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ILLINOIS TORT REMEDIES AVAILABLE TO JUVENILE VICTIMS OF RESIDENTIAL LEAD POISONING

The United States is in the midst of an epidemic more prevalent than polio before the Salk vaccine, and which leaves more children permanently impaired than did German measles before the vaccination programs. The name of this epidemic is lead poisoning.

Lead poisoning is not new. It is one of the oldest known environmental poisons. Lead poisoning may have caused the fall of the Roman Empire. The Roman aristocracy aged its wine in lead utensils which the poor could not afford and, as a consequence, suffered sterility, mental impairment, and death, while the lower classes survived because they could not afford these "luxury" utensils. Lead poisoning still kills, but today its victims are chiefly the poor and the young. It affects the poor because they live in the badly maintained older buildings where lead paint is widely used. It affects the young because they have a natural tendency to put any available object in their mouths, especially the sweet-tasting lead chips. Lead-based paint poisons 400,000 children annually. Of these, 16,000 will require treatment, 3,200 will suffer moderate to severe brain damage, 800 will be "vegetables" for the remainder of their lives, and 200 will die. Children between one and three years of age comprise 85% of all reported cases, and two-year old children account for more than 50% of all lead poisoning deaths. In Chicago, according to 1970 figures published by the Chicago Board of Health, 3,715 children had "elevated bloods," 478 had lead poisoning, and 5 died. In 1971, 4,933 had elevated bloods, 610 had lead poisoning, and 4 died.

The cost of lead poisoning is steep. A case of only moderate brain damage costs $1,750 per child per year for special instruction and other care, for a period of about 10 years. Thus, the care of 3,200 who suffer only moderate damage is $5,600,000 annually. Lifetime institutionalization of the 800 severely brain damaged children costs $4,000 per year or $3,200,000. This, added to the cost of maintaining past victims makes the amount incalculable. Lifetime institutionalization can cost more than $200,000 for one child.

4. Indicating undue lead absorption, but not necessarily lead poisoning.
5. The rate of lead poisoning is expected to increase as various screening programs expand.
6. Supra n.3.
Lead poisoning is paid for by its victims in wasted lives and by taxpayers for care of its victims. Seemingly, the only ones who benefit are the landlords who have saved the expense of repair.

The tragedy of childhood lead poisoning is compounded by the fact that it is utterly preventable through screening programs, strict code enforcement, or other means. The purpose of this article is to discuss some theories of recovery against landlords which hopefully may serve as a deterrent to lead poisoning in the future.

LIABILITY OF LANDLORDS FOR INJURIES OCCURRING IN THE COMMON AREAS

For injuries occurring in the common areas, i.e., those used by more than one tenant, the landlord is generally responsible. Such areas include stairways, passageways, cellarways, roofs, basements, and exterior walls. The landlord's responsibility extends to tenants, social visitors, and all those lawfully on the premises. In these common areas, the landlord has the duty of exercising reasonable care to keep the premises in a reasonably safe condition, and if he neglects to do so, he is liable for injury proximately resulting to persons lawfully on the premises.

LIABILITY OF LANDLORDS FOR INJURIES OCCURRING IN THE PRIVATE AREAS

The liability of the landlord for injuries occurring in the private areas exclusively within the control of the tenant is more difficult to prove than liability for injuries occurring in the common areas. In Illinois, the general rule of caveat emptor applies to private areas (or, as often referred to, cavet rentor). However, there are several methods of circumventing the harsh rule of caveat emptor which would be of use in a lead poisoning case, including landlord's duty to disclose a latent defect, landlord's duty to a child, and violation of statute as evidence of negligence, all of which will be discussed below.

Duty to Disclose a Latent Defect

In Illinois, a landlord has the duty to disclose a dangerous defect.

7. "It will be interesting to speculate how many children from the ghetto who are minimal brain damage syndrome or hyperkinetic syndrome or whatever, have really subclinical lead poisoning." Remarks by Dr. Ronald B. Mack at the University of Illinois Symposium on "Pediatric Lead Poisoning, The Silent Menace," June 16, 1971.

8. As to what comprises a 'common area' the factors are the intention of the parties, the terms of the lease, and responsibility for repairs, maintenance and illumination. Gula v. Gawel, 71 Ill. App. 2d 174, 218 N.E.2d 42 (1966).


existing at the time of the leasing, known to him or of which he should have known in the exercise of reasonable care, which the tenant could not discover by a reasonable examination of the premises. Failure to disclose a latent defect makes the landlord liable for injuries caused by the defect. In lead poisoning cases an argument can be made that no tenant, no matter how carefully he inspects, could know if the walls of an apartment contained lead-based paint. If the landlord knew or should have known that the walls contained lead paint, the landlord must disclose this or be liable for any injury. The difficulty lies in proving that the landlord knew or should have known that the walls contained lead paint. In *Acosta v. Irdank Realty Corp.*, a New York lead poisoning case, the court said the defendant landlord was charged with the knowledge by the existence of an ordinance banning the continued use of lead paint:

> It is not claimed the defendant violated the terms of this section, nor do I find that it did. I merely cite this provision of the law to show that the defendant *should have known* that the paint on the walls of this apartment contained lead which might be harmful to the occupants of the apartment. (Emphasis supplied.)

### Duty of Landlord to a Child

Irrespective of whether the injury occurs in the common areas or the private areas, the landlord owes a special duty to a child under Illinois law. A leading Illinois case on the duty owed a child is *Kahn v. James Burton Company.* In this case an 11-year old child was injured while playing on lumber stacked without proper support on the land of a third party. The defendant lumber company was neither in possession nor control of the premises at the time of the injury, nor was any evidence presented that the defendant had any knowledge that children played on the premises. In holding the defendant liable for injuries to the child, the court said:

> The creator of certain conditions dangerous and hazardous to children because of their immature appreciation of such dangers and hazards must be held to a certain standard of conduct for the protection of such children in accordance with the attendant circumstances and conditions. Account must be taken of the cost and burden of taking precautionary measures and of the right of families and society to rear and develop children with freedom of activity in their communities, without being subject to unreasonable risks which might cause serious injury or death to such children.

13. 238 N.Y.S.2d 713.
14. Id. at 714.
15. 5 Ill. 2d 614, 126 N.E.2d 836 (1955).
16. Id. at 622, 126 N.E.2d at 840.
The defendant's actual knowledge is not important; the point is he should have known there was danger to a child. The test becomes one of foreseeability:

The element of attraction is significant only in so far as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child.17 (Emphasis supplied.)

The Kahn decision was heavily relied upon in the recent Illinois case of Rahn v. Beurskens,18 a suit for injuries sustained by a 15-month old boy when he grasped a defective outside electrical wire with one hand and a water faucet with the other. The injury occurred in a house leased by the child's father. Sometime after the commencement of the tenancy, the landlord had been notified of the defective wire and had promised to repair it. The defendant landlord maintained he could not be liable for defects on the leased premises unless the plaintiff established:

(1) that defendant retained possession of that part of the premises where the injury occurred;
(2) or that the defect was latent;
(3) or that the defendant had actual knowledge of such defect at the time of the letting and concealed it from the tenant;
(4) or that any agreement to repair was entered into at the inception of the lease.19

The plaintiff conceded that none of these factors was present in this case. The court said that ordinarily the above factors would have been a prerequisite to liability had it not been for the age of the plaintiff. The court stated the test for liability in cases involving children was not the above four factors, but:

(1) that the wiring was in a defective condition at the time of the leasing;
(2) that the defendant knew or should have known it;
(3) that defendant knew that the young children frequented the vicinity;
(4) that he knew small children would not understand or appreciate the danger;
(5) that injury to person or property was reasonably foreseeable from its condition. . . .20

The above language could easily be adapted to a case involving lead poisoning. To reiterate, it is not the actual knowledge of the defendant that is important. The defendant's promise to repair the defective wire and his actual knowledge of the defect were not the decisive factors in Rahn. The test is one of foreseeability of conditions which can lead to harm when small children are involved.

17. Id. at 625, 126 N.E.2d at 842.
19. Id. at 425, 213 N.E.2d at 302.
20. Id. at 427, 213 N.E.2d at 303.
The defendant in *Rahn* further contended that because the minor child was a member of the lessee's family, he stood in the shoes of his father and the defendant owed no greater duty to the child than he owed to the father. In rejecting this defense, the court stated that the basis of liability is the foreseeability of harm to children, not the status of the child in relation to the landlord:

> It is not the status of the creator of the dangerous instrumentality as lessor, lessee, owner, or possessor or one in control that determines the liability to a small child, but, *irrespective of status*, the test is whether danger to a child or children is reasonably foreseeable by the creator of such instrumentality.\(^{21}\) (Emphasis supplied.)

The court said that the landlord does not thus become an insurer of children against all risks, but that the landlord's conduct "is to be weighed on the theory that he will not neglect a condition which the common experience of man teaches is dangerous with injury therefore reasonably foreseeable."\(^{22}\) At least one lead poisoning case has decided that it is within the "common experience of man" to foresee the danger to children from lead paint:

> That small children go around the house picking up everything within their reach and placing it in their mouths and attempting to eat it is well known. They often have a craving to put in their mouths and eat most unusual things. It would not be unreasonable, therefore, to foresee that Yvette would pick up pieces of plaster and paint if they were lying around and eat them. On the other hand, it is well known that paint contains lead which may cause lead poisoning to anyone ingesting it.\(^{23}\)

Because the *Rahn* decision specifically refuses to place the child in the shoes of the parents, the defense of non-payment of rent, exculpatory clauses in the lease, or a showing of contributory negligence by the parents should have no effect in a suit by the child. A defense of contributory negligence on the part of the child eating the paint would scarcely be encountered in Illinois because there is a presumption that a child under seven is not responsible for his own acts, and almost all the victims of lead poisoning are under seven. Contributory negligence on the part of the parents may, however, be a defense if the parents are suing on their own behalf seeking recovery for the child's death. Their negligence must, however, be more than a mere failure to maintain a constant watch over the child.\(^{24}\)

\(^{21}\) *Id.* at 430, 213 N.E.2d at 305.
\(^{22}\) *Id.* at 429, 213 N.E.2d at 304.
\(^{24}\) "The law does not require that persons in their station of life shall keep constant watch over their children, nor can the want of such care be imputed to them as negligent conduct." Crutchfield v. Meyer, 414 Ill. 210, 213, 111 N.E.2d 142, 143 (1953). The parents in this case were working people.
Violation of Statute as Evidence of Negligence

The City of Chicago has a strong law regarding lead poisoning which can be used as evidence of a standard of care. The Chicago Municipal Code provides that:

Every floor, interior wall and ceiling shall be kept in sound condition and good repair, and further,

(c) Every interior wall and ceiling shall be free of holes and large cracks.
(d) All interior walls, ceilings and interior woodwork shall be free of flaking, peeling, chipped or loose paint, plaster or structural material.25

The Chicago Municipal Code further provides:

Effective July 1, 1972, it shall be unlawful for any person to sell, offer for sale, for use, or to use or apply lead based coatings or toxic heavy metal based coatings in or upon:
1. Any exposed surface of any dwelling or dwelling unit; or
2. Any fixtures or other objects used, installed in or upon any exposed surface of any dwelling or dwelling unit, or intended to be so used, installed, or located.26

Once injury has occurred, the Chicago Lead Poisoning Ordinance can be a useful tool in a suit for damages. Under Illinois law violation of a statute or ordinance, designed to protect human life, is prima facie evidence of negligence.27 The plaintiff must show that he comes within the purview of the particular ordinance or statute and the injury has a direct and proximate connection with the violation.28 There is ample authority in Illinois for viewing tenants as within the class of persons designed to be benefited and protected by the Chicago Housing Code. For example, in Gula v. Gawel,29 a suit against the landlord to recover for injuries incurred on an unlit stairway, the court said:

The provisions of the Housing Code concern themselves in a large extent with the conditions of premises leased to tenants, and the condition of such premises has an obvious connection with the health and safety of the tenant-occupant. A tenant is clearly within the class of persons designed to be benefited and protected by the Code (Emphasis supplied).

* * *

The Code imposes the obligation upon the landlord to refrain from letting or holding out to another for occupancy any dwelling . . . which does not meet the standards set out by the

25. Chicago Municipal Code ch. 78, § 78-17.2. See also Chicago Municipal Code ch. 100, § 29.3 dealing with the sale of lead based paint.
29. Id.
The Housing Code thus establishes a duty of care based upon contemporary conditions, values and norms of conduct in this community (Emphasis supplied).

The above language indicates clearly that the Housing Code is designed to protect tenants; that anyone who incurs lead poisoning from premises in violation of the Housing Code is within the class of persons intended to be covered, and proof of a violation is therefore prima facie evidence of negligence.

Several state statutes affect lead poisoning, the most significant of which deals with criminal housing management. The law provides a penalty not to exceed one year, or a fine not to exceed $1,000, or both. The statute is aimed at legal or equitable owners, managing agents, or anyone having personal management or control of residential real estate who knowingly allows, by gross carelessness or neglect, the building to deteriorate to the point that it endangers the health or safety of any inhabitant. The statute could be used in lead poisoning cases, although it has not been to date. Other Illinois statutes pertinent to discussion of lead poisoning include a statute requiring the labeling of paint and a statute permitting owners or tenants within 500 feet of any property maintained in violation of a local ordinance, to prevent the occupancy of the building or to correct the violation.

30. Id. at 174, 218 N.E.2d at 46.
31. An alternative would be to assert that the violation of statute is negligence per se, meaning the tenant need only show violation of the statute; proof of negligence is not necessary. Prosser says: "It is entirely possible that a statute may impose an absolute duty, for whose violation there is no recognized excuse. The legislature, within its constitutional powers, may see fit to place the burden of injuries 'upon those who can measurably control their causes, instead of upon those who are in the main helpless in that regard.' In such a case the defendant may become liable on the mere basis of his violation of the statute. No excuse is recognized, and neither reasonable ignorance nor all proper care will avoid liability. Such a statute falls properly under the head of strict liability . . . Thus the Federal Safety Appliance Act, regulating the equipment of trains moving in interstate commerce, has been construed to impose such an absolute duty, as have . . . various types of building regulations . . . " Prosser, Law of Torts 198 (3d ed. 1964). The problem with such an argument is that courts are reluctant to impose absolute liability as a matter of law and normally no such interpretation will be placed upon a statute unless the court finds that it was clearly the purpose of the legislature. Negligence per se is easier to prove if the violation creates a hazard to the physical well being of the tenants. Lead poisoning certainly meets this criterion. See Falick, A Tort Remedy for the Slum Tenant, 58 Ill. B.J. 3 (Nov. 1969), in which the author argues that violation of a housing code should be negligence per se.
33. In a telephone call with Mr. A. Reifman of the Cook County State's Attorney's office, on October 20, 1971, he stated to his knowledge no landlord had been prosecuted for lead poisoning alone under this statute, although it is possible that such landlords have been prosecuted for other violations.
CONCLUSION

At present, in Illinois, it appears that the best approach to recover for injuries to a child from lead poisoning, whether the injury occurs in the private or common areas, is to use the duty owed a child under Rahn plus violation of statute as evidence of neglect. This combination was used successfully in Martin v. Harris Trust & Savings Bank, which was the first Illinois case that went through a complete jury trial. The final settlement in this case was limited by the wrongful death statute in effect at that time. This is no longer a barrier in Illinois. Recoveries for wrongful death in future cases involving lead poisoning should be much higher. Awards can include actual pecuniary damages such as hospital, medical, and funeral expenses, as well as pain and suffering experienced, plus punitive damages. For a child who survives, awards should cover the amount of money sufficient to care for a medically or physically handicapped victim for the rest of his life.

Lawsuits in the private sector can do much to stir landlords into compliance with local housing codes. Perhaps after several well-publicized cases, insurance companies would insist that buildings be maintained in compliance with the lead poisoning ordinance before an insurance policy is issued. Vigorous prosecution by private parties is a much needed deterrent to lead poisoning in Illinois.

Also needed is vigorous prosecution by the state and city authorities for code violations. The Illinois statute on Criminal Housing has not been utilized at all to date in a lead poisoning case, although 45 children died in Chicago alone since its enactment. The Chicago Lead Poisoning Ordinance is still fairly new and it is too early to say how vigorously the Building Department will enforce the code. However, the Building Department, no matter how alert, cannot detect all violations. Even if it could, the hopelessly overcrowded Housing Court often makes it easier and cheaper for the owners to pay the fines than to repair the buildings.

An alternative might be to take the burden from the governmental authorities to prove a landlord is in violation of building laws and shift the burden on the landlord to prove that he is not. Such a shift could be accomplished by several means. One method might be requiring landlords to secure a yearly license to rent, such as the license required for food handlers, and which could be renewed only upon certification by the Building Department that the structure meets code requirements.

37. See Illinois Digest Vol. 11, 130(3) for guidelines as to the amount of money required to care for an infant medically or physically damaged by lead for life.
The purpose of licensing food handlers is to insure the health and safety of citizens. The purpose of licensing landlords would be the same.

A second method of shifting the burden of compliance might be to require a certificate from the Building Department that the dwelling meets code regulations. The certificate would have to be produced before a building could be sold. A resolution along these lines was introduced in the Chicago City Council on February 9, 1972 by Alderman William Singer, but was limited to owners of private dwellings. The bill has been in the Building and Zoning committee since its introduction. Such a resolution, expanded to include all dwellings, could be an effective deterrent to lead poisoning. An owner would have to repair before hoping to sell. Knowing this, he would not be as likely to let the building deteriorate.

In time, the problem of residential lead poisoning will pass as the buildings using the then legal lead paint are destroyed. In the meantime, however, so will the lives of countless children. Most of all, we need more public information. Many parents do not realize that eating paint chips is dangerous to their children. Many doctors make the wrong diagnosis because they do not know the symptoms of lead poisoning. An informed public would be an aroused public. The deaths and injuries from lead poisoning are utterly preventable.

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