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.

1. **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."

2. **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).