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TORTS: THE NON-USER SECOND COLLISION PLAINTIFF: OUTER LIMITS OF DEFECTIVE PRODUCTS LAW?

LOAN AGREEMENT AND EQUITABLE APPORTIONMENT: THE SUPREME COURT PUTS A NEW LOOK ON THIRD PARTY RIGHTS

PREMISE LIABILITY FOR ACCUMULATING "SLUSH": THE CONTINUING DRAMA OF NATURAL CONDITION IMMUNITY

*Richard C. Turkington**

Professor Turkington explains in detail three recent Illinois Supreme Court cases which may have significant impact on Illinois tort law as possible bases for restricting further actions by non-users in products liability cases and circumventing the no-contribution rule for joint tortfeasors in Illinois. The author also discusses problems facing the Illinois courts as reflected in cases involving owner-occupier liability for injuries caused by natural conditions, application of contributory negligence without a jury determination, and special damages in per se defamation cases.

INTRODUCTION

THIS was an active term for torts in Illinois although the results generally were what should have been expected. The Structural Work Act[1] assumed its dominant role in the construction accident area in numerous appellate court cases,[2] while premise liability absorbed its usual share of appellate court resources in the process of defining negligence duty within the trespasser, licensee and invitee rule structure.[3] The scope of the jury

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1. ILL. REV. STAT. ch. 48, §§ 60-69 (1971).

2. *See* St. John v. R.R. Donnelly & Sons Co., 54 Ill. 2d 271, 296 N.E.2d 740 (1973); Navylt v. Kalinich, 53 Ill. 2d 137, 290 N.E.2d 219 (1972); Weber v. Northern Ill. Gas Co., 10 Ill. App. 3d 625, 295 N.E.2d 41 (1973); Halberstadt v. Harris Trust and Sav. Bank, 7 Ill. App. 3d 991, 289 N.E.2d 90 (1972); Isabelli v. Cowless Chem. Co., 7 Ill. App. 3d 888, 289 N.E.2d 12 (1973).

3. *See, e.g.*, DeMario v. Sears, Roebuck and Co., 6 Ill. App. 3d 46, 284 N.E.2d 330 (1972).

function on the proximate cause and duty issue was examined in two unusual factual situations.[4] Regulars such as active-passive negligence[5] and the jury function on the contributory negligence question made inauspicious appearances at the appellate court level.[6] Several courts struggled with application of the negligence and strict liability theories in defective design cases with mixed results.[7]

For potential impact, three Illinois Supreme Court cases stand out this term. In *Reese v. Chicago Burlington & Quincy R.R.* and *Gertz v. Campbell*[8] the supreme court laid the foundation for changing the total direction of third party rights in Illinois. However, a conceptual smog was cast onto the defective products area when the supreme court ruled against the non-user plaintiff in *Mieher v. Brown.*[9] *Mieher,* having languished in the judicial system for almost two years, is an appropriate place to begin.

PRODUCTS LIABILITY

A. Second Collision Plaintiffs

The rich tradition in Illinois in the defective products area which

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4. In Przbylski v. Yellow Cab Co., 6 Ill. App. 3d 243, 285 N.E.2d 506 (1972), a thirteen year old plaintiff was injured when fleeing from a cab taking an unfamiliar route to the destination. The First District Appellate Court held that the question of proximate cause in respect to the cab driver's actions was properly submitted to the jury. In Cunis v. Brennon, 7 Ill. App. 3d 204, 287 N.E.2d 207 (1972), the plaintiff was impaled on a gas or water drain pipe protruding from the ground after being thrown from a car in an accident. The court held that the duty and cause question was properly submitted to the jury in an action against the city.

5. *See* Peoria & Eastern Ry. v. Kenworthy, 7 Ill. App. 3d 350, 287 N.E.2d 543 (1972); Carver v. Grossman, 6 Ill. App. 3d 265, 285 N.E.2d 468 (1972). In Wessel v. Carmi Elks Home, Inc., 54 Ill. App. 2d 127, 295 N.E.2d 718 (1973), the Illinois Supreme Court held that indemnity under the active-passive negligence concept was not available to a person liable under the Dram Shop Act against an actively negligent joint tortfeasor.

6. *See* Wegener v. Anna, 11 Ill. App. 3d 316, 296 N.E.2d 589 (1973); Fisher v. Lang, 9 Ill. App. 3d 696, 292 N.E.2d 915 (1973); Green v. Brown, 8 Ill. App. 3d 638, 291 N.E.2d 16 (1972); Fore v. Vermeer Mfg. Co., 7 Ill. App. 3d 346, 287 N.E.2d 526 (1972).

7. *See* Gelsumino v. E.W. Bliss Co., 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973); Willeford v. Mayrath Co., 7 Ill. App. 3d 357, 287 N.E.2d 502 (1972).

8. Reese v. Chicago Burlington & Quincy R.R., No. 45293 (Ill. Sup. Ct., May, 1973); Gertz v. Campbell, — Ill. 2d —, 302 N.E.2d 40 (1973).

9. 54 Ill. 2d 539, 301 N.E.2d 307 (1973).

began with *Suvada v. White Motor Company*[10] in 1965 was disrupted this term by the Illinois Supreme Court in *Mieher. Mieher* presented the court with the problem of deciding whether a non-user could successfully proceed in negligence[11] against the manufacturer of a product for injuries received when the non-user was injured from a collision with the product. The marriage of a non-user question and a second collision question in one case provided a dramatic opportunity for the state supreme court to tie together several loose strands of Illinois' defective-products law.[12] In denying that the plaintiff in *Mieher* had stated a cause of action, the Supreme Court of Illinois unfortunately made no use of this opportunity.

Esther Mieher was killed when her automobile collided with the rear portion of a truck manufactured by the defendant. The administrator of Ms. Mieher's estate brought a wrongful death action against the manufacturer of the truck on the theory that the truck had been negligently designed because of the failure to include the attachment of a bumper, fender or shield to the rear of the vehicle. On motion of the defendant, the trial court struck the negligent design count against the manufacturer. The plaintiff appealed and successfully pursuaded the Fifth District Appellate Court to reverse the trial court.[13] On appeal, the supreme court, speaking

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10. 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *See also* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (which included wholesalers); Texaco, Inc. v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969) (strict products liability was applied to distributors); Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968) (which further extended the liability to retailers); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966) (which extended strict products liability to design defects). In Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970), the supreme court held that assumption of the risk and not contributory negligence was a defense to a strict liability suit. A federal district court, in White v. Jeffery Galion, Inc., 326 F. Supp. 751 (E.D. Ill. 1971), held that under Illinois law a non-user could proceed against the manufacturer on a strict liability theory.

11. The trial court interpreted the plaintiff's complaint as based on a strict liability theory while the appellate court held that it was a negligent design case. It was treated as a negligent design case by the supreme court.

12. Elucidation of the tort principle established in *Suvada* by the cases noted in footnote 10 left the courts in Illinois with the job of defining the precise relationship between negligence and strict liability in terms of: (1) the standard of liability in a design case; (2) the defenses of misuse of the products, assumption of the risk and contributory negligence; and (3) the status of a non-user. *See generally* Turkington, *Torts, 1971-72 Survey of Illinois Law*, 22 DEPAUL L. REV. 29, 43-46 (1972).

13. 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972).

through Justice Ryan, reversed the appellate court, with only Justice Goldenhersh dissenting.

Background: Negligence Protection for the Second Collision Plaintiff

a. The Larsen *Approach*

Recognition that tort law should protect individuals who receive injury from impact with the interior of a passenger vehicle after there has been a collision between the vehicle and an external object occurred in judicial opinion as early as 1926.[14] Protection against "second collision" injuries did not effectively begin, however, until after Ralph Nader's writings and the ensuing publicity in the 1960's.[15] *Larsen v. General Motors Corp.*,[16] a 1968 Eighth Circuit decision remains the leading case imposing a duty upon manufacturers in designing a product to take precautions against creating unreasonable risk of injury to persons after an accident with the product. In *Larsen* the plaintiff argued that the extended length of the steering column in a Corvair created an unreasonable risk of serious injury to the driver in the event of a crash, and thus constituted a negligently designed product. The Eighth Circuit agreed that, under general negligence principles,[17] General Motors owed a duty to the plaintiff. Since then, *Larsen's* negligent design theory has been used successfully on behalf of several second collision plaintiffs. In *Mickle v. Blackmon*,[18] the South Carolina Supreme Court reversed a trial court judgment notwithstanding the verdict against a plaintiff who was permanently injured after being impaled on the gearshift of a 1949 Ford. Likewise, a Pennsylvania federal district court in *Dyson v. General Motors Corp.*,[19] denied

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14. *See* Foster v. Ford Motor Co., 139 Wash. 341, 246 P. 945 (1926).

15. *See* R. NADER, UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE (1965); Nader and Page, *Automobile Design and the Judicial Process*, 55 CAL. L. REV. 645 (1967).

16. 391 F.2d 495 (8th Cir. 1968).

17. The traditional negligence test reduced to its minimum is said to involve balancing the probability and gravity of harm against the burden on the defendant. *See generally* Learned Hand's famous explication in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

18. 252 S.C. 202, 166 S.E.2d 173 (1969).

19. 298 F. Supp. 1064 (E.D. Pa. 1969).

General Motors' motion for a judgment on the pleadings when the plaintiff brought an action for second collision injuries occurring when the roof of a 1965 Buick two-door hardtop collapsed after the car had overturned.

Recently, in an important case, *Passwaters v. General Motors Corp.*,[20] the Eighth Circuit applied *Larsen's* rationale to a plaintiff who was injured when she was thrown from a motorcycle which collided with a car manufactured by the defendant and received lacerations from unshielded protrusions on the hubcaps of the vehicle. There the Eighth Circuit reversed a directed verdict on behalf of General Motors, and held that the plaintiff was entitled to have her case submitted to a jury.[21]

b. Evans *and the Intended Use Rationale*

Larsen's approach of treating the risk of injury after a collision as within the ambit of the manufacturer's general negligence duty has been rejected in several jurisdictions. The leading case embracing the view that a manufacturer has no duty toward second collision plaintiffs is *Evans v. General Motors Corp.*,[22] a 1966 decision where the Seventh Circuit held as a matter of law that General Motors' duty in designing a 1961 Chevrolet station wagon did not extend to second collision plaintiffs allegedly injured because the car's x-type frame could not adequately protect passengers during a side impact collision.

In refusing to protect the second collision plaintiff, the *Evans* line of cases generally utilize the rationale: (a) that the manufacturer has no duty to produce a crash-proof car; and (b) that an automobile which is in a collision has not been used for its intended purpose.

The "crashworthy" car argument represents, of course, a wholly exaggerated account of the second collision plaintiff's position. It is not the duty to create a "crashworthy" car that is being pressed for by such plaintiffs. Rather, the relevant duty in such cases is the

20. 454 F.2d 1270 (8th Cir. 1972).

21. *See also* Grundmanis v. British Motor Corp., 308 F. Supp. 303 (E.D. Wis. 1970); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1971).

22. 359 F.2d 822 (7th Cir. 1966).

duty to design a product which will not *unreasonably increase the risk of serious injury* to an individual involved in an accident with the product.[23]

The intended use rationale focuses the inquiry in a more relevant direction because it raises questions concerning the foreseeability of second collision injuries. Application of the concept of foreseeability in the context of liability for negligent design has produced the principle that a manufacturer's duty is limited to risks created by normal use of the product. Thus, the manufacturer of a wall decorating compound has no duty to anticipate risk of injury to the user of the product if he stirs it with his finger.[24]

Since foreseeability is the touch stone of the intended or normal use doctrine,[25] the doctrine ought not, as a general matter, preclude recovery in second collision cases. This conclusion would seem to inescapably follow from the regularity with which motor vehicles are involved in accidents. The Eighth Circuit in *Larsen* stated the matter aptly:

> While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury producing impacts. . . . Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its product to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as is reasonably possible under the present state of the art.[26]

Foreseeability has not been a dominant consideration in application of the intended use doctrine to cut off manufacturer liability in second collision cases. As noted by the court in *Evans*, "[t]he intended purpose of an automobile does not include its participation in collision with other objects, despite the manufacturer's ability to foresee the possibility that such collision may occur."[27]

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23. *See* Larsen v. General Motors Corp., 391 F.2d 495, 502-03 (8th Cir. 1968).

24. *See* Schfranek v. Benjamin Moore & Co., 54 F.2d 76 (S.D. N.Y. 1931).

25. The manufacturer must take precuations against risk created by some *uncommon* uses of the product if the risk is foreseeable. *See* Phillips v. Ogle Aluminum Furn. Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (1951); *cf.* Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P.2d 848 (1952) (robe in proximity of the kitchen stove).

26. Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

27. 359 F.2d at 825.

This perversion of the intended use doctrine by *Evans* suggests that the doctrine is used to mask inarticulated policy considerations. The failure of the *Evans* line of cases to spell out exactly what these policy considerations are has done much to obscure the choice of values which are at stake in second collision cases.

c. *The Supreme Court's Rationale in* Mieher

Larsen and *Evans* then represented the two lines of authority available to the supreme court in *Mieher*. *Larsen* extended a duty to second collision plaintiffs consistent with general negligence theory, while *Evans* used the intended use doctrine to immunize the manufacturer. Which approach did the Illinois Supreme Court adopt? Is Illinois a *Larsen* or *Evans* jurisdiction on the second collision issue after *Mieher*? A clear answer may not be be found in the opinion. Instead the court suggests that the facts of the case are distinguishable from the general factual pattern represented by *Evans* and *Larsen*. In a passage which promises much more than it delivers, the court states:

> The question in *Larsen* and *Evans* concerned the duty of the manufacturer to design a vehicle in which it was safe *to ride*. The question in our case involves the duty of a manufacturer to design a vehicle with which it is safe *to collide*.[28]

This statement suggests that the critical distinguishing fact between *Mieher*, and the *Larsen* and *Evans* decisions is that the suing plaintiff in *Mieher* was a non-user of the product. Essentially this is the "collide" and "ride" language the court distills down to.

Thus, after *Mieher* Illinois is left with the proposition that a manufacturer has no legal duty in designing a product to take precautions against creating unreasonable risk of injury to non-users of the product in the event the product is in an accident. As noted previously, the Eighth Circuit extended *Larsen* to a non-user in *Passwaters v. General Motors Corp.*[29] Although *Passwaters* was relied upon substantially by the plaintiffs in their brief, it was not discussed or even noted by the supreme court in their opinion.

By distinguishing *Larsen* and *Evans*, the supreme court has left

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28. 54 Ill. 2d at —, 301 N.E.2d at 309.
29. 454 F.2d 1270 (8th Cir. 1972).

the second collision issue still viable in Illinois. Yet the decision casts considerable doubt on the direction Illinois is likely to go in the defective products area. This doubt is created in *Mieher* primarily because of the absence of a sound rationale for the "collide" and "ride" basis the court is using to distinguish *Larsen* and *Evans*. In one part of the opinion the court suggests two reasons for denying protection to the non-user second collision plaintiff: (1) the unforeseeability of injury to such a plaintiff; and (2) that imposing such a duty on the manufacturer would be against public policy. As stated by the court: "Public Policy and the social requirements do not require that a duty be placed upon the manufacturer of this truck to design his vehicle so as to prevent injuries from the *extraordinary occurrences of this case*."[30]

Distinguishing the injured occupant of the 1961 Corvair in *Larsen* and the injured occupant of the automobile in *Mieher* on the basis of the foreseeability of the injury sued upon is not persuasive. Foreseeability is an open-ended imprecise concept[31] but it hardly seems arguable that injury to the driver of an automobile after a collision with the back of a large truck which is not equipped with a bumper is an extraordinary occurrence. It simply will not do to distinguish the plaintiff in *Larsen* from the plaintiff in *Mieher* on forseeability grounds. *Rear end collisions are too common.*

The policy rationale suggested in this quote from *Mieher* seems equally insubstantial. Common law judges often do, of course, utilize factors other than forseeability in defining the scope of duty in a negligence case.[32] The economic burden placed upon the defendant and upon other resources of society by the imposition of a duty may offset foreseeability in the duty analysis. If it is economic policy that is being implemented in *Mieher*, there is nothing to in-

30. 54 Ill. 2d at —, 301 N.E.2d at 310.

31. *See generally* Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953); RESTATEMENT (SECOND) OF TORTS § 435(2) (1965).

32. Negligence theory contemplates judicial cognizance, through interpreting the elements of negligence—primarily duty and cause—of such factors as: (1) foreseeability of harm; (2) the certainty of the plaintiff's injury; (3) the nexus between the defendant's conduct and injury; (4) the moral blame attached to the parties conduct and the injury; (5) the policy of preventing future harm; (6) the burden on the defendant and the consequences to the community in imposing liability and (7) the availability cost and prevalence of insurance. Compare the more basic restricted view of the negligence formula discussed in footnote 16 *supra*.

dicate what that policy is. No cost analysis is found in the opinion. At least one writer has suggested that no figures are available from manufacturers as to the cost of protecting against second collision injuries.[33] If it is not economic policy in *Mieher* that the court is implementing, what policy is it? One cannot find the answer in the opinion.

As a guide to Illinois policy in defective products cases *Mieher* is not satisfactory. The court apparently has decided to draw the line in the defective *products* area, but exactly where is not clear. The parties to the dispute in *Mieher*—manufacturers, distributors, insurance companies and injured Illinois citizens similarly situated to the plaintiff—expect that disputes in the defective products area will be resolved by the Illinois Supreme Court in a way which is consistent with previously articulated judicial policy.[34] The supreme court in *Mieher* does not satisfy these expectations.

B. Strict Liability for Defectively Designed Products

Mieher was presented to the supreme court as a negligent design case. In 1966, Illinois extended the principle of strict liability in tort to the design of the product in *Wright v. Massey-Harris, Inc.*[35] The continued viability of this tort action was dramatically attested to this term in *Reese v. Chicago Burlington & Quincy R.R.*[36] where the Illinois Supreme Court affirmed a $159,000 judgment in a wrongful death action brought in strict liability for defective design.

Since the conception of the strict liability theory in 1966, appellate courts in Illinois have struggled with defining the interrelation between defective design product cases where the theory of recovery is negligence and defective design cases where the theory of recovery is strict liability. *Williams v. Brown Manufacturing Co.*[37] seems almost hopelessly bogged down with the problem. In the initial appellate court opinion,[38] the fifth district suggested that con-

33. Nader and Page, *supra* note 15, at 645, 673.

34. 54 Ill. 2d at —, 301 N.E.2d at 308. *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 614, 210 N.E.2d 182, 184 (1965).

35. 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

36. No. 45293 (Ill. Sup. Ct., May, 1973).

37. 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

38. 93 Ill. App. 2d 334, 347, 236 N.E.2d 125, 133 (1968).

tributory negligence was a defense to strict liability. The supreme court in *Williams,* however, held that assumption of the risk and not contributory negligence was a defense to strict liability.[39]

The problem of sorting these two tort theories in the context of defective design cases continues to surface. Last term, the Fifth District Appellate Court and the Third District Appellate Court took contrary positions on the question as to whether the evidence rule generally applicable to negligence cases on the admissibility of post accident safety measure was to apply to a cause of action brought in strict liability for defective design.[40] At least one case this term continued to litigate the question of contributory negligence versus assumption of the risk as a defense to strict liability.[41]

This term the First District Appellate Court found itself having to define precise relations between the two torts in respect to the relevance of "custom" or the "state of arts" defense in *Gelsumino v. E. W. Bliss Co.*[42] That court reversed a trial court decision to grant summary judgments for the defendants. One of the questions on appeal was whether the evidence produced by the defendant to show that the product was designed in a way which was customary in the industry established, as a matter of law, that no cause of action was established in negligence or strict liability for defective design. The First District Appellate Court's answer was that proof that a design conforms to the industry is not sufficient to sustain a summary judgment on either the strict liability or negligence theory.[43]

INDEMNITY—CONTRIBUTION

Since at least 1923, Illinois has refused to allow contribution among joint tortfeasors.[44] The harshness of the Illinois no-contribution rule has been responded to by an expansion of the right to

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39. 45 Ill. 2d at 426, 261 N.E.2d at 310 (1970).

40. *See* Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971).

41. *See* Willeford v. Mayrath Co., 7 Ill. App. 3d 357, 287 N.E.2d 502 (1972).

42. 10 Ill. App. 3d 604, 295 N.E.2d 110 (1973).

43. *Id.* at 609, 295 N.E.2d at 113.

44. *See generally* Polelle, *Contributions Amongst Negligent Joint Tortfeasors in Illinois,* 1 LOYOLA U. CHI. L.J. 267 (1970).

indemnity under the active-passive negligence doctrine. Active-passive negligence is an indemnity concept which allows the passively negligent joint tortfeasor to recover from the actively negligent tortfeasor by indemnification. Active-passive negligence has been criticized[45] as a misuse of the indemnity principle since it shifts the *total responsibility* for the injury from one tortfeasor who was at fault to another.

A. Equitable Apportionment: Gertz v. Campbell

In a case of first impression in Illinois, the supreme court recognized the third party concept of "equitable apportionment" in a decision which will grant some relief from the strictures of the active-passive doctrine. The problem presented to the supreme court arose from a narrow factual situation.

In *Gertz v. Campbell*,[46] the plaintiff sued in negligence for personal injuries resulting from the defendant allegedly striking the plaintiff while he was standing alongside the road. The defendant Campbell filed a third party complaint against the treating physician alleging malpractice and seeking indemnity for damages assessed against him which were caused by the third party defendant doctor's negligence. A trial judge dismissed the third party action without leave to amend but was reversed by the Second District Appellate Court[47] which held that Campbell had stated a cognizable claim for "equitable apportionment." On appeal, the Illinois Supreme Court affirmed, with Justice Underwood and Justice Ryan concurring in a separate opinion.

Writing for the court, Justice Ward responded to the argument that Campbell's third party complaint was at odds with the no-contribution policy in Illinois by focusing primarily on the special nature of the relationship between the defendants in a case like *Gertz* involving the intervening negligent act of a physician.

Where a negligent act is followed by the negligence of a treating physician in Illinois the original negligent tort-feasor is liable for

45. *See generally* Turkington, *supra* note 12, at 46-48. *See also* Comment, *Allocation of Loss Among Joint Tort-Feasors*, 41 So. Cal. L. Rev. 728 (1967-68).

46. — Ill. 2d —, 302 N.E.2d 40 (1973).

47. *See* 4 Ill. App. 3d 806, 282 N.E.2d 28 (1972). The appellate court decision was written by Judge Seidenfeld, with Judges Guild and Moran concurring.

the negligence of the treating physician. For purposes of proximate cause the intervening act of the physician is treated as a foreseeable intervening force because the original negligent act created the emergency and some risk of injury by a treating physician.[48] In such cases a form of joint liability is imposed on the parties; the original negligent tortfeasor is liable for the damages caused by his act as well as the aggravated damages caused by the physician's act, while the physician is liable only for the damages produced by his negligence. Both parties then are jointly liable for the damages caused by the physician.

This limited sense of joint liability was found by Justice Ward to be different from the sense of joint liability used in Illinois decisions prohibiting contribution among joint tortfeasors.[49]

Additionally, the third party defendant had argued for dismissal of the indemnity complaint because of Campbell's active negligence. Since Gertz initially struck the plaintiff, he could not recover against the physician under the active-passive negligence indemmity concept.[50] To this argument Justice Ward said that indemnity in Illinois was not restricted to cases of active-passive negligence or joint liability based upon agency principles.[51] Citing California[52] and New York[53] cases with approval, Justice Ward added the concept of equitable apportionment to the conceptual armory of third party rights in Illinois:

> [W]e do not consider that the right to indemnity must be unalterably restricted to the outlines . . . described. The right should be capable of de-

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48. *See* Variety Mfg. Co. v. Landaker, 227 Ill. 22, 81 N.E. 47 (1907); Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 72 N.E. 755 (1904).

49. Justice Ward noted: "There was no concert in the conduct of Campbell and Dr. Snyder. *Inter alia,* neither had control over the acts of the other; the plaintiff's cause of action is based on claimed violations of different duties owed the plaintiff by the original tortfeasor and the physician. The wrongful conduct and the injuries sustained were at different times. The physician in a case as here is not liable for the negligence of the original tortfeasor." — Ill. 2d at —, 302 N.E.2d at 43.

50. Active-passive indemnity is available only if the tortfeasor using it is passively negligent and the tortfeasor against which it is used is actively negligent. *See generally* Miller v. DeWitt, 37 Ill. 2d 273, 226 N.E.2d 630 (1967); Spivack v. Hara, 69 Ill. App. 2d 22, 216 N.E.2d 173 (1963).

51. — Ill. 2d at —, 302 N.E.2d at 43.

52. *See* Herrero v. Atkinson, 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

53. *See* Clark v. Halstead, 76 App. Div. 17, 93 N.Y.S.2d 49 (1949); Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

velopment to meet perceived requirements for just solutions in questions involving multiple tortfeasors. The historical aversion of courts to compare the fault of tortfeasors when contribution or indemnity has been sought has not prevented them from developing concepts which allow indemnity when equity required.[54]

Justices Underwood and Ryan joined in a concurring opinion to express disapproval of the court's expansion of Illinois indemnity principles to include the "potentially troublesome" concept of equitable apportionment. Both agreed, however, that Gertz had a cause of action against the negligent physician based upon subrogation to the rights of the injured plaintiff.[55]

Gertz will be viewed initially, at least, as standing for the limited proposition that indemnity is available under an equitable apportionment theory in those few cases where the original tortfeasor's negligence combines with the intervening negligent act of a treating physician. There are indications in *Gertz*, however, that the supreme court will be amenable to expanding use of the concept beyond the facts of the case.

In particular, the opinion strongly suggests that equitable apportionment could ultimately supplant active-passive negligence. In *Dole v. Dow Chemical Co.*,[56] the New York Court of Appeals recently supplanted active-passive negligence with equitable apportionment as an indemnity criterion. The use of equitable apportionment by the court in *Dole* was cited with approval by the Illinois Supreme Court in *Gertz*.

Equitable apportionment has rather obvious advantages over active-passive negligence where indemnity from a third party is sought. The sufficiency of a third party indemnity complaint ought to turn upon whether a demonstrable tort interest is promoted by shifting the total loss from the third party plaintiff to the third party defendant. Generally, indemnity is used as between joint tortfeasors to promote the tort interest in deterrence.

Where a master is liable for the torts of a servant, indemnity is available against the servant and in this way the loss is borne by the individual who could have prevented the injury by exercising

54. — Ill. 2d at —, 302 N.E.2d at 43.

55. *Id.* at —, 302 N.E.2d at 46.

56. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

reasonable care, *i.e.*, the person whose conduct might have been deterred. Active-passive negligence inhibits the development of a rational indemnity policy because it places emphasis on physical motion associated with the parties' conduct. This obscures the crucial issue—will a demonstrable tort interest be promoted by shifting the total cost from the third party plaintiff to the third party defendant? Active-passive negligence may sometimes be used to properly shift the total loss to the tortfeasor with the deterrable conduct. In cases under the Structural Work Act, for example, where liability is based upon a failure to discover or remedy defects, active-passive indemnity has been used to shift the total loss from the nominally at fault tortfeasor to the tortfeasor whose negligence primarily caused the injury.[57] Inspection may be so impratcical and/or inefficient that the passive tort-feasor's conduct is essentially non-deterrable. In such cases the passive tortfeasor's conduct *happens* to be non-deterrable and the concept operates to properly shift the burden of the loss so as to promote the tort interest in deterrence. But many times passive conduct is deterrable and shifting the total loss to the active tortfeasor becomes a useless judicial exercise.[58]

Much of the confusion in Illinois third party law caused by the active-passive doctrine could be eliminated by the use of equitable apportionment, which places a direct focus on whether a demonstratable tort interest is promoted by allowing the indemnity claim.

Gertz is an example of a soundly reasoned elaboration of a rational indemnity policy. In considering Campbell's right of indemnity against the doctor, Justice Ward pointed out that Campbell had no control over the doctor's conduct and could have done nothing to prevent the negligence of the physician. Requiring Campbell to assume the total loss for injuries caused by the doctor unjustly enriches the doctor and immunizes from economic responsibility the party who has the deterrable conduct in respect to the aggravated injuries. *Gertz* may well represent the beginning of an approach to indemnity which turns upon whether the third party plaintiff can

57. *See* Gadd v. John Hancock Multiple Life Ins. Co., 5 Ill. App. 3d 152, 275 N.E.2d 285 (1971). *See also* Turkington, *Torts, 1971-72 Survey of Illinois Law*, 22 DEPAUL L. REV. 29, 46-59 (1972).

58. *See* Reynolds v. Illinois Bell Tel. Co., 51 Ill. App. 2d 334, 201 N.E.2d 322 (1964). *Cf.* Steward v. Mister Softee, 75 Ill. App. 2d 328, 221 N.E.2d 11 (1966).

demonstrate on the basis of the facts of each case that shifting the loss to the third party defendant would promote a legitimate tort interest. That is the essence of equitable apportionment as it is used by the cases cited with approval in *Gertz*.[59]

B. Loan Agreements: Covenant to Sue the Other Person First

In addition to *Gertz*, the supreme court decided a case which may provide joint tortfeasors with an even more significant route around the no-right to contribution rule.[60]

In *Reese* the plaintiff's decedent, Lowell Reese, was killed when a 1200 pound bucket suspended from a crane fell and struck him. The dedecent was an employee of the Chicago Burlington & Quincy Railroad and was supervising the loading of railroad cars by railroad employees when he died. Suit was brought by the plaintiff against the railroad, under the Federal Employers Liability Act,[61] and the manufacturer of the crane for defective design in both negligence and strict liability. The railroad counterclaimed against the crane manufacturer for indemnity. Immediately before the trial the plaintiff and the railroad executed an agreement in which the railroad company loaned $57,500 without interest to the plaintiff in exchange for a promise to use any reasonable means available to collect the judgment against the defendant crane manufacturer.[62]

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59. *See* Herrero v. Atkinson, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964); Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See also* Comment, *Allocation of Loss Among Joint Tortfeasors*, 41 So. CAL. L. REV. 728 (1967-68).

60. Reese v. Chicago Burlington & Quincy R.R., No. 45293 (Ill. Sup. Ct., May, 1973) [hereinafter cited as *Reese*].

61. 45 U.S.C. §§ 51-61 (1939).

62. The important provisions of the loan agreement read:

> Vella J. Reese, as administratrix of the estate of Lowell Isaac Reese, Deceased, and Vella J. Reese, individually hereby acknowledges receipt from Chicago Burlington & Quincy Railroad Company for the sum of Fifty-Seven Thousand Five Hundred and No/100 Dollars ($57,500.00) as a loan without interest which said sum I promise to pay from any judgment I am legally entitled to collect from Koehring Company, Schield Bantam Division, a corporation, provided that I shall have no obligation to pay said sum from that amount of any judgment I obtain against Koehring Company, Schield Bantam Division, a corporation, which exceeds Fifty-Seven Thousand Five Hundred and No/100 Dollars ($57,500.00). I further agree that I shall use and pursue any reasonable and legal means which are available to me to collect any judgment I obtain against Koehring Company, Schield Bantam Division, a Corporation.

Reese at 2.

Upon plaintiff's request, the defendant railroad was dismissed from the case. The trial court awarded $149,000 against the crane manufacturer and held that the loan agreement was a covenant not to sue which reduced the crane manufacturer's obligation to the plaintiff by the amount of the loan. On appeal, the Second District Appellate Court affirmed the judgment against the crane manufacturer but reversed the trial court's decision that the loan agreement was a covenant not to sue. The Illinois Supreme Court affirmed the appellate court decision on both the judgment and operative effect of the loan agreement with Justices Schaefer, Ward and Ryan dissenting.[63]

In upholding the validity of the "loan agreement" between the plaintiff and a potential joint tortfeasor the supreme court recognized the implications of the decision in regard to the no-contribution rule:

> Contribution between joint-tortfeasors does not exist in Illinois, except in those cases where a tortfeasor whose negligence was "passive" may be entitled to indemnification from a tortfeasor whose negligence was "active." Where the facts do not fall within that exceptional class of cases appropriate for indemnification, it may fairly be argued that a loan agreement permits a joint tortfeasor to achieve by indirection that which he could not do directly. In short, he may thus avoid an adjudication of liability and his joint-tortfeasor may ultimately stand the entire loss.[64]

However the supreme court found that the "loan agreements" promoted tort interests that outweigh Illinois policy against contribution among joint tort feasors.

> Thus framed, the question becomes whether our policy of denying contribution between joint-tortfeasors outweighs the considerations favoring private settlements of lawsuits. We think it does not.[65]

The impact of loan agreements on the private settlement of personal injury suits hardly seems as certain as this passage from the opinion suggests. Loan agreements may arguably operate to produce attitudes in the parties which would work against settlement and thus unnecessarily complicate litigation. If a plaintiff enters into a loan agreement with a potential tortfeasor he is motivated by the need for quick money. The tortfeasor who enters into a loan

63. The dissenting opinions were not available as of this printing and therefore not included in this analysis.

64. *Reese* at 5 [citations omitted].

65. *Id.* at 5.

agreement will probably do so only if the prospect of a judgement against him is likely. Since a loan agreement, unlike a covenant not to sue, does not deprive the tort plaintiff of his right to sue the party to the agreement, it is unlikely that a party defendant with questionable liability would put up money for a "loan agreement." Typically, then, as in *Reese*, the general context of a "loan agreement" will include a plaintiff in need of money before judgment, a defendant likely to be liable, and, of course, a defendant other than the party to the loan agreement whom the plaintiff can proceed against. In this general situation, the loan agreement hardly seems to promote settlement of the suit before trial. The plaintiff, of course, is effectively precluded from settling with the defendant for less than the amount of the loan agreement because he has promised to pursue his remedy against the remaining defendants and to pay the loan back from the judgment. The defendant who loaned the money has a strong interest in continuing the litigation. Those defendants who are not part of the agreement then are left with a plaintiff who is obligated to proceed against them and a potential joint tortfeasor who has invested a large sum of money to cause a total shifting of the loss to them by further litigation. Not much is left to these defendants to use as leverage for an out-of-court settlement. Ironically, *Reese* itself proceeded to trial despite the "loan agreement."

a. Collusion

Beyond this, "loan agreements" such as the one sustained by the supreme court in *Reese* present serious threats to the integrity and adversary nature of the proceedings through collusion among the parties to the agreement. The court in *Reese* explicitly recognized the collusion problem inherent in such agreements:

> It seems not unlikely that, where a defendant has executed a loan receipt agreement with a plaintiff who thereupon dismisses that defendant and proceeds against the remaining ones, the employees and wiitnesses of the dismissed defendant may be substantially more cooperative with plaintiff than would otherwise be true, since any recovery by that defendant of the loaned amount is frequently contingent upon plaintiff's success against the remaining defendants.[66]

The court concluded, however, that adequate protection against collusion existed in the cross-examination process if the defendant

66. *Id.* at 6,

was permitted to establish that the witness knew of the loan agreement and may be biased as a result of it. This important aspect of the holding in *Reese* grants the defendant the right to show the existence of a "loan agreement" during cross-examination of the witnesses in order to establish motive and credibility. The agreement could not be introduced to establish liability or damages. Appropriate instructions would define the scope of admissability of the loan agreement.

While cross-examination may provide a partial check against false or otherwise incredulous testimony, it is by no means certain that the skills of a trial lawyer in cross-examination will be sufficient to overcome the pressure created by "loan agreements" on witnesses who have economic ties with the parties. This would particularly be true in a case like *Reese*, where the evidence as to what happened to cause the death of the plaintiff is completely in the control of witnesses who are employees of a person who has an interest in a prospective judgment against the defendant.

b. Epilogue

It would be difficult to overstate the importance of *Gertz* and *Reese* to third party litigation in Illinois. After these decisions, the total direction of third party rights in Illinois will almost certainly change. As previously mentioned, *Gertz* arises from a narrow factual pattern, and "loan agreements" will not be practical alternatives to some tortfeasors. But *Gertz* and *Reese* represent unmistakable statements of dissatisfaction in the Illinois Supreme Court with the no-contribution policy and active-passive indemnity. Judicial undercurrent undoubtedly goes much deeper. One might even speculate that the court would be receptive to reconsidering *Maki v. Frelk.*[67]

NEGLIGENCE

A. Owner/Occupier

a. Natural Conditions

In the First Annual Illinois Torts Survey, several appellate court cases in the owner-occupier area were examined with a view toward

67. 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

illustrating the built-in historical infirmities of the licensee-trespasser-invitee rule structure that continues to dominate the premise liability area.[68] *DeMario v. Sears, Roebuck and Co.*,[69] a First District Appellate Court decision this term, again exposes to plain view the conceptual quagmire faced by a judge who is required to apply nineteenth century concepts to twenty-first century problems. During the last half of the nineteenth century, in both America and England, immunity was generally extended to owners or occupiers of property for injuries occurring from natural conditions to persons on their property.[70] At that time much land was unsettled or uncultivated. The rule reflected the view that a general duty to inspect the property would place an unreasonable burden on the owner or occupier of such property. Despite dramatic differences in economic and social relations in the twentieth century, the rule continues to enjoy general acceptance in America. Illinois appellate courts have repeatedly reaffirmed the natural condition immunity.[71]

Personal safety and compensatory interests have pressed to the surface in the development of a major qualification on the natural condition immunity. When the owner or occupier engages in activities which alter natural conditions, these alterations are treated as "artificial" for which the owner may be liable.[72] This important qualification on the natural condition immunity doctrine has been applied in Illinois against the owner/occupier in several cases.[73]

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68. *See* Turkington, *supra* note 12, at 30-39.

69. 6 Ill. App. 3d 46, 284 N.E.2d 330 (1972).

70. *See, e.g.*, Middlesex Co. v. McCue, 149 Mass. 103, 21 N.E. 230 (1889); Mohr v. Gault, 10 Wis. 455 (1860). *See* W. PROSSER, LAW OF TORTS, 354-56 (4th ed. 1971).

71. *See generally* Byrne v. Catholic Bishop, 131 Ill. App. 2d 356, 266 N.E.2d 708 (1971); Sims v. Block, 94 Ill. App. 2d 215, 236 N.E.2d 572 (1968); Zide v. Jewel Tea Co., 39 Ill. App. 2d 217, 188 N.E.2d 383 (1963); Fitzsimons v. National Tea Co., 29 Ill. App. 2d 306, 173 N.E.2d 534 (1961); Riccitelli v. Sternfeld, 1 Ill. 2d 133, 115 N.E.2d 288 (1953); Kelly v. Huyvaert, 323 Ill. App. 643, 56 N.E.2d 638 (1944).

72. *See, e.g.*, Coates v. Chinn, 51 Cal. 2d 304, 332 P.2d 289 (1958); McCarthy v. Ference, 358 Pa. 485, 58 A.2d 49 (1948); Bailey v. Blacker, 267 Mass. 73, 165 N.E. 699 (1929); Tremblay v. Harmony Mills, 171 N.Y. 598, 64 N.E. 501 (1902).

73. *See generally* Graham v. Chicago, 346 Ill. 638, 178 N.E. 911 (1931); Hubbard v. Wood River, 244 Ill. App. 414, 417 (1927); Loyd v. East St. Louis, 235 Ill. App. 353, 357 (1925).

b. Accumulating Snow and Ice

The artificial condition doctrine has been important in providing some protection for the business invitee who is injured from falling on accumulated ice or snow on commercial property. Of course, for the snow or ice to be "artificial" within the meaning of the rule, the plaintiff must establish that the snow or ice which caused the injury was produced by some activity of the owner on the property.[74] Despite the difficulties inherent in such a requirement, plaintiffs have been successul in several cases where accumulating ice is the product of water discharged by the owner.[75] A slippery passage-way caused by laundry bags being dragged across the sidewalk was treated as an artificial condition by the First District Appellate Court in one case.[76]

In the general context of injuries occurring to customers on property due to accumulations produced by snow-clearing activities by the owner, the rule has received some use. Perhaps the leading case applying the artificial conditions rule to snow clearing activities is *Fitzsimons v. National Tea Co.*,[77] a 1961 decision. In *Fitzsimons* the Second District Appellate Court affirmed a trial court judgment on behalf of a customer injured from falling on ice in a National Tea Company parking lot. The plaintiff was able to introduce strong circumstantial evidence to establish that the ice which caused the injury was produced by the defendant's activities on the property. The ice upon which the plaintiff fell was described as "rough and dark," and "rutted" with "ridges" made by wheels of automobiles. It was shown that National Tea Company had plowed snow into a pile where it remained for two weeks during a period of alternating freezing and thawing weather. Evidence was introduced to show that water from melted snow regularly froze in the parking lot area where plaintiff fell.

In 1963 the Second District Appellate Court severely limited the scope of *Fitzsimons*. In *Zide v. Jewel Tea Co.*,[78] the appellate court reversed a $25,000 trial court judgment in favor of a plaintiff

74. Fitzsimons v. National Tea Co., 29 Ill. App. 2d 306, 173 N.E.2d 534 (1961).

75. Graham v. City of Chicago, 346 Ill. 638, 178 N.E. 911 (1931); *cf.* Ritgers v. City of Gillespie, 350 Ill. App. 485, 113 N.E.2d 215 (1953).

76. *See* King v. Swanson, 216 Ill. App. 294 (1919).

77. 29 Ill. App. 2d 306, 173 N.E.2d 534 (1961).

78. 39 Ill. App. 2d 217, 188 N.E.2d 383 (1963).

injured from falling on ice in a Jewel Tea parking lot. The appellate court found that the plaintiff had failed to introduce sufficient evidence to show that the fall resulted from ice which had not accumulated from natural causes. At trial the plaintiff testified that she fell on the ice as she left her car in the parking lot. Two witnesses for the defendant testified that they had observed no ice on the parking lot. One witness testified that the plaintiff fell in a spot covered with "hard packed snow." An employee of the defendant testified that salt had been sprinkled around the entrance of the store on several occasions on the day of the accident. The plaintiff introduced evidence showing water accumulations in parts of the parking lot from melting snow. An expert witness for the plaintiff testified that there was a constant flow from the building to parts of the parking area. No direct evidence was introduced by the plaintiff to show that water had accumulated on the portion of the parking lot where the plaintiff fell. This failure was cited by the appellate court as the basis for reversing the jury verdict.

As *Fitzsimons* and *Zide* illustrate, applications of the artificial conditions principle to accumulating snow and ice cases, even when snow removing activities have occurred, turn on minute qualitative judgments about offers of evidence by the parties.

c. *Accumulating "Slush"*

DeMario v. Sears, Roebuck and Co.,[79] decided by the First District Appellate Court this term presents the latest nuance in appellate court application of the artificial condition rule. In *DeMario*, the First District Appellate Court reversed an $11,000.00 jury verdict for the plaintiff. The narrow question on appeal was whether the plaintiff had produced sufficient evidence for the jury to decide whether the plaintiff's injury was caused by "artificial" or "natural" conditions. At trial the plaintiff testified that he slipped on slush or ice on the step approaching an entrance to the store. Employees of the defendant testified that snow had been cleared from the approach to the entrance of the store at approximately 9:15 A.M. and that the walk had been checked at 11:00 A.M. with no slush or ice having been observed.

79. 6 Ill. App. 3d 46, 284 N.E.2d 330 (1972).

An employee testified that slush was on the entrance at 1:30 P.M. shortly after the accident. Despite the fact that the defendant conceded that no snow had fallen since it was removed in the morning, the appellate court held that the plaintiff had not presented sufficient evidence to send the question of whether the slush was caused by the snow removal to the jury. To satisfy this burden, the appellate court would apparently require in a case like *DeMario*, that the plaintiff introduce evidence to show the "origin of the slush."

The trivial distinctions upon which the parties' rights turned in *Fitzsimons, Zide* and *DeMario* are the inevitable product of Illinois' failure to junk the common law approach to premise liability and impose a general duty of reasonable conduct on the part of the owner or occupier in respect to all conditions and activities on the property. The licensee-invitee-trespasser, natural/artificial condition rule structure places emphasis on where the snow was piled or water melted in respect to the plaintiff's injury. Inquiry in such cases ought to focus on balancing the foreseeability of the injury to the business invitee created by activities or omissions of the owner against the cost of requiring that he do more. Imposing a duty on the owner or occupier to take reasonable steps to remove fallen snow would not, as one court has suggested, make the owner or occupier an absolute insurer of safe premises.[80] Such an obligation would extend only to taking reasonable steps to provide a safe place for the customer.

B. *Contributory Negligence*

Illinois has been a jurisdiction evidencing much judicial dissatisfaction with the defense of contributory negligence. The height of this dissatisfaction was depicted in *Maki v. Frelk*[81] where a Second District Appellate Court eliminated the defense of contributory negligence and adopted a comparative negligence standard only to have it later reversed by the Illinois Supreme Court.[82] Since the *Maki* case, appellate courts have expressed their disapproval of the contributory negligence rule by continuing to adopt the policy of giving

80. Foster v. George J. Cyrus & Co., 2 Ill. App. 3d 274, 276 N.E.2d 38 (1971).
81. 85 Ill. App. 3d 439, 229 N.E.2d 284 (1967).
82. 40 Ill. 2d 193, 239 N.E.2d 445 (1968).

the plaintiff an opportunity to present the question to the jury in almost every case.

Each year several appellate court cases are reversed due to the trial judges' failure to accept the policy embodied in the general proposition that "contributory negligence is ordinarily a question of fact for the jury."[83] This term witnessed this recurring pattern in several cases.

In *Wegener v. Anna*,[84] the plaintiff was struck while proceeding west across a north-south street. The plaintiff alleged that he did not know which light was for the pedestrians or automobiles going in an easterly or westerly direction and that before impact he did not see the car that struck him. The trial court entered a summary judgment against the plaintiff on the basis that he was contributorily negligent as a matter of law. The fifth district reversed.

In *Fisher v. Lang*,[85] the Second District Appellate Court reversed a summary judgment directed to the defendant on a case brought by the plaintiff, Fisher, for injuries sustained when a wooden stairway leading to the basement of a store collapsed as he was delivering soft drinks. Evidence was introduced to establish that the stairway was not attached at the top or the bottom and that, alternatively, an elevator was available for the plaintiff to use. The plaintiff testified that the stairway was shaky. This latter admission was treated by the Second District Appellate Court as the primary basis for the summary judgment. Judge Guild, speaking for the court, noted that the evidence established that the plaintiff had used the stairs without accident for several months prior to the accident and held that the evidence presented a question of fact on the contributory negligence question. Thus, the summary judgment was improper.

In *Green v. Brown*,[86] the First District Appellate Court reversed a trial court's refusal to give contributory negligence instructions to the jury. The plaintiff was injured when the automobile she was driving collided with the defendant's automobile at an intersection. The plaintiff testified that she saw the defendant's automo-

83. *See, e.g.*, Morehead v. Mayron, 3 Ill. App. 3d 425, 279 N.E. 473 (1972); Johnson v. City of Rockford, 35 Ill. App. 2d 107, 182 N.E.2d 240 (1962).

84. 11 Ill. App. 3d 316, 296 N.E.2d 589 (1973).

85. 9 Ill. App. 3d 696, 292 N.E.2d 915 (1973).

86. 8 Ill. App. 3d 638, 291 N.E.2d 16 (1972).

bile for the first time a few seconds before the collision. The defendant testified that she was almost completely through the intersection when struck and that she failed to see the plaintiff's car until shortly before the accident. Judge Burman, on appeal, found the evidence sufficiently in dispute to warrant submission of the question of contributory negligence to the jury.

Fore v. Vermeer Mfg. Co.[87] presents the type of exceptional situation where Illinois courts will take the question from the jury. In *Fore,* the plaintiff brought an action for personal injury against the manufacturer of a threshing machine on both negligence and strict products liability theories. The plaintiff was injured when the engine stalled on a threshing machine that he was driving and threw him off the vehicle. At the trial, the defendant moved for a summary judgment on the basis of a deposition taken from the plaintiff in which the plaintiff stated that he had numerous difficulties with the brakes on the tractor, that he knew of the risk and danger of operating the vehicle, and that he had made many complaints to his employer concerning the inadequacies of the brakes. On the basis of the uncontroverted deposition, the summary judgment was granted. On appeal to the third district the trial court decision was affirmed in an opinion written by Judge Dixon. Since the occasions when a judge will take the question of contributory negligence from the jury occur so rarely it is puzzling to see the question as actively litigated as it is. Of the nearly one-hundred-twenty appellate court cases dealing with the issue examined by the De Paul Law Review, only seven supported a holding that the plaintiff was contributorily negligent as a matter of law, and only one of these was a first district case.

DEFAMATION

Speech activity has received significant protection in the judicial development of the common law tort of defamation in Illinois. The Supreme Court of Illinois expanded the malice requirement of *New York Times Co. v. Sullivan*[88] to private individuals one year before the United States Supreme Court.[89] The plaintiff in a defamation

87. 7 Ill. App. 3d 346, 287 N.E.2d 526 (1972).

88. 376 U.S. 254 (1964).

89. *See* Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969); *cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

suit must establish special damages in all cases, except those where the utterance is defamatory on its face and of the per se category.[90] Moreover, the defendant gets the benefit of the "innocent construction" rule which binds the plaintiff to an innocent non-defamatory interpretation of the utterance if it is reasonable.[91] Illinois, restrictive defamation tort discourages plaintiffs to the extent that libel or slander cases only infrequently reach the appellate courts. This term three defamation cases were decided which warrant mention.

SPECIAL DAMAGES: SLANDER PER SE

In *McGuire v. Jankiewicz*,[92] the First District Appellate Court reversed a trial court dismissal of the plaintiff's action for slander per se. The utterances sued upon by the plaintiff, an attorney, arose out of two separate telephone conversations by the defendant insurance adjustor to a client of the attorney. In one conversation the defendant told the plaintiff's client, "you could not have chosen a worse attorney" and in the other stated "your attorney is an asshole." The appellate court, speaking through Judge Lorenz, held that the first statement came within Illinois' slander per se rule and was actionable without proof of special damages. Dismissal was proper in respect to the second statement.

Special damages must be established in all cases written or oral unless they fall within one of the four per se categories in Illinois.[93] Application of the per se category involving words which slander a

90. Slander per se in Illinois means (1) that the utterance falls within categories which in the case of oral utterances would constitute slander per se at common law and (2) that the utterance is defamatory on its face. When the statement falls within the slander per se category the plaintiff need not plead innuendo. *See generally* Mitchell v. Peoria Journal-Star, Inc., 76 Ill. App. 2d 154, 221 N.E.2d 516 (1966) and Whitby v. Associates Discount Corp., 59 Ill. App. 2d 337, 207 N.E.2d 482 (1965). The per se category of utterances in Illinois include: (a) words imputing to the party the commission of a criminal offense; (b) words which impute some contagious disease which would exclude a person from society; (c) words imputing unfitness to perform duties of an office or employment; and (d) words which prejudice such party in his profession or trade. *See* Coursey v. Greater Nile Township Pub. Corp., 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967).

91. *See generally* Wheeler v. Dell Publishing Co., 300 F.2d 372 (7th Cir. 1962); Zeinfeld v. Hayes Freight Lines, Inc., 41 Ill. 2d 334, 243 N.E.2d 217 (1968); John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105 (1962); Snead v. Forbes, Inc., 2 Ill. App. 3d 22, 275 N.E.2d 746 (1971).

92. 8 Ill. App. 3d 319, 290 N.E.2d 675 (1972).

93. *See generally* Skolnick v. Nudelman, 95 Ill. App. 2d 293, 237 N.E.2d 804 (1968).

person in his professional trade was in issue in *McGuire*. A line of cases brought by attorneys developed the distinction between utterances which are merely "name calling" from utterances which impute a want of integrity or incapacity in the legal prosession.[94] It was upon this authority that the first district relied in sustaining the dismissal in respect to the second statement.

In two libel cases this term decided by the First District Apellate Court the absolute privilege for utterances which are part of the record in a judicial proceeding was affirmed. *Wahler v. Schroeder*[95] involved two attorneys suing for alleged defamatory utterances contained in a reply brief of the defendants who were former clients. The trial court awarded the plaintiff $1,000.00. On appeal the first district reversed holding that the statements were absolutely privileged. In *Macie v. Clark Equipment Co.*[96], a First District Appellate Court found that the allegations contained in the defense brief of a patent infringement suit were absolutely privileged. The brief alleged that the plaintiff had organized a corporation for the purpose of bringing the infringement suit and that the corporation was insolvent. The appellate court found these allegations pertinent to the defense of clean hands in the patent suit and thus within the scope of the absolute privilege extended to utterances which are part of a judicial proceeding.

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94. *Id.*
95. 9 Ill. App. 3d 505, 292 N.E.2d 521 (1972).
96. 8 Ill. App. 3d 613, 290 N.E.2d 912 (1972).

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