

## 20.01 Issues Made By The Pleadings--Negligence--One Or More Defendants

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:

*[Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:*

“Defendant C, in [e.g., failing to keep a proper lookout.”

“Defendant D, in \_\_\_\_\_.”]

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

*[Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]*

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defense[s]:

Defendant [Defendant C] claims

*[here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or*

*ruled out by the court and are supported by the evidence*].

[8] The plaintiff denies that [summarize affirmative defense[s]].

[9] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

*Instruction [5] revised August 2023.*

### **Notes on Use**

This instruction may also be used in this form for multiple plaintiffs if the allegations of negligence of all plaintiffs are the same. Where multiple plaintiffs allege different acts of negligence, the instruction must be modified to set forth separately the allegations by each plaintiff. If there is a counterclaim, use IPI 20.02.

This instruction must be modified to fit the allegations of the complaint and answer. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used if they fit the particular case. Additional innovations consistent with the pleadings should, of course, be used whenever required.

All “special defenses” which must be pleaded under the notice requirements of §2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (1994)) are not necessarily “affirmative defenses” in the sense that they bar recovery. Although §2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an “affirmative defense,” it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [4] and not in paragraph [7]. Only affirmative defenses that bar recovery should be set forth under paragraph [7] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff’s denials in a following paragraph.

In a wrongful death or survival action, substitute “decedent” or decedent's name in place of “plaintiff” whenever appropriate.

### **Comment**

An issue instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953), that the issues made by the pleadings be concisely stated without characterization and undue emphasis.

Two cases pre-dating the 1985 amendment to §2-613(d) held that the defendant does not have to specify the contributory negligence relied upon, and if specific acts of contributory negligence are not alleged, they need not be specified in the issues instructions. *Marcin v. Kipfer*, 117 Ill.App.3d 1065, 454 N.E.2d 370, 73 Ill.Dec. 510 (4th Dist.1983); *Witherell v. Weimer*, 118 Ill.2d 321, 515 N.E.2d 68, 77; 113 Ill.Dec. 259, 268 (1987).

Under *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the plaintiff no longer has the burden of pleading and proving freedom from contributory negligence. *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986), held that defendant has the burden of proving the plaintiff's contributory negligence. The present instruction includes not only affirmative defenses which may defeat the claim, but also contributory negligence which may only diminish damages.

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).