

ILLINOIS LAW MANUAL

CHAPTER II NEGLIGENCE

Negligence--or the breach of a duty of care proximately resulting in damage--was scarcely recognized as a separate tort before the early 19th Century. Trespass to land or damage to personal property, along with intentional torts, were the core of civil law for centuries before. Gradually, however, social and cultural progress resulted in less emphasis on property rights and greater emphasis on personal rights. Therefore, for more than a century, negligence has been recognized as an independent basis of liability.

One of the earliest appearances of what we now recognize as negligence involved those who professed to be competent in certain "public callings." Common carriers, innkeepers, blacksmiths, attorneys, and surgeons were regarded as holding themselves out to the public as ones in whom confidence might be placed. Thus, one assuming an obligation to give proper service in a public calling could be liable for negligence in the conduct of that service. The Law of Torts, Dan B. Dobbs, p. 260-261. The early cases were concerned almost exclusively with positive acts rather than failures to act. Gradually, due to the nature of the relations between parties, a certain relationship might be said to give rise to an obligation and legal duty to take affirmative action to avoid harm or injury. Thus, liability for omissions gained a greater recognition as a social obligation.

Around the year 1825, negligence came to be recognized as a separate and independent basis of tort recovery. Intentional torts, whether direct or indirect, were recognized as distinct theories of

liability. Negligence remained the main basis for unintended injuries. Today, there is no dispute that separate problems and principles, as well as distinct questions of public policy, arise in negligence cases versus those involving intentional torts.

A. ELEMENTS OF NEGLIGENCE

Negligence is the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under similar circumstances. Williams v. Conner, 228 Ill. App. 3d 350, 364 (5th Dist., 1992); Illinois Pattern Jury Instructions Civil 10.01. Each person has a duty to use ordinary care so that he does not cause injury or damage to others. Similarly, every person has a duty to use ordinary care for his own safety and for the safety of his property. Illinois Pattern Jury Instructions Civil Second No. 10.03.

In order to recover for negligence, a plaintiff must plead and prove that:

- (1) A duty was owed to the plaintiff by the defendant;
- (2) Injuries or damages were sustained by the plaintiff; and
- (3) Defendant's breach of the duty owed to plaintiff was the proximate cause of plaintiff's injuries or damages.

Dinkins v. Ebbersten, 234 Ill. App. 3d 978, 983 (4th Dist. 1992); Thompson v. County of Cook, 154 Ill. 2d 374, 382 (Ill. 1993); Illinois Pattern Jury Instructions Civil 21.02. The failure to prove any one of the elements is fatal to a plaintiff's cause of action. Illinois Pattern Jury Instructions Civil 21.02.

1. Duty

Whether a duty exists and, if so, the nature of that duty must be determined by the courts as a matter of law. Marshall v. Burger King Corp., 355 Ill. App. 3d 685, 688 (2d Dist. 2005). The relationship of the parties to each other determines the duty owed by one to another. Ziemba v. Mierzwa, 142 Ill. 2d 42, 47 (Ill. 1991)(stated in *dicta*). In determining whether a duty exists under given circumstances, a court will consider the likelihood of injury, the foreseeability of that injury, the magnitude of the burden of eliminating or guarding against the risk, and the consequence of placing that burden on the defendant. Kirk v. Michael Reese Hospital & Medical Center, 117 Ill. 2d 507, 526 (Ill. 1987); Largosa v. Ford Motor Company, 303 Ill. App. 3d 751, 754 (1st Dist. 1999). The question of whether a duty exists is ordinarily a question of law for the court to decide.

2. Breach of Duty

An individual breaches a duty when he or she fails to comply with the applicable standard of care. In other words, in the vast majority of cases involving ordinary negligence (as opposed to professional negligence), a party breaches his duty if he fails to use reasonable care. Whether a duty has been breached is ordinarily a question of fact for a jury to decide. Yager v. Illinois Bell Telephone Co., 281 Ill. App. 3d 903, 908 (4th Dist. 1996).

3. Causation

Whether a person's conduct has proximately caused another's injury is also normally a question of fact for the jury to resolve. Turner v. Roesner, 193 Ill. App. 3d 482, 489 (2d Dist. 1990). The claimed injury must be the natural and probable result of the negligent act or omission, and be of such a character as to have been a foreseeable result of that negligence. However, it is not essential that the person charged with negligence should have

foreseen the precise injury which resulted from his act or omission. Williams v. University of Chicago Hospitals, 179 Ill. 2d 80, 87 (Ill. 1997).

Proximate cause consists of two elements: (1) actual cause; and (2) legal cause. Mengelson v. Ingalls Health Ventures, 323 Ill. App. 3d 69, 75 (1st Dist. 2001). When determining whether a defendant's conduct is the actual cause of an injury, a "but for" analysis is applied. Price v. Phillip Morris, Inc., (Ill. 2005). The question is whether the injury would have occurred "but for" the defendant's conduct. Id. at 269. If the injury would have occurred even absent the defendant's conduct, then there is no actual causation and, accordingly, no proximate causation. Id. Proximate cause is not established where the causal connection is contingent, speculative, or merely possible. Mengelson, 323 Ill. App. 3d at 75.

Once actual cause is established, the next question is whether the defendant may be held legally responsible. That is, was the defendant's conduct the legal cause of the injury? Legal cause is a more imprecise concept than actual cause. In order for a defendant's conduct to be the legal cause of an injury, the injury to the plaintiff must be reasonably foreseeable when the act or omission occurs. Watson v. Enter. Leasing Co., 325 Ill. App. 3d 914 (1st Dist. 2001).

There can be more than one proximate cause of any injury. Id.; see also Countryman v. County of Winnebago, 135 Ill. App. 3d 384, 392 (2d Dist. 1985). When there is more than one proximate cause of an injury, one who is negligent cannot avoid liability merely because another person negligently contributed to cause the same injury. This is true even though the injury would not have occurred but for the negligence of the other person. Turner, 193 Ill. App. 3d at 492; see also Sears v. Kois Bros. Equipment, Inc., 110 Ill. App. 3d 884, 889 (1st Dist. 1982). A negligent defendant can, however, avoid liability for a plaintiff's injury if another's conduct breaks the causal connection between the injury and the defendant's original negligence. Quintana v. City of Chicago, 230 Ill. App. 3d 1032, 1034 (1st Dist. 1992).

The causal connection between a defendant's negligence and a plaintiff's injury is broken if a third party causes the injury and the third party's conduct is unforeseeable. Oakley Transport, Inc. v. Zurich

Ins. Co., 271 Ill. App. 3d 716, 725 (1st Dist. 1995) (applying the law to an insurance coverage dispute). For example, a criminal act committed by a third party which causes a plaintiff's injury is unforeseeable and is ordinarily a superseding cause which breaks the causal connection between the injury and any original negligence. Rowe v. State Bank of Lombard, 125 Ill. 2d 203, 224 (Ill. 1988).

Another example of when a negligent party may not be liable is when the defendant's negligence merely furnishes a condition and is not an actual cause of the injury. Quintana, 230 Ill. App. 3d at 1036-37. An example of a condition resulting from negligence is where a municipal defendant negligently fails to repair broken signal lights at an intersection. Quintana, 230 Ill. App. 3d at 1033-34. If two motorists subsequently collide because they disobey the traffic code and fail to yield at an intersection with non-functioning signals, then their failure to yield, not the lack of signals, may be the proximate cause of the accident. Id. at 1037. In other words, the lack of signals merely furnished a condition for the negligence of the drivers to cause injury. Id.

The issue of proximate cause is generally a question of fact to be determined by the finder of fact from all of the attendant circumstances. Garrett v. Grant School District, 139 Ill. App. 3d 569, 580 (2d Dist. 1985); Kapsouris v. Rivera, 319 Ill. App. 3d 844, 853 (2d Dist. 2001). Proximate cause can be a question of law when the facts are undisputed and there can be no other reasonable inference to be drawn from them. Gilmore v. Stanmar, Inc., 261 Ill. App. 3d 651, 658 (1st Dist. 1994).

4. Analysis

Even when a plaintiff establishes a duty and breach of duty, he must still prove that the breach was the

proximate cause of any injury he suffered. For example, assume a pedestrian is injured in an automobile accident, fracturing her leg and suffering internal damage. The plaintiff is treated at the hospital and subsequently suffers additional injuries due to negligent medical care. The plaintiff may sue the driver of the automobile that struck her and caused the initial injury, as well as the negligent physician. In that case, the driver may be held liable for proximately causing the original injuries. Gertz v. Campbell, 55 Ill. 2d 84 (Ill. 1973). However, liability for a third-party plaintiff's damages should be apportioned on the basis of the relative degree to which the third-party defendant's conduct proximately caused of the plaintiff's injuries. Skinner v. Reed-Prentice Division Package Machinery Co., 70 Ill.2d 1, 14 (1977); *See also Joint Tortfeasor Contribution Act*, 740 ILCS § 100/2.

Another example illustrates the necessity of proving all of the elements of negligence. Assume a plaintiff was involved in an automobile accident and retained an attorney to file a personal injury lawsuit. The attorney subsequently fails to file the lawsuit within the applicable statute of limitations. The plaintiff may sue his attorney for legal malpractice for failure to file the lawsuit within the statute of limitations. Although the defendant's attorney owed a duty to the plaintiff to act reasonably and to file plaintiff's lawsuit in a timely fashion, the plaintiff must still prove that the breach of that duty proximately caused his damages. That is, the plaintiff must prove the underlying personal injury claim against the original defendant, the driver of the other automobile. The mere fact that the attorney failed to timely file the lawsuit is insufficient, unless the plaintiff can show that he was likely to recover damages from his claim. Sheppard v. Krol, 218 Ill. App. 3d 254 (1st Dist. 1991).