Torts: Toward a General Negligence Standard for the Owner/Occupier; the Non-User and a Defectively Designed Product; Equitable Apportionment: An Alternative to Active/Passive Indemnity

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Recommended Citation
Richard Turkington, Torts: Toward a General Negligence Standard for the Owner/Occupier; the Non-User and a Defectively Designed Product; Equitable Apportionment: An Alternative to Active/Passive Indemnity, 22 DePaul L. Rev. 29 (1972)
Available at: https://via.library.depaul.edu/law-review/vol22/iss1/4

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INTRODUCTION

Last term witnessed several developments, legislative and judicial, at both the federal and state level which significantly affected Illinois tort law. A direct assault on the structure of the Illinois negligence rule was temporarily abated in *Grace v. Howlett*, where the state supreme court found no fault legislation unconstitutional; the same court dramatically expanded owner-lesser liability in *Spring v. Little*.

The Illinois guest statute, which just last term sustained a challenge to its constitutionality, was amended substantially in 1971 by the state legislature so that now only hitchhikers receive the limited protection of the willful and wanton misconduct standard. Legislation was also passed which made exculpatory clauses in leases invalid. At the federal level, the malice requirement of *New York Times v. Sullivan*, was expanded by the United States Supreme
Court in *Rosenbloom v. Metro Media*\(^7\) to include private individuals who are the subject of a defamatory publication as long as such publication is in the public interest. The Illinois Supreme Court took substantially the same position on its own in 1970.\(^8\)

These dramatic developments tend to overshadow numerous cases of lower visibility at the state appellate court level. Yet the appellate court decision in Illinois continues to be of basic importance in the formation and development of state tort law. Because they are not the subject of systematic public scrutiny, in this first annual survey of Illinois tort law, I will examine primarily appellate court opinions. Limitations of space demand that the treatment be selective.

**NEGLIGENCE: OWNERS AND OCCUPIERS OF PROPERTY**

As every law student and lawyer, weaned on Prosser, knows, owners and occupiers\(^9\) of property enjoy a qualified immunity in respect to tort liability for personal injuries\(^10\) caused by their use of property. When an individual engages in ordinary activity, he is under a general duty to act reasonably; the manufacturer or distributor of a product is also under a duty to act reasonably and, in addition, may even be responsible in tort when he has done so. But no general duty to act reasonably is imposed upon the owner or occupier of property in respect to his use of property. Instead, the duty of an owner or occupier is determined by the status of the suing plaintiff in relation to the property. A trespasser\(^11\) is owed the least duty;\(^12\) a licensee is owed something more;\(^13\) an invitee, alone, is

\(^7\) 403 U.S. 29 (1971).
\(^9\) "Owners" or "occupiers" in this article refer to the person who is in actual possession of the property (occupier) or if no one is in actual possession, the owner who legally has constructive possession. "Owners" or "occupiers" does not include owners who have leased their property. Owner/lessor tort duties are defined by somewhat different standards than owner/possession tort duties. One of the most dramatic anomalies of Illinois' approach to tort responsibility is in the development of a type of strict liability in respect to owner/lessors under Spring v. Little and the continued perpetuation of some of the common law immunities in tort in respect to owner/occupiers.

\(^11\) See Coppner v. Pennsylvania Co., 12 Ill. App. 600 (1883). A trespasser is a person who enters or remains upon the land of another without the consent of the possessor.
\(^12\) It is virtually impossible to summarize a general approach to duties owed a
owed the duty of reasonable action by the owners/occupiers.¹⁴

This special tort status of the owner or occupier is generally traced
to the high value assigned to the ownership of land by the common
law and to the dominance and prestige of the landowner in England
during the formative period of the invitee-licensee-trespasser rule
structure.¹⁵

A thoroughly industrialized and urban society consists of signifi-
cantly more complex economic and individual relationships than
those found in a feudal society. Today, an individual's economic
worth is determined largely by factors unrelated to property. So-
ciety's interest in the personal safety of an individual economic unit
would be furthered by the expansion of the owner's/occupier's
common law liability. Consequently, the safety and compensation
goals of today's society draws the contemporary common law judge
in owner/occupier cases toward interjecting general negligence the-
ory into his decision making.

Some of these negligence factors are: (1) foreseeability of harm,
(2) the certainty of the plaintiff's injury, (3) the nexus between the de-
fendant's conduct and the injury, (4) the moral blame attached to
the parties conduct, (5) the policy of preventing future harm, (6)
the burden on the defendant and consequences to community in im-
posing liability, and (7) the availability, cost and prevalence of in-

trespasser. Sometimes it is suggested that the duty owed to a trespasser is to re-
frain from willful and wanton misconduct. See Hill v. Baltimore & O.R. Co., 153
F.2d 91 (7th Cir. 1946). The Second Restatement of Torts defines the duty owed
trespassers in terms of whether they are "constant," "known" or "children." Re-
statement (Second) of Torts §§ 333-339 (1965).

13. A licensee is a person similar to a social guest who is not an invitee and
who enters or remains upon land with the consent of the owner. Generally the
owner or occupier owes a licensee the duty to exercise ordinary care in active operations,
and warn of known dangerous conditions. See Prosser, The Law of Torts

14. An invitee is a business visitor who is invited or is permitted to enter or
remain on the land for a purpose directly or indirectly connected with business
dealings between them. The duty owed an invitee is to maintain reasonably safe
premises which includes the duty to inspect for and correct dangerous conditions
as well as the duty to warn of such conditions. See Eliguth v. Blackstone Hotel,
408 Ill. 343, 97 N.E.2d 290 (1951).

15. See 2 Harper and James, The Law of Torts 1430-1505 (1956). See also
Marsh, The History and Comparative Law of Invitees, Licensees and Trespassers,
69 L.Q. Rev. 182, 359 (1953); cf. Kenmorec v. Compagnie Transatlantique,
General negligence theory has crept into owner/occupier cases primarily through verbal machinations within the licensee-invitee-trespasser rule structure. Several appellate court decisions in Illinois last year illustrate the cautioned movement of general negligence theory into owner/occupier cases; others simply reaffirm the dominance of the property interest in this area.¹⁶

1. NATURAL CONDITIONS

*Newcomm v. Jul*¹⁷ affirms that the owner and occupier's immunity for natural conditions is still alive in Illinois. The injured party in *Newcomm* sued the defendant restaurant owner in negligence for damages suffered as a result of insufficient lighting of a patio leading from the restaurant. Mr. Newcomm alleged that the lighting caused him to slip on a patch of accumulated snow, and the jury awarded him $15,000. On appeal, the Third District Appellate Court reversed, one judge dissenting, holding that the restaurant owner was under no duty to warn, by way of illumination, an invitee of the natural accumulation of snow. Since the owner or occupier was under no duty in respect to a fall resulting from naturally accumulated snow, the court reasoned that he is under no duty to warn of such conditions.

*Newcomm* stands as a sad reminder that the cataracts of common law history can distort our perception of owner/occupier problems, so that the basic standard of justice and common sense, as well as rational policymaking, escape consideration.

The immunity granted owners or occupiers for natural accumulations of snow on property is an adjunct to the position of the early common law that an owner or occupier is under no affirmative duty to remedy natural conditions on his land. Looked at in its best light, this rule made some sense when a good deal of land was undeveloped and the imposition of a general duty to inspect and remove unsafe natural conditions would have been an oppressive obstacle to the ownership of such property. Quite obviously these conditions are not present in the instant case where the defendant is using property for commercial purposes in an urban area, and the plaintiff is injured as a direct result of this commercial activity.

In Illinois, personal safety considerations have produced the introduction of negligence factors, albeit slowly, in accumulating snow cases by the rule that an owner or occupier is liable for snow accumulating as a result of artificial causes or the owner's use of the area. This rule would produce the following result in the context of *Newcomm*. If a customer leaving a restaurant slips on snow or ice which accumulated as a result of the owner's attempt to clear away the snow or as a result of water from a gutter spout, the restaurant owner is liable unless a jury finds the plaintiff contributorily negligent. But, if a customer falls as a result of naturally accumulated snow which the owner fails to remove, a question of fact in regard to the owner's breach of duty is not even presented for the jury. Therefore, the Illinois policy as expressed in *Newcomm* will only tend to encourage owners and occupiers from clearing off their commercial premises.

Moreover, the party who is injured from falling on accumulated snow on commercial property no longer can look to dicta in the first district supporting the imposition of a general duty on the owner or occupier to remove naturally accumulated snow after a reasonable length of time has lapsed. This position was expressly repudiated this term by the First District Appellate Court in *Foster v. George J. Cyrus & Company*.

2. **DUTY OFF PREMISES**

The historic property line tort immunity for the owner of occupier of property has slowly been eroded in Illinois by a line of cases.


20. *Id.* at 489, 123 N.E.2d at 156. The first district cites Connecticut cases supporting a general duty to take reasonable steps to remove. *Durkin* itself was an artificially accumulating snow case.

21. 2 Ill. App. 3d 274, 276 N.E.2d 38 (1971). In *Foster*, the first district appellate court, speaking through Justice Schwartz, reversed a trial court verdict of $10,000 because the trial judge had erroneously allowed instructions which included the imposition of a duty to remove naturally accumulated snow after a reasonable length of time had lapsed.
The user of a public highway adjacent to private property may proceed against the possessor of that property for injuries caused by natural or artificial conditions as well as by activity by the possessor on the property. Moreover, several Illinois decisions have interpreted the owner's duty to provide an invitee with reasonably safe premises as including a reasonably safe means of ingress and egress to a business operated on the property.

This latter duty was extended beyond the boundaries of the possessor's property to an injury occurring on a public sidewalk leading to the possessor's tavern in *Cooley v. Makse*.

This term a Second District Appellate Court decision modestly expanded *Cooley*. In *McDonald v. Frontier Lanes, Inc.* the appellate court affirmed a judgment against the president of a corporation owning a bowling alley for injuries occurring to an invitee on a parkway owned by the city of Elgin. Alice McDonald injured herself when she fell into a 12-inch hole as she left the bowling alley in an attempt to reach her car parked on the street.

Justice Nash, speaking for the court, held that the duty owed by an owner or occupier to an invitee to maintain reasonably safe means of ingress and egress extended in this case to the parkway even though it was not owned by the defendant. Support for this ruling was found in *Cooley*, which was interpreted by Justice Nash to extend a tort duty beyond the possessor's property when the possessor had assumed the right to use another's property as a necessary adjunct to the possession and use of his property.

After *McDonald*, Illinois is left with a case by case analysis of the scope of the possessor's duty for unnatural conditions beyond the boundaries of his property. The court in *McDonald* was careful to distinguish *Stedman v. Spiros*, where the plaintiff was denied recovery against defendant lessee for injuries occurring 15 feet from

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the sidewalk leading to lessee's lodge. In Stedman, suggests Justice Nash, the facts did not dictate extension of a duty to the plaintiff.

In this case by case analysis, hopefully, future decisions will consider general negligence theory factors. *McDonald* illustrates that such considerations can be taken into account within the owner/occupier tort rule structure.

3. SOCIAL GUESTS

*Madrazo v. Michaels*\(^2\) is last year's prime contribution to the continuing judicial dialogue on whether a social guest has invitee or licensee status. Mary Madrazo left her job as a seamstress in New Jersey to live with her married niece in Skokie, Illinois and to help with moving into a new house and caring for the children. No promise to the plaintiff in regard to expenses or payment for service was made by the defendant nor did the plaintiff have expectations of such payment when she made the move. While carrying a load of clothes, she stepped into a box left on the stairway by the defendant and fell. The First District Appellate Court reversed a directed verdict by the trial judge on behalf of the defendants. Speaking through Justice Leighton, the court held that the plaintiff was an invitee to whom the defendant owed a general duty of reasonableness.

The court found support for the reversal in second,\(^2\) third\(^3\) and fourth\(^4\) district decisions wherein an economic benefit test, which focused upon compensation to the plaintiff, had been abandoned as the sole criterion for determining invitee status. These courts developed a standard which looked to whether the plaintiff's activity was beneficial to the defendant. In at least one case under this analysis, the invitee status has been given to the social guest even though he received no remuneration from the owner/occupier.\(^5\)

*Madrazo* and these decisions do not represent a complete rejection in Illinois of an economic benefit *principle* in respect to defining invitees. The decisions in other districts all involved in-

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individuals who were not formally carrying on business with the owner/occupier and who were not paid by the owner/occupier for their services. Yet in every case, including Madrazo, the person was performing a service which economically benefited the owner in the sense that the owner would have normally paid to have the service performed. Therefore, in Illinois the social guest, for the most part, will still only get the benefit of licensee status.

The economic benefit test that the appellate court in Madrazo expanded is a dramatic example of how the invitee, licensee and trespasser categories may not provide for the introduction of factors in owner/occupier cases that ought to be taken into account under general negligence theory. There may sometimes be a relationship between whether the defendant received a direct pecuniary benefit and (1) the foreseeability of harm to the plaintiff; (2) the moral blame attached to the defendant's conduct; (3) the policy of preventing future harm; and (4) the availability of insurance, but as Madrazo illustrates, this relationship is not a necessary one. The foreseeability of harm to Mary Madrazo and the moral blame attached to the defendant's conduct are essentially related to the physical circumstances and activities of the plaintiff and defendant, and not to whether the plaintiff received compensation. Society's interest in the personal safety of Mary Madrazo remains constant and should not vary with changes in the owner's or occupier's economic position in respect to her.

4. CHILD/ADULT TRESPASSERS

The most dramatic example of the stress placed on the traditional approach by the safety interest occurred in an important case of first impression in the first district. In Barnes v. Washington, the plaintiff, a forty three year old mental incompetent with the mental age of four years, sued the defendant railroad in negligence for loss of both legs below the knees and parts of both hands. Amputation of the plaintiff's limbs was required because of extreme frostbite received by the plaintiff from over-exposure. The plaintiff alleged that he had been abandoned by friends in defendant's railroad

yard, and had reached the railroad tracks and cars through a break in a fence which was in disrepair. Three days after he was abandoned in a railroad shanty the plaintiff was discovered in Decatur, Illinois. The trial court granted summary judgment against plaintiff on the theory that he was a licensee and as such no duty was breached to him in respect to the condition of the fence. On appeal in an opinion written by Justice McNamara the first district reversed, holding that the defendant railroad owed the same duty of reasonableness to the plaintiff that it owed to a child trespasser or licensee. In addition, and of considerably more importance, the court held that the mental condition of the plaintiff was to be taken into account in determining the standard of care for contributory negligence.

In extending the invitee tort status of a child trespasser to a physical adult in *Barnes* the court correctly reasoned that the rationale behind the child trespasser rule, namely, additional protection for individuals who because of their age are unable to fully appreciate the risk of injury to themselves, is equally applicable to a physical adult with the mental capacity of a child.

There is a paucity of cases dealing with the precise problem prescribed to the appellate court in *Barnes*. Only an Indiana case was cited by the court in its opinion. *Barnes* is a logical extension of the Illinois tort policy as manifested in the child trespasser cases. The decision is an excellent example of creative expansion of the common law by an appellate court.

Most jurisdictions do not take mental deficiencies of the parties into account in defining the standard of conduct in a negligence case. The mentally deficient plaintiff or defendant is required to act like a person of ordinary mental capacity and intelligence. This approach is generally said to be based upon the reluctance of courts to introduce complex issues of mental capacity into a negligence case. Where the mental condition of the plaintiff is extremely de-

ficient, as in the instant case, and there is little doubt as to plaintiff's capacity to conform his conduct to the ordinary reasonable prudent man standard, several recent decisions have given the plaintiff the benefits of a standard which takes into account his mental deficiency. *Barnes* is the first Illinois appellate court decision to do so. No decisions have given the defendant the benefit of such a standard.

5. CONCLUSION

*Mcdonald, Madrazo* and *Barnes* illustrate how general negligence theory can cautiously be brought into owner/occupier cases through the manipulation of the existing rule structure. Yet as long as decision making is confined to the limits of the licensee, invitee or trespasser categories, confusion and unnecessary complexity will result. Illinois is replete with examples of this.

One of the most dramatic is the Illinois rule structure on the duties owed a licensee. Illinois essentially takes a minority position and grants to the licensee only that duty owed a trespasser, namely, the duty to refrain from willful and wanton misconduct. Yet in at least one social guest licensee case, willful and wanton is interpreted as the duty to warn of known dangerous conditions which is generally viewed as the duty owed a licensee.

A person who drives into a service station in Illinois and uses the public toilet is an invitee to whom is owed the duty to maintain reasonably safe premises. If he leaves the public toilet and walks through an alley behind the service station to reach his car, he becomes a licensee. As a licensee he is owed the same duty as a trespasser, namely, the duty to refrain from willful and wanton misconduct. If he steps into an open hole at night, no duty is


42. *See generally* Pauckner v. Wakem, 231 Ill. 272, 83 N.E. 202 (1907).

breached as to him; if he is injured as a result of stepping on a rake or shovel left in undergrowth in the alley, a jury question is presented. If he is a child, a jury question is presented in both cases. Such is the semantic morass through which the Illinois tort plaintiff must proceed.

In 1968, the Supreme Court of California faced up to the problems presented by the invitee-licensee-trespasser rule structure and virtually junked them. The vehicle was a social guest case in which James Rowland was visiting a friend and suffered serious injury to his hand when a water faucet in the bathroom broke. On appeal, the supreme court reversed a summary judgement which was granted to the defendant by the trial court. In Rowland v. Christian, the Supreme Court of California held that the proper test of liability in owner or occupier cases is whether in managing his property, the owner or occupier has acted reasonably. The licensee-trespasser-invitee rule structure was reduced to an auxiliary status. Both Colorado and Hawaii have followed Rowland v. Christian. Until Illinois does the same, owner/occupier cases will continue to be obscured and confused by the bewitchment of the past.

PRODUCTS LIABILITY: JUDICIAL NO-FAULT

In 1965, Illinois established itself as a leading jurisdiction in the products liability area with Suvada v. White Motor Co. Suvada introduced a liability standard based primarily on economic considerations and ended privity of contract limitations on tort liability in products cases. It also created an indemnity rule structure and, by compelling implication, extended strict liability in products cases to the non-users. Subsequent Illinois and federal district court cases applying Suvada developed little products liability law beyond the case itself. This year, however, several significant developments

46. 70 Cal. Rptr. 97, 443 P.2d 561 (1968).
47. Mile High Fence Co. v. Radovich, — Colo. 2d —, 489 P.2d 308 (1971).
49. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
in products cases in the Illinois appellate and federal courts have occurred.


Because *Suvada* came to the appellate courts as an indemnity case, Illinois' posture on extending products liability in tort to non-users of the product has been obscured. The primary issue on appeal in *Suvada* was whether the purchaser of a defective product has the right of indemnity against the manufacturer of the product for money the purchaser paid for tort liability caused by the defective product. *Suvada* had purchased a truck from White Motor Company which contained a defective system manufactured by Bendix Corp. The defective brake system caused the truck to crash into a school bus injuring several occupants. The personal injury claims of the injured passengers on the bus were settled by *Suvada*, who was negligent in failing to check out the brake system properly. *Suvada*'s right to indemnity as against those manufacturers and distributors liable under strict products liability standards was upheld by the Illinois Supreme Court. Indemnity presupposed joint liability in *Suvada* and by holding that the plaintiff had indemnity rights the supreme court also had to determine that the manufacturer was responsible in strict products liability for damages to the non-users of the truck—(passengers on the school bus).

From 1965 until this year, no Illinois appellate or supreme court case squarely faced the non-user question. In 1970, a fifth district case in obiter dictum suggested that the liability established in *Suvada* extended to non-users.51 And in 1970, the Illinois Supreme Court decided in favor of a manufacturer as against a non-user but on evidentiary grounds.52 *White v. Jeffrey Galion, Inc.*,53 decided

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in the eastern district federal court this year, interpreted Illinois law to extend products liability to the non-user.

White was injured when a ram car manufactured by defendant struck an air line that broke and flipped into him while he was waiting for the car. In denying defendant's motion for a summary judgement, the court reasoned that the policy underlying strict products liability as articulated in *Suvada* compelled extension of the doctrine to non-users.

These policy factors are (1) the public interest in human safety, (2) solicitation and invitation to the public to use the product by the manufacturer or distributor, (3) the judgement that loss caused by the defect in the product should be borne by the manufacturer or distributor who created the risk and reaped the profit rather than an innocent non-user.

More is at stake in non-user cases such as *White* than a simple application of the policy factors underlying strict products liability. In cases where injury occurs to a non-user, as a result of a defect in the product, the tort liability of the user or consumer becomes a significant factor in the analysis. The user of a defective product is not responsible on a strict products liability theory to the non-user. He has not offered the product into the stream of commerce nor has he reaped the profit from a sale. If the user is liable to the non-user in tort, it must be on the basis of negligence. To proceed against the user of the defective product in negligence the non-user must show that the user acted unreasonably. Generally, this means that the plaintiff non-user must establish that the user did not take reasonable steps to inspect the product for use or, alternatively, that the user had knowledge or information that would lead a reasonable person to know of a defect in the product and proceeded, despite such knowledge or information, to use it.

If liability for the manufacturer stops with the user of the product, it is far from certain then that the non-user will have a remedy. In the event the non-user could not establish negligence against the user, the loss is borne by the innocent non-user even though the risk of injury is created by the manufacturer who has profited by both the sale and use of the product. Of all the parties in a case like *White*, the innocent injured non-user is the person whose protection
would seem to be most clearly required by public policy. The court in *White* recognized the anomalous result that might occur by virtue of the limited liability in tort of the user and correctly interpreted products liability in Illinois to extend to the non-user.

2. DUTY FOR SECOND COLLISION: *Mieher v. Brown*

*Mieher v. Brown* was presented to the Fifth District Appellate Court as a negligent design case. Esther Mieher was killed when her car struck 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 it failed to include bumper guards or a shield on the rear of the truck. Such failure, alleged the complaint, was the proximate cause of the rear of the truck penetrating Ms. Mieher's windshield and thereby causing her death. The appellate court reversed the district court's dismissal and remanded it.

In *Mieher*, at least three separate yet interrelated tort problems came together in one case. They were: (a) the legal status of a non-user in negligent design and strict products design cases; (b) the scope of the manufacturer's duty in respect to plaintiffs who are injured by the impact of a crash (the second collision problem); (c) the relationship between the fault standard in negligent design cases and the strict liability standard in strict products liability cases.

a. Rights of Non-users.

The non-user problem has been discussed in the previous section on the *White* decision; the *White* analysis was adopted substantially by the Fifth District Appellate Court in *Mieher*.

b. The Second Collision Problem.

The second collision problem has generally arisen in cases where the suing injured party was harmed as a result of contact with the interior part of an automobile after a collision. Since the accident and the resulting injury may be foreseeable, there ought to be no problem in applying general negligence theory to such cases. Until recently, however, courts have been reluctant to extend liability

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54. 3 Ill. App. 3d 802, 278 N.E.2d 869 (1972). There was some confusion as to precisely what the plaintiff's theory was in *Mieher*. The appellate court treated plaintiff as suing on a negligent design theory, id. at 805-06, 278 N.E.2d at 872.
to a manufacturer for injuries occurring as a result of the second collision. Generally these decisions are based upon the proposition that the manufacturer is under no duty to make his automobile accident proof or fool-proof.\(^5\) Sometimes liability in such cases is limited on the basis that the negligent design is not the proximate cause of the injury by the second collision.\(^6\)

The leading case imposing liability for injury occurring as a result of the second collision is \textit{Larsen v. General Motors},\(^7\) an eighth circuit federal court case, decided in 1968.

That court correctly reasoned that negligence theory did not require that liability be cut-off at the second collision. In addition, \textit{Larsen} resolved the causation problem by holding that the manufacturer is liable for "that portion of the damage[s] . . . that probably would have occurred as a result of the impact or collision absent the defective design."\(^8\)

The \textit{Mieher} court adopted both the \textit{Larsen} court's position in respect to the second collision and causation issues\(^9\) and, as already noted, the \textit{White} court's position on the non-user issue. \textit{Mieher} represents a reasonable extension of the fundamental policy established by the Illinois Supreme Court in \textit{Suvada}. If affirmed on appeal, \textit{Mieher} would insure Illinois continued status as a leading jurisdiction in the area of defective products liability.

c. \textit{Implications of Mieher: Strict Liability to the Non-User for Defective Design.}

Although a manufacturer of a defective product may be liable in tort for negligence or strict products liability, negligence and strict products liability are separate causes of action with distinct plead-


\(^{56}\) General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971).


\(^{58}\) 391 F.2d at 503.

\(^{59}\) 3 Ill. App. 3d at 811, 278 N.E.2d at 876.
ings and proof. 60 Contributory negligence is a defense to negligence but not to strict products liability and, at least in Illinois, assumption of the risk is a defense to strict products liability theory but not negligence. 61 Under strict products liability theory the defective condition must be "unreasonably dangerous;" under negligence theory the defective condition must be the product of unreasonable conduct by the manufacturer.

In product design cases courts have experienced considerable difficulty sorting strict products liability theory from negligence theory. This difficulty arises primarily because the inquiry under both theories necessarily focuses on the choices and options exercised in the decision making process which produced the design. If a product is designed in such a way that it causes someone to be injured, the determination that such design is unreasonably dangerous generally depends upon whether an alternative design is available which would have decreased the risk of injury to the plaintiff without devastating economic effect on the manufacturer. Similarly, the design is unreasonable in the negligence sense if an alternative, economically feasible, risk decreasing design was available to the manufacturer.

The thrust of case law, where the question has been carefully considered, is that the standard of liability in products design cases is essentially the same whether the theory is negligence or strict products liability. 62 This merger of standards, I suggest, is inescapable,

60. A cause of action for negligence requires that the plaintiff establish (1) the existence of a duty on the part of the defendant to conform to a standard of care for the protection of the plaintiff against injury; (2) breach of that duty by the defendant; (3) that the breach of duty was the proximate cause of (4) damage to the plaintiff. A cause of action for strict products liability requires that the plaintiff show (1) that as a result of an unreasonably dangerous condition in the product, injury was caused to the plaintiff (2) that the defect existed in the product at the time it left the defendant's control and (3) that the plaintiff was using the product in a way it was intended to be used.


given the activity which is primarily involved in both cases, namely, the choices and options exercised in the decision making process which produced the design. There is no reason for a court to be especially concerned about a merger of liability standards where this merger is not the product of conceptual confusion. Nor should the similarity of analysis in product design cases affect the applicability of the total strict liability rule structure to strict products liability design cases. The policy analysis required by *Suvada* to protect the safety interest when a manufacturer releases a product into commerce with an unreasonably dangerous condition are equally applicable to the manufacturer who releases a product with an unreasonably dangerous design into the stream of commerce.

Illinois recognized the tort concept of strict products liability for defective design in 1966 in *Wright v. Massey-Harris, Inc.* Presumably then, the non-user and second collision position adopted by the court in *Mieher* applies to both negligent and strict products liability design cases.

3. ADVANTAGES OF A STRICT PRODUCTS LIABILITY THEORY

There are several ways in which a party who proceeds upon a strict products liability theory has the advantage. This can be illustrated by using the facts of *Mieher* itself. The plaintiff in *Mieher* ran into the rear of defendant's truck. Usually, this raises an issue of contributory negligence in a negligence suit. Contributory negligence could not effect the plaintiff's rights in a strict products suit because it is not a defense to strict products liability. Moreover, since the plaintiff in *Mieher* is a non-user of the product, the defense of misuse or assumption of the risk would not be available against him in a strict products liability case.

Significant differences also attach in choice of theory when the injured party proceeds against the distributor of a product defectively or negligently designed. Under negligence theory the distributor of such a product is liable only if he acts unreasonably in respect to his handling of the product. This means that the plaintiff must show that he knew or had reason to know of the defective design or, al-

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ternatively, that information existed which would cause a reasonable person to know of the defective design. If the distributor is proceeded against, on a strict products liability design theory, the issue is only whether the defective design existed at the time it left the control of the defendant. This is a question which, assuming the product has such a design, is easily resolved in favor of the plaintiff.

INDEMNITY/CONTRIBUTION

When vicarious liability is imposed upon an individual because of his economic relationship to a negligent tortfeasor, indemnity is utilized to shift the complete loss from the one who had to pay to the one who committed the tort. The employer who is liable for the negligence of an employee has the right to recover his total obligation from the employee in indemnity. When joint liability is imposed upon an individual because his negligence was the contributing proximate cause of the injury, contribution is used to shift the loss above the tortfeasor's apportionate share to others who were joint contributing proximate causes of the injury.

Since 1923, Illinois decisions have repeatedly stated that contribution is not recoverable amongst joint tortfeasors. Partially as a response to the harshness of this rule, Illinois courts have expanded traditional indemnity rights in tort through an active-passive negligence concept. Under this concept of indemnity, the passively negligent tortfeasor can recover from the actively negligent tortfeasor for indemnity.

A cursory examination discloses the conceptual deficiency of the active-passive doctrine. Shifting total tort responsibility from one person to another makes sense when tort responsibility is based upon vicarious liability. The person who had to pay without fault ought to be able to shift responsibility to the person who was at fault so that the person with the deterrable conduct will ultimately shoulder the cost of creating the risk. But it makes little sense to shift the total responsibility from one person who was at fault to another person who was at fault simply because the latter's negligence was qual-

itatively different. A third party rule structure which revolves around a degree of fault standard lends itself to contribution and not indemnity.

1. **ACTIVE-PASSIVE**

Several Illinois appellate court decisions this term involved the application of the active-passive indemnity doctrine to cases where liability is based upon violations of the Structural Work Act.\(^6\) This Act imposes tort responsibility on the basis of both negligence and strict liability on those persons who build or are in control of defective scaffold and scaffold type structures.\(^6\) Decisions at the appellate court level this term for the most part applied the active-passive indemnity concept in Structural Act cases to shift the loss from the passive or nominally at fault tortfeasor to the tortfeasor whose negligence primarily caused the injury.\(^6\) In such cases the liability of the indemnitee is sufficiently statutory and distinct from the negligence of the indemnitor, so that shifting the total cost of creating the risk arguably promotes a deterrent interest. This is particularly true where the liability of an indemnitee-contractor is based upon the failure to discover and remedy defects.\(^6\) In such a case inspection may be so impractical and/or inefficient that the contractors conduct is essentially non-deterrable.

In cases where joint liability is based upon common law negligence, difficulties with the active-passive concept are considerable. *Doerge v. Wabash Railroad Company*,\(^7\) decided by the Fifth District Appellate Court this term is a case on point.

In *Doerge*, the party seeking indemnity (Wabash) was initially liable for negligence in failing to provide a system for communicat-

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68. *Supra* note 66.


70. 4 Ill. App. 3d 914, 282 N.E.2d 226 (1972).
ing a warning signal from the lead engine in a train to the engine in
the rear of the cars which was providing the power. As a result of
the failure to communicate the warning signal, the train collided
with the third party defendant's train which was negligently placed
on the track. The appellate court reversed the trial court's refusal
to direct a verdict in favor of the third party defendant and held that
the third party plaintiff's negligence in failing to provide a warning
system was active and therefore precluded recovery for indemnity.

The result in Doerge is sound. No perceivable tort interest, cer-
tainly not deterrence, would be promoted by shifting the total loss
from the railroad, who was negligent in failing to communicate the
warning signal, to the railroad who was negligent in placing the
train on the track.

Yet there are problems with the court's use of the active-passive
document. The third party plaintiff's negligence does not appear to
be "active" in any meaningful sense; liability was based upon Wa-
bash's omission. Quite obviously it is strange to speak of negli-
gence based upon the absence of an act as "active" negligence.

The appellate court in Doerge was less concerned with the physi-
cal characteristics of the negligence than it was with the sensibility of
allowing indemnity. It correctly did not give the misplaced empha-
sis of labels like "active" and "passive" the opportunity to distort a
rational indemnity policy as other Illinois cases have done. Char-
acterizing Doerge's negligence as passive might have given one neg-
ligent tortfeasor the right to shift the total loss to another negligent
tortfeasor. This would have promoted no valid tort interest and
unnecessarily would use up the resources of the civil court process.

2. EQUITABLE APPORTIONMENT: Gertz v. Campbell

In a case of first impression in Illinois, the Second District Appel-
late Court upheld a third party complaint on the pleadings which
provides Illinois courts with a device which will grant some relief
from the strictures of the active-passive doctrine. The problem pre-
vented to the appellate court arose from a narrow factual situation.

In Gertz v. Campbell,\(^71\) the plaintiff sued in negligence for per-
sonal injuries resulting from defendant allegedly striking plaintiff

while he was standing alongside the road. The defendant 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’s negligence. The trial judge dismissed the third party action without leave to amend.

Where a negligent act is followed by the negligence of a treating physician in Illinois the original negligent tortfeasor is liable for 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 a risk of some injury by the treating physician. 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; 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.

Because of this limited sense of joint liability, the trial court in Gertz adopted the view that the third party complaint must fail under the no contribution rule and the active-passive doctrine. The latter’s deficiency being, of course, that both negligent acts are “active.” On appeal, the Second District Appellate Court reversed in an opinion written by Justice Seidenfeld, with Justices Guild and Moran concurring.

Justice Seidenfeld found that the parties were not joint tortfeasors for purposes of the no contribution rule. He noted several factors which distinguished the relationship of the parties from the traditional joint liability relationship. Justice Siedenfeld then held that relief could be granted by the trial court through the equitable power of the court to apportion losses amongst the parties. Equitable ap-


73. In Gertz Justice Seidenfeld noted “. . . the second tort-feasor is not responsible to the injured party for the negligence of the first tort-feasor. They have not acted in concert. The injuries inflicted are severable in point of time; neither has any control or opportunity to guard against the acts of the other; the cause of action against the driver and the doctor are based upon different duties to the plaintiff, and the same evidence will not support the action against each wrongdoer; and the injury to the plaintiff is capable of being decided by apportioning the extent of the injury caused by the respective acts of negligence.” 4 Ill. App. 3d at 810, 282 N.E.2d at 31.
portionment is a device whereby apportionment of damages can be dealt with on a rational basis within the no contribution rule, at least in the limited factual situation presented in Gertz.

Recently, the court of appeals in New York suggested that indemnity in the context of joint tort liability should be determined upon the basis of equitable principles and not active or passive negligence.74 “Active” and “passive” negligence have been described by several courts as being legal conclusions, which means that the circumstances of the case warrant indemnity as an equitable principle.75 Gertz may represent the beginning of such an approach in Illinois.

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 in terms of equitable apportionment principles 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. Where liability is imposed upon the indemnitee for conduct which is essentially non-deterrable, as in Gertz or certain cases under the Structural Work Act, indemnity should be granted if the conduct of the indemnitor is deterrable because to do so promotes a valid tort interest.76 The advantage of equitable apportionment is that these grounds would be explicitly stated and not obscured by judicial use of the active and passive concept.

76. This occurred in Gertz because of the imposition of liability upon the indemnitee for the conduct of the indemnitor-physician over which the indemnitee had no control. The effect of equitable apportionment was to shift the loss to the physician who was in a position to avoid the injury.