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## ILLINOIS LAW MANUAL

### CHAPTER II NEGLIGENCE

#### B. COMPARATIVE NEGLIGENCE

##### 1. Basic Law

In 1981, the Illinois Supreme Court adopted the "pure form" of comparative negligence as the law in Illinois. Alvis v. Ribar, 85 Ill. 2d 1 (1981). In that decision, the Supreme Court abolished the common law rule of contributory negligence. Prior to Alvis, any degree of contributory negligence on the part of the plaintiff was an absolute bar to the plaintiff's right of recovery in a negligence case. The Supreme Court in Alvis, however, substituted comparative negligence in the place of contributory negligence. Thus, a plaintiff's recovery for injury was reduced by the percentage of his own negligence which proximately caused the injury, regardless of the degree of that negligence. Contributory negligence was no longer a complete bar to recovery.

In 1986, the Illinois legislature enacted modified comparative negligence in the most common negligence causes of action. Under modified comparative negligence, the plaintiff's recovery is reduced by the plaintiff's contributory negligence unless the plaintiff is more than 50 percent at fault for causing his own injuries or damages. If the plaintiff is more than fifty percent (50%) at fault, judgment is entered in favor of the defendant. 735 ILCS 5/2-1116.

The Tort Reform Act of 1995 was a legislative attempt to create broad reform of existing tort law. While the Act would have modified the previous legislation concerning comparative negligence, the Supreme Court found the statute unconstitutional and struck it down in its entirety. Best v. Taylor

Machine Works, 179 Ill. 2d 367 (1997). Hence, comparative negligence continues to apply as set forth in the preceding paragraph.

##### 2. Analysis

In Illinois, there is a limitation on recovery in certain tort actions which is governed by Section 5/2-1116 of the Illinois Code of Civil Procedure. (735 ILCS 5/2-1116). This statute, enacted in 1986, provides that in all negligence actions for bodily injury or death or physical damage to property, and in all product liability actions based on strict tort liability, the plaintiff is barred from recovery if he is more than fifty percent (50%) at fault for the damages sought. The plaintiff is not barred from recovering damages if he is 50 percent or less at fault for the injury or damages. In that case, any damages would be reduced in proportion to that degree of plaintiff's fault which proximately caused the injuries or damages.

Section 2-1116 was enacted on November 25, 1986, with prospective application. This led to an analysis, now largely academic, as to when the cause of action (date of accident) accrued. "Pure" comparative negligence applied to accidents occurring before November 25, 1986. "Modified" comparative negligence applied to accidents occurring November 25, 1986 and after.

The plaintiff must, by a preponderance of the evidence, prove that the defendant was negligent. The defendant has the burden of proof as to the plaintiff's comparative negligence. Casey v. Baseden, 111 Ill. 2d 341 (1986); D.C. v. S.A., 178

Ill. 2d 551 (1997). Plaintiff's comparative negligence must be pleaded as an affirmative defense. The percentage of a plaintiff's negligence may only be used to offset any recovery obtained by that plaintiff and not by any other plaintiff. For example, the negligence of a driver may not be attributed to a passenger in that vehicle and, therefore, may not be used to offset any recovery for injuries to that passenger.

In the following examples, the principles of comparative negligence do not apply:

- a) A plaintiff's negligence or assumption of risk is not a defense in an action under the Structural Work Act (now repealed for accidents that occurred on or after February 14, 1995). The sole inquiry under the Structural Work Act is the defendant's culpability and liability for the injury, not the plaintiff's conduct or misconduct. The plaintiff's negligence is not an issue. Simmons v. Union Electric Co., 104 Ill. 2d 444 (1984); see also Konieczny v. Kamin Builders, Inc., 304 Ill. App. 3d 131 (1999).
- b) Generally, comparative negligence does not apply to causes of action for willful or wanton conduct. Burke v. 12 Rothschild's Liquor Mart, Inc., 148 Ill. 2d 429 (1992). Willful and wanton

misconduct is a cause of action where injury results from actual or deliberate intent to harm or which, if not intentional, is the result of an utter indifference to or a conscious disregard for one's own safety or the safety of others. 745 ILCS 10/1-210 (West 1993).

However, in *Ziarko*, the Illinois Supreme Court revisited the decision in *Burke*, and set forth a "sliding-scale" approach to permit a finding of willful and wanton conduct on lesser grounds. *Ziarko v. Soo Line R. Co.*, 161 Ill.2d 267, 279 (1994).

The Illinois Supreme Court found no injustice to the rule adopted in *Burke* to the extent that it is applied to willful and wanton conduct that amounts to intentional behavior. However, the rule does not carry equal force or validity when applied to willful and wanton acts that are reckless, rather than intentional. Whether a willful and wanton defendant should be permitted to seek contribution from a negligent defendant depends upon whether the willful and wanton defendant's acts were reckless or intentional. Thus, contribution should not be authorized when the defendant's willful and wanton acts amount to intentional behavior, but should be permitted when the defendant's willful and wanton acts amount to mere recklessness under the circumstances. *Id.*

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