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NOTES

COSELMAN v. SCHLEIFER:
THE MARK OF PEDRICK

INTRODUCTION

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

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

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

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

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

Logic demands that one rule govern both the direction of verdicts and the determination of the presence or absence of negligence or contributory negligence as a matter of law, for in both situations the issue is whether a court or the jury should decide the negligence issue. 5

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

3 37 Ill. 2d 494, 229 N.E.2d 504 (1967).
4 Id. at 510, 229 N.E.2d at 513-14.
5 37 Ill. 2d 494, 229 N.E.2d 504 (1967).
6 Id. at 503, 229 N.E.2d at 510.
the problem of direction of verdicts and rulings on negligence and contributory negligence as a matter of law. The underlying rationale of directed verdicts, rulings as a matter of law, and judgments n.o.v., is whether there is any factual issue for a jury to decide; if there is not, the court must decide the question as a matter of law.

_Coselman v. Schleifer_

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

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

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

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8 Id. at 127-28, 239 N.E.2d at 689.
9 Id. at 126-27, 239 N.E.2d at 689-90.
10 37 Ill. 2d 494, 229 N.E.2d 504 (1967).
of law that is directly in line with the tenor of the Pedrick test.\(^\text{12}\)

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

The question of assumed risk is usually and normally one for the jury and involves a subsidiary question of whether the servant understood and appreciated the risks which he is alleged to have assumed.\(^\text{15}\)

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

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

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

\(^\text{12}\) See text at note 4 supra.
\(^\text{14}\) 14 Ill. App. 2d 137, 144 N.E.2d 165 (1957), where the plaintiff was injured while loading a silo, getting his leg caught in an auger.
\(^\text{15}\) Id. at 150, 144 N.E.2d at 171. Accord, Hinrichs v. Gumnaw, 41 Ill. App. 2d 428, 190 N.E.2d 610 (1963).
\(^\text{16}\) 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967).
It is true... that the questions of whether appellant assumed the danger or not... are ordinarily questions of fact for the jury to pass upon, yet where, as here, there is no conflict in the evidence it is the duty of the trial court to apply well-recognized principles of law to the uncontradicted evidence and when that is done the only reasonable conclusion that can be arrived at from all the facts appearing in the record is that the appellant assumed the hazard... knowingly exposed himself to that known danger and this precludes any recovery.19

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

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

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

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

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

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20 178 Ill. App. 363 (1913).
21 Id. at 366.
24 Id. at 426-27, 173 N.E.2d at 859-860. Accord, Chicago & E.I.R.R. v. Heerey, 203 Ill. 492, 68 N.E. 74 (1903), where the Illinois Supreme Court reversed on the ground that the jury instructions did not sufficiently distinguish contributory negligence from assumption of risk.
terms: "... [A]n employee may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger . . . ."\textsuperscript{28} To the same effect is Minters v. Mid-City Management Corp.,\textsuperscript{27} where the court held that contributory negligence involves the notion of some fault or breach of duty on the part of the employee, whereas assumption of risk may be free from any suggestion of fault or negligence on the part of the employee.\textsuperscript{28} Similarly, in Wheeler v. Chicago & Western Indiana Railroad Co.,\textsuperscript{29} the court said that though the question of contributory negligence may be involved in every action for personal injury, contributory negligence, as distinguished from assumption of risk, is the failure of an employee to use those precautions for his own safety that reasonable prudence requires.\textsuperscript{30}

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

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

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

There was, therefore, no contractual relation existing between the plaintiff and the defendant, and as the doctrine of assumed risk rests upon and grows out of the contractual relation which exists between master and servant, the question of assumed risk is not involved in this case, and defendant cannot be relieved of liability on the ground plaintiff assumed the risk which caused his injury.
\textit{Id.} at 246, 76 N.E. at 356.

Other cases have limited the doctrine to situations in which there is at least some contractual relationship. In Reed v. Zellers, 273 Ill. App. 18
Clearly, the separation of the two doctrines is consistent with the trend toward more frequent rulings as a matter of law. This separation makes possible such rulings in cases involving both assumption of risk and contributory negligence where there are present the elements necessary for ruling only one or the other as a matter of law.

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

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

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

However, in other cases, the doctrine of assumption of risk has been held to exist where any voluntarily assumed relationship exists, whether or not contractual. In Campion v. Chicago Landscape Co., 296 Ill. App. 223, 14 N.E.2d 379 (1938), the court, quoting Bohlen, Studies in the Law of Torts 20 HARV. L. REV. 14, 91 (1906), said:

[Neither the maxim, volenti non fit injuria, as expressing the principle that one who has voluntarily encountered a known danger cannot recover from the creator thereof, nor the principle itself, is confined to cases of workmen against their employers, and "is not in any way founded upon anything peculiar to the relation of master and servant, nor based upon the contractual nature of the relation."

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

See text at note 4 supra.


Id.

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

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

No Evidence Test

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

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

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

The question of due care is a question of fact to be submitted to the
jury when there is any evidence which with legitimate inferences that may be reasonably drawn therefrom tends to show the exercise of due care.43

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

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

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

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

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

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

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

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

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

45 Id. at 274, 8 N.E.2d at 621. Accord, Carter v. Winter, 50 Ill. App. 2d 467, 200 N.E.2d 529 (1964), aff'd, 32 Ill. 2d 275, 204 N.E.2d 755 (1965), cert. denied, 382 U.S. 825 (1965), where the plaintiff entered the highway with another car approaching. The court said that the question of the plaintiff's contributory negligence was for the jury:

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

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

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

47 Id. at 278, 192 N.E. at 218 (emphasis added).
All Reasonable Minds Must Agree Test

The second and most common of the Illinois tests is the “all reasonable minds must agree” test. This test is not as restrictive as to the granting of rulings as a matter of law as the “no evidence” test.\(^4\) The “all reasonable minds must agree” test allows some evidence to be in the plaintiff’s favor and still contributory negligence may be ruled against the plaintiff as a matter of law. The amount of evidence in the plaintiff’s favor must certainly be very small, as the court in Swenson v. City of Rockford\(^9\) indicated. There, the plaintiff walked over a defective sidewalk with knowledge of its unsafe condition. In holding the plaintiff’s contributory negligence to be a jury question, the court said:

It [contributory negligence] becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence.\(^5\)

The test was reiterated in Sterba v. First Federal Savings and Loan\(^5\) where the plaintiff walked into and struck her head on the wooden awning attached to a parking lot attendant’s shelter. The court, in holding the question of the plaintiff’s contributory negligence to be a jury question, said:

The question of contributory negligence is ordinarily a question of fact for the jury and becomes a question of law only when all reasonable minds would reach a conclusion that there was contributory negligence.\(^5\)

Court Can Clearly See Test

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

\(^4\) See text at note 41, supra.
\(^9\) 9 Ill. 2d 122, 136 N.E.2d 777 (1956).
\(^5\) Id. at 128, 136 N.E.2d at 780. Accord, Ziraldo v. W.I. Lynch Co., 365 Ill. 197, 6 N.E.2d 125 (1936). In that case the plaintiff, who was leaning into an elevator shaft was struck and thrown down the adjacent shaft by a descending elevator. The court, using the language later adopted by the Swenson court held the contributory negligence issue to be a jury question.

\(^5\) Id. at 385, 222 N.E.2d at 549. Accord, Ames v. Armour Co., 246 Ill. App. 118 (1927); Petro v. Hines, 299 Ill. 236, 132 N.E. 462 (1921). In the Ames case, the plaintiff was injured when a train and the defendant’s truck collided. The court said:

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

Ames v. Armour Co., supra at 124. In Petro, where the deceased was hit and killed by a train at a crossing where the warning signals had been operating, the court said, “all reasonable minds must agree.” Petro v. Hines, supra at 240, 132 N.E. at 464.
nor that all reasonable minds agree that the plaintiff was con-
tributorily negligent. The test was stated in *Ames v. Terminal
Railroad Association*,\(^5\) where the plaintiff’s intestate was a pas-
senger in the car of another and was killed instantly by a train
at a railroad crossing. In holding the plaintiff’s intestate con-
tributorily negligent as a matter of law, the court said:

> [W]hen there is no conflict in the evidence and the court can clearly
see that the injury was the result of the negligence of the party
injured, it should not hesitate to instruct the jury to return a ver-
dict for the defendant.\(^5\)

An equally compelling version of this rule was stated in *Beidler
v. Branshaw*,\(^5\) where the plaintiff was injured in an elevator in
the defendant’s building when he caught his foot between the
elevator and the elevator shaft. In holding the plaintiff guilty of
contributory negligence as a matter of law, this court clearly
eliminated the requirement that there be no evidence in the plain-
tiff’s favor. The court said:

> . . . “While questions of negligence or of contributory negligence
are ordinarily questions of fact, to be passed upon by a jury, yet
when the undisputed evidence is so conclusive that the court would
be compelled to set aside a verdict in opposition to it, the court may
withdraw the case from the consideration of the jury and direct a
verdict.”\(^5\)

In another conceptual restatement of this test, the First Dis-
trict Appellate Court in 1946 presaged the *Pedrick* test\(^5\) in *Zoloth
v. Walker-Wabash Corp.*,\(^5\) In that case, the plaintiff was injured
by falling over the edge of the wooden ramp used by the defend-
ant in the operation of a parking lot business, as he stepped out
of the automobile in which he was riding as a guest. The win-
dows of the automobile in which the plaintiff was a guest were
steamed up. The defendant’s attendant did nothing to caution
the plaintiff of any danger. The appellate court, in holding the
question to be one for the jury, laid down an expansive rule for
determining when the question should be one of law. The test
is distinctly a forerunner of *Pedrick* as the question is placed
entirely within the discretion of the trial court:

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

\(^{54}\) *Id.* at 193-94, 75 N.E.2d at 45. *Accord*, *Pope v. Illinois Terminal
wald*, 338 Ill. 270, 170 N.E. 247 (1930). Both cases, using the identical
wording of the *Ames* case, held the plaintiff contributorily negligent as a
matter of law.
\(^{55}\) 200 Ill. 425, 65 N.E. 1086 (1902).
\(^{56}\) *Id.* at 431, 65 N.E. at 1088, quoting from *Werk v. Illinois Steel Co.,
Ill. 603, 71 N.E. 398 (1904), where the court in applying the *Beidler* test
found the plaintiff, a railroad employee run over in the railroad yard by a
locomotive, guilty of contributory negligence as a matter of law.
\(^{57}\) See text at note 4 *supra.*
\(^{58}\) 328 Ill. App. 564, 66 N.E.2d 443 (1946).
or his conduct so violative of all rational standards of conduct applicable to persons in a like situation that the court can say, as a matter of law, that no rational person would have acted as he did and render judgment for the defendant."  

THE EFFECT OF PEDRICK

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

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

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

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

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

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In Kelly, the plaintiff was struck by the rear or overhanging portion of a streetcar when the streetcar rounded the curve. Despite the breadth of the test, the Kelly court found that the contributory negligence question was one for the jury.

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

Id. at 510, 229 N.E.2d at 513-14.


38 Ill. 2d 280, 230 N.E.2d 859 (1967).
in those cases in which all the evidence, when viewed in its aspects most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand."

Applying the rule to the facts of this case, we are of the opinion that the trial court properly directed the verdict as to all defendants. Under this state of facts plaintiff could never establish... that his intestate was free from contributory negligence.64

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

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

Both of these rulings are directly and emphatically against the former weight of authority of Illinois cases involving similar fact situations.67 Particularly striking is the contrast of the pre-Pedrick case of Carter v. Winter68 with Keen v. Davis,69 which followed the Pedrick rule.70 It is very difficult to reconcile the jury question ruling of Winter with the matter of law holding in the Keen case. Under the much more detailed, confusing, and complicated facts of Keen, including the obstruction of the plaintiff's view, the contributory negligence question would almost certainly have to be for the jury under the Winter precedent. On the other hand, under the Keen (Pedrick) rule, there seems to be only slight doubt that the contributory negligence

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64 Id. at 283-84, 230 N.E.2d at 861-62.
66 Id. at 50, 243 N.E.2d at 663.
69 38 Ill. 2d 280, 230 N.E.2d 859 (1967).
70 See text at note 4 supra.
question involved would be decided as a matter of law against the plaintiff. The impact of Pedrick is unmistakable.

The pre-Pedrick “stair and incline” cases are almost unanimous in ruling the contributory negligence question to be one for the jury.11 So, the facts in the post-Pedrick case of McInturff v. Chicago Title & Trust Co.,12 particularly the absence of a handrail would indicate that the contributory negligence issue would be one for the jury, but in that case, the ruling was made as a matter of law.13 Here again, unmistakably, Pedrick has compelled the different result.

CONCLUSION

It seems inevitable that application of the Pedrick test will lead to more rulings of contributory negligence as a matter of law. After protesting that the test it laid down will not increase the frequency of rulings as a matter of law,14 the Pedrick court went on to say:

[I]n any event, the current delay at the trial level is of greater social concern than are our appellate caseloads. And since it is well settled that trial courts may constitutionally direct verdicts, minor variations in the rules governing such action can scarcely render it unconstitutional.15

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

In light of the Pedrick progeny, as exemplified by Coselman, it is highly problematical if the Pedrick court’s characterization of its new test as a “minor” variation in the test for holding contributory negligence as a matter of law16 is accurate. The “no evidence” test17 is clearly no longer the law in Illinois. Simi-

71 See note 36 supra.
73 Id.
74 The court said: “That a substantial increase in the proportion of directed verdicts or judgments n.o.v. will be a necessary result seems highly questionable . . . .” 37 Ill. 2d 494, 511, 229 N.E.2d 504, 514 (1967).
75 Id. at 511, 229 N.E.2d at 514.
76 See text at note 75 supra.
77 See text at note 41 supra.
larly, the "all reasonable minds would agree" test is also inoperative both as to the extent it was a substitute for the "no evidence" test and in those situations where it displayed its own independent viability. The trial court can no longer merely look to see if there is little or no evidence in the plaintiff's favor before ruling contributory negligence as a matter of law. Today, under the Pedrick test, the trial court must weigh the evidence, if only on a preliminary basis. In McInturff v. Chicago Title & Trust Co., the First District Appellate Court said:

[T]he crucial question was whether it was error for the trial court to overrule the defendants' motion for a directed verdict. They [plaintiff's cited cases] are pre-Pedrick cases, and thereunder, a motion for directed verdict or judgment notwithstanding the verdict presented the single question of whether there was any evidence in the record, which standing alone and taken with its intendment most favorable to the party resisting the motion, tended to prove the material elements of such party's case.

This rule was superseded by the Pedrick rule which provides that a motion for a directed verdict and for a judgment notwithstanding the verdict should be entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.

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

The impact of Pedrick might be summarized as follows:

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

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78 See text at note 50 supra.
79 See text at note 4 supra.
81 Id. at 54, 243 N.E.2d at 664-65.
83 See text at notes 41, 50 and 54 supra.