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NOTES

COSELMAN v. SCHLEIFER: THE MARK OF *PEDRICK*

INTRODUCTION

Beyond question, the meaning and operation of the concept of "contributory negligence as a matter of law" has changed radically in the very recent past in Illinois. Four short years ago the Illinois Supreme Court could say:

> But it is also the law that when all the evidence is considered in its aspect most favorable to the other party, together with all reasonable inferences, and it appears therefrom that there is no evidence from which [contributory] negligence could reasonably be inferred, it is the trial court's duty to direct a verdict accordingly.[1]

This is a very restrictive test. But, in the recent case of *Coselman v. Schleifer*,[2] the Second District Appellate Court held both contributory negligence and assumption of risk to have been properly ruled as a matter of law in the trial court. The genesis of the test tacitly applied by the *Coselman* court was the case of *Pedrick v. Peoria & Eastern Railroad Co.*,[3] where the Illinois Supreme Court comprehensively reviewed the question of when the direction of a verdict, entry of a judgment *n.o.v.*, or making of a ruling as a matter of law was proper. The *Pedrick* court stated the test as follows:

> [V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.[4]

The *Pedrick*[5] court made it clear that the test for direction of a verdict is identical to the test for determining when negligence or contributory negligence is a question of law. The court cogently stated:

> Logic demands that one rule govern both the direction of verdicts and the determination of the presence or absence of negligence or contributory negligence as a matter of law, for in both situations the issue is whether a court or the jury should decide the negligence issue.[6]

Coselman is one of what looms to be a legion of cases in the post-*Pedrick* era in which the courts will realistically deal with

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[1] Smith v. Bishop, 32 Ill. 2d 380, 383-84, 205 N.E.2d 461, 463 (1965).
[2] 97 Ill. App. 2d 123, 239 N.E.2d 687 (1968).
[3] 37 Ill. 2d. 494, 229 N.E.2d 504 (1967).
[4] *Id.* at 510, 229 N.E.2d at 513-14.
[5] 37 Ill. 2d 494, 229 N.E.2d 504 (1967).
[6] *Id.* at 503, 229 N.E.2d at 510.

the problem of direction of verdicts and rulings on negligence and contributory negligence as a matter of law. The underlying rationale of directed verdicts, rulings as a matter of law, and judgments *n.o.v.*, is whether there is any factual issue for a jury to decide; if there is not, the court must decide the question as a matter of law.

Coselman v. Schleifer

In *Coselman*, a domestic employee sued to recover for injuries sustained while doing housework for her employer. The seventy-two year old cleaning woman caught her foot on a rubber-backed rug lying on a landing at the top of a steep, narrow and poorly lighted stairwell leading to the defendant's basement, and fell to the basement floor, striking her head and suffering severe injuries. The plaintiff had never complained about the stairs or the landing. There was evidence that the woman had suffered from hypertension and was subject to dizziness. The Second District Appellate Court, for purposes of the appeal, assumed that the plaintiff did not become dizzy and fall, but tripped on the rug in question.[7] There was also a finding of fact that the light was sufficient for the plaintiff to see various objects laying on the stairs.[8]

In considering the judgment notwithstanding the verdict entered by the trial court, the appellate court held that: (1) under the facts, contributory negligence was properly ruled as a matter of law; (2) under the facts, assumption of risk was properly ruled as a matter of law; (3) contributory negligence and assumption of risk are separate and distinct concepts in Illinois law; and (4) an employee assumes all ordinary risks and extraordinary ones of which he knows, or ought to know, and the dangers which he appreciates or ought to appreciate, and of which he makes no complaint.[9]

Before turning to the contributory negligence question, it should be noted that in its discussion of these other issues the court appeared to be imbued with the philosophy of *Pedrick*.[10] That is, in holding contributory negligence and assumption of risk to be separate and distinct concepts and ruling assumption of risk as a matter of law, the *Coselman* court extended the role of the court into another area which has generally been one for the jury.[11] An analysis of the treatment of these two concepts in *Coselman* will evidence an attitude toward rulings as a matter

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[7] 97 Ill. App. 2d 123, 126, 239 N.E.2d 687, 688 (1968).
[8] *Id.* at 127-28, 239 N.E.2d at 689.
[9] *Id.* at 126-27, 239 N.E.2d at 689-90.
[10] 37 Ill. 2d 494, 229 N.E.2d 504 (1967).
[11] Kelly v. Fletcher-Merna Co-op. Grain Co., 29 Ill. App. 2d 419, 426, 173 N.E.2d 855, 859 (1961).

of law that is directly in line with the tenor of the *Pedrick* test.[12]

In holding that the plaintiff had assumed the risk in the employment, the *Coselman* court was not bound to any such dramatic precedent as *Pedrick*. The court tacitly laid down a test for ruling assumption of risk as a matter of law that has been laid down in virtually all of the Illinois cases on this subject.[13] As the Third District Appellate Court said in *Stone v. Guthrie*[14] in holding the question of the plaintiff's assumption of risk to be one for the jury:

> The question of assumed risk is usually and normally one for the jury and involves a subsidiary question of whether the servant understood and appreciated the risks which he is alleged to have assumed.[15]

The step taken by the *Coselman* court that is uncommon in most Illinois cases on this subject is the inference of the court that it is proper for a court to make a judgment as to the plaintiff's mental state, that is, as to whether the plaintiff appreciated the dangers involved in the situation. One such case not willing to make this inference is *Maytnier v. Rush*.[16] In *Maytnier*, a patron at a major league baseball game was hit by a ball thrown wildly from the bullpen. In stating that the question of the plaintiff's assumption of risk would have been one for the jury, the court said:

> [T]he doctrine's [assumption of risk's] underlying premise is appreciation of the danger itself, not mere knowledge of a defect or condition by which danger is created, thereby necessarily raising a question of fact for the jury.[17]

However, other courts, like the *Coselman* court, find no difficulty in making the determination of the plaintiff's mental state as a matter of law. In *Kelly v. Fletcher-Merna Co-operative Grain Co.*,[18] an experienced farm worker was injured when his foot slipped into a nearby auger as he was attempting to load corn. The *Kelly* court said:

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[12] See text at note 4 *supra*.

[13] *See* Maytnier v. Rush, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967); Kelly v. Fletcher-Merna Co-op. Grain Co., 29 Ill. App. 2d 419, 173 N.E.2d 855 (1961); Stone v. Guthrie, 14 Ill. App. 2d 137, 144 N.E.2d 165 (1957); Stahl v. Dow, 332 Ill. App. 233, 74 N.E.2d 907 (1947); Huff v. Illinois Cent. R.R., 279 Ill. App. 323, *aff'd*, 362 Ill. 95, 199 N.E. 116 (1935); Wehrhahn v. Stern Ullman Co., 178 Ill. App. 363 (1913).

[14] 14 Ill. App. 2d 137, 144 N.E.2d 165 (1957), where the plaintiff was injured while loading a silo, getting his leg caught in an auger.

[15] *Id.* at 150, 144 N.E.2d at 171. *Accord*, Hinrichs v. Gummow, 41 Ill. App. 2d 428, 190 N.E.2d 610 (1963).

[16] 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967).

[17] *Id.* at 351, 225 N.E.2d at 91. *Accord*, Preble v. Wabash R.R., 243 Ill. 340, 90 N.E. 716 (1909); Fox v. Beall, 314 Ill. App. 144, 41 N.E.2d 126 (1942); Collins v. Kurth, 247 Ill. App. 156 (1925); Levi v. Illinois Box Co., 161 Ill. App. 157 (1911); Barrett Mfg. Co. v. Marsh, 137 Ill. App. 110 (1907); Linderman Box & Veneer Co. v. Thompson, 127 Ill. App. 134 (1906); Frink v. Potts, 105 Ill. App. 92 (1902).

[18] 29 Ill. App. 2d 419, 173 N.E.2d 855 (1961).

> 'It is true . . . that the questions of whether appellant assumed the danger or not . . . are ordinarily questions of fact for the jury to pass upon, yet where, as here, there is no conflict in the evidence it is the duty of the trial court to apply well-recognized principles of law to the uncontradicted evidence and when that is done the only reasonable conclusion that can be arrived at from all the facts appearing in the record is that the appellant assumed the hazard . . . knowingly exposed himself to that known danger and this precludes any recovery.'[19]

In *Wehrhahn v. Stern Ullman Co.*,[20] the trial court's directed verdict for the defendant was upheld on appeal, the First District Appellate Court ruling that by frequently using the stairs upon which he was injured, the plaintiff must have known of their condition and assumed the risk connected with their use.[21]

In short, though there was authority for the position of the *Coselman* court in holding the risk to have been assumed by the plaintiff as it did, the approach in *Coselman* was an expansive one, favoring rulings as a matter of law.

In distinguishing contributory negligence from assumption of risk, the *Coselman* court followed the weight of Illinois case law on the subject.[22] In *Kelly v. Fletcher-Merna Co-operative Grain Co.*,[23] the court said:

> 'Contributory negligence and assumption of risk are entirely different things in the law. Although the two questions may arise under the facts of a case, yet they are wholly separate and distinct. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety so that the question of contributory negligence may be involved in every case; but an employee may have assumed a risk by virtue of his employment or by continuing in such employment with knowledge of the defect and danger and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover.'[24]

In Illinois, contributory negligence has been operationally defined as follows: "Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety . . . ."[25] On the other hand, assumption of risk has been likewise functionally defined in the following

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[19] *Id.* at 426, 173 N.E.2d at 859, quoting from Stahl v. Dow, 332 Ill. App. 233, 74 N.E.2d 907 (1947).

[20] 178 Ill. App. 363 (1913).

[21] *Id.* at 366.

[22] *See* Wheeler v. Chicago & W.I.R.R., 267 Ill. 306, 108 N.E. 330 (1915); Chicago & E.I.R.R. v. Heerey, 203 Ill. 492, 68 N.E. 74 (1903); Kelly v. Fletcher-Merna Co-op. Grain Co., 29 Ill. App. 2d 419, 173 N.E.2d 855 (1961); Minters v. Mid-City Mgt. Corp., 331 Ill. App. 64, 72 N.E.2d 729 (1947).

[23] 29 Ill. App. 2d 419, 173 N.E.2d 855 (1961), quoting from Stahl v. Dow, 332 Ill. App. 233, 74 N.E.2d 907 (1947).

[24] *Id.* at 425-26, 173 N.E.2d at 858-59. *Accord,* Chicago & E.I.R.R. v. Heerey, 203 Ill. 492, 68 N.E. 74 (1903), where the Illinois Supreme Court reversed on the ground that the jury instructions did not sufficiently distinguish contributory negligence from assumption of risk.

[25] Chicago & E.I.R.R. v. Heerey, 203 Ill. 492, 502, 68 N.E. 74, 77 (1903).

terms: " . . . [A]n employee may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger . . . ."[26] To the same effect is *Minters v. Mid-City Management Corp.*,[27] where the court held that contributory negligence involves the notion of some fault or breach of duty on the part of the employee, whereas assumption of risk may be free from any suggestion of fault or negligence on the part of the employee.[28] Similarly, in *Wheeler v. Chicago & Western Indiana Railroad Co.*,[29] the court said that though the question of contributory negligence may be involved in every action for personal injury, contributory negligence, as distinguished from assumption of risk, is the failure of an employee to use those precautions for his own safety that reasonable prudence requires.[30]

There is not, however, complete uniformity as to this conceptual separation of assumption of risk and contributory negligence. The Fourth District Appellate Court, in *Hargis v. Standard Oil Co.*,[31] an action for injuries sustained by the plaintiff while delivering oil products to the defendant, rejected the defendant's contention that the plaintiff had assumed the risk by attempting to make the delivery with inadequate light, saying:

> Plainly, the courts frequently treat the question of voluntary exposure to a visible risk as bearing upon the defense of contributory negligence. While we do not hold that the doctrine of assumed risk is limited to master-servant cases, we do hold that in the instant case it is merely a reargument of the question whether plaintiff was guilty of contributory negligence; that the conduct of plaintiff in proceeding with his work by the aid of a hand lantern, knowing the yard light was out, was properly submitted to the jury as a question of due care . . . .[32]

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[26] *Id.* at 502, 68 N.E. at 77.
[27] 331 Ill. App. 64, 72 N.E.2d 729 (1947).
[28] *Id.* at 73, 72 N.E.2d at 734.
[29] 267 Ill. 306, 108 N.E. 330 (1915).
[30] *Id.* at 319-20, 108 N.E. at 336.
[31] 10 Ill. App. 2d 119, 134 N.E.2d 518 (1956).
[32] *Id.* at 124, 134 N.E.2d at 521.

Another problem with regard to the distinction between contributory negligence and assumption of risk turns on the question of whether the doctrine of assumption of risk is applicable only to cases arising between master and servant. In Conrad v. Springfield Consol. Ry., 240 Ill. 12, 88 N.E. 180 (1909), the court said: "Appellant's contention that appellee must be held, as a matter of law, to have assumed the risk, cannot be sustained, since the doctrine of assumption of risk is only applicable to cases arising between master and servant." *Id.* at 17, 88 N.E. at 182. Similarly, in Schoninger Co. v. Mann, 219 Ill. 242, 76 N.E. 354 (1905), the court said:

> There was, therefore, no contractual relation existing between the plaintiff and the defendant, and as the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant, the question of assumed risk is not involved in this case, and defendant cannot be relieved of liability on the ground plaintiff assumed the risk which caused his injury.

Id. at 246, 76 N.E. at 356.

Other cases have limited the doctrine to situations in which there is at least some contractual relationship. In Reed v. Zellers, 273 Ill. App. 18

Clearly, the separation of the two doctrines is consistent with the trend toward more frequent rulings as a matter of law. This separation makes possible such rulings in cases involving both assumption of risk and contributory negligence where there are present the elements necessary for ruling only one or the other as a matter of law.

However important these other questions are in *Coselman,* undoubtedly the most significant point which *Coselman* demonstrates is the clearly apparent ease with which the court found contributory negligence as a matter of law. Here the great latitude of the *Pedrick* test[33] becomes compellingly apparent. In ruling that the plaintiff was contributorily negligent as a matter of law, the court relied principally on two factors. First, "[t]he plaintiff knew of the condition of the landing and stairs."[34] Secondly, "[b]y her own testimony, it is clear that she could or should have seen the rug had she been attentive."[35] In holding as it did, the *Coselman* court took a position contrary to the weight of the Illinois cases in similar factual situations. Suits by plaintiffs who had fallen on stairs had in the past virtually universally been held to be questions for the jury on the issue of whether the plaintiff was contributorily negligent.[36]

(1933), in holding that the doctrine of assumption of risk did not apply in an action by an automobile guest passenger, the court said: "The doctrine of assumed risk applies only where there is a contractual relation between the parties." *Id.* at 24.

In Baker v. Illinois Cent. R.R., 161 Ill. App. 521 (1911), the court held that the defendant, a railroad, could not use the defense of assumption of risk because the plaintiff was an employee of another railroad.

However, in other cases, the doctrine of assumption of risk has been held to exist where any voluntarily assumed relationship exists, whether or not contractual. In Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N.E.2d 879 (1938), the court, quoting Bohlen, *Studies in the Law of Torts,* 20 HARV. L. REV. 14, 91 (1906), said:

> [N]either the maxim, *volenti non fit injuria,* as expressing the principle that one who has voluntarily encountered a known danger cannot recover from the creator thereof, nor the principle itself, is confined to cases of workmen against their employers, and "is not in any way founded upon anything peculiar to the relation of master and servant, nor based upon the contractual nature of the relation."

295 Ill. App. 225, 238, 14 N.E.2d 879, 884 (1938).

[33] See text at note 4 *supra.*

[34] 97 Ill. App. 2d 123, 129, 239 N.E.2d 687, 690 (1968).

[35] *Id.*

[36] Some of the "stair and incline" cases in the past have been: Holsman v. Darling State St. Corp., 6 Ill. App. 2d 517, 128 N.E.2d 581 (1955), where the plaintiff slipped while attempting to go down stairs and the court ruled the question of the plaintiff's contributory negligence to be one for the jury; Peterson v. Hendrickson, 335 Ill. App. 223, 81 N.E.2d 266 (1948), where the plaintiff fell down tavern basement stairs behind a small door in a telephone room and the Second District Appellate Court ruled the question to be one for the jury; Savaiano v. The 12th St. Store, 330 Ill. App. 248, 70 N.E.2d 744 (1947), in which a customer fell on the stairs of a business establishment and the question was one for the jury; and Lubin v. Goldblatt Bros., 37 Ill. App. 2d 437, 186 N.E.2d 64 (1962), a customer, leaving a store, slipped and fell on a recently waxed floor containing a slight slope, and in ruling the contributory negligence question to be one of fact, the First District Appellate Court said: "No precise law can be laid down

PRE-PEDRICK TESTS IN ILLINOIS

Before the decision in the *Pedrick* case, the Illinois authority on the ruling of contributory negligence as a matter of law could be divided into three broad and somewhat overlapping categories. The first test stated that whenever there was any evidence whatsoever tending to show due care on the part of the plaintiff, the question was one for the jury.[37] The second and most common test was that in order for the plaintiff to be ruled contributorily negligent as a matter of law, all reasonable minds must agree that such was the case.[38] Third, there was, even from the early cases, a line of decisions less restrictive than the first two tests in ruling contributory negligence as a matter of law. The test was that the court must be able to clearly see that the plaintiff was contributorily negligent.[39]

No Evidence Test

A statement of perhaps the most restrictive test to determine if the question of contributory negligence should be ruled as a matter of law was made by the First District Appellate Court in *Prill v. City of Chicago*,[40] where the plaintiff's intestate fell into an excavation in the street and the court held him guilty of contributory negligence as a matter of law:

> While ordinarily the question of contributory negligence is one of fact for a jury to determine, where as here, there is *no evidence* in the record that Prill exercised any care for his own safety immediately prior to and at the time of the injury, it becomes a question of law.[41]

In *Okai v. United Roofing & Siding Co.*,[42] where the plaintiff's intestate was killed while attempting to put out a fire allegedly caused by the defendant's employee, the court, in holding the contributory negligence question to be one for the jury, said:

> The question of due care is a question of fact to be submitted to the

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on the subject, but each case must be determined on its own facts." *Id.* at 444-45, 186 N.E.2d at 68.

Until *Pedrick*, contributory negligence had been ruled as a matter of law only in extreme circumstances. In Durkin v. Marshall Field & Co., 161 Ill. App. 505 (1911), the First District Appellate Court indicated that the plaintiff might have been contributorily negligent in attempting to go down stairs while intoxicated and carrying a wheelbarrow on his shoulders, though the case was reversed on a finding of no negligence on the defendant's part. Also, in Blumberg v. Baird, 319 Ill. App. 642, 49 N.E.2d 745 (1943), the First District Appellate Court indicated that the plaintiff was contributorily negligent for using stairs which were clearly icy and slippery. However, the decision also turned upon the fact that a continuous snowfall had made it practically impossible for the defendant to keep the stairs clear.

See J. O'MEARA, TORT LIABILITY OF ILLINOIS LAND OCCUPIERS (1968).

[37] See text at note 41 *infra*.

[38] See text at note 50 *infra*.

[39] See text at note 54 *infra*.

[40] 317 Ill. App. 202, 46 N.E.2d 119 (1942).

[41] *Id.* at 214, 46 N.E.2d at 124 (emphasis added).

[42] 24 Ill. App. 2d 243, 164 N.E.2d 237 (1960).

> jury when there is any evidence which with legitimate inferences that may be reasonably drawn therefrom tends to show the exercise of due care.[43]

An important corollary of the "no evidence" test is that there be no reasonable inference that can be drawn from the evidence in the plaintiff's favor. In *Blumb v. Betz*,[44] a surviving wife brought a wrongful death action against the defendant who ran over her husband as he was walking on a highway. The court said:

> [I]n considering such a motion [by the defendant for a directed verdict] the trial court should consider the evidence produced on the part of the plaintiff most strongly in the plaintiff's favor and give it every reasonable intendment favorable to plaintiff.[45]

One of the more comprehensive statements of the "no evidence" rule is found in the case of *Thomas v. Buchanan*,[46] a case in which the plaintiff's intestate was riding in an automobile and died as a result of a collision with another car. In holding the question of the plaintiff's intestate's contributory negligence to be a jury question, the court said:

> The question of due care . . . is always a question of fact to be submitted to a jury whenever there is *any evidence* in the record which, with any legitimate inferences that may be reasonably and legally drawn therefrom, tends to show the exercise of due care on the part of the deceased.[47]

The "no evidence" test stresses the fact that there be no evidence in the plaintiff's favor showing his due care; nor can there be any inference in his favor.

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[43] *Id.* at 246-47, 164 N.E.2d at 239. *Accord*, Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 125 N.E.2d 47 (1955), and Bracher v. Illinois Terminal R.R., 5 Ill. App. 2d 375, 125 N.E.2d 687 (1955). In *Geraghty*, the plaintiff caught his foot on poles used to keep cars in line in an unlighted parking lot. The court, in ruling the question of contributory negligence to be one for the jury said:

> [A]ll controverted questions of fact, in a jury trial, must be submitted to the jury for decision. This is primarily the exclusive function of the jury, and to withdraw such questions from its consideration is to usurp its function.

5 Ill. 2d 153, 164, 125 N.E.2d 47, 53 (1955). Similarly, in *Bracher*, the court said: " . . . questions of contributory negligence, where the facts were in dispute, are questions of fact for the jury to determine." 5 Ill. App. 2d 375, 379, 125 N.E.2d 687, 689 (1955).

[44] 366 Ill. 273, 8 N.E.2d 620 (1937).

[45] *Id.* at 274, 8 N.E.2d at 621. *Accord*, Carter v. Winter, 50 Ill. App. 2d 467, 200 N.E.2d 528 (1964), *aff'd*, 32 Ill. 2d 275, 204 N.E.2d 755 (1965), *cert. denied*, 382 U.S. 825 (1965), where the plaintiff entered the highway with another car approaching. The court said that the question of the plaintiff's contributory negligence was for the jury:

> Even where the facts are admitted or undisputed, but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the questions of negligence and contributory negligence ought to be submitted to the jury — it is primarily for the jury to draw the inference.

Id. at 477, 200 N.E.2d at 533.

[46] 357 Ill. 270, 192 N.E. 215 (1934).

[47] *Id.* at 278, 192 N.E. at 218 (emphasis added).

All Reasonable Minds Must Agree Test

The second and most common of the Illinois tests is the "all reasonable minds must agree" test. This test is not as restrictive as to the granting of rulings as a matter of law as the "no evidence" test.[48] The "all reasonable minds must agree" test allows some evidence to be in the plaintiff's favor and still contributory negligence may be ruled against the plaintiff as a matter of law. The amount of evidence in the plaintiff's favor must certainly be very small, as the court in *Swenson v. City of Rockford*[49] indicated. There, the plaintiff walked over a defective sidewalk with knowledge of its unsafe condition. In holding the plaintiff's contributory negligence to be a jury question, the court said:

> It [contributory negligence] becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence.[50]

The test was reiterated in *Sterba v. First Federal Savings and Loan*[51] where the plaintiff walked into and struck her head on the wooden awning attached to a parking lot attendant's shelter. The court, in holding the question of the plaintiff's contributory negligence to be a jury question, said:

> The question of contributory negligence is ordinarily a question of fact for the jury and becomes a question of law only when all reasonable minds would reach a conclusion that there was contributory negligence.[52]

Court Can Clearly See Test

The most liberal test in granting rulings as a matter of law demands neither that there be no evidence in the plaintiff's favor

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[48] See text at note 41 *supra*.

[49] 9 Ill. 2d 122, 136 N.E.2d 777 (1956).

[50] *Id.* at 128, 136 N.E.2d at 780. *Accord*, Ziraldo v. W.I. Lynch Co., 365 Ill. 197, 6 N.E.2d 125 (1936). In that case the plaintiff, who was leaning into an elevator shaft was struck and thrown down the adjacent shaft by a descending elevator. The court, using the language later adopted by the *Swenson* court held the contributory negligence issue to be a jury question.

[51] 77 Ill. App. 2d 380, 222 N.E.2d 547 (1966).

[52] *Id.* at 385, 222 N.E.2d at 549. *Accord*, Ames v. Armour Co., 246 Ill. App. 118 (1927); Petro v. Hines, 299 Ill. 236, 132 N.E. 462 (1921). In the *Ames* case, the plaintiff was injured when a train and the defendant's truck collided. The court said:

> Whether the plaintiff, at and just prior to the time of the collision, was in the exercise of ordinary care for his own safety, we think — considering the complicated situation of facts, shown by the evidence, some of which tends to show care and some almost foolhardiness, and concerning which reasonable men might differ in their judgment — was a question of fact for the jury. And the jury having found in favor of the plaintiff, the question arises, was their finding clearly against the weight of the evidence?

Ames v. Armour Co., *supra* at 124. In *Petro*, where the deceased was hit and killed by a train at a crossing where the warning signals had been operating, the court said, "all reasonable minds must agree." Petro v. Hines, *supra* at 240, 132 N.E. at 464.

nor that all reasonable minds agree that the plaintiff was contributorily negligent. The test was stated in *Ames v. Terminal Railroad Association,*[53] where the plaintiff's intestate was a passenger in the car of another and was killed instantly by a train at a railroad crossing. In holding the plaintiff's intestate contributorily negligent as a matter of law, the court said:

> [W]hen there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant.[54]

An equally compelling version of this rule was stated in *Beidler v. Branshaw,*[55] where the plaintiff was injured in an elevator in the defendant's building when he caught his foot between the elevator and the elevator shaft. In holding the plaintiff guilty of contributory negligence as a matter of law, this court clearly eliminated the requirement that there be no evidence in the plaintiff's favor. The court said:

> . . . "While questions of negligence or of contributory negligence are ordinarily questions of fact, to be passed upon by a jury, yet when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, the court may withdraw the case from the consideration of the jury and direct a verdict."[56]

In another conceptual restatement of this test, the First District Appellate Court in 1946 presaged the *Pedrick* test[57] in *Zoloth v. Walker-Wabash Corp.*[58] In that case, the plaintiff was injured by falling over the edge of the wooden ramp used by the defendant in the operation of a parking lot business, as he stepped out of the automobile in which he was riding as a guest. The windows of the automobile in which the plaintiff was a guest were steamed up. The defendant's attendant did nothing to caution the plaintiff of any danger. The appellate court, in holding the question to be one for the jury, laid down an expansive rule for determining when the question should be one of law. The test is distinctly a forerunner of *Pedrick* as the question is placed entirely within the discretion of the trial court:

"[C]ases occasionally arise in which a person is so careless

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[53] 332 Ill. App. 187, 75 N.E.2d 42 (1947).

[54] *Id.* at 193-94, 75 N.E.2d at 45. *Accord,* Pope v. Illinois Terminal R.R., 329 Ill. App. 62, 67 N.E.2d 284 (1946); Illinois Cent. R.R. v. Oswald, 338 Ill. 270, 170 N.E. 247 (1930). Both cases, using the identical wording of the *Ames* case, held the plaintiff contributorily negligent as a matter of law.

[55] 200 Ill. 425, 65 N.E. 1086 (1902).

[56] *Id.* at 431, 65 N.E. at 1088, quoting from Werk v. Illinois Steel Co., 154 Ill. 427, 40 N.E. 442 (1895). *Accord,* Wilson v. Illinois Cent. R.R., 210 Ill. 603, 71 N.E. 398 (1904), where the court in applying the *Beidler* test found the plaintiff, a railroad employee run over in the railroad yard by a locomotive, guilty of contributory negligence as a matter of law.

[57] See text at note 4 *supra.*

[58] 328 Ill. App. 564, 66 N.E.2d 443 (1946).

or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."[59]

THE EFFECT OF PEDRICK

The 1967 case of *Pedrick v. Peoria & Eastern Railroad Co.*[60] has become the leading case in the area of ruling contributory negligence as a matter of law in Illinois. In this profoundly reasoned case, the only testimony for the plaintiffs was their own and that of another interested person. The defendants presented testimony by disinterested witnesses in addition to testimony by their employees. Even with testimony on both sides of the case, the Illinois Supreme Court still held the question to be one of law. The court said:

> [V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.[61]

Since *Pedrick*, three other Illinois cases[62] have found contributory negligence as a matter of law.

In *Keen v. Davis*[63] the Illinois Supreme Court considered a case in which an administrator sued the drivers and owners of two trucks to recover damages for wrongful death. The decedent was travelling on an unpaved road, and the defendants were approaching her from the opposite direction. The first defendant was pulling a drilling rig weighing many tons, which raised a heavy cloud of dust around him and the decedent too, when their vehicles passed by each other. A collision resulted between the automobile driven by the decedent and the truck driven by the second defendant. The second defendant was about four hundred feet to the rear of the drilling rig. At the trial, it was shown that at the time of the collision, each vehicle was approximately an equal distance from its edge of the road. The Illinois Supreme Court quoted and applied the *Pedrick* test:

> "[V]erdicts ought to be directed and judgments *n.o.v.* entered only

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[59] 328 Ill. App. 564, 570, 66 N.E.2d 443, 445 (1946), quoting from Lotspiech v. Continental Ill. Nat'l Bank & Trust Co., 316 Ill. App. 482, 45 N.E.2d 530 (1942). *Accord*, Kelly v. Chicago City R.R., 283 Ill. 640, 119 N.E. 622 (1918), laying down the *Lotspiech* test, later followed in *Zoloth*. In *Kelly*, the plaintiff was struck by the rear or overhanging portion of a streetcar when the streetcar rounded the curve. Despite the breadth of the test, the *Kelly* court found that the contributory negligence question was one for the jury.

[60] 37 Ill. 2d 494, 229 N.E.2d 504 (1967).

[61] *Id.* at 510, 229 N.E.2d at 513-14.

[62] Keen v. Davis, 38 Ill. 2d 280, 230 N.E.2d 859 (1967), Coselman v. Schleifer, 97 Ill. App. 2d 123, 239 N.E.2d 687 (1968), and McInturff v. Chicago Title & Trust Co., 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968).

[63] 38 Ill. 2d 280, 230 N.E.2d 859 (1967).

> in those cases in which all the evidence, when viewed in its aspects most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."
>
> Applying the rule to the facts of this case, we are of the opinion that the trial court properly directed the verdict as to all defendants. Under this state of facts plaintiff could never establish . . . that his intestate was free from contributory negligence.[64]

In *McInturff v. Chicago Title & Trust Co.*,[65] the First District Appellate Court reversed the trial court, which had held that the contributory negligence question was for the jury. *McInturff* was a wrongful death action for damages allegedly caused by the defendant's negligent maintenance of a flight of stairs that lacked a handrail. On the question of contributory negligence, the court said:

> Under the circumstances of this case — the absence of any direct positive evidence that the defendants' negligence was the proximate cause of the decedent's injury; the dubious probative value of Dr. Okunieff's testimony relative to the decedent being a careful man; and the weakness of the plaintiff's proof that the decedent was in the exercise of ordinary care at and immediately prior to the injury which caused his death — we believe that it may fairly be said, that all of the evidence viewed most favorably to the plaintiff, so overwhelmingly favors the defendants that no contrary verdict based on this evidence could ever stand. Consequently, the defendant's motion for a directed verdict at the close of all the evidence should have been allowed.[66]

Both of these rulings are directly and emphatically against the former weight of authority of Illinois cases involving similar fact situations.[67] Particularly striking is the contrast of the pre-*Pedrick* case of *Carter v. Winter*[68] with *Keen v. Davis*,[69] which followed the *Pedrick* rule.[70] It is very difficult to reconcile the jury question ruling of *Winter* with the matter of law holding in the *Keen* case. Under the much more detailed, confusing, and complicated facts of *Keen*, including the obstruction of the plaintiff's view, the contributory negligence question would almost certainly have to be for the jury under the *Winter* precedent. On the other hand, under the *Keen* (*Pedrick*) rule, there seems to be only slight doubt that the contributory negligence

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[64] *Id.* at 283-84, 230 N.E.2d at 861-62.

[65] 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968).

[66] *Id.* at 50, 243 N.E.2d at 663.

[67] *See* Thomas v. Buchanan, 357 Ill. 270, 192 N.E. 215 (1934); Carter v. Winter, 50 Ill. App. 2d 467, 200 N.E.2d 528 (1964), *aff'd* 32 Ill. 2d 275, 204 N.E.2d 755 (1965), *cert. denied*, 382 U.S. 825 (1965); Lubin v. Goldblatt Bros., Inc., 37 Ill. App. 2d 437, 186 N.E.2d 64 (1962); Bracher v. Illinois Terminal R.R., 5 Ill. App. 2d 375, 125 N.E.2d 687 (1955); Holsman v. Darling State St. Corp., 6 Ill. App. 2d 517, 128 N.E.2d 581 (1955); Peterson v. Hendrickson, 335 Ill. App. 223, 81 N.E.2d 266 (1948); Savaiano v. The 12th St. Store, 330 Ill. App. 248, 70 N.E.2d 744 (1947).

[68] 50 Ill. App. 2d 467, 200 N.E.2d 528 (1964), *aff'd*, 32 Ill. 2d 275, 204 N.E.2d 755 (1965), *cert. denied*, 382 U.S. 825 (1965).

[69] 38 Ill. 2d 280, 230 N.E.2d 859 (1967).

[70] See text at note 4 *supra*.

question involved would be decided as a matter of law against the plaintiff. The impact of *Pedrick* is unmistakable.

The pre-*Pedrick* "stair and incline" cases are almost unanimous in ruling the contributory negligence question to be one for the jury.[71] So, the facts in the post-*Pedrick* case of *McInturff v. Chicago Title & Trust Co.*,[72] particularly the absence of a handrail would indicate that the contributory negligence issue would be one for the jury, but in that case, the ruling was made as a matter of law.[73] Here again, unmistakably, *Pedrick* has compelled the different result.

CONCLUSION

It seems inevitable that application of the *Pedrick* test will lead to more rulings of contributory negligence as a matter of law. After protesting that the test it laid down will not increase the frequency of rulings as a matter of law,[74] the *Pedrick* court went on to say:

> [I]n any event, the current delay at the trial level is of greater social concern than are our appellate caseloads. And since it is well settled that trial courts may constitutionally direct verdicts, minor variations in the rules governing such action can scarcely render it unconstitutional.[75]

Clearly, *Coselman v. Schleifer* is an example of the court's entry into questions which have in the past been issues to be fully tried before a jury. After holding the concepts of assumed risk and contributory negligence to be separate and distinct concepts, the court, in imputing to the plaintiff sufficient knowledge of the danger involved, ruled that she assumed the risk, choosing to follow the line of Illinois authority more lenient in allowing such rulings as a matter of law. Then, in ruling contributory negligence as a matter of law, *Coselman* showed in bold relief the increased latitude of trial courts to direct verdicts and make rulings as a matter of law.

In light of the *Pedrick* progeny, as exemplified by *Coselman*, it is highly problematical if the *Pedrick* court's characterization of its new test as a "minor" variation in the test for holding contributory negligence as a matter of law[76] is accurate. The "no evidence" test[77] is clearly no longer the law in Illinois. Simi-

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[71] See note 36 *supra*.
[72] 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968).
[73] *Id.*
[74] The court said: "That a substantial increase in the proportion of directed verdicts or judgments *n.o.v.* will be a necessary result seems highly questionable . . . ." 37 Ill. 2d 494, 511, 229 N.E.2d 504, 514 (1967).
[75] *Id.* at 511, 229 N.E.2d at 514.
[76] See text at note 75 *supra*.
[77] See text at note 41 *supra*.

larly, the "all reasonable minds would agree" test[78] is also inoperative both as to the extent it was a substitute for the "no evidence" test and in those situations where it displayed its own independent viability. The trial court can no longer merely look to see if there is little or no evidence in the plaintiff's favor before ruling contributory negligence as a matter of law. Today, under the *Pedrick* test,[79] the trial court must weigh the evidence, if only on a preliminary basis. In *McInturff v. Chicago Title & Trust Co.*,[80] the First District Appellate Court said:

> [T]he crucial question was whether it was error for the trial court to overrule the defendants' motion for a directed verdict. They [plaintiff's cited cases] are pre-*Pedrick* cases, and thereunder, a motion for directed verdict or judgment notwithstanding the verdict presented the single question of whether there was *any evidence* in the record, which standing alone and taken with its intendment most favorable to the party resisting the motion, tended to prove the material elements of such party's case.
>
> This rule was superseded by the *Pedrick* rule which provides that a motion for a directed verdict and for a judgment notwithstanding the verdict should be entered only in those cases in which *all of the evidence*, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.[81]

The *Coselman* court inferred from the plaintiff's knowledge of the condition of the stairs and her own testimony that " . . . she could or should have seen the rug had she been attentive."[82] Under the *Pedrick* test, courts are able to draw such inferences.

The impact of *Pedrick* might be summarized as follows: (1) Directed verdicts will become more frequent; (2) Judgments *n.o.v.* will become more frequent; (3) There will be more rulings as a matter of law, not only of negligence and contributory negligence, but in other areas as well. While a case such as *Coselman* simply could not have existed under any of the pre-*Pedrick*[83] tests, it is a logical application of the *Pedrick* test to a given set of facts. Whatever the intentions or expectations of the *Pedrick* court, the effect of its test is already unmistakable.

David Carlson

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[78] See text at note 50 *supra*.
[79] See text at note 4 *supra*.
[80] 102 Ill. App. 2d 39, 243 N.E.2d 657 (1968) (Supplement to Opinion on Denial of Petition for Rehearing).
[81] *Id.* at 54, 243 N.E.2d at 664-65.
[82] 97 Ill. App. 2d 123, 129, 239 N.E.2d 687, 690 (1968).
[83] See text at notes 41, 50 and 54 *supra*.