Premises Liability Law in a Nutshell

CARLTON D. FISHER
Hinshaw & Culbertson
Chicago

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I. [1.1] OVERVIEW

The law of premises liability is perhaps the most expansive of all tort law topics. People encounter activities and conditions, some expected and non-injurious and others unexpected and harmful, on a daily basis as they move to and from property owned or occupied by individuals, businesses, schools, or governmental agencies.

Slips, trips, falls, hazard exposures, fires, explosions, chemical exposures, and criminal acts can each form the basis of liability of property owners, occupiers, vendors, purchasers, managers, or contractors for personal injury, wrongful death, property damage, or commercial loss.

In order to understand the underlying bases for which premises liability may be assessed, modified, or avoided, a comprehensive knowledge of the sources of law applicable to the conditions and uses of property is necessary.

II. [1.2] SOURCES OF APPLICABLE LAW

The most succinct statements of Illinois law applicable to premises liability are found in the Illinois Pattern Jury Instructions — Civil (1995) (I.P.I. — Civil). A brief historical synopsis of Illinois premises liability law is found as an introduction to the jury instructions on owners and occupiers of Land. I.P.I. — Civil No. 120.00. The instructions deal with the specific topics of owners and occupiers of land (I.P.I. — Civil Nos. 120.01 through B120.09), liability for falls on snow and ice (I.P.I. — Civil Nos. 125.01 through B125.03), landlord and tenant (I.P.I. — Civil Nos. 130.01 through 130.03), abutting property owner (I.P.I. — Civil No. 135.01), and municipality (I.P.I. — Civil No. 140.01).

The RESTATEMENT (SECOND) OF TORTS (1975) (RESTATEMENT) is also a useful source for applicable law on premises liability cases. Although Chapter 13 of the RESTATEMENT has the bulk of the commentators’ views on liability for the condition and use of land, other sections deal with commonplace problems associated with activities and conditions on property. See, e.g., RESTATEMENT §§414A, 427A, 519, 821. See also Central Trust & Savings Bank v. Toppert, 198 Ill.App.3d 562, 554 N.E.2d 820, 143 Ill.Dec. 885 (3d Dist. 1990).

Many sections of the RESTATEMENT have been adopted by Illinois appellate courts, most notably §343, which enunciates the general rule of liability for dangerous conditions on one’s land to persons legally entitled to be there. Genaust v. Illinois Power Co., 62 Ill.2d 456, 343 N.E.2d 465 (1976). In fact, in some of the Illinois Supreme Court’s pronouncements on premises liability law, the court has gone as far as to adopt and use the language of the comments and examples of a RESTATEMENT section to support its decision. Ward v. K Mart Corp., 136 Ill.2d 132, 554 N.E.2d 223, 143 Ill.Dec. 288 (1990) (Ward); Deibert v. Bauer Brothers Construction Co., 141 Ill.2d 430, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990) (citing RESTATEMENT §§343, 343A, cmts. e, f, illus. 2, 3). Suffice it to say that the RESTATEMENT may be a fertile source of authority to help establish or preclude liability when coupled with any Illinois cases interpreting an applicable section.

Other sources of applicable law can be found in statutes such as the Americans with Disabilities Act of 1990, 42 U.S.C. §12101, et seq., the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., the Recreational Use of Land and Water Areas Act, 745 ILCS 65/1, et seq., and the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 1-101, et seq. (to name but a few); ordinances or regulations such as the Chicago Municipal Code, the BOCA Basic National Building Code recommended by the Building Officials and Code Administrators International, Inc., the Illinois Carnival and Amusement Ride Inspection Law, 56 Ill.Admin. Code, Part 6000; or industry-wide standards such as American Society for Testing and Materials (ASTM) standards on the coefficient of friction of a floor finish or wax.
Obviously, the predominant source for premises liability law is the common law as interpreted by the Illinois Supreme Court and Illinois appellate courts. Federal decisions interpreting Illinois law should not be ignored since federal courts are more likely to give an unbiased overview of Illinois law than some Illinois appellate courts, whose expressed views are more parochial.

III. [1.3] PERSPECTIVES OF ANALYSIS

Many authors have approached an analysis of this topic by categorizing the subject matter according to the status of the individual who claims injury. Others have arranged their analysis according to the type of defendant involved. Some commentators have suggested that analysis by recurring fact patterns or scenarios is the most comprehensive.

An eclectic approach that includes all three of these conceptual perspectives is perhaps the most useful, allowing the reader and the author the luxury of conjoining disparate topics when the need arises. It must be remembered that some principles apply equally to children and adults while others do not so as to afford society the ability to distinguish the liability exposure of a contractor or business from that of a homeowner or school.

IV. COMMON LAW AND STATUTORY TORT DUTIES

A. [1.4] Legal Factors Determining the Existence of a Legal Duty

In a premises liability case, the question of whether a duty exists is one of law for the courts to determine at the outset. Cunis v. Brennan, 56 Ill.2d 372, 308 N.E.2d 617 (1974). This question depends on whether the parties stood in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff. Ziemba v. Mierzwa, 142 Ill.2d 42, 566 N.E.2d 1365, 153 Ill.Dec. 259 (1991). The factors to be weighed by the court in making its duty assessment include

1. the foreseeability that the defendant’s conduct will result in injury;
2. the likelihood of injury;
3. the magnitude of the burden of guarding against it; and
4. the consequences of placing that burden on the defendant.


B. [1.5] No Common Law Duty Exists in Some Cases

In some situations, the appellate courts have concluded that no common law duty exists for an injury on the premises of a building. For instance, in Fahey v. State & Madison Property Association, 200 Ill.App.3d 437, 558 N.E.2d 192, 146 Ill.Dec. 229 (1st Dist. 1990), a building owner’s duty to exercise reasonable care to the entrants of a washroom did not include the duty to provide handrails for steps in the washroom on which the patron fell. The court specifically employed the criteria of Lance v. Senior, 36 Ill.2d 516, 224 N.E.2d 231 (1967), to arrive at its decision denying liability. This factual situation was distinguished from that of a case involving a steep and narrow stairway that was hidden by a closed door leading directly to the first step of the stairway on which plaintiff fell (Allgauer v. Le Bastille, Inc., 101 Ill.App.3d 978, 428 N.E.2d 1146, 57 Ill.Dec. 466 (1st Dist. 1981))
and that of a case in which the stairway’s appearance was deceptive due to the sameness of the floor covering, insufficient lighting, and absence of a guardrail or warning signs (Halpin v. Pekin Thrifty Drug Co., 79 Ill.App.2d 153, 223 N.E.2d 708 (3d Dist. 1967)).

In a similar fashion, there is no duty owed by a landowner to paint, stripe, or otherwise mark the nose of steps (Glass v. Morgan Guaranty Trust Co., 238 Ill.App.3d 355, 606 N.E.2d 384, 179 Ill.Dec. 552 (1st Dist. 1992)) absent evidence of a difficult-to-perceive change in elevation, inadequate lighting, physical defects, or absence of handrails. Likewise, the de minimis rule, barring actions against municipalities for minor deviations in elevation grade of sidewalk sections, is also applicable to private landowners, so that a property owner was not liable for a trip when the defect measured only one half to three fourths of an inch high. Hartung v. Maple Investment & Development Corp., 243 Ill.App.3d 811, 612 N.E.2d 885, 184 Ill.Dec. 9 (2d Dist. 1993).

Reasonable adults have been deemed to appreciate the obvious risks attendant to standing on a boat when it is being docked or walking out onto a jet airport’s tarmac without hearing protection so that no duty to warn of certain risks is ascribed to the defendant land occupier. Wilson v. Bell Fuels, Inc., 214 Ill.App.3d 355, 546 N.E.2d 200, 137 Ill.Dec. 552 (1st Dist. 1991); Nally v. City of Chicago, 190 Ill.App.3d 218, 546 N.E.2d 630, 137 Ill.Dec. 685 (1st. Dist. 1989).

C. [1.6] Statutory Duties and Exemptions

The Premises Liability Act, 740 ILCS 130/1, et seq., sets forth a specific duty owed by an owner or occupier of any premises to invitees or licensees. Section 2 of the Act specifically states:

The duty owed to [invitees and licensees] is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.

Other statutes may impose a duty on a landowner or occupier to protect certain entrants on the land from injury. A prime example is the former Structural Work Act, 740 ILCS 150/0.01, et seq.


On the other hand, some statutes promoting safety on the premises of a landowner do not create a duty on a landowner to protect a visitor from injury. For example, the Safety Glazing Materials Act, 430 ILCS 60/1, et seq., did not create a private cause of action for strict liability against a restaurant owner when the glass portion of the interior door of a restaurant broke as a patron exerted force on it. Rhodes v. Mill Race Inn, Inc., 126 Ill.App.3d 1024, 467 N.E.2d 915, 81 Ill.Dec. 793 (2d Dist. 1984).
Likewise, the Choke-Saving Methods Act, 410 ILCS 10/1, \textit{et seq.}, does not create a duty on a restaurant owner to assist or promptly summon emergency medical personnel when a patron chokes on food (\textit{Parra v. Tarasco, Inc.}, 230 Ill.App.3d 819, 595 N.E.2d 1186, 172 Ill.Dec. 516 (1st Dist. 1992)) even though the statute in question requires the restaurant to post first-aid instructions.

The Illinois Lead Poisoning Prevention Act, 410 ILCS 45/1, \textit{et seq.}, and the Chicago Municipal Code have been found to create a private cause of action (\textit{Abbasi v. Paraskevoulakos}, 296 Ill.App.3d 278, 694 N.E.2d 1064, 230 Ill.Dec. 786 (1st Dist. 1998)).

A private cause of action may exist under an Illinois statute or will be implied when there is a clear need to effect the purpose of an act. Sawyer Realty Group, Inc. \textit{v. Jarvis Corp.}, 89 Ill.2d 379, 432 N.E.2d 849, 59 Ill.Dec. 905 (1982). In order for a private cause of action to be implied, four requirements must be satisfied:

1. The plaintiff falls within the class of persons the statute is designed to benefit.
2. The plaintiff’s injury is one the statute is intended to prevent.
3. Implying the cause of action is consistent with the underlying purpose of the statute.
4. Implying a private cause of action is necessary to effect the purpose of the statute; \textit{i.e.}, a civil remedy is needed. Board of Education of City of Chicago \textit{v. A, C & S, Inc.}, 131 Ill.2d 428, 546 N.E.2d 580, 137 Ill.Dec. 635 (1989).

D. [1.7] \textbf{Tort Duties Owed to Entrants on or near Property}

The law recognizes several possible duties owed to entrants on the property of others. These duties are discussed in depth in later sections as they become relevant to the analysis. Here, however, it should be noted that a hierarchy of duties exists. Proceeding from highest to lowest, that hierarchy is

1. absolute liability for ultrahazardous or intrinsically or inherently dangerous activity (I.P.I. — Civil No. 115.01);
2. highest degree of care (owed by common carriers and innkeepers) (I.P.I. — Civil No. 100.01);
3. ordinary care for the safety of any persons lawfully on the property (I.P.I. — Civil Nos. 120.02.01, 120.02.02, 120.03.01, 120.03.02, 120.09, B120.09); and
4. refraining from wilful and wanton conduct to injure some trespassers (I.P.I. — Civil Nos. 120.02.01, 120.02.02, 120.03.01, 120.03.02, 120.07.01, 120.07.02).

V. \textbf{CATEGORYIZING ENTRANTS TO PROPERTY}

A. [1.8] \textbf{Status Categories Before September 12, 1984}

B. [1.9] Premises Liability Act

With the September 12, 1984, adoption of the Premises Liability Act, Illinois abolished the common law distinction as to the duties owed to an invitee and a licensee. As noted above, the legislature established that the duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or the acts done or omitted on them.


The Premises Liability Act did not make any changes in the law regarding the duty owed to trespassers. Additionally, it has no effect on liability under the Recreational Use of Land and Water Areas Act, 745 ILCS 65/1, et seq., which limits the liability of owners who allow their property to be used for recreational or conservation purposes.

A few Illinois cases have interpreted the Premises Liability Act as it applies to invitees and licensees. In Brown v. Jewel Cos., 175 Ill.App.3d 729, 530 N.E.2d 57, 125 Ill.Dec. 139 (4th Dist. 1988), a customer at a combined grocery and drug store was allegedly injured by a fleeing shoplifter and a pursuing security guard. The trial court dismissed plaintiff’s amended complaint, which alleged that the defendant violated §2 of the Premises Liability Act in that it failed to keep a proper lookout during the chase and failed to avoid coming in contact with the plaintiff. On appeal, the court noted that §2 of the Act abolished the distinction between invitees and licensees and prescribed a duty of reasonable care under the circumstances regarding acts or omissions committed on the premises. The court held that under the allegations of plaintiff’s amended complaint, the security guard owed a duty to plaintiff to use care not to injure her while pursuing the shoplifter. The appellate court panel reversed the dismissal of the complaint.

In Erne v. Peace, 164 Ill.App.3d 420, 517 N.E.2d 1203, 115 Ill.Dec. 517 (2d Dist. 1987), an 85-year-old visually impaired invitee was injured when she fell while on defendant’s premises. Plaintiff’s amended complaint alleged that she was lawfully on the premises, that she was visually impaired, and that defendants were aware of her condition. The trial court dismissed the pleading as failing to state a cause of action under the Premises Liability Act. On appeal, the appellate court noted that the Act had abolished the distinction between invitees and licensees with regard to the duty owed by a property owner to entrants and that the Act provided that a duty of reasonable care under the circumstances was now owed to an entrant onto land. The court held that the allegations contained in the amended complaint placed the defendants under a duty to use reasonable care to protect the plaintiff from the dangers on the premises. The appellate court consequently reversed the trial court’s dismissal, ruling that whether the property owners exercised the care required under the circumstances was a question for the jury.

Finally, in Icenogle v. Meyers, 167 Ill.App.3d 239, 521 N.E.2d 163, 118 Ill.Dec. 95 (3d Dist. 1988), plaintiff was injured while painting a metal grain bin on defendant’s property when a wooden paint applicator came into contact with a 7,200-volt power line. Count II of plaintiff’s amended complaint alleged defendant had failed to exercise reasonable care as required by §2 of the Premises Liability Act. Summary judgment was entered in defendant’s favor. The appellate court noted that the
Premises Liability Act had not altered the common law duty owed to an invitee but had only abolished the distinction between the duty owed to an invitee and that owed to a licensee. Since it was apparent from the face of his complaint that plaintiff was an invitee, the duty owed by the defendant was to exercise ordinary care. However, the court also noted that an invitee must be held to be aware of obvious and normal hazards incident to the premises. Based on the facts that plaintiff failed to allege that the power lines were on or over defendant’s premises and that plaintiff saw the wires and was aware current might be running through them, the court affirmed the award of summary judgment.

In Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992), the Illinois Supreme Court declined to abolish completely the common law distinctions between any entrant onto property, specifically between trespassers and non-trespassers. The court noted that the Illinois legislature’s then-recent reiteration of the Illinois Premises Liability Act distinction between trespassers and non-trespassers “persuade[d] [it] that society yet finds some benefit in retaining the trespasser classification.” 605 N.E.2d at 499.

C. [1.10] Types of Entrants

Although Illinois law has now divided entrants into trespassers and non-trespassers, it is still important to understand the distinctions in common law because the older cases discuss different duties and situations in which an entrant’s status changes while moving from one area of property to another.

1. [1.11] Invitees

Under the common law, an invitee is someone invited onto the premises by the owner for some business or pecuniary benefit to the owner. Ellguth v. Blackstone Hotel, Inc., 340 Ill.App. 587, 92 N.E.2d 502 (1st Dist. 1950), aff’d, 408 Ill. 343 (1951). The test for whether someone is an invitee is whether (a) entry on the premises of another is by express or implied invitation, (b) the entry is connected with the owner’s business or with an activity the owner conducts or permits to be conducted on its land, and (c) there is a mutuality of benefit or a benefit to the owner. Hopkinson v. Chicago Transit Authority, 211 Ill.App.3d 825, 570 N.E.2d 716, 156 Ill.Dec. 240 (1st Dist.), appeal denied, 141 Ill.2d 541 (1991). Illinois courts have departed from the position that an economic benefit to the owner should be the exclusive test to determine invitee status. Augsburger v. Singer, 103 Ill.App.2d 12, 242 N.E.2d 436 (2d Dist. 1968); Hamilton v. Faulkner, 80 Ill.App.2d 159, 224 N.E.2d 304 (4th Dist. 1967); Kapka v. Urbaszewski, 47 Ill.App.2d 321, 198 N.E.2d 569 (1st Dist. 1964); Drews v. Mason, 29 Ill.App.2d 269, 172 N.E.2d 383 (3d Dist. 1961); Bogovich v. Schermer, 16 Ill.App.2d 197, 147 N.E.2d 711 (4th Dist. 1958). I.P.I. — Civil No. 120.05 defines an “invitee” as a person who is on the premises by the invitation of the owner or occupant for

a. a purpose connected with the owner’s or occupant’s business;

b. an activity that the owner or occupant carries on or permits to be carried on on the premises; or

c. a mutually beneficial interest.

The invitation must be express or able to be implied from the circumstances under which the person enters the premises.

Among those now considered to be invitees are business customers and their children, patrons of a restaurant, spectators at sporting events, persons coming onto property to seek employment, independent contractors and their employees working on the premises, workers of a buyer who are
sent to a seller’s premises to remove what has been sold, firefighters, police officers, babysitters, and, specifically, an aunt who was asked by her niece to come from another state and help with the care of the niece’s children during a move from one house to another. Michael J. Polelle and Bruce L. Ottley, ILLINOIS TORT LAW, p. 461 (2d ed. 1993).

2. [1.12] Licensees

A licensee under the common law was a person who entered the premises of another by permission for no purpose connected with the pecuniary interest of the occupier. Mazzeffí v. Schwanke, 52 Ill.App.3d 1032, 368 N.E.2d 441, 10 Ill.Dec. 846 (1st Dist. 1977); Dent v. Great Atlantic & Pacific Tea Co., 4 Ill.App.2d 500, 124 N.E.2d 360 (4th Dist. 1955). A social guest was a person who went onto the premises of another by permission as an incident to hospitality or companionship and to satisfy personal purposes but, once again, for no purpose connected with the pecuniary interest of the occupier. Biggs v. Bear, 320 Ill.App. 597, 51 N.E.2d 799 (1st Dist. 1943); Krantz v. Nichols, 11 Ill.App.2d 37, 135 N.E.2d 816 (4th Dist. 1956). Incidental performance of services at the host’s request did not change the relationship. Ciaglo v. Ciaglo, 20 Ill.App.2d 360, 156 N.E.2d 376 (1st Dist. 1959).

Since social guests and licensees were treated alike under the law (Pashinian v. Haritonoff, 81 Ill.2d 377, 410 N.E.2d 21, 43 Ill.Dec. 21 (1980)), land occupiers owed them the same duties to refrain from willfully and wantonly injuring them and to warn of hidden dangers of which the owner or occupier had knowledge. Seipp v. Chicago Transit Authority, 12 Ill.App.3d 852, 299 N.E.2d 330 (1st Dist. 1973).


Although these cases and §342 of the RESTATEMENT, which deals with licensees, have little validity today, those cases that deal with licensees and find no duty to exercise ordinary care to warn of conditions that might aggravate an injury (as opposed to cause an injury) may still have validity when the duty owed to a non-trespasser is in question. Smith v. Goldman, 53 Ill.App.3d 632, 368 N.E.2d 1052, 11 Ill.Dec. 444 (2d Dist. 1977).

3. [1.13] Trespassers

A “trespasser” is simply defined as a person who goes onto the premises of another without express or implied permission or invitation or other right. I.P.I. — Civil No. 120.01. This definition has long roots in Illinois common law. Illinois Central R.R. v. Eicher, 202 Ill. 556, 67 N.E. 376 (1903); Darsch v. Brown, 332 Ill. 592, 164 N.E. 177 (1928); Trout v. Bank of Belleville, 36 Ill.App.3d 83, 343 N.E.2d 261 (5th Dist. 1976); Grimwood v. Tabor Grain Company, Division of Archer Daniels Midland Corp., 130 Ill.App.3d 708, 474 N.E.2d 920, 86 Ill.Dec. 6 (3d Dist. 1985). As noted above, the trespasser’s status as a legal creature has withstood calls for its extinction. See Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992).

As the comment to I.P.I. — Civil No. 120.01 accurately points out, one who enters land pursuant to a “privilege” is not by definition a “trespasser.” This concept is mentioned in the RESTATEMENT at §§167, 329, and 345, but it is not discussed. There are no Illinois cases decided since the passage of
the Premises Liability Act that discuss the effect of any privileges on the landowner’s duty to the entrant. Examples of these privileges are the privileges to recapture personal property, to rescue another, or to act in self-defense.

RESTATEMENT §345(1) states that the duty owed to those entering on a privilege is that of a licensee. Although three cases have discussed this section, the two older cases, West v. Faurbo, 66 Ill.App.3d 815, 384 N.E.2d 457, 23 Ill.Dec. 663 (2d Dist. 1978), and Murphy v. Ambassador East, 54 Ill.App.3d 980, 370 N.E.2d 124, 12 Ill.Dec. 501 (1st Dist. 1977), are clearly inapplicable today after passage of the Premises Liability Act, and the third case, Wadycki v. Vanee Foods Co., 208 Ill.App.3d 492, 567 N.E.2d 423, 153 Ill.Dec. 465 (1st Dist. 1990), was decided under the open and obvious danger rule in existence at the time. Section 345(2) of the RESTATEMENT articulates the duty owed to public employees performing a public duty. A discussion of this principle and the “fireman’s rule,” as enunciated in Illinois, is contained in the comment to I.P.I. — Civil No. 120.01 and §1.22 of this chapter.

D. [1.14] Shifting Entrant Status

An invitee’s status may change. The status of invitee ceases when the visitor enters a portion of the premises to which the invitation did not extend and that the owner would not reasonably expect the invitee to use in connection with the express or implied scope of the original invitation or consent. Briney v. Illinois Central R.R., 401 Ill. 181, 81 N.E.2d 866 (1948). Numerous older cases discuss scenarios in which a visitor’s status changes from that of an invitee to a licensee or trespasser. Id.; Jones v. Granite City Steel Co., 104 Ill.App.2d 379, 244 N.E.2d 427 (5th Dist. 1969); Packard v. Kennedy, 4 Ill.App.2d 177, 124 N.E.2d 55 (2d Dist. 1955); Edwards v. Lederer, 339 Ill.App. 647, 90 N.E.2d 799 (1st Dist. 1950) (abst.); Wesbrock v. Colby, Inc., 315 Ill.App. 494, 43 N.E.2d 405 (2d Dist. 1942).

Some of these cases may be of doubtful utility since changing one’s status from invitee to licensee will not change the duty owed by a landowner and because the doctrine of “scope of invitation” no longer applies to children on the property of another. American National Bank & Trust Co. v. Pennsylvania R.R., 52 Ill.App.2d 406, 202 N.E.2d 79 (1st Dist. 1964).

As one federal court has noted, the rule in Illinois is not “Once an invitee, always an invitee.” Roland v. Langlois, 945 F.2d 956, 959 (7th Cir. 1991). Although the scope of an invitation varies with the facts of the individual case, it usually extends

to the entrance to the property, and to a safe exit after the purpose is concluded; and it extends to all parts of the premises to which the purpose may reasonably be expected to take him, and to those which are so arranged as to lead him to think that they are open to him. 945 F.2d at 959 – 960, quoting W. Page Keeton et al., PROSSER AND KEETON ON TORTS §61, pp. 424 – 425 (5th ed. 1984).

However, it must be remembered that an entrant’s status is determined “at the time of her injury.” Soucie v. Drago Amusements Co., 145 Ill.App.3d 348, 495 N.E.2d 997, 999, 99 Ill.Dec. 262 (1st Dist. 1986).

The amusement or carnival industry provides two excellent examples of how an entrant’s status may change after arrival at a defendant’s property. In Soucie, supra, a carnival patron was injured after she walked inside a generator trailer parked between two carnival rides. Despite evidence that (1) the trailer was positioned in an area where patrons were expected to pass, (2) the trailer door was open with no screen door or barrier of any kind obstructing entry, (3) wooden steps facilitated entry, (4) no guards were posted, and (5) no signs warned patrons to “keep out,” the appellate court concluded as a
matter of law that the injured patron was indisputably a trespasser. Although the trial court gave jury instructions indicating that the only duty owed by the defendant was to refrain from wilfully and wantonly injuring the plaintiff, the jury returned a verdict in favor of the plaintiff.

In Roland, supra, a similar set of facts produced more favorable legal instructions for the plaintiff but a defense verdict nonetheless. Roland involved a 45-year-old man who entered the operational area of a large amusement ride and was struck in the head; no signs told him not to enter the area. Although the facts were disputed, the plaintiff claimed that an opening in fencing around the ride was an invitation to enter. The appellate court, interpreting Illinois law, found this analysis unpersuasive since it ignores what is behind the opening. The court noted:

An open fence leading into a grassy meadow, for example, would give rise to a different analysis than an open fence leading into the lion cage at the zoo. The reasonable person would have noticed the “large dangerous machine” and would have taken that factor into consideration in deciding whether the operational area of the Zipper [ride] was within the scope of his or her invitation. 945 F.2d at 961 n.8.

The federal court went on to agree with the Illinois appellate court in Soucie that a certain area of premises is beyond the scope of the original invitation even if the area is otherwise “open” and even if no signs prohibit entry. Once again, an appellate court found support for such a position in the RESTATEMENT, specifically, §332, cmt. 1:

While a customer in a department store is not an invitee if he goes behind a counter without encouragement from the salesman to do so, he is an invitee in any of the aisles unless he is notified, by a sign or otherwise, that a particular aisle is closed to customers.

[Emphasis added.] Roland, supra.

After concluding its discussion of the applicable law on scope of invitation, the court affirmed the trial court’s decision not to give jury instructions on the duty owed to an invitee, but instead to give instructions on the duties owed to two types of trespassers: the undiscovered trespasser (refrain from wilfully and wantonly injuring) and the discovered trespasser (exercise ordinary care). The jury was instructed to determine which type of trespasser the plaintiff was. The jury verdict in favor of the defendant was affirmed.

E. [1.15] Status: Question of Fact or Law

VI. [1.16] TRESPASSERS: A VANISHING BREED?

Since a trespasser comes onto the property at the trespasser’s risk, the duty of the owner or occupier is generally to refrain from wilfully and wantonly injuring the trespasser. Miller v. General Motors Corp., 207 Ill.App.3d 148, 565 N.E.2d 687, 152 Ill.Dec. 154 (4th Dist. 1990); Sumner v. Hebenstreit, 167 Ill.App.3d 881, 522 N.E.2d 343, 118 Ill.Dec. 888 (5th Dist. 1988); Soucie v. Drago Amusements Co., 145 Ill.App.3d 348, 495 N.E.2d 997, 99 Ill.Dec. 262 (1st Dist. 1986). This rule evolved out of the idea that the law does not require an owner or occupier to anticipate the presence of persons wrongfully or unexpectedly on land. Because of the harsh effect of this attitude toward trespassers, Illinois courts have developed four exceptions to the wilful and wanton standard.

First, when the trespasser is a child, the test of liability is whether the owner or occupier of the land could have foreseen harm to the child. Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955). If so, the child is owed a duty of reasonable care that will be judged according to ordinary negligence principles. See §1.17.

A second exception to the usual rule applied to trespassers occurs when there is habitual acquiescence in a trespass by a landowner and the tolerance is so pronounced that it is tantamount to permission. Mentesana v. LaFranco, 73 Ill.App.3d 204, 391 N.E.2d 416, 29 Ill.Dec. 153 (1st Dist. 1979). This exception is also known as the “permissive use” exception. In such a case, the trespasser becomes a licensee, and the duty becomes “reasonable care under the circumstances.” 740 ILCS 130/2. But note that in Skoczylas v. Ballis, 191 Ill.App.3d 1, 547 N.E.2d 565, 138 Ill.Dec. 398 (1st Dist. 1989), the appellate court affirmed the circuit court’s dismissal of a plaintiff’s complaint and held that sufficient facts were not alleged to establish that the owner habitually acquiesceded to the trespass onto his parking lot so as to constitute a license for persons to walk across his premises. The court referred to RESTATEMENT §330, cmt. c, for guidance as to what facts will establish implied consent or tolerance sufficient to constitute a license. An excellent historical recitation of this exception is found in Rodriguez v. Norfolk & Western R.R., 228 Ill.App.3d 1024, 593 N.E.2d 597, 170 Ill.Dec. 708 (1st Dist. 1992).

The third exception to the wilful and wanton standard is the “discovered trespasser” rule. Under this doctrine, an owner or occupier of property owes a duty of reasonable care to a trespasser once the trespasser’s presence is known. Beverly Bank v. Penn Central Co., 21 Ill.App.3d 77, 315 N.E.2d 110 (1st Dist. 1974); Briney v. Illinois Central R.R., 401 Ill. 181, 81 N.E.2d 866 (1948). This exception, however, applies only to an owner’s active operations on the property and not to a passive condition. Smith v. Goldman, 53 Ill.App.3d 632, 368 N.E.2d 1052, 11 Ill.Dec. 444 (2d Dist. 1977). This rule was applied in Roland v. Langlois, 945 F.2d 956 (7th Cir. 1991).

A fourth exception was carved out by the Illinois Supreme Court in Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493, 178 Ill.Dec. 699 (1992). The court relied on RESTATEMENT §337, “Artificial Conditions Highly Dangerous to Known Trespassers,” and held that “if a landowner knows of or reasonably anticipates the presence of a trespasser in a place of danger, the landowner should be held to a duty of ordinary care to protect and/or warn the trespasser.” 605 N.E.2d at 499. In Lee, the Illinois Supreme Court reversed the appellate court (205 Ill.App.3d 163 (1st Dist. 1990)) and found that the CTA owed a duty of ordinary care to plaintiff’s decedent, who was found dead in a CTA right-of-way after coming into contact with the third rail, which supplies electric power to CTA trains, when he stopped to urinate while walking home from a party in the early hours of the morning.

To establish a duty under RESTATEMENT §337, the trespasser must show that the landowner knew or had reason to know of the trespasser’s presence and that the condition was of such a nature
that the landowner had reason to believe that a trespasser would not discover it. If those two conditions are met, the landowner owes the trespasser a duty of ordinary care to warn the trespasser of the condition. Section 337 provides:

A possessor of land who maintains on the land an artificial condition which involves a risk of death or serious bodily harm to persons coming in contact with it, is subject to liability for bodily harm caused to trespassers by his failure to exercise reasonable care to warn them of the condition if

(a) the possessor knows or has reason to know of their presence in dangerous proximity to the condition, and

(b) the condition is of such a nature that he has reason to believe that the trespasser will not discover it or realize the risk involved.

Analyzing the two-prong analysis of §337, the Illinois Supreme Court noted that the first prong of the analysis was satisfied by the CTA stipulation that it could reasonably anticipate persons contacting the third rail at the grade level six and one-half feet from the busy sidewalk and being killed or seriously injured by that contact. With the first prong satisfied, the Supreme Court turned to the second prong to determine the nature of the condition and the adequacy of the warnings. The court found that there were no warnings at the crossing of the existence or the location of the third rail and its highly charged electrical constituency. The court found that the likelihood of injury from contact with a third rail was great and that the existence of feasible, available, alternative methods to guard and/or warn of the third rail satisfied the second prong.

Of course, this did not end the analysis because the plaintiff’s conduct was at issue with respect to proximate cause. The court affirmed the reduction of the verdict by 50 percent for the plaintiff’s contributory negligence since the plaintiff’s inability to comprehend the danger through either his ignorance or his intoxication was a proximate cause of his death. The Supreme Court recognized its holding represented a “slight departure from the traditional rule regarding the duty owed trespassers.” Lee, supra, 605 N.E.2d at 501. The court believed its holding to be reflective of prevailing social policies, stating that “[i]n the choice of competing considerations of societal policy, the need for protection against the reasonably foreseeable risk of death or severe personal injury outweighs the freedom of action that would otherwise characterize the relation of the possessor of land to a trespasser.” Id., citing Imre v. Riegel Paper Corp., 24 N.J. 438, 132 A.2d 505, 510 (1957).

One commentator who was involved in the trial of the case noted that while the court’s ruling was perhaps a departure from the traditional ways in which Illinois appellate courts have treated trespassers, the so-called “departure” was contemplated years ago by the drafters of the RESTATEMENT and was in line with the laws of other states. Geoffrey L. Gifford, Lee v. CTA: A Modest Change in the Duty Towards Trespassers, 81 Ill.B.J. 184 (1993).

This case clearly illustrates the need for practitioners to be conversant with sections of the RESTATEMENT that can be used as a sword or a shield. For example, although §333 states the general rule applicable to trespassers (no duty to exercise reasonable care), it specifically states that it is subject to the exceptions of §§334 – 339. Sections 334, 335, 336, and 338 have been cited only twice by the cases mentioned above. Miller, supra; Lee, supra. Their application to scenarios involving activities highly dangerous to constant trespassers on limited areas (§334), artificial conditions highly dangerous to constant trespassers on limited areas (§335), activities dangerous to known trespassers (§336), or controllable forces dangerous to known trespassers (§338) is yet to be seen.
Being conversant with the sections of the RESTATEMENT and spouting the language of the “place of danger” exception do not guarantee that principles of premises liability law will have application to a case. In *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213, 665 N.E.2d 1260, 216 Ill.Dec. 703 (1996), the Illinois Supreme Court had the opportunity to examine whether the place of danger exception applies when an injured trespasser arrives at an alleged place of danger. The plaintiff’s decedent in *Rhodes* was discovered lying in a warming house on the defendant’s commuter rail route. Although the jury returned a verdict in favor of the plaintiff, which was upheld by the appellate court, the Illinois Supreme Court found no application of the place of danger exception since to accept the plaintiff’s interpretation of the exception would render all premises places of danger once an injured trespasser arrived there. Since the plaintiff did not contend that the decedent’s head injury was caused by a condition of the defendant’s premises or activities conducted thereon by the defendant nor that by virtue of the decedent’s presence on the premises he was in any danger of being injured by a moving train or high voltage rail, the court found that the place of danger exception did not apply. It stated that the exception does not arise simply because a trespasser is discovered in an injured state on the landowner’s premises. Thus, the court found that the only duty owed to the decedent if he was a trespasser was to refrain from wilful and wanton injury.

Moreover, the court found that the principles of premises liability law were not implicated in this case since there was no evidence that any condition or activity on the defendant’s premises caused the decedent’s injury. The only theory of liability against the defendant was that the defendant had a duty to take some affirmative action to aid the decedent because the decedent was discovered injured on the defendant’s premises. (Interestingly, the defendant in *Rhodes* did not challenge the imposition of the duty to take affirmative action if the decedent was an invitee.) The court agreed that Illinois law does not support the imposition of a duty on landowners to take affirmative action to aid injured trespassers. It left open the question of whether the relationship between a landowner and an invitee would give rise to a duty to take affirmative action to aid.

VII. CHILDREN: A SPECIAL BREED?

A. [1.17] Duty of Owners and Occupiers

The common law categories of invitee, licensee, and trespasser are not applicable in deciding whether an owner or occupier of land is at fault for an injury to a child. *American National Bank & Trust Co. v. Pennsylvania R.R.*, 52 Ill.App.2d 406, 202 N.E.2d 79 (1st Dist. 1964). There are four seminal Illinois Supreme Court decisions interpreting premises liability law applicable to children.

In abolishing the “attractive nuisance” doctrine, the now-rejected idea that a dangerous condition had to “lure” the child onto the premises, the decision in *Kahn v. James Burton Co.*, 5 Ill.2d 614, 126 N.E.2d 836 (1955), involved an 11-year-old boy who was injured when a lumber pile, delivered by a defendant to an empty lot the day before it was to be used by a co-defendant in constructing a house, toppled over when the boy climbed onto it. The *Kahn* doctrine was enunciated as follows:

> [A]n exception exists where the owner or person in possession knows, or should know, that young children habitually frequent the vicinity of a defective structure or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of appreciating the risk involved, and where the expense or inconvenience of remedying the condition is slight compared to the risk to the children. In such cases there is a duty upon the owner or other person in possession and control of the premises to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it. 126 N.E.2d at 842.
Illinois appellate courts have uniformly interpreted the Kahn doctrine to mean that a person must now use ordinary care to protect children from dangerous conditions whether created by the person or found on his property.

NOTE: Although the attractive nuisance doctrine has been abandoned in Illinois, the element of allurement or attraction is still significant as it indicates that a child’s trespass should have been anticipated. Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995).

Since the Kahn decision, Illinois courts have developed a four-part test to determine the foreseeability of injury to children on a person’s property. This test, succinctly stated in I.P.I. — Civil No. 120.04 (the burden of proof instruction for child trespassing cases), requires the child to show that

1. the owner or occupier of the property knew or should have known that children frequent the property;
2. a defective structure or dangerous condition or agency was present on the property;
3. the structure or dangerous condition or activity was likely to injure children because they are incapable, because of age and maturity, of appreciating the risk involved; and
4. the expense or inconvenience of remedying the defective structure or dangerous condition would have been slight when compared to the risk to children.

Early appellate court decisions presaged or used the Kahn doctrine to require owners to protect children from dangerous, nonobvious conditions such as unguarded excavations (Melford v. Gaus & Brown Construction Co., 17 Ill.App.2d 497, 151 N.E.2d 128 (1st Dist. 1958)), unguarded edges of a parking lot being paved (Kleren v. Bowman, 15 Ill.App.2d 148, 145 N.E.2d 810 (2d Dist. 1957)), or defective rungs on a homemade ladder at a construction site (Wilinski v. Belmont Builders, 14 Ill.App.2d 100, 143 N.E.2d 69 (1st Dist. 1957)).

Later Illinois Supreme Court decisions continued to recognize that the duty owed to children is essentially a negligence concept and based liability on the foreseeability of injury to children. In Corcoran v. Village of Libertyville, 73 Ill.2d 316, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978), the parents of a two-year-old child brought an action against the village, township, and county to recover damages for injuries that resulted when the child fell into a ditch owned by the village and managed, maintained, and controlled by the township and county. Dismissal of the complaint was upheld by the Supreme Court, which noted that unless an owner or occupier of land has reason to know that children of very tender age are likely to roam unattended onto the premises, the law will impose a duty on the owner or occupier to remedy only conditions that are dangerous to children generally.

In Cope v. Doe, 102 Ill.2d 278, 464 N.E.2d 1023, 80 Ill.Dec. 40 (1984) (Cope), a tenant brought a wrongful death action against owners of an apartment complex after her seven-year-old son fell through ice and drowned in a retention pond on the property. The Supreme Court affirmed the granting of defendants’ motion for judgment notwithstanding the verdict, holding that the defendants owed no duty to the decedent. The court observed that a landowner has a duty to remedy a condition that is likely to cause injury to children who, due to their age, would not be expected to comprehend the risks. However, the court held that the danger of drowning in a pond was an obvious danger that children would be expected to appreciate, so the defendants had no duty to remedy the condition.
In *Logan v. Old Enterprise Farms, Ltd.*, 139 Ill.2d 229, 564 N.E.2d 778, 151 Ill.Dec. 323 (1990), a 15-year-old boy was injured when he fell from a ladder he had climbed to disentangle a rope swing hanging from a tree. The Supreme Court held that the property owner and the church that sponsored the picnic on the property were entitled to summary judgment because the plaintiffs had presented no evidence to support their allegations that a dangerous condition existed on the property and thus failed to establish the existence of a duty on which liability could be based. The court concluded that the risk of falling out of the tree was an obvious danger that the boy was reasonably expected to understand and appreciate.

With the exception of those cases involving mostly construction activities and nonobvious risks, such as jumping on and off slow-moving trains (*Engel v. Chicago & North Western Transportation Co.*, 186 Ill.App.3d 522, 542 N.E.2d 729, 134 Ill.Dec. 383 (1st Dist.), *appeal denied*, 128 Ill.2d 662 (1989)), the appellate courts have become less sympathetic to children’s claims against land occupiers. This loss of sympathy is due in large measure to the recognition that even the youngest children, even those not capable of being guilty of contributory negligence, are capable of appreciating “obvious” risks.


**B. [1.18] Effect of Ward v. K Mart**

As §1.21 of this chapter notes in detail, the Illinois Supreme Court decision in *Ward* held that the “obviousness of a risk” may not negate a defendant’s liability but instead may be a factor in assessing a plaintiff’s contributory negligence. Several attempts have been made to establish a modification to the *Cope* line of cases (see §1.17 above) involving obvious risks appreciated by a child. To date, these challenges have been unsuccessful.

The Illinois Supreme Court has made it clear that there are many dangers, such as fire, water, and falling from a height, that a child allowed to be at large is expected to fully understand and appreciate. Notable Supreme Court cases include *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 383 N.E.2d 177, 180, 22 Ill.Dec. 701 (1978) (risk of falling into ditch is one that two-year-old child can be expected to recognize and appreciate); *Cope v. Doe*, 102 Ill.2d 278, 464 N.E.2d 1023, 1028, 80 Ill.Dec. 40 (1984) (when seven-year-old drowned in partially frozen retention pond, court found that pond was not dangerous condition, but open, ordinary body of water that presented risk of falling in and drowning, peril boy was expected to appreciate and avoid); and *Logan v. Old Enterprise Farms, Ltd.*, 139 Ill.2d 229, 564 N.E.2d 778, 784, 151 Ill.Dec. 323 (1990) (when fifteen-year-old youth fell from tree and was injured, court concluded risk of falling out of tree was obvious danger). When a condition complained of presents an obvious danger or risk that children are expected to appreciate and avoid, there is no duty imposed on the defendant to remedy the condition because there is no reasonably foreseeable risk of harm. *Corcoran, supra*. 383 N.E.2d at 181; *Cope, supra*, 464 N.E.2d at 1027; *Logan, supra*, 564 N.E.2d at 782.

In *Logan*, the court traced the history of numerous preceding appellate decisions holding that young children are capable of appreciating the obvious risk of falling from a height. 564 N.E.2d at 783. The cases specifically mentioned in *Logan* are *Merkousko v. Janik*, 14 Ill.App.3d 343, 302
N.E.2d 390, 393 (1st Dist. 1973) (when seven-year-old fell from tree onto sidewalk and alleged defendants negligently piled dirt around trunk of tree enabling him to climb tree, court held that danger, if any, was simple danger of falling, which should have been obvious to boy); Bazos v. Chouinard, 96 Ill.App.3d 526, 421 N.E.2d 566, 569, 51 Ill.Dec. 931 (2d Dist. 1981) (when ten-year-old fell while jumping from picnic table to tree limb, court concluded there was nothing unsuspecting about circumstances confronting her and she should have appreciated risks of her activity); Knapp by Rangos v. City of Decatur, 160 Ill.App.3d 498, 513 N.E.2d 534, 538, 112 Ill.Dec. 120 (4th Dist. 1987) (when six-year-old fell from sand pile located 100 feet from elementary school next to concrete and brick surface, court determined that neither location nor condition of sand pile was likely to cause injury because of child’s immaturity or inability to appreciate risk because falling was obvious risk capable of appreciation by even very young children); Batzek v. Betz, 165 Ill.App.3d 399, 519 N.E.2d 87, 89, 116 Ill.Dec. 497 (3d Dist. 1988) (fourteen-year-old was expected to appreciate and avoid obvious risk involved in climbing tree; because risk was obvious, court held there was no reasonably foreseeable risk of harm and, thus, no duty to protect against plaintiff’s action of climbing tree); Salinas v. Chicago Park District, 189 Ill.App.3d 55, 545 N.E.2d 184, 188, 136 Ill.Dec. 660 (1st Dist. 1989) (eight-year-old “mongoloid” child should have been able to appreciate dangers involved in falling from slide); and Swearingen v. Korfist, 181 Ill.App.3d 357, 537 N.E.2d 365, 368 – 369, 130 Ill.Dec. 298 (2d Dist. 1989) (fifteen-year-old who was injured when he fell from pulley device between two trees could appreciate general danger of falling from heights).

Although not mentioned in Logan, the following appellate decisions, which also precede Logan, stand for the same proposition: Newby by Newby v. Lake Zurich Community Unit District 95, 136 Ill.App.3d 92, 482 N.E.2d 1061, 1071, 90 Ill.Dec. 778 (2d Dist. 1985) (seventeen-year-old who slipped and fell climbing tree to gain access to field house could appreciate the risk); Alop by Alop v. Edgewood Valley Community Association, 154 Ill.App.3d 482, 507 N.E.2d 19, 22, 107 Ill.Dec. 355 (1st Dist. 1987) (when six-year-old fell from slide onto asphalt surface, court affirmed entry of summary judgment for defendants and held that falling from slide onto asphalt is risk children frequently encounter and one this six-year-old should have been aware of and appreciated); Hagy v. McHenry County Conservation District, 190 Ill.App.3d 833, 546 N.E.2d 77, 85, 137 Ill.Dec. 453 (2d Dist. 1989) (court affirmed trial court’s holding that danger presented to fifteen-year-old plaintiff by diving from height of 8 to 12 feet into creek was obvious one and, thus, defendant owed plaintiff no duty).

Numerous appellate courts since Logan and Alop hold that no duty is owed to a minor who purposely encounters an open and obvious condition and the specific risk of falling from a height. Schnering v. Midlothian Park District, 219 Ill.App.3d 664, 579 N.E.2d 908, 912, 162 Ill.Dec. 94 (1st Dist. 1991) (summary judgment was appropriate when four-year-old should have been aware of obvious risk posed by opening in platform located four feet above ground through which he fell); Cozzi v. North Palos Elementary School District No. 117, 232 Ill.App.3d 379, 597 N.E.2d 683, 685, 173 Ill.Dec. 709 (1st Dist. 1992) (eleven-year-old could appreciate risk of playing on eleven-foot jungle gym from which he fell, so summary judgment for defendant was appropriate); Barrett v. Forest Preserve District of Cook County, 228 Ill.App.3d 975, 593 N.E.2d 990, 994, 171 Ill.Dec. 170 (1st Dist. 1992) (when sixteen-year-old fell from rope swing into ravine, court affirmed summary judgment for defendant and held that plaintiff was expected to appreciate and avoid obvious risk involved in swinging over deep ravine from 30-foot rope; plaintiff’s argument that danger was not obvious was unpersuasive when plaintiff testified she had to physically walk down into ravine to retrieve rope and walk back up hill with it.)

With respect to the dangers associated with water, Illinois appellate courts have reaffirmed the “obvious risk” rule notwithstanding the Ward decision as applied to cases involving children and homeowners (Englund v. Englund, 246 Ill.App.3d 468, 615 N.E.2d 861, 186 Ill.Dec. 57 (2d Dist. 1993); Stevens v. Riley, 219 Ill.App.3d 823, 580 N.E.2d 160, 162 Ill.Dec. 534 (2d Dist. 1991)).

The latest Illinois Supreme Court case on children and obvious conditions is Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995), in which a six-year-old suffered serious injury after he nearly drowned in a swimming pool. At the time of the accident, the pool was surrounded by a gated and locked fence. The child entered the swimming pool area by climbing over the fence with the aid of a “utility pedestal” that had been erected by Consolidated, a telephone company, outside, but in close proximity to, the fence. The plaintiff sued Consolidated for ordinary negligence. On appeal, after Consolidated’s motion to dismiss was granted, the plaintiff argued that because Consolidated was not the owner or occupier of the land, premises liability concepts did not apply. Specifically, the plaintiff contended that Consolidated should not be allowed to avail itself of the “special protections” available to landowners and occupiers such as the “open and obvious” exception. Consolidated countered by arguing that its status was irrelevant and, therefore, it had no duty to protect the plaintiff from the obvious perils of the swimming pool.

Relying on its decision in Kahn v. James Burton Co., 5 Ill.2d 614, 126 N.E.2d 836 (1955), the Illinois Supreme Court agreed with Consolidated and determined that the test of liability was the foreseeability of harm regardless of the status of the alleged creator of a dangerous condition. The Supreme Court concluded that “there is absolutely no reason, either in law or in logic, to preclude operation of the obvious danger exception” to a nonowner or occupier. 660 N.E.2d at 872. Applying the open and obvious danger doctrine, the court concluded that the dangers presented by the swimming pool were obvious to the plaintiff and therefore held that Consolidated owed no legal duty to the plaintiff.

C. [1.19] Duty of Parental Supervision


It is always unfortunate when a child gets injured while playing, but a person who is merely in possession and control of the property cannot be required to indemnify against every possibility of injury thereon. The responsibility for a child’s safety lies primarily with its parents, whose duty it is to see that his behavior does not involve danger to himself.

While the primary responsibility for injury to very young children should be placed on parents of children, owners and occupiers of land are not absolved of all duty to very young children simply because of their parents’ responsibility. Landowners will be absolved, however, when it is shown that a child was injured as a result of obvious danger while being supervised by its parents or when its parents knew of the existence of a dangerous condition that caused the child’s injury. Stevens v. Riley, 219 Ill.App.3d 823, 580 N.E.2d 160, 162 Ill.Dec. 534 (2d Dist. 1991), appeal denied, 143 Ill.2d 648 (1992).

Parental responsibilities were redefined in Cates v. Cates, 156 Ill.2d 76, 619 N.E.2d 715, 189 Ill.Dec. 14 (1993). In this case, parental immunity was abolished in cases involving negligence when the conduct is not inherent to the parent-child relationship.
VIII. INVITEES: A WELL-PROTECTED BREED?

A. [1.20] General Rules

In *Genaust v. Illinois Power Co.*, 62 Ill.2d 456, 343 N.E.2d 465, 472 (1976), the Supreme Court of Illinois found that the “Restatement (Second) of Torts, section 343, correctly states the settled law regarding the liability of possessors of land to invitees.” Section 343 provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

*See also Longnecker v. Illinois Power Co.*, 64 Ill.App.3d 634, 381 N.E.2d 709, 21 Ill.Dec. 382 (5th Dist. 1978); *Chapman v. Foggy*, 59 Ill.App.3d 552, 375 N.E.2d 865, 16 Ill.Dec. 758 (5th Dist. 1978). Section 343 has been adopted by Illinois appellate courts in cases too numerous to mention since the *Genaust* opinion.

The “notice” requirement of RESTATEMENT §343 has long been recognized in Illinois decisions. The property owner or occupier must have either “actual” or “constructive” notice of the dangerous condition in order to impose liability. If there is no evidence that the owner knew or should have discovered the condition had ordinary care been exercised, liability cannot be imposed. Section 343 has no applicability when there is evidence that the dangerous condition was created by the defendant, its agents, or their activities. *Briney v. Illinois Central R.R.*, 401 Ill. 181, 81 N.E.2d 866 (1948). In such cases, the landowner has a duty to exercise ordinary care for the safety of those lawfully on the property. See I.P.I. — Civil No. 120.00.

Landowners have a duty to provide an invitee with reasonably safe means of ingress and egress, both within the boundaries of the premises and beyond, depending on the facts of the case. *McDonald v. Frontier Lanes, Inc.*, 1 Ill.App.3d 345, 272 N.E.2d 369 (2d Dist. 1971); *Seipp v. Chicago Transit Authority*, 12 Ill.App.3d 852, 299 N.E.2d 330 (1st Dist. 1973). The duty to provide safe ingress or egress may not be based solely on a defendant’s status as a landowner; rather, it may also be based on express consent. *Slager v. Commonwealth Edison Co.*, 230 Ill.App.3d 894, 595 N.E.2d 1097, 172 Ill.Dec. 427 (1st Dist. 1992). Other well-recognized duties include the duty to illuminate properly, to give adequate warning, or to repair a known dangerous condition. *Cooley v. Makse*, 46 Ill.App.2d 25, 196 N.E.2d 396 (2d Dist. 1964).

The key question is what is an invitee entitled to expect? As RESTATEMENT §343, cmt. d., points out:

An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.
Section 341 discusses “conditions” on the premises for which the landowner must provide protection. A similar role applies to “activities” that are dangerous to invitees. Section 341A provides:

A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

The only Illinois case citing this section is Deerhake v. DuQuoin State Fair Association, Inc., 185 Ill.App.3d 374, 541 N.E.2d 719, 133 Ill.Dec. 508 (5th Dist.), appeal denied, 127 Ill.2d 613 (1989). In Deerhake, after one spectator was killed and another seriously injured in a motorcycle accident at an unsanctioned drag race held at a racetrack, the decedent’s widow and the injured man sued the owner of the racetrack. The trial court entered judgment on a jury verdict for the plaintiffs. In affirming, the appellate court held that the defendant owed a duty to protect invitees from the dangers associated with unauthorized drag racing because it had notice of the negligent acts being performed by third parties on its premises, did nothing to prevent the illegal activity, and knew of prior accidents that happened at the unsanctioned drag races.

B. [1.21] Open and Obvious Hazards After Ward v. K Mart

RESTATEMENT §343, cmt. a, specifically states that §343 should be read together with §343A. Section 343A(1) provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Read together, §343A(1) limits the scope of liability stated in §343.


There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing
so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

*Ward* provided the facts with which the Illinois Supreme Court adopted the rationale of §343A and comment f in toto.

In *Ward*, the court decided that if an owner or occupier has reason to suspect that guests or workers on the premises may not appreciate a danger because they are distracted or preoccupied, this becomes a fact question as to the owner’s negligence as well as an issue as to the possible contributing negligence of the plaintiff. George Ward was a store customer who, when exiting the store at the same place he entered while carrying a large, bulky item that partially obscured his vision, collided with a five-foot-tall concrete post located near the exit. A jury verdict in favor of Mr. Ward was taken away by the trial court in granting the defendant’s motion for judgment notwithstanding the verdict. The Supreme Court reversed and remanded the case with directions to enter a verdict in favor of the plaintiff for an amount equal to plaintiff’s damages less the jury verdict percentage attributable to the plaintiff’s contributory negligence.

The court specifically found that “a condition may be so blatantly obvious and in such position on the defendant’s premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition.” 554 N.E.2d at 230. As noted above, this principle has been applied in cases involving children since the *Ward* decision. See §1.18. This principle is perfectly consistent with §343A, illus. 1, which hypothesizes:

The A Company has in its store a large front door, made of heavy plate glass. The door is well lighted and plainly visible, and its existence is obvious to any person exercising ordinary attention and perception. B, a customer in the store, while preoccupied with his own thoughts, mistakes the glass for an open doorway, and runs his head against it and is injured. A Company is not liable to B.

The court found unpersuasive the claim that the adoption of comparative negligence should result in the elimination of those common law decisions that act as absolute bars to recovery. The court also found unpersuasive the notion that its decision would require landowners to satisfy an impossible burden: make the premises injury-proof. Instead, the court found that in those cases involving known or obvious risks or conditions that are not so blatant as to make a defendant immune from liability, the finder of fact must determine

1. whether the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant’s duty; and
2. the extent, if any, of plaintiff’s contributory negligence.

Therefore, in those cases in which §343A is applicable, although summary judgment for a defendant is not possible, a finder of fact could still find in favor of a defendant if the first query is answered in favor of the defendant.

The Supreme Court has had the opportunity to apply the holding in *Ward* in six subsequent cases. In *Deibert v. Bauer Brothers Construction Co.*, 141 Ill.2d 430, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990), the court affirmed a circuit court verdict and appropriate reduction in the jury verdict for contributory negligence. *Deibert* involved a construction setting in which the plaintiff was injured.
when he stepped in a tire rut after exiting a portable bathroom. The plaintiff had looked up as he came out of the bathroom because workers in the past had thrown plasterboard and other construction materials off the balcony above the bathroom. The Supreme Court used two more examples from RESTATEMENT §343A, illus. 2 and 3, to justify its decision.

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

The court went on to emphasize that its decision would not require landowners to ensure or guarantee the safety of its invitees. It noted, as RESTATEMENT §343A, cmt. e, provides, that a plaintiff has a responsibility for his own safety and is held to the same degree of awareness as a defendant; however, a defendant’s duty does not end “if the defendant had reason to expect that the plaintiff’s attention would be distracted so that the plaintiff would not discover what is obvious.” 566 N.E.2d at 247 – 248. Once again, the Supreme Court declined to abolish the obvious danger rule.

In the second case, American National Bank & Trust Company of Chicago v. National Advertising Co., 149 Ill.2d 14, 594 N.E.2d 313, 171 Ill.Dec. 461 (1992), the Supreme Court found that a power line with which the decedent came into contact was an obvious condition. A co-worker never saw what actually happened and never saw the decedent make contact with the power line. The court also found that the decedent was distracted by having to watch where to place his feet below him while the power line was above him. Notwithstanding the lack of personal knowledge of the co-worker, the court stepped forward and defined the distraction as a moment of forgetfulness for the plaintiff given these facts.

The distraction exception enunciated in American National Bank & Trust Company was recently reexamined in Rivas v. Westfield Homes of Illinois, Inc., 295 Ill.App.3d 304, 692 N.E.2d 1359, 230 Ill.Dec. 193 (2d Dist. 1998). In Rivas, plaintiff attempted to move an obvious stack of large drywall sheets away from a window when they fell on top of him. 692 N.E.2d at 1360. In affirming summary judgment for the defendant builder, the court noted that Rivas knew exactly what he was doing and that nothing distracted him or interfered with his actions. 692 N.E.2d at 1363.

In the third case, the Supreme Court held that the Ward open and obvious doctrine also applies to nonowners or occupiers of land such as contractors, adjacent landowners, or creators of conditions on adjacent land. Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill.2d 110, 660 N.E.2d 863, 214 Ill.Dec. 156 (1995). The Mt. Zion decision illustrates the Supreme Court’s recognition of the illogical dichotomy that would result if a legal duty were imposed on a nonowner or occupier while an owner or occupier was relieved of liability under the open and obvious doctrine. Per Mt. Zion, it would be an incongruous result to hold liable the more distant or removed defendant rather than the owner or occupier that may successfully avail itself of the open and obvious defense.

In the fourth case, Bucheleres v. Chicago Park District, 171 Ill.2d 435, 665 N.E.2d 826, 216 Ill.Dec. 568 (1996), the court faced the issue of whether the open and obvious doctrine should be
rejected or greatly modified because of the principles of comparative negligence. After noting that this argument had been rejected on three previous occasions (Dunn v. Baltimore & Ohio R.R., 127 Ill.2d 350, 537 N.E.2d 738, 130 Ill.Dec. 409 (1989); Ward, supra; Deibert, supra), the Supreme Court affirmed the continuing viability of the open and obvious doctrine, rejected the notion that the doctrine should be considered an affirmative defense, and emphasized that the existence of a defendant’s duty is separate and distinct from the issues of a plaintiff’s contributory negligence and the parties’ comparative fault. Applying these principles to the circumstance of a plaintiff seriously injured when he dove into Lake Michigan from the park district’s seawalls, the court noted that the “forgetfulness or distraction” exception to the open and obvious no liability rule was not present in Bucheleres. 665 N.E.2d at 834. Although the court noted that “Illinois law does not view the existence of an open and obvious condition as an automatic or per se bar to the finding of a legal duty,” it found that Lake Michigan, as a large body of water with uncertain or fluctuating water levels and bottom composition, presents open and obvious risks to lakefront patrons who dive into the water from concrete seawalls. 665 N.E.2d at 833. After finishing its analysis of the open and obvious doctrine, the court conducted a traditional analysis of the imposition of a duty on a defendant. In this case, the guarding against injury and the consequences of placing that burden on the defendant all gravitated in favor of imposing no duty on the defendant.

In the fifth Supreme Court case, LeFever v. Kemlite Company, Division of Dyrotech Industries, Inc., 185 Ill.2d 380, 706 N.E.2d 441, 235 Ill.Dec. 886 (1998), the court addressed the “deliberate encounter exception” to the open and obvious doctrine. That exception states that if a defendant could have reasonably foreseen that a plaintiff would encounter certain risks during the fulfillment of employment obligations, then liability may be imposed and the open and obvious danger rule will not preclude liability. The court noted that by formally adopting the deliberate encounter exception to the open and obvious doctrine, it was not rendering property owners insurers of invitees’ welfare. Its finding that a landowner may reasonably be expected in certain circumstances to predict that an invitee may suffer harm from an open and obvious danger was conclusive only of the possessor’s duty, and then only partially so, since foreseeability alone is not determinative of duty. The court noted that any plaintiff claiming that a premises owner owed the plaintiff a duty of care cannot prevail unless the plaintiff also proves that the owner’s efforts to protect invitees from harm were inadequate. The court reminded readers that the openness or obviousness of a hazard will have a bearing on the plaintiff’s ultimate recovery, but it will never be wholly determinative of the landowner’s liability.

The existence of a known or obvious danger is not an automatic or per se bar to the finding of a legal duty on the part of a land owner. Bucheleres, supra. “[T]he existence of a duty in the face of a known or obvious condition is subject to the same analysis of duty as is necessary in every other claim of negligence.” Ralls v. Village of Glendale Heights, 233 Ill.App.3d 147, 598 N.E.2d 337, 174 Ill.Dec. 140 (2d Dist. 1992). The danger presented by a condition is examined to determine if it was known or obvious. A “known” condition includes not only knowledge of the existence of the condition, but also an appreciation of the danger it involves. An “obvious” condition is one in which both the condition and the risk of the condition are apparent to and would be recognized by a reasonable person in the position of the plaintiff, exercising ordinary perception, intelligence, and judgment. Huggins v. Village of Bishop Hill, 294 Ill.App.3d 466, 690 N.E.2d 656, 228 Ill.Dec. 897 (3d Dist. 1998). The issue of whether a condition is obvious is determined by the objective knowledge of a reasonable person, not the plaintiff’s subjective knowledge. Deibert, supra; Menough v. Woodfield Gardens, 296 Ill.App.3d 244, 694 N.E.2d 1038, 230 Ill.Dec. 760 (1st Dist. 1998).

The sixth Supreme Court case, Jackson v. TLC Associates, Inc., 185 Ill.2d 418, 706 N.E.2d 460, 235 Ill.Dec. 905 (1998), involved the risk associated with diving. Distinguishing Bucheleres, supra, the court noted that the risk involved in Jackson was the presence of a submerged pipe whose location was variable and could not be detected by swimmers, as opposed to the risk of drowning or the risk of injury from diving into water that is too shallow.


One of the most aggressive decisions to date is Zumbahlen v. Morris Community High School, District No. 101, 205 Ill.App.3d 601, 563 N.E.2d 1228, 151 Ill.Dec. 122 (3d Dist. 1990), appeal denied, 137 Ill.2d 673 (1991). In this case, the appellate court reversed the granting of summary judgment, finding there was no evidence of distraction or forgetfulness.


At the time of the final draft of this chapter in June 1999, one appellate court considered the most recent Illinois Supreme Court open and obvious decisions and decided that summary judgment was appropriate for a defendant that had erected and maintained a ladder and rope swing that were connected to a tree at its beach adjacent to the lake and that it allegedly intended swimmers to use to swing out over the lake and fall or dive into it. Bier v. Leanna Lakeside Property Association, No. 2-98-0331, 1999 WL 108195 (2d Dist. Mar. 3, 1999). Distinguishing Jackson and LaFever, supra, the appellate court decided that the risk was open and obvious and akin to the risk that the minor plaintiff appreciated in Alop by Alop v. Edgewood Community Association, 154 Ill.App.3d 482, 507 N.E.2d 19, 107 Ill.Dec. 355 (1st Dist. 1987). Consequently, summary judgment was proper for the defendant. However, the plaintiff’s statutory cause of action based on the Illinois Swimming Pool and Bathing Beach Act, 210 ILCS 125/1, et seq., was permissible since plaintiff’s expert opined in an affidavit that if the defendant had applied for a license to operate its bathing beach, the presence of the rope swing would have resulted in a denial of its license application. The court concluded by stating that on these facts the issues of comparative negligence and proximate cause should be determined by a jury. The moral of the story: Even if the open and obvious common law doctrine bars a plaintiff from proceeding with her case, the existence of a statutory cause of action may keep a plaintiff’s case alive.
C. Special Rules for Certain Entrants

1. [1.22] Emergency Personnel

Illinois law on the duty of care owed to both firefighters and police officers is consistent with RESTATEMENT §345(2), which states:

The liability of a possessor of land to a public officer or employee who enters the land in the performance of his public duty, and suffers harm because of a condition of a part of the land held open to the public, is the same as the liability to an invitee.

In Illinois, a landowner owes a firefighter a duty of reasonable care to maintain property to prevent injury to a firefighter “rightfully on the premises, fighting the fire at a place where he might reasonably be expected to be.” Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881, 886 (1960). Similarly, a landowner owes a duty to maintain the premises in a reasonably safe condition for a police officer on the premises performing official duties at a place where he might reasonably be expected to be. Fancil v. Q.S.E. Foods, Inc., 60 Ill.2d 552, 328 N.E.2d 538, 60 Ill.Dec. 552 (1975).

However, a landowner’s liability to a firefighter is limited by the “fireman’s rule,” which provides that an owner or occupier of land owes no duty of care to a firefighter to prevent the fire that necessitated the firefighter’s presence on the premises. Court v. Grzelinski, 72 Ill.2d 141, 379 N.E.2d 281, 19 Ill.Dec. 617 (1978); Washington v. Atlantic Richfield Co., 66 Ill.2d 103, 361 N.E.2d 282, 5 Ill.Dec. 143 (1976); Horn v. Urban Investment & Development Co., 166 Ill.App.3d 62, 519 N.E.2d 489, 116 Ill.Dec. 597 (2d Dist. 1988).

As under the fireman’s rule, a landowner owes no duty of care to a police officer for safety from the inherent risks of the officer’s occupation. Fancil, supra, 328 N.E.2d at 540 – 541. However, the inherent risk principle is limited to premises liability of a landowner and did not bar an off-duty police officer’s claim against a common carrier, which had a duty to protect its passengers from unreasonable risk of harm. Martin v. Chicago Transit Authority, 128 Ill.App.3d 837, 471 N.E.2d 544, 84 Ill.Dec. 15 (1st Dist. 1984).

Moreover, a landowner may invoke the fireman’s rule and obtain dismissal of any contribution claims filed against it. Vroegh v. J & M Forklift, 165 Ill.2d 523, 651 N.E.2d 121, 126, 209 Ill.Dec. 193 (1995). As the court noted:

Unlike an affirmative defense, the “fireman’s rule” does not presuppose the existence of an otherwise valid cause of action. It goes to the threshold question of whether an owner or occupier of land has any duty to fire fighters injured while fighting a fire on his premises.

Since no meritorious claim could be advanced by a plaintiff against the owner, no co-defendant also sued in tort is entitled to contribution from the landowner or occupier. This scenario was specifically distinguished from those in which a contribution claim is not barred because of a procedural bar (statute of limitations) or immunity (parent-child tort immunity, immunity under the Local Governmental and Governmental Employees Tort Immunity Act, or immunity under the Workers’ Compensation Act).

The fireman’s rule has been avoided in many instances when an injury is deemed the result of a negligent act independent of the negligent act that caused the fire. For example, the fireman’s rule was avoided in a case in which the police officer’s injury on a depressed and defective sidewalk was
unrelated to his task of finding a prowler on the premises. *Hedberg v. Mendino*, 218 Ill.App.3d 1087, 579 N.E.2d 398, 161 Ill.Dec. 850 (2d Dist. 1991). It was also avoided in a case in which a firefighter was injured in an explosion due to an alleged failure of the property owner to maintain operable water standpipe systems for use by firefighters. *Harris v. Chicago Housing Authority*, 235 Ill.App.3d 276, 601 N.E.2d 1011, 176 Ill.Dec. 313 (1st Dist. 1992). Likewise, recovery could still be had against a building owner when two firefighters were injured and two were killed because of a defectively wired elevator, a locked stairwell door, the physical configuration of a floor, and the lack of emergency signage. *McShane v. Chicago Investment Corp.*, 235 Ill.App.3d 860, 601 N.E.2d 1238, 176 Ill.Dec. 540 (1st Dist. 1992).

The fireman’s rule may have application to some claims but no application to other claims in a case. In *Zimmerman v. Fasco Mills Co.*, 302 Ill.App.3d 308, 704 N.E.2d 949, 235 Ill.Dec. 376 (2d Dist. 1998), a grain mill could assert the fireman’s rule for its alleged negligence in pumping five million cubic feet of carbon dioxide into a grain bin, which resulted in the carbon monoxide poisoning and asphyxiations death of a volunteer firefighter who responded to a call of “men down” in that bin, since the reason the firefighter came to the bin in the course of his duties was the carbon monoxide level that caused injuries to the workers inside the bin. However, the fireman’s rule was inapplicable to claims that the mill breached its duty to warn the firefighter of the latent danger presented and that the mill knowingly violated safety regulations that would have helped to ensure the firefighter’s safe egress from the bin. These claims alleged separate dangerous conditions for the firefighter, independent of his reason for being in the bin.

When experts found that the immediate causes of a chimney collapse were the effects of heat, fire damage, and lateral stress on the unlined chimney exerted by the firefighters who were fighting a fire at the defendant’s home, the defendant’s assertion of the fireman’s rule was valid, and the rule precluded recovery. *Balley v. Pora*, 303 Ill.App.3d 239, 706 N.E.2d 1038, 236 Ill.Dec. 164 (3d Dist. 1999).


2. [1.23] **Sports Fans**

The duty owed by landowners to sports-fan invitees depends on the nature of the sporting event. The duty owed to spectators at a baseball game does not require a complete fencing of the grandstand, but owners may be required to fence the most dangerous parts of the grandstand. *Coronel v. Chicago White Sox, Ltd.*, 230 Ill.App.3d 734, 595 N.E.2d 45, 171 Ill.Dec. 917 (1st Dist. 1992); *Yates v. Chicago National League Ball Club, Inc.*, 230 Ill.App.3d 472, 595 N.E.2d 570, 172 Ill.Dec. 209 (1st Dist. 1992); *Maytnier v. Rush*, 80 Ill.App.2d 336, 225 N.E.2d 83 (1st Dist. 1967).

In the case of ice hockey, team owners may be under a duty to provide greater protection for spectators. *Riley v. Chicago Cougars Hockey Club, Inc.*, 100 Ill.App.3d 664, 427 N.E.2d 290, 56 Ill.Dec. 210 (1st Dist. 1981).

A country club or golf tournament sponsor owed a spectator at a golf tournament a duty to warn of the risk of being hit by a golf ball while at a concession stand between two fairways when that area was located where golf balls might be hit. *Duffy v. Midlothian Country Club*, 92 Ill.App.3d 193, 415 N.E.2d 1099, 47 Ill.Dec. 786 (1st Dist. 1980).
3. [1.24] Intoxicated Individuals, Social Hosts, and Fraternities or Clubs


In *Cravens v. Inman*, 223 Ill.App.3d 1059, 586 N.E.2d 367, 166 Ill.Dec. 409 (1st Dist. 1991), the appellate court departed significantly from the current law when it found social hosts liable for the provision of alcohol to a minor on the hosts’ premises. The social hosts were liable for injuries suffered by the plaintiff’s minor daughter as a result of an automobile accident caused by an intoxicated minor driver when that driver became intoxicated as a guest in the defendants’ home. It was found that the social hosts knowingly served alcohol and permitted alcohol to be served at their residence to youths under 18 years of age, permitted the minors to consume the alcohol to the point of intoxication, and allowed the minors to depart from their residence in a motor vehicle.

In finding the defendants’ conduct negligent under the common law, the court cited the Illinois Premises Liability Act, finding that the defendants owed the plaintiff’s decedent the duty to exercise “reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.” *Cravens, supra*, 586 N.E.2d at 378, quoting §2 of the Premises Liability Act. The court went on to cite RESTATEMENT §318, which refers to the landowner’s duty to control the conduct of a third person and provides:

If the actor permits a third person to use land ... he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him ... from so conducting himself as to create an unreasonable risk of bodily harm to them, when the actor

(a) knows or has reason to know that he has the ability to control the third person, and

(b) knows or should know of the necessity and opportunity for exercising such control.

As support for its decision, the court also cited §371, which provides:

A possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place.

In *Cravens*, the appellate court did not follow the precedent of declining to acknowledge common law negligence liability when a social host provides liquor to a minor. The court would not agree that the Dram Shop Act, 235 ILCS 5/6-21, preempted common law negligence for a social host’s provision of alcohol to a minor. The court sided with a substantial majority of other states that recognize social host liability when the host has served alcohol to a minor who becomes intoxicated, drives an automobile, and causes an injury-producing accident. See 586 N.E.2d at 374 – 375 for citations of cases on a state-by-state basis.
In carrying out an exception to the Illinois common law rule, the Cravens court carefully limited its holding to apply only when

(1) a social host has knowingly served alcohol, and permits the liquor to be served, to youths under 18 years of age at the social host’s residence, (2) the social host permits the minors’ consumption to continue to the point of intoxication, and (3) the social host allows the inebriated minors to depart from the residence in a motor vehicle. 586 N.E.2d at 378.


Cravens has been distinguished in subsequent cases. In Robertson v. Okraj, 250 Ill.App.3d 848, 620 N.E.2d 612, 189 Ill.Dec. 644 (4th Dist. 1993), the court affirmed the dismissal of the plaintiff’s complaint when the social hosts entrusted the underage decedent to the care of his roommates, who took him to his apartment and ultimately put him in his own bed, where he died in his own vomit. See also Fitzpatrick v. Carde Lounge, Ltd., 234 Ill.App.3d 875, 602 N.E.2d 19, 176 Ill.Dec. 712 (1st Dist. 1992).

Fraternities or clubs and their individual members may be liable for injuries to and deaths of students from drinking or hazing: Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 155 Ill.App.3d 231, 507 N.E.2d 1193, 107 Ill.Dec. 824 (4th Dist. 1987); Haben, supra. The duty of a defendant in these cases is normally construed as distinguishable from that owed by a social host.

4. [1.25] Bystanders

For a bystander to recover from an owner for injuries received from objects falling from the owner’s property, it must be established that the owner knew or should have known that people dropped objects off the property. The property owner’s duty exists only if the occurrence is reasonably foreseeable. In Mazzone v. Chicago & North Western Transportation Co., 226 Ill.App.3d 56, 589 N.E.2d 632, 168 Ill.Dec. 232 (1st Dist. 1992), a motorcyclist plaintiff failed to establish that a bridge owner knew or should have known that people dropped objects off the owner’s bridge, and the owner was entitled to summary judgment. However, in Andronick v. Daniszewski, 268 Ill.App. 543 (1st Dist. 1932), the court found that the building owners had an obligation to see that reasonable care was exercised in making improvements to their building. Because they did not take precautions against possible and probable injuries by erecting a barricade or by other appropriate means, the owners were held liable for injuries the plaintiff sustained from being hit by a falling chisel while walking on a sidewalk in front of the defendants’ premises.

However, a bystander injured in a shopping center’s parking lot failed as a matter of law to establish that negligence on the part of the shopping center’s owners proximately caused her injuries. The bystander was hurt when a driver entering the parking lot hit a wheel stop and lost control. Although there was evidence that the wheel stop was difficult to see, there was no evidence that the driver did not in fact see it or that the defendants’ alleged negligence proximately caused plaintiff’s injuries. Tarulis v. Prassas, 236 Ill.App.3d 56, 603 N.E.2d 13, 177 Ill.Dec. 232 (1st Dist. 1992).

5. [1.26] Victims of Third-Party Acts or Crimes

The general rule in Illinois is that a landowner or occupier has no duty to protect others against the criminal attacks of a third person. A duty does not arise unless there are sufficient facts to put the defendant on notice that an intervening criminal act is likely to occur. Just as in other cases, in determining whether a legal duty exists, the likelihood of injury, the magnitude of the burden of

In some settings, foreseeability is more likely than in others. For example, when a bridge owner did not know or have reason to know that objects were being thrown over a bridge onto passing motorists or did not have sufficient time to install protective screening after other occurrences and before the plaintiff’s injury, no duty to protect the plaintiff existed. *Mazzone v. Chicago & North Western Transportation Co.*, 226 Ill.App.3d 56, 589 N.E.2d 632, 168 Ill.Dec. 232 (1st Dist. 1992). However, in certain situations, foreseeability is more likely given the special relationship between the plaintiff-victim and defendant-owner. In short, a duty to protect will be imposed only if there is a special relationship between the defendant and the victim of the criminal attack.


With respect to the business/storekeeper-patron relationship, an additional section of the RESTATEMENT may also apply. Section 344 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

   (a) discover that such acts are being done or are likely to be done, or

   (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.


RESTATEMENT §344, cmt. f, makes it clear that any duty is contingent on some notice:

[A business owner may] know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.
Two standards exist to determine if a landowner should have anticipated a particular criminal act. The first is the “prior similar acts” rule, and the second is the “totality of the circumstances” approach.

The prior similar acts rule has been followed by many courts outside Illinois without a consistent application. *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987); *Vorbeck v. Carnegie’s at Soulard, Inc.*, 704 S.W.2d 296 (Mo.App. 1986); *Ortell v. Spencer Cos.*, 477 So.2d 299 (Ala. 1985). This traditional rule also has been followed in Illinois. *Duncavage v. Allen*, 147 Ill. App.3d 88, 497 N.E.2d 433, 100 Ill.Dec. 455 (1st Dist. 1986); *Burks v. Madyun*, 105 Ill. App.3d 917, 435 N.E.2d 185, 61 Ill.Dec. 696 (1st Dist. 1982); *Krautstrunk v. Chicago Housing Authority*, 95 Ill. App.3d 529, 420 N.E.2d 429, 51 Ill.Dec. 15 (1st Dist. 1981); *Taylor*, supra; *Stribling v. Chicago Housing Authority*, 34 Ill. App.3d 551, 340 N.E.2d 47 (1st Dist. 1975). In particular, the rule has been followed in the landlord-tenant setting; for example, “[a]lthough the injury to plaintiff need not be identical to the prior criminal incidents in order for it to be considered foreseeable, plaintiff’s injury must have resulted from the same risk as was present in the prior incidents.” *Hill v. Chicago Housing Authority*, 233 Ill. App.3d 923, 599 N.E.2d 1118, 1125, 175 Ill.Dec. 104 (1st Dist. 1992), citing *Petrauskas v. Wexenthaler Realty Management, Inc.*, 186 Ill. App. 3d 820, 542 N.E.2d 902, 134 Ill.Dec. 556 (1st Dist. 1989).


At least one district of the Illinois appellate court has adopted the totality of the circumstances approach as enunciated in *Isaacs*. In *Shea v. Preservation Chicago, Inc.*, 206 Ill. App.3d 657, 565 N.E.2d 20, 151 Ill.Dec. 749 (1st Dist. 1990), the court disagreed with the defendant’s argument that Illinois law requires in all instances that prior incidents of the same criminal activity must have occurred before plaintiff’s attack in order to find a duty on the part of the defendant to protect tenants from third-party criminal attacks. The court noted that “[a]lthough prior incidents are a factor in several cases in which the landlord has been held liable for a third-party criminal attack upon a tenant, [it did] not believe that prior incidents of the same criminal activity are a per se requirement in all cases.” 565 N.E.2d at 25. In support of this idea, the *Shea* court observed that the Illinois Supreme Court in *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 531 N.E.2d 1358, 126 Ill.Dec. 519 (1988), had cited with approval the appellate court opinion of *Mims v. New York Life Insurance Co.*, 133 Ill. App.2d 283, 273 N.E.2d 186 (1st Dist. 1971), in which there had not been any prior incident of criminal activity in the building.

The *Shea* court then announced its version of the totality of the circumstances rule:

> [T]he proper inquiry is to consider all relevant circumstances in order to determine whether the landlord had assumed a duty, under the facts of each particular case, to protect a tenant from reasonably foreseeable third-party criminal attacks. A rigid application of a “prior incidents” rule “has the effect of discouraging landowners from taking adequate measures to protect premises which they know are dangerous. . . . Moreover, under the rule, the first victim always loses, while subsequent victims are
permitted recovery.... Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property.” Isaacs v. Huntington Memorial Hospital (1985), 38 Cal.3d 112, 125-26, 211 Cal.Rptr. 356, 695 P.2d 653; see also Small v. McKennan Hospital (S.D. 1989), 437 N.W.2d 194, 201 (“violent criminal activity can be foreseeable simply upon common experience”). 565 N.E.2d at 25.

Whether this rule will be adopted by other Illinois courts in non-landlord settings is yet to be seen.

Business storekeepers, places of entertainment, and financial institutions generally are charged with a duty to exercise ordinary care to protect or warn invitees against foreseeable criminal attacks caused by third parties. However, certain circumstances, albeit anticipated, do not lead to the conclusion that criminal attacks will occur on the premises. Lutz v. Goodlife Entertainment, Inc., 208 Ill.App.3d 565, 567 N.E.2d 477, 153 Ill.Dec. 519 (1st Dist. 1990) (unknown assailant’s criminal act of hitting plaintiff in response to casual bump on overcrowded dance floor not reasonably foreseeable). Additionally, a property owner owes no duty to automatic teller machine customers to warn them of unspecified risks attendant to the use of ATMs (Popp v. Cash Station, Inc., 244 Ill.App.3d 87, 613 N.E.2d 1150, 184 Ill.Dec. 558 (1st Dist. 1992)), nor does a financial institution have a duty to accede to the demands of a robber on the premises (Boyd v. Racine Currency Exchange, Inc., 56 Ill.2d 95, 306 N.E.2d 39 (1973)).

The innkeeper-guest relationship exception, specifically recognized in RESTATEMENT §314A(2), has been accepted by Illinois courts. Mrzlak v. Ettinger, 25 Ill.App.3d 706, 323 N.E.2d 796 (1st Dist. 1975); Danile v. Oak Park Arms Hotel, Inc., 55 Ill.App.2d 2, 203 N.E.2d 706 (1st Dist. 1964); Fortney v. Hotel Rancroft, Inc., 5 Ill.App.2d 327, 125 N.E.2d 544 (1st Dist. 1955). Innkeepers are held to the highest degree of care, not just ordinary care. Although at least one court has equated a tavern owner to an innkeeper and imposed the highest degree of care duty on the owner (Hayes v. O’Donnell, 76 Ill.App.3d 695, 395 N.E.2d 184, 32 Ill.Dec. 237 (2d Dist. 1979)), other courts have rejected this idea (Smith v. 601 Liquors, Inc., 101 Ill.App.2d 306, 243 N.E.2d 367 (1st Dist. 1968)) or refused to impose liability absent specific allegations that the danger was apparent to the patron or that the circumstances put the tavern keeper on notice of the probability of the danger (Yangas v. Charlie Club, Inc., 113 Ill.App.3d 398, 447 N.E.2d 484, 69 Ill.Dec. 267 (3d Dist. 1983)). See §1.42.

Common carriers are treated in the same fashion as innkeepers. The Illinois Supreme Court has stated that a common carrier must exercise the highest degree of care toward its passengers and may be responsible for reasonably foreseeable criminal acts of other passengers or carrier employees if the acts could have been prevented. McCoy v. Chicago Transit Authority, 69 Ill.2d 280, 371 N.E.2d 625, 13 Ill.Dec. 690 (1977); Watson v. Chicago Transit Authority, 52 Ill.2d 503, 288 N.E.2d 476 (1972); Letsos v. Chicago Transit Authority, 47 Ill.2d 437, 265 N.E.2d 650 (1970). See §1.42.

The voluntary custodian-protectee relationship is also recognized by Illinois courts. Figueroa v. Evangelical Covenant Church, 879 F.2d 1427 (7th Cir. 1989). While a patient at a mental health center is not normally considered a protectee and a mental health facility has no duty to control a known dangerous person in order to prevent harm to others unless the dangerous person is legally in the custody and actual control of the mental health facility (Estate of Johnson by Johnson v. Condell Memorial Hospital, 119 Ill.2d 496, 520 N.E.2d 37, 117 Ill.Dec. 47 (1988)), a mental health facility may still owe a duty of ordinary care to provide services to a patient to the extent of its voluntary or contractual undertaking (Siklas v. Eck Center for Mental Health, Inc., 248 Ill.App.3d 124, 617 N.E.2d 507, 187 N.E.2d 299 (2d Dist. 1993); RESTATEMENT §323).
As §314B of the RESTATEMENT indicates, the employer-employee relationship is another special relationship that may give rise to a duty to protect against criminal attack. *Ozment v. Lance*, 107 Ill.App.3d 348, 437 N.E.2d 930, 63 Ill.Dec. 281 (5th Dist. 1982). Liability usually is not imposed unless the criminal attack on the employee is reasonably foreseeable and the burden of preventing such an attack can be reasonably placed on the employer. *Burks, supra*.

Even if a defendant does not fall within a special relationship exception because of a franchisor-franchisee-employee relationship (Martin v. McDonald’s Corp., 213 Ill.App.3d 487, 572 N.E.2d 1073, 157 Ill.Dec. 609 (1st Dist. 1991)), it may still be liable because of a voluntarily assumed duty by creating its own security department to deal with security problems and disseminating a “bible” for store security operations. Failure to follow up on a voluntary security policy may be enough to establish liability notwithstanding the absence of a technical employer-employee relationship. Tort liability for criminal attacks might be imposed under an express agreement to protect employees. See Annot., 40 A.L.R.5th 1 (1996).

Although a landlord has no general duty to provide protection to tenants or guests against foreseeable third-party criminal attacks (Rowe v. State Bank of Lombard, 125 Ill.2d 203, 531 N.E.2d 1358, 126 Ill.Dec. 519 (1988)), the proper question is whether a particular landlord, under the facts of a case, assumed a duty to do so. When the landlord has retained or exercised control over a portion of the premises, the landlord has assumed a duty to exercise such control in a reasonably safe manner. Whether this retention of control includes a duty to protect tenants against foreseeable third-party criminal attacks depends on the normal and usual function of such control and the particular circumstances of the case. *Id*.

However, a landlord who voluntarily undertakes to provide security measures but performs the undertaking negligently may be held liable if the negligent voluntary undertaking is the proximate cause of the plaintiff’s injury. *Phillips v. Chicago Housing Authority*, 89 Ill.2d 122, 431 N.E.2d 1038, 59 Ill.Dec. 281 (1982).

There are certain relationships that still do not fit within the recognized RESTATEMENT exceptions enunciated in §314A. The landlord-tenant or landlord-tenant-social guest relationships exemplify application of the common law rule that an owner or occupier does not owe a duty to protect the tenant or guest from criminal attacks by third persons. *Pippin v. Chicago Housing Authority*, 78 Ill.2d 204, 399 N.E.2d 596, 35 Ill.Dec. 530 (1979); *Carrigan v. New World Enterprises, Ltd.*, 112 Ill.App.3d 970, 446 N.E.2d 265, 68 Ill.Dec. 531 (3d Dist. 1983). This rule is based on the principle that the landlord is not an insurer and cannot be held liable to a tenant or guest for any harm done by every criminal intruder. *Duncavage v. Allen*, 147 Ill.App.3d 88, 497 N.E.2d 433, 100 Ill.Dec. 455 (1st Dist. 1986).

If the owner assumes a duty to protect tenants or guests against some criminal acts of third parties, its duty is limited by the extent of its undertaking and the reasonable foreseeability of the injuries sustained. *Rowe, supra*. For example, providing a door attendant and a means of communication for allowing tenants to identify visitors for entry did not mean that a landlord was liable for a robbery of a tenant in a common area of the building. *Morgan v. 235 East Delaware Condominium Association*, 231 Ill.App.3d 208, 595 N.E.2d 36, 171 Ill.Dec. 908 (1st Dist. 1992). Providing a security firm or agreeing to repair windows also will not guarantee that a plaintiff has a viable action against a landlord if the victim is shot while a security firm is on the premises or is raped by an intruder who gains access through an un-repaired window. *Hill, supra*; *Fitzpatrick v. ACF Properties Group, Inc.*, 231 Ill.App.3d 690, 595 N.E.2d 1327, 172 Ill.Dec. 657 (2d Dist. 1992).
Although inoperable interior security doors and safety locks may impose a duty on a landlord (Shea, supra), in other circumstances a landlord’s provision of certain devices or services does not necessarily lead to the imposition of liability, e.g., common-entrance door locks (Beck v. Rossi Brothers, 125 Ill.App.3d 874, 466 N.E.2d 1124, 81 Ill.Dec. 322 (1st Dist. 1984); Martin v. Usher, 55 Ill.App.3d 409, 371 N.E.2d 69, 13 Ill.Dec. 374 (1st Dist. 1977)), entrance doors (N. W. v. Amalgamated Trust & Savings Bank, Trust No. 4015, 196 Ill.App.3d 1066, 554 N.E.2d 629, 143 Ill.Dec. 694 (1st Dist. 1990)), fire escape doors and hallway lights (Petrauskas, supra), or burglar alarms (Carrigan, supra). Moreover, when the cost of more extensive security measures is prohibitive to a landowner of large expanses of land such as a university campus or shopping mall parking lot, no duty to protect individuals may exist. Rabel v. Illinois Wesleyan University, 161 Ill.App.3d 348, 514 N.E.2d 552, 112 Ill.Dec. 889 (4th Dist. 1987); Taylor v. Hocker, 101 Ill.App.3d 639, 428 N.E.2d 662, 57 Ill.Dec. 112 (5th Dist. 1981); Figueroa, supra.

Outside the landlord-tenant relationship, several more relationships have established case law that may impose a duty on a landowner. In many cases, the voluntary hiring of a security firm may lead to the imposition of liability on the landowner who hired the security firm. The liability may be based on a negligent hiring or retention theory or on the theory that a duty once voluntarily assumed, such as the provision of part-time security guards, must be carried out in a reasonable fashion rather than in a way that results in an increase in the incidence of crime or danger to tenants. Cross v. Wells Fargo Alarm Services, 82 Ill.2d 313, 412 N.E.2d 472, 45 Ill.Dec. 121 (1980).

Particular attention must be focused on the language contained in leases or contracts and the evidence presented at trial to determine whether any duty has been assumed and has been breached. In Kolodziejzak v. Melvin Simon & Associates, 292 Ill.App.3d 490, 685 N.E.2d 985, 226 Ill.Dec. 530 (1st Dist. 1997), although a jury had allocated ten percent of the fault to a property management company, the absence of evidence that the property management company had violated any specific duty it undertook (reviewing daily log reports) was sufficient to vacate the jury verdict against the property management company. On the other hand, when a property owner retained and exercised the right to install, operate, and maintain a building security system that monitored, by closed-circuit television and otherwise, all persons entering and leaving its building and hired a security service to provide 24-hour-per-day security (whose principal posts and hours of duty were mutually agreed on by the owner and the contractor and whose posted orders to guards included the reduction of risk of assault and maintaining a high level of visibility), summary judgment was not appropriate since an issue of fact existed as to whether the defendants exercised their duty and whether the breach of the duty caused the plaintiff’s injury. Berg v. Allied Security, Inc., 297 Ill.App.3d 891, 697 N.E.2d 769, 232 Ill.Dec. 27 (1st Dist. 1998).

The school-student relationship may also provide the basis of liability; however, since the Illinois School Code, 105 ILCS 5/1-1, et seq., confers a certain immunity from tort liability on teachers and school districts absent allegations of wilful and wanton misconduct, teachers generally cannot be held liable for personal injuries sustained by students as a result of criminal attacks during school activities. Kohylanski v. Chicago Board of Education, 63 Ill.2d 165, 347 N.E.2d 705 (1976). Simple absence from a classroom or failure to maintain discipline that results in a criminal attack on a student is insufficient to impose liability. Clay v. Chicago Board of Education, 22 Ill.App.3d 437, 318 N.E.2d 153 (1st Dist. 1974); Woodman v. Litchfield Community School District No. 12, 102 Ill.App.2d 330, 242 N.E.2d 780 (5th Dist. 1968). Clear allegations of wilful and wanton misconduct that demonstrate with particularity how and in what manner the teacher or school was wilful and wanton and establish that the teacher or school intentionally abandoned a duty to supervise and discipline or had a knowledge of an impending danger may be sufficient to plead a cause of action. Booker v. Chicago Board of Education, 75 Ill.App.3d 381, 394 N.E.2d 452, 31 Ill.Dec. 250 (1st Dist. 1979); Cipolla v. Bloom Township High School District No. 206, 69 Ill.App.3d 434, 388 N.E.2d 31, 26 Ill.Dec. 407 (1st Dist. 1979).
The immunity does not apply to teachers’ aides or administrative personnel who supervise school activities. Immunity for non-teachers is provided by the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101, et seq.; however, this immunity, unlike that granted by the School Code, may be waived by a school district’s purchase of liability insurance. *Edmonson v. Chicago Board of Education*, 62 Ill.App.3d 211, 379 N.E.2d 27, 19 Ill.Dec. 512 (1st Dist. 1978).

6. [1.27] Disabled Individuals

Physical disabilities of a plaintiff may affect whether a defendant landowner maintained the premises with reasonable care. For example, in one case a property owner had a duty to protect an 85-year-old visually impaired invitee from dangers created by a step near the building’s front door even though the elderly invitee encountered the step whenever she entered the premises. As explained above, if an invitee is likely to fail to protect herself from harm and the defendant is aware of this fact and if the defendant’s burden to warn or protect is minimal, then a duty to protect such an invitee may exist as a matter of law. *Erne v Peace*, 164 Ill.App.3d 420, 517 N.E.2d 1203, 115 Ill.Dec. 517 (2d Dist. 1987).

However, not all physical disabilities may be entitled to protection under the common law. At least one case suggests that there is no duty owed to plaintiffs who have idiosyncratic reactions to activities or conditions on premises that would not ordinarily cause harm to the average person. In *Bear v. Power Air, Inc.*, 230 Ill.App.3d 403, 595 N.E.2d 77, 172 Ill.Dec. 14 (1st Dist. 1992), the building owners were not liable for injuries to plaintiff’s eyes sustained from the dust generated during the installation of new air conditioning equipment. The court noted that the moving of acoustical tile was not in and of itself inherently dangerous; instead, the moving of the tile became hazardous only to a person with the plaintiff’s sensitive eye condition, an injury that would not have been anticipated by the owners of the building as a probable consequence of its independent contractor’s work.

Although a building owner has a duty to contemplate that physically disabled individuals will enter its building’s doorways (*Hodges v. Jewel Cos.*, 72 Ill.App.3d 263, 390 N.E.2d 930, 28 Ill.Dec. 571 (2d Dist. 1979)), no common law duty exists to compel an owner to make physical accommodations for disabled individuals.

In 1990, Congress passed the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, et seq., making it incumbent on many building owners to make physical accommodations for those with disabilities. Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more “major life activities,” has a record of such an impairment, or is regarded as having such an impairment. 42 U.S.C. §12102(2). Examples of disabilities include orthopedic, visual, speech, or hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, AIDS, tuberculosis, and, if rehabilitated, drug addiction or alcoholism. “Major life activities” include functions such as walking, seeing, hearing, speaking, breathing, learning, caring for oneself, performing manual tasks, and working.

Public accommodations must provide certain physical accommodations, goods, or services for disabled individuals. 42 U.S.C. §12181, et seq. As a basic rule, landowners covered by the ADA must maintain accessible features of facilities and equipment, remove architectural and structural communication barriers in existing facilities when readily achievable, design and construct new facilities, and, when undertaking alterations, alter existing facilities in accordance with the ADA accessibility guidelines.
Notwithstanding these provisions, a public accommodation is not required to permit an individual to participate or benefit from goods and services if that individual poses a “direct threat to the health or safety of others.” 42 U.S.C. §12182(b)(3). A “direct threat” means a significant risk that cannot be eliminated by reasonable modifications of policies, practices, or procedures, or by the provision of auxiliary aids or services. *Id.* In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain

a. the nature, duration, and severity of the risk;

b. the probability that the potential injury will actually occur; and

c. whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

Safety requirements may be imposed only if they are necessary for the safe operation of a place of public accommodations. While the ADA specifically addresses the perceived evil of discrimination against disabled individuals, the provisions of the law may provide additional support for an injured individual’s claim that a duty was owed and it was breached.

D. Special Rules for Certain Circumstances

1. [1.28] Walking Surfaces: Flat, Uneven, Elevated, and Slippery

If a slip and fall occurs on a natural floor, such as polished wood, tile, or terrazzo, the general rule is there is no negligence for merely having a floor of a commonly accepted design. *Robinson v. Southwestern Bell Telephone Co.*, 26 Ill.App.2d 139, 167 N.E.2d 793 (4th Dist. 1960). Unsupported assertions about the alleged insufficiencies of a walking surface do not establish a cause of action. *Richter v. Burton Investment Properties, Inc.*, 240 Ill.App.3d 998, 608 N.E.2d 1254, 181 Ill.Dec. 780 (2d Dist. 1993). However, detailed testimony of the plaintiff or the expert testimony of a building contractor or custodian, for example, may be sufficient to make out a case. *Id.*

Moreover, there are cases that indicate that liability may be imposed on a land occupier if a walking surface becomes unreasonably dangerous because of the nature of its construction or the materials used to construct it. *Selby v. Danville Pepsi-Cola Bottling Co.*, 169 Ill.App.3d 427, 523 N.E.2d 697, 119 Ill.Dec. 941 (4th Dist. 1988). This case should be compared to the Illinois Supreme Court decisions of *Sonnese v. Maling Brothers, Inc.*, 36 Ill.2d 263, 222 N.E.2d 468 (1966), in which the court affirmed a plaintiff’s verdict when the plaintiff’s fall on a wet, outside terrazzo floor was caused by the lack of any abrasive material in the terrazzo, and *Fanning v. LeMay*, 38 Ill.2d 209, 230 N.E.2d 182 (1967), in which arguably the plaintiff’s pleadings about the inadequacies in the composition of defendant’s floor surface were countenanced notwithstanding the fact that the Supreme Court’s opinion was based on other grounds.

Whether a defect or irregularity in a surface is sufficient to allow a jury to determine negligence has been held to depend on the circumstances of the particular case. Whether a defect presents a danger was discussed in *Tracy v. Village of Lombard*, 116 Ill.App.3d 563, 451 N.E.2d 992, 996, 71 Ill.Dec. 838 (2d Dist. 1983):

> [T]he determination of whether a defect is so minor as to be non-actionable depends upon the particular facts of each case... However, in *River v. Atlantic & Pacific Tea Co.* (1961), 31 Ill.App.2d 232, 175 N.E.2d 593, the court, while recognizing the
particularities of each case, found a discernable pattern in negligence cases involving the conditions of flooring in business establishments. . . . “[I]f there is positive evidence of defects in the flooring, such as holes, worn boards or depressions, and some direct evidence, however slight, which associates plaintiff’s fall with that defect, the problem becomes a jury question and verdicts for plaintiffs are usually affirmed. . . . Where, however, the fall occurs upon a floor not having any depression, concavity, hole or other defective condition and there is nothing upon which the jury can reasonably find negligence, it is improper to submit the case to the jury.” [Citations omitted.]

Merely subjective testimony that a floor looked slick or had a high-gloss finish does not raise a question of fact. Lucker v. Arlington Park Race Track Corp., 142 Ill.App.3d 872, 492 N.E.2d 536, 97 Ill.Dec. 100 (1st Dist. 1986).

Falls resulting from tripping on rugs and mats, without evidence of a defect in the rug or mat, have also led to directed verdicts for defendants. Rathbun v. Old Barn Restaurant, 4 Ill.App.3d 723, 281 N.E.2d 726 (1st Dist. 1972). (However, see the cases since Ward.)

Actual or constructive notice to the owner must be shown, generally, as part of the plaintiff’s prima facie case. Repinski v. Jubilee Oil Co., 85 Ill.App.3d 15, 405 N.E.2d 1383, 40 Ill.Dec. 291 (1st Dist. 1980).

Nongovernmental property owners are entitled to the same protection as governmental owners for de minimis deviations in sidewalk grade. Sidewalk grade deviations of one half of an inch to three fourths of an inch are not actionable. Hartung v. Maple Investment & Development Corp., 243 Ill.App.3d 811, 612 N.E.2d 885, 184 Ill.Dec. 9 (2d Dist. 1993).

Although the de minimis rule as to slight irregularities in municipal sidewalks precludes recovery against municipalities (Warner v. City of Chicago, 72 Ill.2d 100, 378 N.E.2d 502, 19 Ill.Dec. 1 (1978)) and this rule has been extended to outdoor privately owned sidewalks (Hartung, supra), it does not apply to partially enclosed entryways since indoor flooring is not exposed to the weather and can be more easily monitored for defects and repaired. Moreover, monitoring an area such as an entryway is not a burden equivalent to monitoring an expanse of sidewalks. Bledsoe v. Dredge, 288 Ill.App.3d 1021, 681 N.E.2d 96, 224 Ill.Dec. 114 (3d Dist. 1997).

Although property owners may have no duty to provide handrails when no factual support exists (Fahey v. State & Madison Property Association, 200 Ill.App.3d 437, 558 N.E.2d 192, 146 Ill.Dec. 229 (1st Dist. 1990)) and there is no duty to paint or mark noses of steps when there is no evidence of poor lighting, unsafe design, physical defect on the steps, or concealment of changing elevations (Glass v. Morgan Guaranty Trust Co., 238 Ill.App.3d 355, 606 N.E.2d 384, 179 Ill.Dec. 552 (1st Dist. 1992)), unevenness of stairs can be the basis of liability, especially when counsel at the deposition of the plaintiff constantly refers to the so-called “unevenness.” Bellerive v. Hilton Hotels Corp., 245 Ill.App.3d 933, 615 N.E.2d 858, 186 Ill.Dec. 54 (2d Dist. 1993).

2. [1.29] Foreign Substances

An owner or operator may be liable when a business invitee is injured by slipping on a foreign substance on the premises if it was placed there by the negligence of the proprietor or its servants or, if there is no showing as to how the substance got on the premises, it appears that the proprietor or its servants knew of the substance’s presence or that the substance was there long enough so that in the exercise of ordinary care its presence should have been discovered. Olinger v. Great Atlantic & Pacific Tea Co., 21 Ill.2d 469, 173 N.E.2d 443 (1961).
If a foreign substance is on the premises due to the negligence of the proprietor or its servants, it is not necessary to establish actual or constructive knowledge. *Donoho v. O’Connell’s, Inc.*, 13 Ill.2d 113, 148 N.E.2d 434 (1958); *Pabst v. Hillman’s, Inc.*, 293 Ill.App. 547, 13 N.E.2d 77 (1st Dist. 1938) (inference raised that defendant caused green bean to drop to floor from overflowing bin nearby). The courts have held that under certain circumstances a jury may infer that the placement of the substance was the result of the defendant’s conduct when the substance or object was related to the operation of the business. *Sundberg v. Boal*, 320 Ill.App. 138, 49 N.E.2d 824 (1st Dist. 1943) (abst.); *Pabst*, supra; *Donoho*, supra.

When notice, constructive or otherwise, has not been shown, the courts have tended to direct verdicts for defendants even when the substance has been related to the business of the defendant. *Davis v. South Side Elevated R.R.*, 292 Ill. 378, 127 N.E. 66 (1920); *Antibus v. W. T. Grant Co.*, 297 Ill.App. 363, 17 N.E.2d 610 (4th Dist. 1938) (plaintiff slipped on banana peel on steps).

When there is proof that the foreign matter was related to defendant’s business but no further evidence is offered other than its presence on the floor, the defendant is entitled to a directed verdict, such evidence being insufficient to support the necessary inference. *Wroblewski v. Hillman’s, Inc.*, 43 Ill.App.2d 246, 193 N.E.2d 470 (1st Dist. 1963); *Schmelzel v. Kroger Grocery & Baking Co.*, 342 Ill.App. 501, 96 N.E.2d 885 (4th Dist. 1951); *Jones v. Kroger Grocery & Baking Co.*, 273 Ill.App. 183 (4th Dist. 1933) (lettuce leaves on floor). Ordinarily, the wilted, torn, or dirty condition of an object does not raise an inference that it remained on the floor long enough to charge the defendant with constructive notice of its presence. *Canales v. Dominick’s Finer Foods, Inc.*, 92 Ill.App.3d 773, 416 N.E.2d 303, 48 Ill.Dec. 272 (1st Dist. 1981) (inference raised when plaintiff slipped on crushed tube of Ben-Gay and contents spread on aisle floor in area with five or six greasy footprints).

If the substance is on the premises through acts of third persons, the time element to establish knowledge or notice to the proprietor is a material factor. *Schmelzel*, supra.

When a business invitee is injured by slipping on a foreign substance on defendant’s premises and there is evidence tending to show that the substance was on the floor through the acts of defendant or his servants or when there is evidence tending to show that defendant or his servants knew or should have known of its presence, the issue of negligence will be submitted to the jury. *Oliger*, supra; *Thompson v. Economy Super Marts, Inc.*, 221 Ill.App.3d 263, 581 N.E.2d 885, 163 Ill.Dec. 731 (3d Dist. 1991); *Windeguth v. National Super Markets, Inc.*, 201 Ill.App.3d 35, 558 N.E.2d 548, 146 Ill.Dec. 585 (5th Dist. 1990); *Little v. Metropolis IGA Foods, Inc.*, 188 Ill.App.3d 136, 544 N.E.2d 28, 135 Ill.Dec. 671 (5th Dist. 1989); *Palumbo v. Frank’s Nursery & Crafts, Inc.*, 182 Ill.App.3d 283, 537 N.E.2d 1073, 130 Ill.Dec. 744 (1st Dist. 1989); *Canales*, supra. See §1.51 for a discussion of the “presumptive notice” test articulated in *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill.App.3d 149, 650 N.E.2d 258, 208 Ill.Dec. 801 (3d Dist. 1995).

### 3. [1.30] Natural Conditions

As a general rule, the owner or possessor of property has no duty to remove natural conditions such as snow, ice, or water from the land. *Endsley v. Harrisburg Medical Center*, 209 Ill.App.3d 908, 568 N.E.2d 470, 154 Ill.Dec. 470 (5th Dist. 1991). There is no liability for a natural accumulation of ice or snow on which a person falls and sustains personal injuries. *Greenwood v. Leu*, 14 Ill.App.3d 11, 302 N.E.2d 359 (5th Dist. 1973); *Zide v. Jewel Tea Co.*, 39 Ill.App.2d 217, 188 N.E.2d 383 (2d Dist. 1963).

In *Williams v. Alfred N. Koplin & Co.*, 114 Ill.App.3d 482, 448 N.E.2d 1042, 70 Ill.Dec. 164 (2d Dist. 1983), the court held that a property owner had no obligation to clear snow and ice from a
sidewalk. Although the property owner may have been aware that the accumulation of snow and ice was hazardous, there still was no duty to remove the natural accumulation. *Hankla v. Burger Chef Systems, Inc.*, 93 Ill.App.3d 909, 418 N.E.2d 35, 49 Ill.Dec. 391 (4th Dist. 1981). The courts have held similarly for natural accumulations of water. *Walker v. Chicago Transit Authority*, 92 Ill.App.3d 120, 416 N.E.2d 10, 48 Ill.Dec. 115 (1st Dist. 1980).

Determining whether the accumulation is natural is a question of fact. *Turner v. Cosmopolitan National Bank*, 180 Ill.App.3d 1022, 536 N.E.2d 806, 129 Ill.Dec. 756 (1st Dist. 1989). To succeed in a negligence action against a property owner, it is required that the plaintiff plead and prove either that the accumulation was unnatural in origin or that the defendant has aggravated the natural accumulation in some way. *Gehrman v. Zajac*, 34 Ill.App.3d 164, 340 N.E.2d 184 (1st Dist. 1975). Expressed another way, the plaintiff has the burden of proving that the accumulation of ice, snow, or water is “unnatural,” that the defendant had actual or constructive notice of the condition, and that the defendant failed to take reasonable precautions to avoid injury to others. *Wolter v. Chicago Melrose Park Associates*, 68 Ill.App.3d 1011, 386 N.E.2d 495, 25 Ill.Dec. 224 (1st Dist. 1979); *Byrne v. Catholic Bishop of Chicago*, 131 Ill.App.2d 356, 266 N.E.2d 708 (1st Dist. 1971). These propositions apply to all categories of owners and possessors of land. See, e.g., *Chisolm v. Stephens*, 47 Ill.App.3d 999, 365 N.E.2d 80, 7 Ill.Dec. 795 (1st Dist. 1977) (landlords have no duty to remove natural accumulations); *Hankla, supra* (business owners have no duty to remove natural accumulations); *Serritos v. Chicago Transit Authority*, 153 Ill.App.3d 265, 505 N.E.2d 1034, 106 Ill.Dec. 243 (1st Dist. 1987) (common carriers have no duty to remove natural accumulations).

The natural accumulation rule has been the law in Illinois since 1931 (*Graham v. City of Chicago*, 346 Ill. 638, 178 N.E. 911 (1931)), and Illinois courts of review have consistently reaffirmed it. See, e.g., *Wilson v. Gorski’s Food Fair*, 196 Ill.App.3d 612, 554 N.E.2d 412, 143 Ill.Dec. 477 (1st Dist. 1990); *Strappelli v. City of Chicago*, 371 Ill. 72, 20 N.E.2d 43 (1939). With respect to landlords, Illinois courts continue to reaffirm what was called the “Massachusetts” rule (as articulated in *Cronin v. Brownlie*, 348 Ill.App. 448, 109 N.E.2d 352 (2d Dist. 1952)), namely, that a landlord has no legal duty (absent the exceptions to the rule — unnatural accumulation, negligent undertaking, or specific contractual undertaking not involving recent or continuous precipitation) to remove snow and ice from areas used jointly with his tenants when the ice and snow accumulate from natural causes. *Williams v. Lincoln Tower Associates*, 207 Ill.App.3d 913, 566 N.E.2d 501, 152 Ill.Dec. 814 (2d Dist. 1991); *Burke v. City of Chicago*, 160 Ill.App.3d 953, 513 N.E.2d 984, 112 Ill.Dec. 375 (1st Dist. 1987).

The natural accumulation rule has withstood attacks on its so-called antiquity. In *Watson v. J. C. Penney Co.*, 237 Ill.App.3d 976, 605 N.E.2d 723, 178 Ill.Dec. 929 (4th Dist. 1992), the appellate court rejected the argument that the rule should be abandoned because other states have done so. Pointing the plaintiff to the legislature as the appropriate forum for redress, the court noted that the General Assembly enacted the Snow and Ice Removal Act (Removal Act), 745 ILCS 75/0.01, et seq., to grant immunity to residential owners or occupants from liability (absent wilful or wanton misconduct) for injuries suffered as the result of snow or ice conditions after a residential owner or occupant has removed or attempted to remove snow and ice from a sidewalk. Further, the court noted that the legislature had broadened the immunity provided by the Local Governmental and Governmental Employees Tort Immunity Act specifically to include injuries caused by the effect of weather conditions.

Moreover, the court in *Watson* specifically stated that the natural accumulation rule is not inconsistent with the Illinois Supreme Court’s pronouncements in *Ward*. Since *Ward* merely reiterated the principle that §§343 and 343A of the RESTATEMENT have been a part of Illinois law for decades, their reinterpretation by the Illinois Supreme Court did not upset their peaceful coexistence with the natural accumulation rule. *Watson, supra*, 605 N.E.2d at 726.


Property owners have no duty to remove natural accumulations regardless of the length of time the accumulations remain. Foster v. George J. Cyrus & Co., 2 Ill.App.3d 274, 276 N.E.2d 38 (1st Dist. 1971) (rejecting dicta in Durkin, supra, indicating otherwise). Even a gratuitous custom of removing snow and ice does not give rise to a duty to continue to remove natural accumulations of snow or ice. Chisolm, supra. In Chisolm, the court held that a landlord owed no duty to remove snow and ice even though a voluntary inspection was undertaken each day except on the day of the accident.

Although there is no duty to remove natural accumulations of snow and ice, a voluntary undertaking to remove snow and ice may be the basis of liability if the removal is performed negligently. See, e.g., Williams v. Alfred N. Koplin & Co., supra; DeMaria v. Sears, Roebuck & Co., 6 Ill.App.3d 46, 284 N.E.2d 330 (1st Dist. 1972); Webb v. Morgan, 176 Ill.App.3d 378, 531 N.E.2d 36, 125 Ill.Dec. 857 (5th Dist. 1988); Endsley v. Harrisburg Medical Center, 209 Ill.App.3d 908, 568 N.E.2d 470, 154 Ill.Dec. 470 (5th Dist. 1991). See also McCarthy v. Hidden Lake Village Condominium Association, 186 Ill.App.3d 752, 542 N.E.2d 868, 134 Ill.Dec. 522 (1st Dist. 1989) (defective plowing may lead to liability). Of course, if a trespasser is the plaintiff, the property owner’s duty is limited to only refraining from wilful and wanton behavior. Harkins, supra; Mentesana v. LaFranco, 73 Ill.App.3d 204, 391 N.E.2d 416, 29 Ill.Dec. 153 (1st Dist. 1979).

Moreover, residential landowners or occupants are liable only for wilful and wanton misconduct in the removal of ice or snow. The Removal Act provides:

It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice. The General Assembly, therefore, determines that it is undesirable for any person to be found liable for damages due to his or her efforts in the removal of snow or ice from such sidewalks, except for acts which amount to clear wrongdoing, as described in Section 2 of this Act.

* * *

Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was wilful or wanton. 745 ILCS 75/1, 75/2.
The existence of a municipal nuisance ordinance does not necessarily imply a duty to remove natural accumulations when the common law creates no such duty. *Thompson v. Tormike, Inc.*, 127 Ill.App.3d 674, 469 N.E.2d 453, 82 Ill.Dec. 919 (1st Dist. 1984). Although some cases hold that it is a reasonable exercise of police power for a municipality to pass ordinances requiring that sidewalks be kept clear (City of Carbondale v. Brewster, 78 Ill.2d 111, 398 N.E.2d 829, 34 Ill.Dec. 838 (1979)), this does not mean that a landowner has a tort duty to remove snow and ice from city sidewalks, especially when in this part of the country the burden of guarding against slips and falls would be too onerous (*Klikas v. Hanover Square Condominium Association*, 240 Ill.App.3d 715, 608 N.E.2d 541, 181 Ill.Dec. 468 (1st Dist. 1992)). A public entity may be liable for unnatural accumulations of ice and snow even absent a showing that the underlying sidewalk or street was defective provided that the public entity has violated its duty to exercise ordinary care. *Kiel v. City of Girard*, 274 Ill.App.3d 821, 654 N.E.2d 1101, 211 Ill.Dec. 291 (4th Dist. 1995). However, when the unnatural accumulation is a small but easily visible mound of snow on the curb as a side effect of a city’s street- and sidewalk-cleaning efforts, the city has no duty to promptly clean up all snow plowed curbside. *Id.*


Moreover, since accumulations of water or snow carried in on the shoes and outerwear of persons in and around commercial or public premises in bad weather is deemed “natural” (see, e.g., *Lohan, supra*; *Walker, supra*; *Murray v. Bedell Company of Chicago*, 256 Ill.App. 247 (1st Dist. 1930)), an owner has no duty to continuously mop water off floor or entrance mats or remove tracks of customers. *Wilson, supra*; *Bakeman, supra*; *DeMario, supra*; *Spirn v. Joseph*, 144 Ill.App.3d 127, 493 N.E.2d 1197, 98 Ill.Dec. 176 (3d Dist. 1986); *Buscaglia v. United States*, 25 F.3d 530 (7th Cir. 1994)


Even common carriers have no duty to remove slush or snow from the steps of their vehicles notwithstanding the fact that they owe their passengers the highest degree of care. *Serritos, supra*. A landowner also has no duty to provide mats or rugs for customers to wipe their feet. *Lohan, supra*. Even when an owner has assumed the voluntary duty of providing entrance mats, the owner has not assumed a duty to remove all tracked-in water; rather, the owner has a duty only to maintain the mats with reasonable care. *Roberson v. J. C. Penney Co.*, 251 Ill.App.3d 523, 623 N.E.2d 364, 191 Ill.Dec. 119 (3d Dist. 1993).

Falls on allegedly wet, slippery, flat walking surfaces have been the subject of numerous cases. In *Sommese v. Maling Brothers, Inc.*, 36 Ill.2d 263, 222 N.E.2d 468 (1966), the Illinois Supreme Court
affirmed a jury verdict for a plaintiff who fell on an outside terrazzo entryway floor that, according to plaintiff’s expert, had no abrasive in it, thus making it very slippery and hazardous when wet. Such expert testimony comports with the law that liability may be imposed on a landlord if a walking surface becomes unreasonably dangerous because of the nature of its construction or the materials used to construct it. *Selby v. Danville Pepsi-Cola Bottling Co.*, 169 Ill.App.3d 427, 523 N.E.2d 697, 119 Ill.Dec. 941 (4th Dist. 1988). *Sommese* has provided justification for an appellate case that allowed a complaint to stand when it alleged that the plaintiff fell on the wet asphalt tile in defendant’s laundromat and that the defendants were negligent in failing to furnish a mat for customers to wipe their shoes on and in failing to warn the plaintiff that the floor was slippery when wet. *Fanning v. Lemay*, 78 Ill.App.2d 166, 222 N.E.2d 815 (5th Dist. 1966), rev’d on other grounds, 38 Ill.2d 209 (1967). Although the Supreme Court in *Sommese* was asked to rule only on the product liability counts against the manufacturer and the retailer of the plaintiff’s shoes, nothing in the Supreme Court opinion indicated that the court would have reversed the appellate court’s opinion that the plaintiff’s pleading stated a cause of action against the landlord.

In apparent distinction from these cases are those in which a plaintiff slips and falls on floors wet from natural accumulations of precipitation and merely believes that the floor surface was wrong for the floor where the fall occurred. One court noted in affirming summary judgment for a building owner:

> Plaintiff points us to his deposition in which he testified that the ceramic tile in the foyer was the wrong surface for the foyer and it was slippery even on a normal day. This bald conclusion is not an evidentiary fact that creates a material issue of fact concerning the construction or maintenance of the foyer. Plaintiff had to present evidence detailing why the foyer was excessively slippery. . . . Even plaintiff could have detailed the factual basis for his conclusion that the foyer was too slippery. Richter v. Burton Investment Properties, Inc., 240 Ill.App.3d 998, 608 N.E.2d 1254, 1258, 181 Ill.Dec. 780 (2d Dist. 1993).

In *Richter*, the court went on to point out that a plaintiff could make out a case that a floor surface was excessively slippery or reasonably safe based on testimony of the custodian of the building as to floor care, testimony of a building contractor as to the slipperiness of a floor surface, or testimony of a more explicit, detailed nature from the plaintiff himself. In short, a plaintiff must present some evidentiary facts to support allegations that a floor surface is unreasonably slippery or maintained in an excessively slippery condition. See also *Shoemaker*, supra.

When assessing cases concerning natural conditions and accumulations under the Premises Liability Act, it is critical not to focus on the condition alone. For example, the lack of duty to remove natural accumulations does not abrogate a business owner’s duty to illuminate the area in a nonnegligent fashion so the natural accumulation may be seen. *Kittle v. Liss*, 108 Ill.App.3d 922, 439 N.E.2d 972, 64 Ill.Dec. 307 (3d Dist. 1982); *Weber v. Chen Enterprises, Inc.*, 184 Ill.App.3d 847, 540 N.E.2d 957, 133 Ill.Dec. 91 (1st Dist. 1989). In *Kittle*, the court determined that a natural accumulation of ice and snow may give rise to landowner liability to invitees when the hazards of the accumulation were not apparent due to inadequate illumination. Although in *Kittle* the tavern was held negligent for its patron’s fall on poorly lit, snow-covered stairs, in *Newcomm v. Jul*, 133 Ill.App.2d 918, 273 N.E.2d 699 (3d Dist. 1971), the landowner was exonerated when the plaintiff slipped and fell on a poorly lit but level sidewalk covered by ice and snow. The landowner presumably owes a greater duty to illuminate stairs than a sidewalk at night.

Similarly, although there is no duty on a landlord to remove natural accumulations, the landlord does have a duty to maintain the areas of ingress and egress in a reasonably safe manner. *Williams v. Alfred N. Koplin & Co.*, supra. But see *Greenwood*, supra (owner had no duty to provide lighting,
handrails, or other safeguards with respect to natural accumulations of ice and snow). Likewise, an owner cannot escape liability because a natural accumulation conceals or aggravates a preexisting defect in the premises. *McGourty v. Chiapetti*, 38 Ill.App.2d 165, 186 N.E.2d 102 (1st Dist. 1962) (preexisting condition was concrete block that provided ingress to and egress from defendant’s loading dock); *Jones v. City of Rock Island*, 101 Ill.App.2d 174, 242 N.E.2d 302 (3d Dist. 1968) (preexisting condition was broken curbing between pedestrian sidewalk and street); *McCann, supra*; *Fitz Simons v. National Tea Co.*, 29 Ill.App.2d 306, 173 N.E.2d 534 (2d Dist. 1961) (preexisting condition was sloping grade that allowed melting snow and ice to collect and refreeze where plaintiff fell).

Recovery for falls on icy sidewalks or parking lots may also be based on negligent design or maintenance of the underlying pavement. *Sepsy v. Archer Daniels Co.*, 59 Ill.App.2d 356, 375 N.E.2d 180, 16 Ill.Dec. 549 (4th Dist. 1978) (sloping surface created unnatural accumulations); *Webb v. Morgan*, 176 Ill.App.3d 378, 531 N.E.2d 36, 125 Ill.Dec. 857 (5th Dist. 1988) (slope of parking lot altered natural runoff); *McCann, supra* (summary judgment improper when affidavit of architect hired by plaintiff showed incline of parking lot excessive, thereby leading to unnatural accumulations of snow and ice).

With respect to slope causing unnatural accumulations, the courts have not divined a precise formula to determine whether a sloping grade is reasonable or hazardous under changing climactic conditions. In *McCann, supra*, and *Fitz Simons, supra*, the plaintiffs produced expert testimony that the slope caused a runoff due to a defective design. In another case, *Stroyeck v. A. E. Staley Manufacturing Co.*, 26 Ill.App.2d 76, 167 N.E.2d 689 (3d Dist. 1960), the owner was held liable when there was evidence that the defendant’s engineers had drawn up plans but failed to remedy the sloping grade of a sidewalk before plaintiff’s fall. In two other cases, *Davis v. City of Chicago*, 8 Ill.App.3d 94, 289 N.E.2d 250 (1st Dist. 1972), and *Smalling v. LaSalle National Bank of Chicago*, 104 Ill.App.3d 894, 433 N.E.2d 713, 60 Ill.Dec. 671 (4th Dist. 1982), the defendant was held not liable when there was not expert proof.

Defective roofs and gutters may also result in liability. In *Lapidus v. Hahn*, 115 Ill.App.3d 795, 450 N.E.2d 824, 71 Ill.Dec. 136 (1st Dist. 1983), a tenant fell on ice that formed from water that had dripped “in torrents” from the roof and collected in a depression on the porch. The defendant was held negligent because the ice had formed as a result of the manner in which the building was erected and maintained. *Cf. Lorek v. Hollenkamp*, 144 Ill.App.3d 1100, 495 N.E.2d 679, 99 Ill.Dec. 232 (2d Dist. 1986) (homeowner owed no duty to warn licensee of obvious conditions of ice on stairs caused by water dripping from gutter); *Schultz v. Richie*, 148 Ill.App.3d 903, 499 N.E.2d 1069, 102 Ill.Dec. 289 (4th Dist. 1986) (evidence that gutter or roof over porch had been removed and not replaced before fall inadmissible as here plaintiff fell on icy porch).

If a duty to remove or protect against natural accumulations of snow or ice is created by conduct or contract, then the plaintiff need not prove the existence of an unnatural accumulation. *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist. 1980). In *Schoondyke*, after the trial court granted summary judgment in favor of the defendant condominium associations and corporations, the First District reversed, holding that the declaration of condominium and the condominium bylaws created the duty to remove natural accumulations of snow and ice even in the absence of technical privity of contract. A similar result in another case involving a condominium association was obtained in *McCarthy v. Hidden Lake Village Condominium Association*, 186 Ill.App.3d 752, 542 N.E.2d 868, 134 Ill.Dec. 522 (1st Dist. 1989), in which the appellate court reversed the circuit court’s granting of summary judgment in favor of the condominium association, holding that defective plowing may lead to liability.
In a similar case, another division of the appellate court reversed a trial court’s granting of
summary judgment to a landlord, holding that an issue of fact existed on the delay in snow removal
when a landlord gave the tenant a handbook that contained a covenant to remove snow and ice. Tressler v. Winfield Village Cooperative, Inc., 134 Ill.App.3d 578, 481 N.E.2d 75, 89 Ill.Dec. 723 (4th Dist. 1985). Likewise, an issue of fact may exist in those cases in which a lease provides that a
commercial tenant has the duty to remove snow and ice since the contract terms may be ambiguous
and both the tenant and the landlord may have a coexisting duty to third parties based on the lease

When a defendant is charged with negligence because of an alleged failure to remove snow or ice
pursuant to a contract, the question of whether the defendant had such a duty is determined by the
terms of the contract. If a contract to remove snow is silent as to the extent of the duty to remove
snow, it requires no more than removing snow in a reasonable, nonnegligent fashion and does not
require removal of all the snow on the property. Crane v. Triangle Plaza, Inc., 228 Ill.App.3d 325,
591 N.E.2d 936, 169 Ill.Dec. 432 (2d Dist. 1992). Even when a contract or lease specifies removal of
“all” the snow or ice, such a contract will be construed as requiring removal only of all that is
503 (2d Dist. 1988). Moreover, even when a contract exists, a duty cannot be imposed when the
precipitation is recent or continuous. Schoondyke, supra.

Natural conditions other than precipitation may also be the subject of litigation. For example, a
protruding tree root on a golf course that allegedly caused an unsuspecting player to fall was deemed a
natural condition for which the owner was not liable. Burns v. Addison Golf Club, Inc., 161 Ill.App.3d
127, 514 N.E.2d 68, 112 Ill.Dec. 672 (2d Dist. 1987). See also Warchol v. City of Chicago, 75
Ill.App.3d 289, 393 N.E.2d 725, 30 Ill.Dec. 689 (1st Dist. 1979), holding that protruding tree roots did
not create an unreasonable risk of harm.

1989), the court found that whether the weeds growing through a crack in the sidewalk were in a
natural condition was a question of fact and that the burden was on the plaintiff to show that the area
containing the weeds was not in a natural condition.

IX. [1.31] WHO IS A POTENTIAL DEFENDANT?

The Illinois Pattern Jury Instructions — Civil categorize premises liability defendants into two
types: owners or occupiers. The RESTATEMENT recognizes several categories of potential
defendants: possessors, vendors, lessors, transferors, and household members. What follows are
descriptions of different rules as they affect potential defendants in premises liability cases.

A. [1.32] Resident Owners or Occupiers

Resident owners or occupiers of property are subject to liability according to all the applicable
rules of premises liability law. Although there are different rules that apply in some cases to
residential home owners, e.g., the Snow and Ice Removal Act, most of the principles of Illinois
premises liability law apply to resident owners or occupiers whether they are homeowners, businesses,
landlords, tenants, or real estate managers.

Whether a party is an owner of property is usually either obvious or easily ascertainable. In order
for a defendant to be an occupier of land, the defendant must evidence an intent to control it during

B. [1.33] Nonresident Owners or Occupiers

An owner of property need not be residing at or occupying the premises for liability to attach.

As noted in §1.32, a defendant must intend to control a premises area to be classified as an occupier. However, even if a defendant does not constitute an occupier for purposes of premises liability law, the same defendant may be liable under principles of ordinary negligence. Esser v. McIntyre, 169 Ill.2d 292, 661 N.E.2d 1138, 214 Ill.Dec. 693 (1996); O’Hara v. Holy Cross Hospital, 137 Ill.2d 332, 561 N.E.2d 18, 148 Ill.Dec. 712 (1990).

C. [1.34] Adjacent Landowners

As a general rule, a possessor of land is not liable for physical harm caused to others outside the land by a natural condition of the land. Nichols by Nichols v. Sitko, 157 Ill.App.3d 950, 510 N.E.2d 971, 109 Ill.Dec. 903 (1st Dist. 1987). This rule is enunciated in §363 of the RESTATEMENT, which provides:

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

Several cases have interpreted this section. In Justice v. CSX Transportation, Inc., 908 F.2d 119 (7th Cir. 1990), the court reversed and remanded the granting of summary judgment for a landowner who permitted railroad cars to be left on a spur line obstructing the view of the main tracks from the public road so that a person unable to see a train approaching at high speed was killed when crossing the tracks. The court distinguished this case from one involving liability for harm caused by natural conditions existing on the land, reasoning that “a person may not use his land in such a way as unreasonably to injure the interests of persons not on his land,” including users of public roadways. 908 F.2d at 123. Other important cases include Dealers Service & Supply Co. v. St. Louis National Stockyards Co., 155 Ill.App.3d 1075, 508 N.E.2d 1241, 108 Ill.Dec. 664 (5th Dist. 1987); Nichols, supra; and Altszyler v. Horizon House Condominium Association, 175 Ill.App.3d 93, 529 N.E.2d 704, 124 Ill.Dec. 723 (1st Dist. 1988).

Certain rules also exist for injuries caused by dangerous artificial conditions as opposed to natural conditions. Section 364 of the RESTATEMENT provides:

A possessor of land is subject to liability to others outside of the land for physical harm caused by a structure or other artificial condition on the land, which the possessor realizes or should realize will involve an unreasonable risk of such harm, if

(a) the possessor has created the condition, or
(b) the condition is created by a third person with the possessor’s consent or acquiescence while the land is in his possession, or

(c) the condition is created by a third person without the possessor’s consent or acquiescence, but reasonable care is not taken to make the condition safe after the possessor knows or should know of it.

See Dealers Service, supra; Altszyler, supra.

In Dealers Service, the court found that the defendant was under a duty to exercise reasonable care for the safety of the plaintiff as an adjoining landowner when fire spread from the defendant’s land onto the plaintiff’s property. In Altszyler, the court held that a landowner owes a duty of ordinary care to persons using an abutting public sidewalk for harm caused by a nonnatural condition of the land. Liability existed in this case because the sidewalk slab sank due to rainwater that ran off the defendant’s retaining wall.

The RESTATEMENT also has rules dealing with the disrepair or other artificial condition of a structure (§365) and artificial conditions existing when possession is taken (§366). No Illinois cases cite these two sections.

In those cases in which land appears to be a highway, §367 applies. It provides:

A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.

In Carroll v. Lily Cache Builders, Inc., 74 Ill.App.3d 264, 392 N.E.2d 986, 30 Ill.Dec. 221 (3d Dist. 1979), the court found that the defendant landowner retained control over a roadway that was not yet finished and provided the only means of access to and from the plaintiff’s home. Because the defendant maintained the roadway, which was reasonably believed to be a public road, he had a duty of care to maintain the road in a reasonably safe condition. The status of the plaintiff as an invitee or licensee was deemed irrelevant. However, in Langford v. Cook County, 127 Ill.App.3d 697, 469 N.E.2d 335, 82 Ill.Dec. 801 (1st Dist. 1984), §367 of the RESTATEMENT was distinguished because the defendant corporation that owned a small portion of land underlying the right-of-way did not maintain or control the right-of-way and did not hold that portion of land out as a public highway. In this instance, summary judgment for the defendant was appropriate.

Illinois courts have been guided in their consideration of landowners’ duties toward travelers on adjacent highways by RESTATEMENT §368, which presents the well-established common law rule that a landowner’s only duty toward travelers on an adjacent highway is to keep the land free from conditions that are unreasonably dangerous to such travelers who may come into contact with the condition. Section 368 provides:

A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who

(a) are traveling on the highway, or

(b) foreseeably deviate from it in the ordinary course of travel.

In *Gouge*, a plaintiff’s vehicle skidded 65 feet, left the paved surface of the road, and after crossing a gravel shoulder, struck a wooden utility pole owned by CIPS. Upon impact, the utility pole fractured, the top portion containing the transformer fell through the windshield of Gouge’s automobile, the transformer broke open, and flammable material spilled out and ignited, severely injuring the plaintiff. The Supreme Court rejected the application of §368 of the RESTATEMENT and found that utility companies owe no duty to motorists who collide with utility poles unless it is reasonably foreseeable that the vehicles would leave the roadway in the ordinary course of travel and strike the utility poles.

In *Hutchings*, the Supreme Court held that a landowner who erected a barricade located on property adjacent to a highway owed no duty to a motorcyclist who slid off the highway and was injured by the barricade. Section 368 is mentioned in the concurring opinion and relied on for the proposition that a barrier’s distance from the highway is frequently decisive of the issue of duty.

In *Ziemba*, the Supreme Court held that a landowner owed no duty to warn a passing bicyclist of a driveway hidden by foliage that posed no danger to the bicyclist absent the independent, negligent act of a truck driver in pulling out from the driveway without looking. The court noted that since there was no contact between the bicyclist and the condition of the land, §368 would provide guidance only as to the existence of any duty.


*Ziemba* was distinguished in *Whittaker v. Honegger*, 284 Ill.App.3d 739, 674 N.E.2d 1274, 221 Ill.Dec. 169 (5th Dist. 1996). In *Whittaker*, summary judgment for defendant adjacent landowners was reversed in favor of a plaintiff motorcyclist who sustained injuries when he encountered a patch of loose gravel on the paved public highway in front of the defendants’ gravel driveway. After acknowledging the applicability of RESTATEMENT §368 and Ziemba’s recognition of its principles, the *Whittaker* court imposed a duty on the landowners since their gravel migrated onto the highway in much the same way that snow and ice can become an unnatural accumulation. It relied on the old English decision of *Rylands v. Fletcher*, 3 H.L. 330 (1868), in concluding that liability may result for harm caused by an otherwise harmless condition or activity that becomes hazardous when it migrates to an inappropriate location.

A landowner was held to have no duty to a passing motorist who was allegedly injured when trying to avoid another driver who was distracted by a landowner’s bungee-jumping business near the highway. Since the jumping platform was 180 feet high, the burdens and consequences to the landowner of building a wall or curtain weighed against imposing a duty to passing motorists. *Largosa v. Ford Motor Co.*, 303 Ill.App.3d 751, 708 N.E.2d 1219, 237 Ill.Dec. 179 (1st Dist. 1999). Using *Ziemba* and *Whittaker* as guideposts, the *Largosa* court concluded that motorists are exposed to distractions as they drive and as long as the distractions, activities, or conditions do not come on the highway, an adjacent landowner or occupier owes no duty to the passing motorist.
Some cases have recognized liability for private property owners when parked vehicles across pedestrian walkways forced pedestrians to take alternative routes that caused injury. *Sutherland v. Guccione*, 8 Ill.App.2d 201, 131 N.E.2d 130 (1st Dist. 1955); *Dory v. Kovatchis*, 196 Ill.App.3d 899, 554 N.E.2d 487, 143 Ill.Dec. 552 (1st Dist. 1990). These cases are consistent with I.P.I. — Civil No. 135.01 on the duty of owners of property abutting a sidewalk, which provides:

The owner of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition [which would interfere] [or] [by interfering] with the customary and regular use of the walk.

Statutory authority for the liability of adjacent landowners involved in excavation can be found in the Adjacent Landowner Excavation Protection Act (Excavation Protection Act), 765 ILCS 140/0.01, et seq. Under this statute, a landowner is entitled to the continuous lateral and subjacent support that its land receives from adjoining property, subject to the rights of the adjoining landowner to make proper and usual excavations for construction or improvements. In order to protect the lateral support of a landowner’s property, this statute requires an owner or possessor of land that intends to excavate on its property to give due and reasonable notice in writing to the owners of adjoining land, buildings, and other structures. 765 ILCS 140/1. If the excavation is to be so close as to endanger the adjoining buildings or structures in any way, then the adjoining landowner is allowed a reasonable time in which to take measures to protect its property from any damage. *Id.* Additionally, the adjacent landowner must be given a license to enter onto the land on which the excavation is to be made for the purpose of protecting its property. *Id.*

An owner or possessor of land that does not comply with the provisions of the Excavation Protection Act when so required shall be liable to the owner of the adjacent property for any damage to the land or to any buildings or other structure arising from the excavation. *Id.* Additionally, the landowner will also be liable to the occupants and tenants of the adjoining land or structures for any damage to their property or business proximately resulting from the injury to the land or structures and caused by the failure of the landowner to comply with the provisions of 765 ILCS 140/1. *Id.* However, a landowner contesting construction of buildings on adjacent land has no cause of action against a city under the Excavation Protection Act. *Heer ey v. Berke*, 179 Ill.App.3d 927, 534 N.E.2d 1277, 128 Ill.Dec. 672 (1st Dist.), *appeal denied*, 127 Ill.2d 559 (1989).

**D. [1.35] Landlords and Tenants**

The law on landlords and tenants is voluminous. Several basic rules exist, and some of the sections of the RESTATEMENT have been adopted by Illinois courts.


Generally, the tenant who is in possession, not the landlord, is liable for injuries sustained by third persons because of a failure to keep the property in repair. . . . “The basic rationale for lessor immunity has been that the lease is a conveyance of property which ends the lessor’s control over the premises, a prerequisite to the imposition of tort liability.” (Schoshinski, *American Law of Landlord and Tenant* sec. 4.1, at 186 (Lawyer’s Cooperative 1980).) Thus, under the general rule, only . . . the party in possession and control of the entire premises, could be held liable for injuries to persons on the property. [Citations omitted.]

A few states have taken the position of applying a standard of reasonable care in all landlord-tenant cases, regardless of which party had control over the area where the injury occurred. Illinois has not adopted that position, but the appellate court in *Thorson v. Aronson*, 122 Ill.App.2d 156, 258 N.E.2d 33, 34 (2d Dist. 1970), has set out four exceptions to non-liability:

1. where a latent defect exists at the time of the leasing, which defect is known or should have been known to the landlord in the exercise of reasonable care and which could not have been discovered upon a reasonable examination of the premises by the tenant;
2. where the landlord fraudulently conceals from the tenant a known, dangerous condition;
3. where the defect causing the harm, in the law, amounts to a nuisance; and
4. where the landlord promises the tenant to repair the premises at the time of the leasing.

The position of RESTATEMENT §361 regarding common areas has been adopted by Illinois courts. A lessor who leases part of the property and retains control over common passageways in multiple-unit dwellings “is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee ... for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control.” *Magnotti v. Hughes*, 57 Ill.App.3d 1000, 373 N.E.2d 801, 803, 15 Ill.Dec. 455 (5th Dist. 1978).

Courts have held landlords liable for injuries to tenants from the landlords’ failure to maintain common areas of the property. *Drewick v. Interstate Terminals, Inc.*, 42 Ill.2d 345, 247 N.E.2d 877 (1969); *Seago, supra*. Since the test is whether the landlord retained control over the area, it can include a stairway or hall reserved for all tenants. Determining the status of a stairway as demised or common depends on several factors: (1) where the stairway leads; (2) what it is used for and by whom it is used; (3) intention of the parties; (4) terms of the lease; and (5) responsibility for repairs, maintenance, and illumination. *Gula v. Gawel*, 71 Ill.App.2d 174, 218 N.E.2d 42 (1st Dist. 1966). Common areas may also include walls, ceilings, and floor tile of apartments. *Hiller v. Harsh*, 100 Ill.App.3d 332, 426 N.E.2d 960, 55 Ill.Dec. 635 (1st Dist. 1981); *Kuhn v. General Parking Corp.*, 98 Ill.App.3d 570, 424 N.E.2d 941, 54 Ill.Dec. 191 (1st Dist. 1981); *Campbell v. Harrison*, 16 Ill.App.3d 570, 306 N.E.2d 643 (1st Dist. 1973). This duty does not go beyond maintaining the common areas, so there is no liability for an injury on demised premises if the injury was not foreseeable. *Seago, supra*. If the tenant puts the common premises to a different use, the landlord’s duty ceases. *McGinnis v. Berven*, 16 Ill.App. 354 (1st Dist. 1885).

The landlord’s duty to maintain the common areas extends beyond the property lines and includes the means of ingress and egress. In *Cooley v. Makse*, 46 Ill.App.2d 25, 196 N.E.2d 396 (2d Dist. 1964), the appellate court reversed the trial court and held the owner-operator to a duty to illuminate the brick walk properly and to give adequate warning of or repair a dangerous condition of the brick walk. This duty was imposed even though the brick walk was located on a city easement and the dangerous condition of the brick walk was not affirmatively created by the owner-operator of the premises. The court stated that the plaintiff was an invitee of the defendant and that the normal use of the entrance by the invitee was foreseeable. Once the invitation was extended to use that entrance, “it
was incumbent upon the inviters to see that that invitation could be safely exercised by their invitees.” 196 N.E.2d at 399. Additionally, a landlord may be liable for injuries on adjacent property if the landlord assumes control over the property for its own purposes. See Smith v. Rengel, 97 Ill.App.3d 204, 422 N.E.2d 1146, 52 Ill.Dec. 937 (4th Dist. 1981).

With respect to latent defects in the premises, a landlord must tell a tenant of a defect on the premises about which the landlord knows or, based on known facts, should know and that could not be discovered by the tenant after a reasonable inspection. Mercer v. Meinel, 290 Ill. 395, 125 N.E. 288, 290 (1919). However, the landlord has no duty to notify a tenant of defects discovered after the time of leasing. Long v. Joseph Schiltz Brewing Co., 214 Ill.App. 517 (1st Dist. 1919).

In Housh v. Swanson, 203 Ill.App.3d 377, 561 N.E.2d 321, 149 Ill.Dec. 43 (2d Dist. 1990), the court stated the rule that a tenant’s guest stands in the same position as the tenant and has no greater rights against the landlord than the tenant if the guest’s injuries are caused by defective conditions on the premises leased to the tenant and under the tenant’s control. A latent defect for which the landlord may be held liable is a defect that is known or should have been known to the landlord in the exercise of reasonable care and that could not have been discovered upon reasonable examination of the premises by the tenant. The tenant has a duty to inspect the premises and determine their safety and suitability. See also Greenlee v. First National Bank in DeKalb, 175 Ill.App.3d 236, 529 N.E.2d 723, 124 Ill.Dec. 742 (1st Dist. 1988).

These pronouncements of Illinois law should be compared and contrasted to certain sections of the RESTATEMENT, specifically §§355 – 362.

Section 355 sets forth the general rule for conditions arising after a lessor transfers possession. It states:

Except as stated in §§357 and 360 – 362, a lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sublessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession.

There are no Illinois cases relying on this section of the RESTATEMENT.

Section 356 sets forth the general rule for conditions existing when a lessor transfers possession. It states:

Except as stated in §§357 – 362, a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

The only Illinois case citing this section is Hurt v. Pershing Mobile Homes Sales, Inc., 83 Ill.App.3d 724, 404 N.E.2d 842, 39 Ill.Dec. 251 (4th Dist. 1980). In this case, the court stated that generally a lessor is not liable to a lessee for dangerous conditions on the land that existed when the lessee took possession. The court stated that an exception to that rule exists when the lessor contracts by a covenant in the lease to make repairs. The covenant must have been given for consideration, and in this case, there was no allegation that the lessor’s oral promises were given for consideration. Furthermore, the oral promise was directly contrary to the terms of the lease and unenforceable because of the parol evidence rule. Therefore, dismissal of the complaint was justified.
Section 358 of the RESTATEMENT deals with undisclosed dangerous conditions known to the lessor. It states:

(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if

(a) the lessee does not know or have reason to know of the condition or the risk involved, and

(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

(2) If the lessee actively conceals the condition, the liability stated in Subsection (1) continues until the lessee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the lessee has had reasonable opportunity to discover the condition and to take such precautions.

The only Illinois case citing this section of the RESTATEMENT is Sparling v. Peabody Coal Co., 59 Ill.2d 491, 322 N.E.2d 5 (1975), which mentioned it only parenthetically.

RESTATEMENT §359 covers land leased for a purpose involving admission of the public. It states:

A lessor who leases land for a purpose which involves the admission of the public is subject to liability for physical harm caused to persons who enter the land for that purpose by a condition of the land existing when the lessee takes possession, if the lessor

(a) knows or by the exercise of reasonable care could discover that the condition involves an unreasonable risk of harm to such persons, and

(b) has reason to expect that the lessee will admit them before the land is put in safe condition for their reception, and

(c) fails to exercise reasonable care to discover or to remedy the condition, or otherwise to protect such persons against it.

There are no Illinois cases interpreting this section.

Section 360 discusses parts of land retained in the lessor’s control that the lessee is entitled to use. It states:

A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.
Illinois cases citing this section include *Cross v. Chicago Housing Authority*, 74 Ill.App.3d 921, 393 N.E.2d 580, 30 Ill.Dec. 544 (1st Dist. 1979), aff’d, 82 Ill.2d 313 (1980); *Trice v. Chicago Housing Authority*, 14 Ill.App.3d 97, 302 N.E.2d 207 (1st Dist. 1973); *Finesilver v. Caporusso*, 1 Ill.App.3d 450, 274 N.E.2d 905, 908 (1st Dist. 1971) (Moran, J., dissenting); and *Hiller, supra*.

Section 361 of the RESTATEMENT covers parts of land retained in a lessor’s control but necessary to the safe use of the part of the land leased. It states:

A possessor of land who leases a part thereof and retains in his own control any other part which is necessary to the safe use of the leased part, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor’s control, if the lessor by the exercise of reasonable care

(a) could have discovered the condition and the risk involved, and

(b) could have made the condition safe.

Two Illinois cases have cited this section and distinguished it: *Magnotti, supra*, and *Bielarczyk v. Happy Press Lounge, Inc.*, 91 Ill.App.3d 577, 414 N.E.2d 1161, 47 Ill.Dec. 45 (1st Dist. 1980). The *Magnotti* court held that this rule was not applicable when plaintiffs merely alleged that the defendant retained control over the structural parts of a leased house that were allegedly defective because they were composed of materials susceptible to destruction by fire.

As noted above, when a landlord agrees to repair the tenant’s demised premises, the landlord may be liable if any disrepair causes injury to a tenant, a tenant’s guest, or other non-trespasser. The RESTATEMENT rules are succinctly stated in §§357 and 362.

Section 357, covering situations in which the lessor contracts to repair, states:

A lessor of land is subject to liability for physical harm caused by his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if

(a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and

(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor’s agreement would have prevented, and

(c) the lessor fails to exercise reasonable care to perform his contract.


RESTATEMENT §362 applies to negligent repairs by a lessor. It states:

A lessor of land who, by purporting to make repairs on the land while it is in the possession of his lessee, or by the negligent manner in which he makes such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use or
given it a deceptive appearance of safety, is subject to liability for physical harm caused by the condition to the lessee or to others upon the land with the consent of the lessee or sublessee.

There are no Illinois cases citing this section of the RESTATEMENT.

Generally, a landlord who undertakes to make improvements or repairs on the leased premises is under a duty to use ordinary care in carrying out the work even if the landlord was not under a legal obligation to make the improvements or repairs. When voluntarily undertaking to make improvements or repairs on a leased premises, a lessor’s duty extends to all of those who may reasonably be expected to encounter the improved or repaired property. Brewer v. Bankord, 69 Ill.App.3d 196, 387 N.E.2d 344, 25 Ill.Dec. 688 (2d Dist. 1979). A duty to repair may be created when the landlord’s course of conduct establishes a duty to maintain plaintiff’s premises. Jones v. Chicago Housing Authority, 59 Ill.App.3d 138, 376 N.E.2d 26, 17 Ill.Dec. 133 (1st Dist. 1978) (landlord liable for failure to repair window latch when it had consistently made repairs in past when notified of need). However, a landlord who makes minor repairs or cosmetic changes to rental property does not thereby become obligated to fix areas under the tenant’s control or become liable for injuries that occur in those areas. Seago, supra.

Generally, no duty to repair exists unless the lessor has a covenant to repair (Cerniglia v. Farris, 160 Ill.App.3d 568, 514 N.E.2d 792, 113 Ill.Dec. 10 (4th Dist. 1987)), and an agreement by a landlord to repair defects in the tenant’s premises must be supported by consideration in order to be enforceable (Moldenhauer v. Krynski, 62 Ill.App.2d 382, 210 N.E.2d 809 (1st Dist. 1965)).

Several cases concerning apartment building lessors and injuries to tenants or their guests have dealt with the troublesome issue of how far a landlord’s duty extends. A landlord owes no duty to provide continuous elevator service for tenants injured while using stairs when the elevator service is intermittent. Champs v. Chicago Housing Authority, 141 Ill.App.3d 881, 491 N.E.2d 20, 96 Ill.Dec. 206 (1st Dist. 1986).

Additionally, a landlord has no common law duty to provide window screens sufficient to support the weight of a child who leans against them, and a renovator (builder) owes no common law duty to apartment residents to install childproof window screens. Lamkin v. Towner, 138 Ill.2d 510, 563 N.E.2d 449, 150 Ill.Dec. 562 (1990). This principle has been extended so that even when a landlord entered into an agreement to install screens properly mated with an existing window frame, a duty was not created to provide an apartment with a childproof screen or sufficient safeguards to prevent a child’s falling from a window. Henstein v. Buschbach, 248 Ill.App.3d 1010, 618 N.E.2d 1042, 188 Ill.Dec. 472 (1st Dist. 1993).

E. [1.36] Licensors and Licensees

A lease is not the same as a license under Illinois law. A licensee has a right to enter property and use it for a specific purpose; the licensor retains the right and obligation to control the premises. Mueller v. Keller, 18 Ill.2d 334, 164 N.E.2d 28 (1960). As noted above in §1.35, in many cases a lessor or a lessee or both have independent or concurrent duties to control the premises covered by a lease. The status of licensee is important because a licensee has no duty to maintain the premises subject to a license and is not liable for a plaintiff’s injuries. J. P. Collins v. Mid-America Bag Co., 179 Ill.App.3d 792, 535 N.E.2d 48, 128 Ill.Dec. 834 (2d Dist. 1989).
F. [1.37] Vendors and Purchasers

An ordinary vendor of real property is not liable for personal injuries that are sustained after transfer of possession and control. *Anderson v. Cosmopolitan National Bank of Chicago*, 54 Ill.2d 504, 301 N.E.2d 296 (1973). The exception to this general rule is when the vendor actively conceals or fails to reveal a dangerous condition to the vendee, in which case liability of the vendor continues until the vendee discovers the defective condition and has an opportunity to remedy it. *Regas v. Associated Radiologists, Ltd.*, 230 Ill.App.3d 959, 595 N.E.2d 1223, 172 Ill.Dec. 553 (1st Dist. 1992). Moreover, the doctrine of equitable estoppel may preclude a previous owner from a legal finding of non-liability. *Buczak v. Central Savings & Loan Association*, 230 Ill.App.3d 490, 594 N.E.2d 1291, 171 Ill.Dec. 771 (1st Dist. 1992).

Sections 351 and 352 of the RESTATEMENT may have application. Section 351, covering dangerous conditions arising after a vendor transfers possession, states:

A vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land by any dangerous condition, whether natural or artificial, which comes into existence after the vendee has taken possession.

Section 352, covering dangerous conditions existing at the time a vendor transfers possession, states:

Except as stated in §353, a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.

The seminal Supreme Court case that discusses these sections of the RESTATEMENT is *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 531 N.E.2d 1358, 126 Ill.Dec. 519 (1988), in which two employees were attacked and shot by an intruder who entered the office in which they were working. The owner and operator of the office park, the owner’s managing agent, and the prior owner of the office park were sued for personal injury and wrongful death. Summary judgment in favor of the prior owner was upheld by the Illinois Supreme Court. The court held that the prior owner could no longer be held liable as a vendor of real property for injuries caused by the intruder (a former employee who possessed master keys to the individual office) since the evidence established that a maintenance engineer at the office park told the managing agent that master keys to the individual offices were unaccounted for but that the agent rejected the idea of rekeying the locks to render the master keys inoperable.

A previous Illinois Supreme Court case that relied on these sections was *Century Display Manufacturing Corp. v. D. R. Wager Construction Co.*, 71 Ill.2d 428, 376 N.E.2d 993, 17 Ill.Dec. 664 (1978). In that case, a purchaser brought an action to recover damages for fire losses to the property allegedly caused by the negligence and willful and wanton misconduct of the vendor. The Supreme Court held that although the appellate court erred in failing to apply the RESTATEMENT to cases involving property damage, when the vendor concealed or failed to disclose to his vendee a condition that posed an unreasonable risk to persons on the land, the appellate court could properly affirm the order of the trial court granting summary judgment since the pleading showed no triable issue as to material fact, thus entitling the defendant to judgment as a matter of law. In this case the vendor, after inspection, had agreed to take the property “as is” for a reduced price, and the mere presence of combustible material on the property that became ignited only through some outside agency was not seen by the court as constituting an unreasonable risk that would permit the purchaser to recover under the RESTATEMENT provision governing dangerous conditions existing at the time the vendor transfers possession of property.

Section 353 of the RESTATEMENT, dealing with undisclosed dangerous conditions known to the vendor, may also apply. It states:

(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if

(a) the vendee does not know or have reason to know of the condition or the risk involved, and

(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions.

The cases cited above with reference to §352 also rely on §353 in their analysis. Additional Illinois cases include *Brooks by Brooks v. United States*, 712 F.Supp. 667 (N.D.Ill. 1989), and *Dubin v. Michael Reese Hospital & Medical Center*, 74 Ill.App.3d 932, 393 N.E.2d 588, 30 Ill.Dec. 552 (1st Dist. 1979), rev’d, 38 Ill.2d 277 (1980).

In *Heider v. Leewards Creative Crafts, Inc.*, 245 Ill.App.3d 258, 613 N.E.2d 805, 184 Ill.Dec. 488 (2d Dist. 1993), the court reversed a trial court decision not to dismiss a portion of the complaint alleging liability. In its analysis, the court discussed both §§353 and 352 of the RESTATEMENT.

Section 354 of the RESTATEMENT, which deals with transferors of ownership and possession other than vendors, provides:

(1) The rules stated in §§ 351 and 352 apply to any former owner of land whose ownership and possession have been transferred otherwise than by sale.

(2) The rule stated in § 353 applies to any former owner of land who has voluntarily transferred the ownership and possession inter vivos.
G. [1.38] Contractors

Contractors on the land of others may be held liable for personal injuries of individuals who come onto the land while the work is being conducted or after the work has been completed and accepted by the owner.

A general contractor owes a duty to persons who might reasonably be expected to come onto the premises or to be in the vicinity of the construction site to keep it safe and to see that adequate safeguards are furnished to protect against foreseeable injuries. Ross v. Aryan International, Inc., 219 Ill.App.3d 634, 580 N.E.2d 937, 162 Ill.Dec. 754 (1st Dist. 1991). Moreover, the negligent performance of contractual duties causing physical injuries can give rise to tort liability (Perkaus v. Chicago Catholic High School Athletic League, 140 Ill.App.3d 127, 488 N.E.2d 623, 94 Ill.Dec. 624 (1st Dist. 1986)) regardless of whether privity of contract exists between the plaintiff and defendant (Rozny v. Marnul, 43 Ill.2d 54, 250 N.E.2d 656 (1969)), and the scope of the defendant’s duty is dependent on the terms of the contract (Perkaus, supra).

Interestingly, §414 of the RESTATEMENT has been rejected as a basis for liability of a contractor unless the contractor is an owner or possessor of land. Section 414 provides:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

All the Illinois cases relying on §414 have dealt solely with owners of land. See Unger v. Eichleay Corp., 244 Ill.App.3d 445, 614 N.E.2d 1241, 185 Ill.Dec. 556 (3d Dist. 1993), and cases cited therein.

Additionally, when presented with a question of the duty of care owed by an owner of premises to an independent contractor employed by the owner, §414 is to be read in harmony with the Premises Liability Act and §§343 and 343A of the RESTATEMENT. Cihon v. Cargill, Inc., 293 Ill.App.3d 1055, 689 N.E.2d 153, 228 Ill.Dec. 281 (1st Dist. 1997).

The accepted work doctrine was created in Illinois by the Illinois Supreme Court in Paul Harris Furniture Co. v. Morse, 10 Ill.2d 28, 139 N.E.2d 275 (1956). In that case, the court held that “where an independent contractor is employed to construct or install any given work or instrumentality, and has done the same and it has been accepted by the employer and the contractor discharged, he is no longer liable to third persons for injuries received as the result of defective construction or installation.” 139 N.E.2d at 282. The court created three exceptions:

(1) where the thing dealt with is imminently dangerous in kind, such as explosives, poisonous drugs, and the like, (2) where the subject matter of the contract is to be used for a particular purpose, requiring security for the protection of life, such as a scaffold, and (3) where the thing is rendered dangerous by a defect of which the constructor knows but deceitfully conceals, and which causes an accident when the thing is used for the particular purpose for which it was constructed. Id.

As the court pointed out in Fournier v. 3113 West Jefferson Partnership, 100 Ill.App.3d 820, 427 N.E.2d 408, 56 Ill.Dec. 328 (2d Dist. 1981), the Paul Harris rule of non-liability was a corollary to the doctrine of privity of contract, and because it was honored in its exceptions more than its general application, it was discarded when the Illinois Supreme Court had an opportunity to do so 23 years later in Hunt v. Blasius, 74 Ill.2d 203, 384 N.E.2d 368, 23 Ill.Dec. 574 (1978).
In *Hunt*, the court held that a contractor’s “[l]iability in negligence arises only if the independent contractor has breached a duty owed to persons whose injuries proximately resulted from the breach.” 384 N.E.2d at 371. The court went on to point out that a contractor who has simply carried out the specifications that are the subject of the contracted undertaking “is justified in relying upon the adequacy of the specifications unless they are so obviously dangerous that no competent contractor would follow them.” *Id.* Cases interpreting the *Hunt* doctrine have consistently held that when a contractor has no contractual duty to reinspect and absent evidence that a failure to reinspect was obviously dangerous, liability is not established. *See, e.g., Geever v. O’Shea & Sons Builders, Inc.,* 233 Ill.App.3d 917, 600 N.E.2d 21, 175 Ill.Dec. 398 (1st Dist. 1992).

Further discussion of the liability of a contractor is contained in §1.43 below, in which §§383 – 386 of the RESTATEMENT are discussed.

H. [1.39] Architects and Engineers

Like contractors’ duties, architects’ and engineers’ duties are usually circumscribed by the terms of their contracts with owners of property or other contractors. In *Miller v. DeWitt*, 37 Ill.2d 273, 226 N.E.2d 630 (1967), an architect was held responsible under a negligence theory for inadequate supervision when a school gym under construction collapsed. An engineer usually cannot contend that recovery can be sought against only the owner. *Laukkanen v. Jewel Tea Co.*, 78 Ill.App.2d 153, 222 N.E.2d 584 (4th Dist. 1966) (plaintiff was rendered paraplegic when building’s pylon fell on her). Although the work performed by an architect or engineer has been completed, the architect or engineer still can be liable for injuries even after the work has been accepted by the owner. *Johnson v. Equipment Specialists, Inc.*, 58 Ill.App.3d 133, 373 N.E.2d 837, 15 Ill.Dec. 491 (4th Dist. 1978); RESTATEMENT §385. These principles should be contrasted to the principle that upon the satisfaction of the terms of a construction contract, an independent contractor owes no duty to third parties concerning the construction specifications. *Hunt v. Blasius*, 74 Ill.2d 203, 384 N.E.2d 368, 23 Ill.Dec. 574 (1978).

I. [1.40] Schools


Two exceptions to these statutory and common law immunities have been developed. First, a school has a duty to exercise ordinary care in furnishing personal property such as football helmets and athletic equipment. *Gerrity v. Beaty*, 71 Ill.2d 47, 373 N.E.2d 1323, 15 Ill.Dec. 639 (1978). Stated a different way, a school district has an affirmative duty of care to provide adequate personal property equipment. *Lynch v. Board of Education of Collinsville Community Unit School District No. 10*, 82 Ill.2d 415, 412 N.E.2d 447, 45 Ill.Dec. 96 (1980).

The second exception, known as the “premises liability” exception, has been recognized by the Second, Fourth, and Fifth Districts of the appellate court. In these cases, several different premises conditions or pieces of playground equipment have been encompassed by this so-called exception. The premises liability exception has been applied to playground ruts (*Sidwell by Sidwell v. Griggsville Community Unit School District No. 4*, 208 Ill.App.3d 296, 566 N.E.2d 838, 152 Ill.Dec. 961 (4th
Premises Liability

1.41


The First and Third Districts have rejected this so-called premises liability exception. In Brock v. Rockridge Community Unit School District No. 300, 183 Ill.App.3d 447, 539 N.E.2d 445, 132 Ill.Dec. 135 (3d Dist. 1989), the appellate court applied the Illinois School Code immunity to a case involving a student injured in a touch football game during a physical education class. In Ward v. Community Unit School District 220, 213 Ill.App.3d 1008, 572 N.E.2d 986, 157 Ill.Dec. 522 (1st Dist. 1991), vacated, 145 Ill.2d 645 (1992), the First District rejected the invitation by plaintiff’s counsel to apply the premises liability exception to a situation in which a student observing one athletic contest was seriously injured by a student athlete who strayed from an adjacent athletic field. Attempts in both Brock and Ward to analogize the defective personal equipment exception to the facts were unsuccessful. Whether the Illinois Supreme Court will reconcile the split in authority is yet to be seen.

A school district was held to have no duty to protect a 17-year-old spectator from the danger of being struck by a tennis ball while watching a tennis match from within the protective fence. Chareas v. Township High School District No. 214, 195 Ill.App.3d 540, 553 N.E.2d 23, 142 Ill.Dec. 673 (1st Dist. 1990). The court noted that bleachers were provided for spectators, no one gave the spectator permission to go inside the fence to watch the match, and the dangers of standing inside the tennis court during the match were obvious. Although this case was decided before Ward, it is likely that a similar factual situation would still result in summary judgment for the school district since the danger of being hit by a ball is blatantly obvious.

J. [1.41] Municipalities and Other Governmental Entities

The premises liability law applicable to municipalities or governmental entities is so expansive that this section could never do it justice. Consequently, only the highlights of the law that may establish a government as a potential defendant are discussed.

“Local public entities” includes a wide variety of governmental bodies such as townships, counties, municipalities, municipal corporations, school districts, park districts, and other governmental units. 745 ILCS 10/1-206. These entities can be sued in circuit courts, but the actions must be filed within one year of the injury. Actions against the State of Illinois must be brought within the Illinois Court of Claims.

Whether a governmental entity owes a duty to an injured person depends on whether the governmental body is exercising its authority for a governmental purpose; if so, then it owes no duty to a member of the public. Gebhardt v. Village of LaGrange Park, 354 Ill. 234, 188 N.E. 372 (1933). For example, a municipality has no duty to provide a lifeguard at a municipal swimming pool for that reason. Moreover, a township has no duty to the motoring public to make its drainage ditches that run parallel to the traveled way safe for vehicular traffic since a drainage ditch is deemed not to be an unreasonable hazard to the motoring public. DiBenedetto v. Flora Township, 153 Ill.2d 66, 605 N.E.2d 571, 178 Ill.Dec. 777 (1992). Nor does a city have a duty to build a fence between city property and adjacent railroad property to protect children from being injured on the railroad tracks by trains. Foreman v. Consolidated Rail Corp., 214 Ill.App.3d 700, 574 N.E.2d 178, 158 Ill.Dec. 384 (1st Dist. 1991).
However, as stated in the Local Governmental and Governmental Employees Tort Immunity Act, a public entity has

the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom [it] intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition. 745 ILCS 10/3-102(a).


However, just as is the case with private property owners, when a governmental entity actually causes the dangerous condition through the acts or omissions of its employees, then no actual or constructive notice of the condition is required. Harding v. City of Highland Park, 228 Ill.App.3d 561, 591 N.E.2d 952, 169 Ill.Dec. 448 (2d Dist. 1992).

Although a municipality is responsible for negligent construction of public works and for failure to maintain them, it has no duty for its negligence or refusal to undertake such improvements generally; the duty arises only when the public improvement is actually undertaken. Thompson v. Cook County Forest Preserve District, 231 Ill.App.3d 88, 595 N.E.2d 1254, 172 Ill.Dec. 584 (1st Dist. 1992). Therefore, in Thompson the common law duty to maintain property in a reasonably safe condition did not require the creation of public improvements such as crosswalks and sidewalks or any warning signs.

The intended and permissive user requirement of the Tort Immunity Act has been discussed in several cases concerning municipal sidewalks. In Prokes v. City of Chicago, 208 Ill.App.3d 748, 567 N.E.2d 592, 153 Ill.Dec. 634 (1st Dist. 1991), the appellate court determined that an adult bicyclist is neither an intended nor a permitted user of a sidewalk. The same result obtained in a case in which a bicyclist was injured near a raised portion of a sidewalk containing a manhole. Lipper v. City of Chicago, 233 Ill.App.3d 834, 600 N.E.2d 18, 175 Ill.Dec. 395 (1st Dist. 1992). Ordinances barring bicyclists from sidewalks have been upheld as constitutional. Garcia v. City of Chicago, 240 Ill.App.3d 199, 608 N.E.2d 239, 181 Ill.Dec. 166 (1st Dist. 1992).

Skateboarders appear to have more protection than bicyclists in Illinois. Although the appellate court in Olson v. Village of Oak Lawn, 104 Ill.App.3d 501, 432 N.E.2d 1120, 60 Ill.Dec. 221 (1st Dist. 1982), held that a village owed no duty to maintain its sidewalks in a condition safe for skateboarding, the appellate court in Larson v. City of Chicago, 142 Ill.App.3d 81, 491 N.E.2d 165, 96 Ill.Dec. 351 (1st Dist. 1986), held that a municipality owes a duty to maintain public sidewalks in a condition reasonably safe for all foreseeable use, including skateboarding.

In some cases, pedestrians have been deemed intended and permissive users of the streets, curbs, parkways, and sidewalks owned by municipalities; in other cases, pedestrians have not been protected by the “intended and permissive user” label. One Illinois Supreme Court pronouncement on this issue held that a municipality has no duty to illuminate highways or provide crosswalks for pedestrians since they are not intended users of a highway midblock. Wojdyla v. City of Park Ridge, 148 Ill.2d 417, 592 N.E.2d 1098, 170 Ill.Dec. 418 (1992). Forest preserve districts have no duty to provide crosswalks, sidewalks, or any warning signs for pedestrians. Thompson, supra.

These cases should be distinguished from those in which a pedestrian was walking from a legally parked car to another spot on the street and was injured (*Torres v. City of Chicago*, 218 Ill.App.3d 89, 578 N.E.2d 158, 161 Ill.Dec. 31 (1st Dist. 1991); *Princivalli v. City of Chicago*, 202 Ill.App.3d 525, 559 N.E.2d 1190, 147 Ill.Dec. 850 (1st Dist. 1990)) or in which a bus passenger was walking within a bus loading zone (*Jorgensen v. Whiteside*, 233 Ill.App.3d 783, 599 N.E.2d 1009, 174 Ill.Dec. 925 (1st Dist. 1992); cf. *Wolowinski v. City of Chicago*, 238 Ill.App.3d 639, 606 N.E.2d 273, 179 Ill.Dec. 441 (1st Dist. 1992)).


Although municipalities have a duty to maintain the sidewalks they own, that duty does not rise to the level of requiring the sidewalks to be in perfect condition. Accordingly, three-quarter-inch cracks between sidewalk slabs (*Walter v. City of Rockford*, 332 Ill.App. 243, 74 N.E.2d 903 (2d Dist. 1947)), one-half-inch defects in a sidewalk slab (*Cooks v. United States*, 815 F.2d 34 (7th Cir. 1987)), and one-quarter-inch cracks in a sidewalk (*Gleason v. City of Chicago*, 190 Ill.App.3d 1068, 547 N.E.2d 518, 138 Ill.Dec. 351 (1st Dist. 1989)) have been held to be not actionable.

Several additional immunities apply to local governmental entities, including an immunity for injuries arising from the effect of weather conditions on streets, highways, alleys, sidewalks, or other public ways (745 ILCS 75/1, 75/2); the lack of a duty to upgrade the condition of a street, highway, alley, sidewalk, or other place (65 ILCS 5/9-3-1); and immunity from all lawsuits except those alleging wilful or wanton conduct when injuries are caused by conditions on recreational public property such as parks, playgrounds, open areas, or other recreational facilities (745 ILCS 10/3-106).

In fact, even a crosswalk that was part of the county bicycle trail system has been held to come within the recreational use provision of the Tort Immunity Act since the crosswalk was designed and implemented for recreational purposes. *Dinelli v. County of Lake*, 294 Ill.App.3d 876, 691 N.E.2d 394, 229 Ill.Dec. 284 (2d Dist. 1998). Similarly, as a matter of first impression, the Illinois appellate court has held that a former Navy pier owned by a municipal corporation was a “recreational property” within the meaning of the Tort Immunity Act. The court found that the recreational nature of the pier, despite its multiple other uses, was sufficient to trigger immunity. As a result, a pedestrian who fell on a walkway could not maintain a negligence action for her injuries. *Wallace v. Metropolitan Pier & Exposition Authority*, 302 Ill.App.3d 573, 707 N.E.2d 140, 236 Ill.Dec. 295 (1st Dist. 1998).
K. [1.42] Common Carriers and Innkeepers

While the special rules applicable to common carriers or innkeepers in the context of liability for third-party criminal acts are discussed in §1.26 above, obviously many cases involving common carriers and innkeepers do not involve criminal acts.


A common carrier undertakes by contract of carriage to protect its passengers; therefore, the carrier is responsible for injury caused by the intentional acts of its employees regardless of whether the acts were within the actual or apparent scope of the employees’ authority. Chicago & Eastern R.R. v. Flexman, 103 Ill. 546 (1882); McMahon v. Chicago City Ry., 239 Ill. 334, 88 N.E. 223 (1909). Whether the operator has accepted a person as a passenger for the purposes of escalator or elevator cases will usually depend on the purpose for which the person is in the building. Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N.E.117 (1908).

The relationship of passenger and carrier exists only when the person is in the act of boarding, is aboard, or is in the act of departing the carrier’s vehicle. Katamay v. Chicago Transit Authority, 53 Ill.2d 27, 289 N.E.2d 623 (1972). However, in the case of an elevator, one must be in the car (as opposed to stepping into an open shaft) to impose on the elevator owner the duty of the highest degree of care.

Whether the uncontroverted facts establish the relationship of carrier and passenger is a question of law for the court to determine. Burns v. Regional Transportation Authority, 112 Ill.App.3d 464, 445 N.E.2d 348, 67 Ill.Dec. 868 (1st Dist. 1982), rev’d sub nom. Stack v. Regional Transportation Authority, 101 Ill.2d 284 (1984). Thus, when a plaintiff was struck by a train after falling from the station platform, the court held that the plaintiff was entitled to the highest degree of care. Skelton v. Chicago Transit Authority, 214 Ill.App.3d 554, 573 N.E.2d 1315, 158 Ill.Dec. 130 (1st Dist. 1991). Innkeepers also owe a guest the highest degree of care.
L. [1.43] Other Possible Defendants

The listing of potential defendants found in §§1.31 – 1.42 is extensive but not exhaustive. It must be understood, however, that unless a potential defendant controls the land or intends to control the land, a defendant cannot be held liable as a possessor of land. *Stedman v. Spiros*, 23 Ill.App.2d 69, 161 N.E.2d 590 (2d Dist. 1959).

The RESTATEMENT has several sections that deal with other classes of potential defendants. Several Illinois cases have referred to these sections in articulating the potential liability of “occupiers” of land as referred to in the Illinois Pattern Jury Instructions. RESTATEMENT §§383 – 387 have application to those employees or contractors who work on behalf of an owner or possessor of land.

The liability of persons acting on behalf of the possessor is covered in §383, which provides:

*One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.*

The liability of persons creating artificial conditions on land on behalf of the possessor while work remains in their charge is covered by §384, which provides:

*One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.*

These sections apply to employees or contractors who either gratuitously or for pay act not only for the purposes of the possessor but also under the possessor’s direction or control and, therefore, by the possessor’s authority. The fact that a person is paid or acts gratuitously does not affect that person’s liability to someone who is injured, but it may determine if the person is liable for the manner in which the directed activity is carried out.

Illinois cases that have referred to these sections or principles include *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 383 N.E.2d 177, 22 Ill.Dec. 701 (1978), and *Deibert v. Bauer Brothers Construction Co.*, 141 Ill.2d 430, 566 N.E.2d 239, 152 Ill.Dec. 552 (1990).

Section 385 of the RESTATEMENT applies to those situations in which physical harm occurs after the work has been accepted. It provides:

*One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.*

Utility companies often are potentially liable because of the creation of dangerous conditions on the land of others. These scenarios are covered by §386 of the RESTATEMENT, which provides:

> Any person, except the possessor of land or a member of his household or one acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should recognize as involving an unreasonable risk of physical harm to others upon or outside of the land, is subject to liability for physical harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor or otherwise, or are trespassers as between themselves and the possessor.


Finally, when an owner or possessor of land turns over the day-to-day operation of certain premises to another person or company, that person or company is potentially liable. Section 387 of the RESTATEMENT refers to the liability of persons taking over entire charge of the land:

> An independent contractor or servant to whom the owner or possessor of land turns over the entire charge of the land is subject to the same liability for harm caused to others, upon or outside of the land, by his failure to exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land.

Although there are no Illinois cases relying on this section of the RESTATEMENT, the usual situation to which this rule applies is when a person, partnership, or corporation making a business of the management of real estate takes over the entire charge of a building or parcel of land, including the rent or collection of rent as well as its maintenance in safe repair. One need only look at the titles of certain Illinois appellate cases to confirm the reality that real estate management firms are subject to liability in Illinois.

X. UNUSUAL ACTIVITIES AND CONDITIONS

A. [1.44] Ultrahazardous or Inherently Dangerous Activities or Conditions

Owners of property who conduct ultrahazardous activities are strictly liable for any and all injuries or damage that occurs as a result of the activity. I.P.I. — Civil No. 115.01 succinctly states the Illinois law on the subject:

> When a person carries on an ultrahazardous activity . . . he is liable for any [injury] [property damage] proximately caused by that activity regardless of the amount of care used [except to one who has actual knowledge of the dangers involved and (voluntarily participates in the activity) (or) (voluntarily exposes himself to the dangers)].
Although this strict liability concept had its genesis in England over 150 years ago in *Fletcher v. Rylands*, 159 Eng.Rep. 737 (1865), rev’d, 1 L.R.-Ex. 265 (1866), aff’d, 3 L.R.-H.L. 330 (1868), Illinois courts have recognized it since 1885. *Chicago & Northwestern Ry. v. Hunerberg*, 16 Ill.App. 387 (1st Dist. 1885).

RESTATEMENT §§519 and 520 set out the criteria for determining if an activity is “abnormally dangerous,” to use the RESTATEMENT parlance, or “ultrahazardous,” to use the I.P.I. label. Section 520 states:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

In applying these criteria, Illinois courts have recognized two activities as being ultrahazardous: blasting and demolition. The seminal cases finding blasting to be ultrahazardous are *City of Joliet v. Harwood*, 86 Ill. 110 (1877), and *Fitzsimons & Connell Co. v. Braun*, 199 Ill. 390, 65 N.E. 249 (1902). In dealing with demolition cases, Illinois courts have usually characterized the activity as “inherently” dangerous. See *Sherman House Hotel Co. v. Gallagher*, 129 Ill.App. 557 (1st Dist. 1906); *Clark v. City of Chicago*, 88 Ill.App.3d 760, 410 N.E.2d 1025, 43 Ill.Dec. 892 (1st Dist. 1980). Landowners who employ demolition contractors will be just as liable for the contractor’s demolition work since an exception to the normal independent contractor rule applies when the contractor is performing an inherently dangerous activity (*Woodward v. Mettille*, 81 Ill.App.3d 168, 400 N.E.2d 934, 36 Ill.Dec. 354 (3d Dist. 1980)). This exception to the general rule of non-liability for the acts of an independent contractor does not apply when the act is not inherently dangerous but becomes hazardous only to a person who has an idiosyncratic reaction to an activity. *Bear v. Power Air, Inc.*, 230 Ill.App.3d 403, 595 N.E.2d 77, 172 Ill.Dec. 14 (1st Dist. 1992).

Other activities that have been deemed not to be ultrahazardous or inherently dangerous include storing containers of highly flammable chemicals in a warehouse (*Continental Banking Corp. v. Union Oil Company of California*, 152 Ill.App.3d 513, 504 N.E.2d 787, 105 Ill.Dec. 502 (1st Dist. 1987)), using a trampoline (*Fallon v. Indian Trail School*, 148 Ill.App.3d 931, 500 N.E.2d 101, 102 Ill.Dec. 479 (2d Dist. 1986)), and sandblasting (*Anderson v. Marathon Petroleum Co.*, 801 F.2d 936 (7th Cir. 1986)).

A recent case held that the displaying of fireworks is not an ultrahazardous activity that would allow a person displaying the fireworks to be held liable for harm caused under the RESTATEMENT regardless of the amount of care used. *Cadena v. Chicago Fireworks Manufacturing Co.*, 297
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Ill.App.3d 945, 697 N.E.2d 802, 232 Ill.Dec. 60 (1st Dist. 1998). The court reiterated the elements of §520 of the RESTATEMENT as the factors to be considered in determining whether an activity is abnormally dangerous or ultrahazardous. The court went on to note that the inherently dangerous activity doctrine, which applies to make property owners who authorize inherently dangerous activity on their property vicariously liable for harm caused by such activity, is not substantially similar to the ultrahazardous activity doctrine, which holds that actors who engage in abnormally dangerous activity are liable for harm caused regardless of the level of care used to prevent the harm. The court referred the unsuccessful plaintiff’s counsel to §427 of the RESTATEMENT, which provides:

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor’s failure to take reasonable precautions against such danger.

The court further explained that the inherently dangerous activity doctrine is clearly distinct from the ultrahazardous activity doctrine because while an activity may be considered inherently dangerous, the imposition of strict liability under an ultrahazardous activity theory may not be warranted in certain situations. See Miller v. Civil Constructors, Inc., 272 Ill.App.3d 263, 651 N.E.2d 239, 209 Ill.Dec. 311 (2d Dist. 1995) (stating that use of firearms has been classified as highly dangerous but their use does not constitute ultrahazardous activity). Finally, the court noted that liability under §427 can be avoided by taking reasonable precautions against the danger, whereas under the ultrahazardous doctrine, reasonable precautions will not preclude the imposition of liability.

B. [1.45] Nuisance

Public and private nuisance cases involve the invasion of a protective right rather than a specific type of conduct. In Laflin-Rand Powder Co. v. Tearney, 131 Ill. 322, 23 N.E. 389, 390 (1890), the Illinois Supreme Court stated that the “question of care or want of care is not involved in an action for injuries resulting from a nuisance.” See also Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Commission, 34 Ill.2d 544, 216 N.E.2d 788 (1966). If there is an unreasonable interference with the use and enjoyment of the land of another, it is a private nuisance; if the interference is with a public right, it is a public nuisance. Generally, for a defendant to be liable for creating a public or private nuisance, it must be shown that there was a substantial interference or the threat of a substantial interference with a protected interest.

The term “nuisance” is incapable of any exact or comprehensive definition. Shell Oil Co. v. Illinois Pollution Control Board, 37 Ill.App.3d 264, 346 N.E.2d 212 (5th Dist. 1976). In deciding whether a particular annoyance is sufficient to constitute a nuisance, as far as injury to the person is concerned, the key criterion is its effect on an ordinarily reasonable person, i.e., a normal person of ordinary habits and sensibilities. Id.; Belmar Drive-In Theatre Co., supra.

A private nuisance is a non-trespassory invasion of another’s interest in private use and enjoyment of land. Colwell Systems, Inc. v. Henson, 117 Ill.App.3d 113, 452 N.E.2d 889, 72 Ill.Dec. 636 (4th Dist. 1983). According to RESTATEMENT §821D, cmt. d, the elements of private nuisance are that

1. there was some interference with the interest in the private use and enjoyment of the land, whether or not the amount and extent of that interference was anticipated or intended;

2. the interference resulted in significant harm; and
3. the interference that came about under such circumstances was of such a nature, duration, or amount as to constitute an unreasonable interference with the use and enjoyment of the land.

A “private nuisance” is defined by §821D as a “nontrespassory invasion of another’s interest in the private use and enjoyment of land.”

In order to be actionable as a private nuisance, an invasion of another’s interest in the use and enjoyment of land must exist, be substantial, and be either negligent, intentional, or unreasonable.


In determining whether an activity constitutes a nuisance, the court balances the benefit from the defendant’s use of the land, the suitability of the location to the defendant’s activity, and the harm to the plaintiffs. *Pasulka*, supra.

An action may be maintained for the creation of a nuisance, and a subsequent and separate action may be maintained for continuance of the nuisance. *Admiral Builders Corp. v. Robert Hall Village*, 101 Ill.App.3d 132, 427 N.E.2d 1032, 56 Ill.Dec. 627 (1st Dist. 1981).

Private nuisances include offensive odors, excess of noise, smoke, dust, or vibrations. Whether smoke, odors, dust, or gaseous fumes constitute a nuisance depends on the particular facts presented by each case. *City of Chicago v. Commonwealth Edison Co.*, 24 Ill.App.3d 624, 321 N.E.2d 412 (1st Dist. 1974). For example, because the operation and maintenance of a funeral home constitutes lawful business and neither the business nor the establishment is a nuisance per se, whether a funeral establishment is a nuisance depends on the particular circumstances involved; it may constitute a nuisance by the way it is conducted or because of its location (as when it is located in a residential district). *Bauman v. Piser Undertakers Co.*, 34 Ill.App.2d 145, 180 N.E.2d 705 (1st Dist. 1962).

Public nuisances are defined by statute and by common law. Article XI, §2, of the Illinois Constitution provides that “[e]ach person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.” This section essentially eliminated the need for an individual to prove special damages in a public nuisance action that is based on a violation of environmental regulations. In *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 426 N.E.2d 824, 834, 55 Ill.Dec. 499 (1981), the Illinois Supreme Court adopted Professor Prosser’s definition of a “public nuisance” as “an act or omission ‘which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all.’” Quoting William Lloyd Prosser, HANDBOOK OF THE LAW OF TORTS §86, p. 572 (4th ed. 1971). Section 821B of the RESTATEMENT defines a “public nuisance” as “an unreasonable interference with a right common to the general public.”

The Illinois Compiled Statutes list numerous acts as nuisances per se. These activities include, among others, maintaining a house of prostitution (740 ILCS 105/0.01, et seq.), polluting water (720 ILCS 5/47-5(3); 415 ILCS 5/11), obstructing a highway (720 ILCS 5/47-4(5); 615 ILCS 5/9-117) or waterway (720 ILCS 5/47-5(4); 615 ILCS 20/1, et seq.), and using property for purposes that endanger the public health (720 ILCS 5/47-5(8)). In addition, Chapter 225 of the Illinois Compiled
Statutes contains a number of sections making it a public nuisance to engage in specific professions or trades without the required license (e.g., barber, beautician, funeral director, land surveyor, nurse, optometrist, medical professional, engineer, psychologist, shorthand reporter, and veterinarian). Further, a municipality has the power to declare anything a nuisance that is either a nuisance per se or a nuisance at common law or by statute. *Turner v. Thompson*, 102 Ill.App.3d 838, 430 N.E.2d 157, 58 Ill.Dec. 215 (1st Dist. 1981); 720 ILCS 5/47-5.

By common law, in order for something to be a public nuisance, the interference with the public interest or right must be both substantial and unreasonable. *City of Chicago v. Festival Theater Corp.*, 88 Ill.App.3d 216, 410 N.E.2d 341, 43 Ill.Dec. 341 (1st Dist 1980), *aff’d*, 91 Ill.2d 295 (1982). In most cases, a private individual cannot bring an action for an injunction or damages against a public nuisance unless the person can show special damage. Special damage or particular injury is distinct from that suffered in common with the public at large.

As determinative of damages recoverable for injury to property, the law recognizes two types of nuisances: temporary and permanent. A “permanent nuisance” is one characterized as continuing indefinitely, and the structure constituting the nuisance is a lawful one or one that the person or entity has a legal right to maintain. *Tamalunis v. City of Georgetown*, 185 Ill.App.3d 173, 542 N.E.2d 402, 134 Ill.Dec. 223 (4th Dist.), *appeal denied*, 128 Ill.2d 672 (1989). A “temporary nuisance” is one that is occasional, intermittent, or recurrent and is remediable, removable, or abatable. *Id.*

Remedies include damages or injunctions. In addition to these judicial remedies, a person whose rights have been invaded by a nuisance may, in certain situations, use extrajudicial methods of self-help to remove a nuisance. First, the person wishing to abate the nuisance must give notice to the other party. Second, the person may enter onto the land of another only in order to terminate the nuisance and must not cause excessive damage to the other person’s property or lead to a breach of peace.

An applicant for an injunction against an alleged nuisance must show that injury is imminent as well as that there is no adequate remedy at law. *In re Chicago, Rock Island & Pacific R.R.*, 756 F.2d 517 (7th Cir. 1985). In an action to enjoin an alleged private nuisance, the trial court must balance the harm done to the plaintiff against the benefit caused by defendant’s use of the land and the suitability of the use in that particular location. *Carroll v. Hurst*, 103 Ill.App.3d 984, 431 N.E.2d 1344, 59 Ill.Dec. 587 (4th Dist. 1982). To incur liability, one need not be the owner of the property on which the nuisance exists unless a nuisance ordinance makes ownership a prerequisite to liability for the expense of abating a nuisance. *City of Chicago v. Cross City Disposal, Inc.*, 200 Ill.App.3d 520, 558 N.E.2d 249, 146 Ill.Dec. 286 (1st Dist.), *appeal denied*, 135 Ill.2d 554 (1990).

Generally, an injunction will be granted only to restrain an actual or existing nuisance. A court of equity may, however, enjoin, threaten, or anticipate a nuisance when it clearly appears that the nuisance will not necessarily result from a contemplated act or thing that it is sought to enjoin, particularly when proof shows that apprehension of material injury is well grounded on stated facts from which it appears that the danger is real and immediate. *Fink v. Board of Trustees of Southern Illinois University*, 71 Ill.App.2d 276, 218 N.E.2d 240 (5th Dist. 1966).

Ordinarily, an injunction will not be granted to abate a nuisance if redress can be obtained in a court of law. *Haack v. Lindsay Light & Chemical Co.*, 393 Ill. 367, 66 N.E.2d 391 (1946). The “irreparable injury” necessary to give a court of equity jurisdiction to issue an injunction abating a nuisance is not one so great as to be impossible of compensation but one of such character that the law cannot give adequate compensation for it.
The correct measure of damages for a permanent nuisance is depreciation in market value of a property affected by the nuisance; by contrast, damages for a temporary nuisance when the owner has resided on the property during the period when it was damaged are measured by the owner’s discomfort and deprivation of the healthful use and comforts of the home. *O’Brien v. City of O’Fallon*, 80 Ill.App.3d 841, 400 N.E.2d 456, 36 Ill.Dec. 36 (5th Dist. 1980). *See also Tamulonis, supra.*

In a case of first impression in Illinois, the appellate court held that punitive damages can be awarded in nuisance cases if the defendant’s actions were malicious, that is, “only done with the intent to annoy the plaintiff.” *Statler v. Catalano*, 167 Ill.App.3d 397, 521 N.E.2d 565, 572, 118 Ill.Dec. 283 (5th Dist.), *appeal denied*, 122 Ill.2d 595 (1988).

**XI. DEFENSES TO A PREMISES LIABILITY ACTION**

A. **[1.46] Immunities**

As mentioned above, several statutes create immunities from liability because of the status of the defendant. Governmental entities and their schools and teachers are prime examples of potential defendants whom the legislature has immunized from tort liability. Certain exceptions, such as the provision of insurance coverage, will many times ensure that a plaintiff can be made whole notwithstanding statutory immunity. See §§1.26, 1.40, 1.41. See also §§2.2 – 2.8 of this handbook.

B. **[1.47] Limitations**

The standard statute of limitations for personal injury actions is two years from the date of injury. 735 ILCS 5/13-202. Children have until their 20th birthday since the limitations period is tolled during their minority. 735 ILCS 5/13-211. If an improvement to realty is involved as defined by the rule, then the limitations period is four years. 735 ILCS 5/13-214.

In cases involving municipalities, the notice of lawsuit must be filed within one year of the date of injury. 745 ILCS 10/8-101. Actions based on written contracts must be brought within ten years unless a more specific statute of limitations specifies otherwise. 735 ILCS 5/13-206.

Actions for contribution must be filed during the pendency of the underlying lawsuit (*Laue v. Leifheit*, 105 Ill.2d 191, 473 N.E.2d 939, 85 Ill.Dec. 340 (1984)) even though the language of the Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01, *et seq.*, arguably suggests otherwise. Most importantly, any contribution action must be filed within the same limitations period applicable to the underlying case, counting from the first effective date of notice of the underlying lawsuit. *Caballero v. Rockford Punch Press & Manufacturing Co.*, 244 Ill.App.3d 333, 614 N.E.2d 362, 185 Ill.Dec. 228 (1st Dist. 1993).

C. **[1.48] Contractual Limitations**

Exculpatory clauses or disclaimers are usually looked on with disfavor in premises liability cases. The reasoning behind such disfavor is that these clauses are contrary to public policy because of the unequal bargaining power of the parties. *See, e.g., Simmons v. Columbus Venetian Stevens Buildings, Inc.*, 20 Ill.App.2d 1, 155 N.E.2d 372 (1st Dist. 1958). *See also Scheff v. Homestretch, Inc.*, 60 Ill.App.3d 424, 377 N.E.2d 305, 18 Ill.Dec. 152 (3d Dist. 1978).
D. [1.49] Plaintiff’s Conduct

Before the advent of comparative negligence, a plaintiff was barred from recovery if he walked knowingly into danger or would have avoided the danger had he known about it. Stambaugh v. Central Illinois Light Co., 42 Ill.App.3d 582, 356 N.E.2d 148, 1 Ill.Dec. 148 (3d Dist. 1976). Illinois cases agreeing with this principle, such as Mort v. Walter, 98 Ill.2d 391, 457 N.E.2d 18, 22, 75 Ill.Dec. 228 (1983), quoting Pantlen v. Gottschalk, 21 Ill.App.2d 163, 157 N.E.2d 548, 551 (3d Dist. 1959), usually stated the obvious:

[O]ne cannot look with unseeing eye and not see the danger which he could have seen by the proper exercise of his sight, or stated in another way, one will be deemed to have observed that which would necessarily have been seen if he had looked, and will not be absolved of the charge of negligence in failing to look by testimony that he looked and did not see.

However, some cases applying the contributory negligence rule found that certain conduct was not contributory negligence per se. Stach v. Sears, Roebuck & Co., 102 Ill.App.3d 397, 429 N.E.2d 1242, 57 Ill.Dec. 879 (1st Dist. 1981).

In light of the Ward v. K Mart rule (see §1.21), it is still conceivable that a defendant can be exonerated when a plaintiff claims to have looked but not seen a hazard or danger if the hazard was blatantly obvious and would ordinarily be seen in normal circumstances and there is no evidence of distraction as per RESTATEMENT §343A, cmt. f, or deliberate encounter.

In fact, findings of as high as 90-percent contributory negligence have been approved by the appellate court in premises liability cases in which plaintiffs denied seeing a hazardous condition before the injury, especially when they consciously choose a hazardous way of proceeding as opposed to a safe avenue. Healy v. Bearco Management, Inc., 216 Ill.App.3d 945, 576 N.E.2d 1195, 160 Ill.Dec. 241 (2d Dist. 1991). However, since the advent of the rule requiring jurors to be instructed by the court that the defendant shall be found not liable if the jury finds that the plaintiff’s contributory negligence is more than 50 percent, even splits between defendant and plaintiff are not unusual. 735 ILCS 5/2-1107.1

XII. [1.50] APPLICABLE STATUTES, CODES, REGULATIONS, AND STANDARDS

Various statutes, codes, and ordinances may affect a landowner’s liability in a tort action. This section should by no means be considered an exhaustive listing of them; nonetheless, it should give the legal practitioner a sampling of the duties and obligations imposed by legislative enactments or voluntary standards.

When considering whether a statutory violation gives rise to a cause of action, it must be first determined whether the plaintiff is within the class of persons intended to be protected by the statute. Additionally, the legislature must have intended to impose the duty described in the statute on the defendant-landowner. Finally, if they consciously choose a hazardous way of proceeding as opposed to a safe avenue. See Dini v. Naiditch, 20 Ill.2d 406, 170 N.E.2d 881 (1960); Kapka v. Urbaszewski, 47 Ill.App.2d 321, 198 N.E.2d 569 (1st Dist. 1964); Bell v. Willoughby Tower Building Corp., 46 Ill.App.2d 45, 196 N.E.2d 487 (1st Dist. 1964).

One of the statutes that seeks to immunize property owners from tort liability is the Recreational Use of Land and Water Areas Act (Recreational Use Act), 745 ILCS 65/1, et seq. The express purpose
of the Recreational Use Act is to “encourage owners of land to make land and water areas available to
the public for recreational or conservation purposes by limiting their liability toward persons entering
thereon for such purposes.” §1. In keeping with that purpose, the Recreational Use Act provides that
“an owner of land owes no duty of care to keep the premises safe for entry or use by any person for
recreational or conservation purposes.” §3. Furthermore, an owner of land owes no duty to give any
warning of any natural or artificial dangerous condition, use, structure, or activity on the premises to
persons entering for recreational or conservation purposes. Id. A landowner who directly or indirectly
invites or permits without charge any person to use property for recreational or conservation purposes
does not thereby assure that the premises are safe, confer the status of licensee or invitee, assume
responsibility or incur liability for any injury caused by an act or omission, or assume responsibility or
incur liability for any injury caused by any natural or artificial condition or structure. §4.

However, nothing in the Recreational Use Act limits in any way the liability that otherwise exists
for “wilful and wanton failure to guard or warn against a dangerous condition, use, structure, or
activity.” §6. Additionally, it does not limit liability for injuries suffered in any case when the
landowner charges the person to enter or go onto the land for the recreational use thereof except that
when a landowner leases land to the state or a subdivision thereof, any consideration received by the
landowner for that lease is not a “charge” within the meaning of the Act. Id.

The Recreational Use Act does not entitle an employer or landowner to immunity when a fee is
charged even if the injured user did not, for example, pay the fee for use of a horse on the recreational
land. Phillips v. Community Center Foundation & Children’s Farm, 238 Ill.App.3d 505, 606 N.E.2d
447, 179 Ill.Dec. 615 (1st Dist. 1992). Charging a minimal fee, such as four dollars for the use of a
dirt bike, will also preclude a landowner from asserting the Act’s immunity. Lundquist v. Nickels, 238

The limitations on liability granted to landowners under the Recreational Use Act do not apply to
landowners who fall under the provisions of the Campground Licensing and Recreational Area Act,
210 ILCS 95/1, et seq. See Miller v. United States, 597 F.2d 614 (7th Cir. 1979). The Campground
Licensing Act applies to areas such as national wildlife refuges that are maintained primarily for
recreational purposes, while the Recreational Use Act applies only to lands that are used on a casual
basis for recreational purposes. Miller, supra, 597 F.2d at 616.

The Dram Shop Act, 235 ILCS 5/6-21, creates a cause of action for every person who is injured
within this state by an intoxicated person against the person who, by selling or giving alcoholic liquor,
causd the intoxication of the injured person. Included in the web of liability created are persons
owning, renting, leasing, or permitting the occupation of any building or premises with knowledge
that alcoholic liquors are to be sold therein. Those persons shall be liable severally or jointly with the
person selling or giving the liquors. However, the holder of mere naked title to property occupied by a
Also, an uncompensated social host is not liable under the Dram Shop Act for giving intoxicating

An action under the Dram Shop Act is not in any sense a common law negligence action. Arington v. Phelps, 79 F.Supp. 295 (E.D.Ill. 1948). The Dram Shop Act provides the exclusive
remedy against tavern owners for injuries caused by intoxicated persons and has eliminated the
common law cause of action for loss of support to the family of an intoxicated person as a result of the
Under the Excavation Fence Act, 720 ILCS 605/0.01, et seq., property owners, among others, are required to surround with protective fencing any open well, cesspool, cistern, quarry, recharging basin, catch basin, sump, excavation for the erection of any building structure, or excavation created by the razing or removal of any building structure. §1. Failure to do so is a Class C misdemeanor. *Id.* However, during the course of repair, construction, or removal of a structure or the filling of any of the above-described conditions, the provisions of the Excavation Fence Act do not apply as long as there are workers present either performing services or guarding the location. *Id.*

Finally, the Fire Escape Act, 425 ILCS 15/0.01, et seq., requires all buildings in Illinois that are four or more stories high to be provided with one or more metallic ladders or stairs or other approved fire escapes attached to the outer walls thereof. Section 1 exempts buildings used exclusively for private residences but includes flats and apartment buildings. In addition, §1 requires that all buildings more than two stories high, including hotels, dormitories, schools, seminaries, hospitals, asylums, and buildings used for manufacturing purposes, shall have at least one such fire escape for every 50 persons for which working, sleeping, or living accommodations are provided above the second story. Section 7 states that the Act shall not apply to cities, villages, and towns within the state that have passed and adopted ordinances, bylaws, or resolutions governing the kind, number, location, material, and construction of fire escapes to be required on buildings within the corporate limits of such cities, villages, and towns.

Notwithstanding the penal character of the Fire Escape Act, the Illinois Supreme Court long ago in *Arms v. Ayer*, 192 Ill. 601, 61 N.E. 851 (1901), in which the plaintiff’s intestate died in a fire in a building that did not have the requisite number of fire escapes, found the owner to be both primarily and civilly liable for the failure to perform the duties required by the Act.

Certain local ordinances or national codes incorporated into an ordinance may also be the subject of inquiry. Evidence of the lack of a handrail on a staircase as per a Chicago municipal ordinance was sufficient in one case to reinstate a plaintiff’s verdict when the evidence established that the lack of a handrail was a proximate cause of a plaintiff’s injuries. *Kalata v. Anheuser-Busch Cos.*, 144 Ill.2d 425, 581 N.E.2d 656, 163 Ill.Dec. 502 (1991). A landlord’s failure to comply with the two-exit requirement of the Life Safety Code of 1981 as incorporated in the Rockford Municipal Code was sufficient to preclude the entry of summary judgment in favor of a defendant landlord. *Williams v. Stanfill*, 202 Ill.App.3d 696, 560 N.E.2d 29, 147 Ill.Dec. 881 (2d Dist. 1990).

Municipal ordinances should be consulted for evidence of both compliance and noncompliance. It should be remembered, however, that although violation of a safety statute, ordinance, or regulation having the force of law is prima facie evidence of negligence, it is not negligence per se. *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 356 N.E.2d 93, 1 Ill.Dec. 93 (1976).

**XIII. [1.51] EVIDENTIARY ISSUES IN A PREMISES LIABILITY CASE**

Evidentiary issues exist that impact both pretrial motions and trials in premises liability cases. In *Kimbrough v. Jewel Cos.*, 92 Ill.App.3d 813, 416 N.E.2d 328, 48 Ill.Dec. 297 (1st Dist. 1981), the appellate court concluded that a plaintiff must state some factual basis for a slip and fall; in other words, it is not enough for a plaintiff to state that he fell and, therefore, there was something dangerous about the floor. Although circumstantial evidence may be sufficient when an inference of negligence or proximate cause may reasonably be drawn from it, facts will not be established from circumstantial evidence when the circumstances are unrelated and allow more than one conclusion to be drawn. *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983).
Therefore, when there is no evidence that addresses the issue of what caused a person to slip and fall, notwithstanding the existence of expert testimony on the conditions at the scene or expert medical testimony about the mechanism of injury, summary judgment is appropriate. *Kellman v. Twin Orchard Country Club*, 202 Ill.App.3d 968, 560 N.E.2d 888, 148 Ill.Dec. 291 (1st Dist. 1990).

Premises liability cases sometimes revolve around whether particular incident reports are subject to discovery. Ordinarily, incident reports would be subject to discovery since evidence or lack of evidence of prior incidents may be relevant to the issue of notice of a condition on the premises. However, the Medical Studies Act, 735 ILCS 5/8-2101, *et seq.*, exempts certain in-house reports about matters affecting risk management maintained by hospitals. At least one appellate court has held that hospital slip-and-fall incident reports are not protected from disclosure by the Medical Studies Act. *Dunkin v. Silver Cross Hospital*, 215 Ill.App.3d 65, 573 N.E.2d 848, 158 Ill.Dec. 35 (3d Dist. 1991).

Cases involving hospitals have also discussed whether expert testimony is necessary in slip-and-fall cases. An excellent discussion about those circumstances in which expert testimony is required (or not required) to establish the applicable standard of care owed to patients who slip or fall in hospitals can be found in *Edelin v. Westlake Community Hospital*, 157 Ill.App.3d 857, 510 N.E.2d 958, 109 Ill.Dec. 890 (1st Dist. 1987). In *Edelin*, the court concluded that expert testimony was unnecessary with regard to a patient who slipped and fell in the hospital lobby after discharge.

Premises liability cases that have discussed expert testimony seem to suggest that reviewing courts are more reluctant to take cases away from juries when there is expert opinion testimony proffered by a plaintiff on the dangers presented by conditions on the premises. See *Wolfe v. Bertrand Bowling Lanes, Inc.*, 39 Ill.App.3d 919, 351 N.E.2d 313 (2d Dist. 1976). Moreover, plaintiffs may be well advised to proffer expert testimony of architects, engineers, building managers, or custodians to preclude the entry of summary judgment. See §§1.28 – 1.30 above.

Numerous cases discuss the evidentiary rules with regard to actual or constructive notice of a particular danger or hazard. Evidence of a history of no accidents is admissible for the limited purpose of showing absence of notice of a dangerous condition provided that the proof shows that the condition had been unchanged. *Wolczek v. Public Service Company of Northern Illinois*, 342 Ill. 482, 174 N.E. 577 (1930). On the other hand, evidence of prior, similar accidents is admissible to prove notice (*id.*) and causation (*Welter v. Bowman Dairy Co.*, 318 Ill.App. 305, 47 N.E.2d 739 (1st Dist. 1943)). Moreover, evidence that a transient dangerous condition existed on an occasion before an accident in question is admissible to circumstantially prove notice. *Perminas v. Montgomery Ward & Co.*, 60 Ill.2d 469, 328 N.E.2d 290 (1975).

It is important to note the different reasons why evidence of prior accidents or conditions may or may not be admissible. If the evidence of prior accidents is offered only to show the defendant’s notice of the generally hazardous nature of the accident site, then the proponent does not have to establish a foundation showing the similarity between the prior accidents and the accident in question. In fact, evidence of dissimilar prior accidents is relevant to the issue of whether a defendant knew the accident site was generally hazardous. *Henderson by Hudspeth v. Illinois Central Gulf R.R.*, 114 Ill.App.3d 754, 449 N.E.2d 942, 70 Ill.Dec. 595 (4th Dist. 1983).

However, if the evidence is being offered to show the existence of a particular danger or hazard, then a foundation must be laid establishing the similarity between the prior accident and the present accident. Only similar accidents are relevant to show the existence of a particular danger. *Windeguth v. National Super Markets, Inc.*, 201 Ill.App.3d 35, 558 N.E.2d 548, 146 Ill.Dec. 585 (5th Dist. 1990).
When a plaintiff claims that constructive notice establishes the negligence of a defendant, the
length of time that a condition existed on the premises becomes a key determinant of a defendant’s

The distinction between conditions liability and activities liability has recently crept into the
notice requirement of premises liability cases, perhaps even abrogating it in an “activities” case. In *Wind v. Hy-Vee Food Stores, Inc.*, 272 Ill.App.3d 149, 650 N.E.2d 258, 208 Ill.Dec. 801 (3d Dist. 1995), a plaintiff slipped and fell on an entrance mat placed due to inclement weather. There was evidence that the mats were not completely taped to the floor, were in poor condition, and were poorly maintained. The appellate court announced a new test for cases in the “activities” category: if the substance is related to the landowner’s business and there is merely “slight” evidence that the substance was placed on the floor by the landowner, then a jury may consider the issue of negligence. This test allows presumptive notice.

The *Wind* test was subsequently expanded in *Reed v. Wal-Mart Stores, Inc.*, 298 Ill.App.3d 712, 700 N.E.2d 212, 233 Ill.Dec. 111 (4th Dist. 1998). In *Reed*, the plaintiff stepped on a rusty nail protruding from a board in the middle of a pathway in the defendant store’s outdoor garden area. The appellate court concluded that there was little doubt the board was related to Wal-Mart’s business and found that the trial court erred when it required the plaintiff to prove actual or constructive notice.

In contrast, the court in *Carey v. J. R. Lazzara, Inc.*, 277 Ill.App.3d 902, 661 N.E.2d 413, 214 Ill.Dec. 559 (1st Dist. 1996), held that actual or constructive notice had to be proved when the plaintiff claimed that stairs were too narrow and winding, there was insufficient lighting, and there should have been a center handrail. The *Carey* court rejected the plaintiff’s attempt to apply the *Wind* test because “liability was predicated on the dangerous condition existing on the defendant’s premises, and not on the defendant’s negligent activities.” 661 N.E.2d at 417.

Many times, plaintiffs or their witnesses will describe a condition on the premises from their
perspective after an accident occurred. It is not uncommon for plaintiffs to have no knowledge of
conditions as they existed before the accident. For instance, although they may not have seen how wet
a floor was before being injured, they may have very vivid recollections, from their tactile or visual
senses, of the floor’s condition after the injury.

Although such postaccident observations clearly can be relevant and sufficient to suggest
constructive notice to the premises owner (*Papadatos v. National Tea Co.*, 21 Ill.App.3d 616, 316 N.E.2d 83 (1st Dist. 1974)), in some cases the length of time that passed between the accident and the observations of a witness is fatal to the admissibility of such evidence because of the passage of time, fear of speculative evidence, or existence of post-remedial measures. *Canales v. Dominick’s Finer Foods, Inc.*, 92 Ill.App.3d 773, 416 N.E.2d 303, 48 Ill.Dec. 272 (1st Dist. 1981) (one hour and twenty minutes).

Post-remedial measures, of course, are generally not admissible to prove negligence of a
landowner. Four exceptions exist, three of which depend on the existence of disputed issues. First, if
ownership is at issue, evidence of a postaccident change might show that a defendant had an
ownership interest. Second, postaccident changes performed by or arranged by a building manager or agent, for example, are admissible to show that the building manager or agent had control over a particular area if that fact is disputed. Third, postaccident changes are admissible to show feasibility if a defendant disputes the pre-accident ability to make a certain repair or improvement that would have prevented the accident. Schaffner v. Chicago & North Western Transportation Co., 129 Ill.2d 1, 541 N.E.2d 643, 133 Ill.Dec. 432 (1989). The fourth exception is that in certain circumstances evidence of postaccident remedial measures may be admissible to impeach a witness’ relevant testimony. A limiting instruction may be warranted in any of these circumstances to ensure that the jury understands that the evidence is being offered to prove something other than the negligence of the defendant.

XIV. [1.52] JURY INSTRUCTIONS

As mentioned above, the Illinois Pattern Jury Instructions include several instructions that pertain to premises liability. These instructions should be consulted by the practitioner since they are generally accurate statements of Illinois law. However, some courts have allowed non-I.P.I. or modified instructions in premises liability cases.

Substituting a different phrase for the I.P.I. language may be appropriate. In Colls v. City of Chicago, 212 Ill.App.3d 904, 571 N.E.2d 951, 151 Ill.Dec. 971 (1st Dist. 1991), the use of the phrase “appreciation of risk” in the burden of proof instruction was found to be more appropriate.

When there is no specific I.P.I. instruction on an issue of premises liability, a party is entitled to a jury instruction that accurately states the law of Illinois and fairly instructs the jury on a party’s theory of the case. For example, since there is no I.P.I. instruction on third-party criminal acts, a defendant was entitled to an instruction that read as follows:

Generally, there is no duty to protect others from criminal attack by third persons unless there are sufficient facts to put defendant on notice that a criminal attack is reasonably foreseeable. If you find that the criminal attack on the plaintiff had not been reasonably foreseeable, then your verdict should be for the Chicago Park District. Ono v. Chicago Park District, 235 Ill.App.3d 383, 601 N.E.2d 1172, 1174 – 1175, 176 Ill.Dec. 474 (1st Dist. 1992).

Ono supports the view that in special circumstances non-I.P.I. instructions are quite appropriate.

The application of the correct I.P.I. instructions on premises liability law has also been the subject of appellate court comment. The I.P.I. instructions distinguish between the condition of the premises (I.P.I. — Civil Nos. 120.02.01, 120.02.02, 120.07.01) and activities on the premises (I.P.I. — Civil Nos. 120.03.01, 120.03.02, 120.07.02). In Lee v. Chicago Transit Authority, 152 Ill.2d 432, 605 N.E.2d 493, 498, 178 Ill.Dec. 699 (1992), the Illinois Supreme Court found that the trial court erred in using I.P.I. — Civil No. 120.03, which defines the duty owed to a trespasser injured by an “activity” on the landowner’s premises. The court held that the jury should have been instructed by I.P.I. — Civil No. 120.02, which defines the duty owed to a trespasser injured by a “condition” on the premises.

A recent Illinois Supreme Court case on the burden of proof of a premises liability plaintiff supports the proposition that I.P.I. — Civil Nos. 120.02 and 120.03 accurately reflect Illinois law. Jordan v. National Steel Corp., 183 Ill.2d 448, 701 N.E.2d 1092, 233 Ill.Dec. 818 (1998).
Premises Liability Law in a Nutshell

CARLTON D. FISHER
Hinshaw & Culbertson
Chicago

The author has determined that a supplement is not needed at this time. The reader is encouraged to Shepardize or otherwise update citations in the 1999 chapter before relying on them.