malicious and Willful Conduct--Violation of Trust and Confidence

If you find for the plaintiff and if you find the defendant's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence] and caused damage to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter the defendant and others from similar conduct.

Notes on Use

This instruction should be given where punitive damages are sought in an action for fraud.

If the phrase "willful and wanton" is used in the instruction, also give IPI 14.01.

Comment

In a fraud action, it is error to give a version of IPI 35.01 which substitutes the words "fraud and deceit" for the words "willful and wanton." *Home Savings & Loan Association v. Schneider,* 108 Ill.2d 277, 483 N.E.2d 1225, 1228; 91 Ill.Dec. 590, 593 (1985). Punitive damages may not be awarded solely upon a finding of fraud without requiring willful and wanton conduct. *Id*. The court in *Schneider* relied on *Laughlin v. Hopkinson,* 292 Ill. 80, 89; 126 N.E. 591, 594 (1920), which held that in a deceit action, punitive damages may be allowed where the wrong involves some violation of duty springing from a relationship of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness.

Whether the circumstances in a particular case may justify an award of punitive damages is a question of law for the court. *J. I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.,* 118 Ill.2d 447, 453; 516 N.E.2d 260, 263; 114 Ill.Dec. 105, 108 (1987).

The purpose of punitive damages is not to compensate the plaintiff but rather to punish the defendant and to serve as a deterrent. Punitive damages can only be awarded for conduct involving some element of outrage similar to that usually found in crime. *Loitz v. Remington Arms Co.,* 138 Ill.2d 404, 563 N.E.2d 397, 401; 150 Ill.Dec. 510, 514 (1990).

800.07 Fraud and Deceit--Punitive/Exemplary Damages--Liability of Corporate Principal for the Act of an Agent

The defendant [name of corporate defendant] is a corporation and can act only through its officers and employees. As to plaintiff's claim for compensatory damages against [name of corporate defendant], any act or omission of an officer or employee within the scope of his employment is the action or omission of the defendant [name of corporate defendant].

As to plaintiff's claim for punitive damages against [name of corporate defendant], a different rule applies. Punitive damages may be awarded against [name of corporate defendant] only if (1) you find in favor of the plaintiff and against [name of corporate defendant] under Count ____ of the complaint, and (2) you find the officer's or employee's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence], and (3) you find that, as to the act(s) or omission(s) giving rise to liability under Count ____, [state condition (a), (b), (c), or (d)] [one or more of] [both of] the following condition[s] [is] [are] met:

[(a)] [The corporation, through its management, authorized the doing and the manner of the act or omission] [; or]

[(b)] [The employee responsible for the act or omission was unfit, and the corporation was reckless in employing him] [; or]

[(c)] [The act or omission was that of a managerial employee who was acting in the scope of his employment] [; or]

[(d)] [The corporation, through its management or a managerial employee, ratified or approved the act or omission].

If you find for the plaintiff and against the defendant under Count ____ of the complaint, and if you further find that the officer's or employee's conduct was [willful and wanton] [malicious and willful] [a violation of trust or confidence], and if you further find that [restate condition (a), (b), (c), or (d)] [one or (more) (both) of these conditions (is) (are) met], and if you further believe that justice and the public good require it, you may, in addition to any other damages to which you find the plaintiff entitled, award an amount which will serve to punish [name of corporate defendant] and to deter [name of corporate defendant] and others from similar conduct.

Notes on Use

This instruction must be given in lieu of IPI 800.06 and IPI 50.11 in any case in which the trial court rules that a submissible case has been made on the issue of punitive damages and such damages are sought against a corporate defendant based on the fraudulent conduct of its employee(s).

If only one of the four conditions is claimed, it should be inserted in the second and last paragraphs where indicated, and the other conditions omitted. If more than one condition is claimed, use the appropriate subparagraphs ((a), (b), (c), or (d)) and number or letter them consecutively for reference. A condition should be included only if the court rules that it is

supported by evidence sufficient to support a jury finding of that condition.

Additional agency instructions should be used as appropriate. *See* IPI Chapter 50.

Comment

As to the award of punitive damages against a corporation for the tort of one of its employees, Illinois has adopted the requirements of the Restatement (Second) of Torts § 909 and the Restatement (Second) of Agency § 217C. *Mattyasovszky v. West Towns Bus Co.,* 61 Ill.2d 31, 330 N.E.2d 509, 512 (1975); *Deal v. Byford,* 127 Ill.2d 192, 537 N.E.2d 267, 130 Ill.Dec. 200 (1989); *Kennan v. Checker Taxi Co.,* 250 Ill.App.3d 155, 620 N.E.2d 1208, 1212; 189 Ill.Dec. 891, 895 (1st Dist.1993) (citing cases); *Kemner v. Monsanto Co.,* 217 Ill.App.3d 188, 576 N.E.2d 1146, 1156-1157; 160 Ill.Dec. 192, 202-203 (5th Dist.1991).

See Comment to IPI 800.06.

800.08 Fraud and Deceit--Fraudulent Concealment--Issues Made by the Pleadings--One Defendant

The plaintiff claims that the defendant knowingly [concealed from] [withheld from] the plaintiff the following fact[s]:

[Here insert or paraphrase the alleged fact(s) claimed to have been concealed or withheld.]

The plaintiff further claims that the fact[s] [concealed] [withheld] [was] [were] [a] material fact[s].

The plaintiff further claims that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and to induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"].

The plaintiff further claims that he [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the facts as he knew them.

The plaintiff further claims that he sustained damages as a result of the [concealment] [withholding] of [a] material fact[s] by the defendant.

The defendant [denies that he knowingly (concealed) (withheld) any material fact(s) from the plaintiff,] [denies that he (concealed) (withheld) any fact(s) with the intent to deceive the plaintiff or to induce the plaintiff to (act) ([describe what the plaintiff did, e.g., "buy the farm"]),] [denies that the plaintiff (acted) ([describe what the plaintiff did, e.g., "bought the farm"]) in justifiable reliance on the facts as he knew them,] [and] [denies that damage resulted to the plaintiff from his reliance on the facts as he knew them].

Notes on Use

This instruction should be used where the plaintiff's complaint is based upon fraudulent concealment or silence. Before this instruction can be given, the court must determine that the defendant had a duty to the plaintiff to disclose the fact(s) allegedly concealed or withheld.

Comment

Illinois courts have consistently held that the elements of a claim for fraudulent concealment are the same as the elements for a claim of fraudulent misrepresentation. Intentional concealment is said to be the equivalent of a false statement of material fact. Zimmerman v. Northfield Real Estate, Inc., 156 Ill.App.3d 154, 510 N.E.2d 409, 413; 109 Ill.Dec. 541, 545 (1st Dist.1986).

To assist the practitioner, the elements have been restated in this instruction to accommodate the complaint of concealment as distinguished from misrepresentation.

"Fraud may consist in the concealment of what is true as well as the assertion of what is false where the concealment is shown to have been done with the intention to deceive under

circumstances creating an opportunity and duty to speak." *In re Marriage of Richardson,* 237 Ill.App.3d 1067, 606 N.E.2d 56, 67; 179 Ill.Dec. 224, 235 (1st Dist.1992). Concealment of an existing material fact is actionable where employed as a device to mislead. *Chapman v. Hosek,* 131 Ill.App.3d 180, 475 N.E.2d 593, 598; 86 Ill.Dec. 379, 384 (1st Dist.1985). Fraud is the intentional misrepresentation of a material fact or the concealment of a fact which induces a party to rely on that misrepresentation to his or her detriment. *In re Marriage of Gurin,* 212 Ill.App.3d 806, 571 N.E.2d 857, 862; 156 Ill.Dec. 877, 882 (1st Dist.1991).

Silence alone does not generally constitute a misrepresentation. *Russow v. Bobola,* 2 Ill.App.3d 837, 277 N.E.2d 769 (2d Dist.1972). However, when the opportunity and duty to speak exists, deceptive conduct or the suppression of material facts is involved, and the injured party would have acted differently absent the other party's silence, such silence may constitute either misrepresentation or concealment. *Heider v. Leewards Creative Crafts, Inc.,* 245 Ill.App.3d 258, 613 N.E.2d 805, 184 Ill.Dec. 488 (2d Dist.1993); *In re Marriage of Richardson,* 237 Ill.App.3d 1067, 606 N.E.2d 56, 179 Ill.Dec. 224 (1st Dist.1992). In cases involving such fraudulent behavior, the distinction between concealment and affirmative misrepresentation is tenuous. *Lindsey v. Edgar,* 129 Ill.App.3d 718, 473 N.E.2d 92, 84 Ill.Dec. 876 (4th Dist.1984).

800.09A Fraud and Deceit--Burden of Proof on the Issues--Alternative One--Fraudulent Concealment--One Plaintiff and One Defendant--Clear And Convincing Evidence Only as to Certain Elements

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];

Second, that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"].

The plaintiff has the burden of proving each of the following propositions is more probably true than not true:

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff's damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that propositions First and Second have been proved by clear and convincing evidence and that propositions Third and Fourth are more probably true than not true, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved as required in this instruction, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that only the first two elements of the cause must be proved by clear and convincing evidence. If the court requires all elements to be proved by clear and convincing evidence, then use IPI 800.09B. The committee makes no recommendation with respect to which burden of proof instruction should be given.

IPI 20.01 (meaning of burden of proof) should not be given with this instruction; it is already included. No definition of "clear and convincing" has been prepared by the committee. *See* comment to IPI 800.03.

This instruction should not be used where fraudulent concealment is asserted as a defense to a contract action. In that case, use IPI 700.03.

Comment

The elements for a claim of fraudulent concealment and fraudulent misrepresentation have been held to be the same. Intentional concealment is said to be the equivalent of a false statement of material fact. *Zimmerman v. Northfield Real Estate, Inc.,* 156 Ill.App.3d 154, 510

N.E.2d 409, 413; 109 Ill.Dec. 541, 545 (1st Dist.1986). For this reason, the burden of proof in a case of fraudulent concealment is essentially the same as the burden of proof in fraudulent misrepresentation. For a discussion of the alternative burden of proof instructions *see* the comment to 800.02A.

800.09B Fraud and Deceit--Burden of Proof on the Issues--Alternative Two--Fraudulent Concealment--One Plaintiff and One Defendant--Clear and Convincing Evidence

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

First, the defendant knowingly [concealed] [withheld] from the plaintiff [a] material fact[s];

Second, that the defendant [concealed] [withheld] the fact[s] with the intent to deceive the plaintiff and induce the plaintiff to [act] [describe what the plaintiff did, e.g., "buy the farm"];

Third, the plaintiff [acted] [describe what the plaintiff did, e.g., "bought the farm"] in justifiable reliance on the facts as he knew them;

Fourth, the plaintiff's damages resulted from the [concealment] [withholding] of [a] material fact[s] by the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved by clear and convincing evidence, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Notes on Use

This instruction should be given when the court has ruled that each element of the case must be proved by clear and convincing evidence. If the court rules that only the first two elements of the cause must be proved by clear and convincing evidence, then use IPI 800.09A. The committee makes no recommendation with respect to which burden of proof instruction should be given.

This instruction should not be used when fraudulent concealment is asserted as a defense to a contract action. In that case use IPI 700.03.

Comment

See the comment to IPI 800.09A and IPI 800.02A.