Tort Law IBJ Feb. 07

Tort Law

The Incredible Expanding/Shrinking Right of Children to Sue "Parents"

By Jeffrey J. Kroll and Sean P. Driscoll

Illinois courts are expanding the in loco parentis doctrine to protect more types of "parents" after having carved exceptions into parental immunity and thus having allowed more opportunities for children to recover. The authors recommend a consistent narrowing of immunity.

The parent-child immunity doctrine was designed to prevent a cause of action between a minor child and parent for personal injuries.[1] Thus, a child was prohibited from suing a parent for a tortious act, whether the parent's conduct was intentional[2] or negligent.[3]

Over the years, courts have dramatically altered the doctrine and permitted minors to bring a cause of action against a parent. In some states, such as Illinois, courts have created a series of exceptions limiting the applicability of the doctrine.[4] Other courts have gone further and abrogated parental immunity.[5] Yet just as many courts are carving out exceptions to the parent-child immunity doctrine, they are also bringing more "parents" under the protective ambit of in loco parentis,[6] with contradictory and confusing results. We believe that Illinois courts should continue to narrow the parent-child immunity doctrine and quit expanding in loco parentis to entities and individuals outside the family unit.

---

[1] *Hewellette v. George,* 68 Miss 703, 9 So 885 (1891).

[2] *Smith v. Smith*, 81 Ind App 566, 142 NE 128 (1924); *Miller v. Pelzer*, 159 Minn 375, 199 NW 97 (1924); *Cook v. Cook* 232 Mo App 994, 124 SW2d 675 (1939); *McKelvey v McKelvey*, 111 Tenn 388, 77 SW 664 (1903); *Roller v. Roller*, 37 Wash 242, 79 P 788 (1905).

[3] *Villaret v. Villaret*, 169 F2d 677 (DC Cir 1948); *Hastings v. Hastings*, 33 NJ 247, 163 A2d147 (1960); *Chaffin v. Chaffin*, 239 Or 374, 397 P2d 771 (1964); *Ownby v. Kleyhammer*, 194 Tenn 109, 250 SW2d 37 (1952); *Stevens v. Murphy*, 69 Wash 2d 939, 421 P2d 668 (1966).

[4] See, e.g., *Nudd v. Matsoukas*, 7 Ill 2d 608, 619, 131 NE2d 525, 531 (1956); *Larson v. Buschkamp*, 105 Ill App 3d 965, 969, 435 NE2d 221, 224 (2d D 1982); *Cummings v. Jackson*, 57 Ill App 3d 68, 70, 372 NE2d 1127, 1128 (4th D 1978); *Johnson v. Myers*, 2 Ill App 3d 844, 846, 277 NE2d 778, 779 (2d D 1972); *Schenk v. Schenk*, 100 Ill App 2d 199, 206, 241 NE2d 12, 15 (4th D 1968).

[5] *Gelbman v. Gelbman*, 23 NY2d 434, 437, 245 NE2d 192, 193 (ct of App 1969); *Goeller v White*, 20 Wis 2d 402, 413, 122 NW2d 193, 198 (1963).

[6] *In loco parentis* has been generally defined as on e who stands in place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities.

Judicial history of parental-child immunity

The doctrine of parent-child tort immunity had its beginning over a century ago in decisions reach by three different courts.

In *Hewellette v. George*,[7] the Supreme Court of Mississippi reasoned that minor children who depend upon their parents for support have a reciprocal obligation to obey their parents. The court further said that the criminal laws of a state protect children from intentional parental violence. In a case of first impression, the court created parent-child immunity.

Twelve years later, in *McKelvey v. McKelvey*, the Tennessee Supreme Court followed the reasoning put forth by the *Hewellette* court and held thta a minor child could not recover civil damages from her father and stepmother for personal injuries inflicted by the latter.[8] The *McKelvey* court held that the criminal laws of the state protected a child from family violence. There, a child was not permitted to sue a parent for cruel and unusual treatment.

Soon thereafter, in *Roller v. Roller*, the Washington Supreme Court held that a tort action would not lie at common law against a parent for injuries resulting to a minor child, even where the child was raped and the offending parent had been convicted fo the crime. The *Roller* court held that a minor could not maintain an action for damages against parents for inujuries inflicted while the family relationship existed.[9]

Illinois adopts the parent-child immunity doctrine

Parental immunity became law in Illinois not long after this trilogy of cases. In *Foley v. Foley*,[10] the court laid out the rationale for permitting parental immunity:

> [I]f a parent, *or one sustaining that relation to a child*, treats that child inhumanely and cruelly, so as to injure it in health or limb, the parents are subject to criminal prosecution, and on conviction punished by fine or imprisonment in the penitentiary for a term not exceeding five years. But the child cannot maintain a civil action for damages against its parents for such injury. This rule of law, as the court conceives, is founded upon consideration of public policy, affecting family government; that is, that the child shall not contest with the parent the parent's right to govern the child.[11]

Since *Foley*, numerous decisions have advanced a variety of justifications for parent-child immunity. The first and most common is that it preserves family harmony.[12] This is based on

---

[7] *Hewellette* (cited in note 1).
[8] *McKelvey* at 393, 77 SW at 665.
[9] *Roller* at 245, 79 P at 789.
[10] 61 Ill App 577 (2d D 1895).
[11] Id at 579 (emphasis added).
[12] See *Mathis v Ammons*, 453 F Supp 1033, 1036 (ED Tenn 1978); *Myers v Tranquility*

the notion that allowing a child to sue his or her parents is more detrimental to family tranquility than the pain suffered by the child.[13]

The second is that the doctrine preserves parental authority and discipline,[14] based on the rationale that parents have the right and obligation to support, educate, protect, and guide their children. Children have a reciprocal obligation to obey their parents. Arguably, if parents are to have the authority to discipline their children, they should not be burdened with the threat of litigation or a changing standard of socially accepted parental conduct.

Finally, the argument goes, a lawsuit could deplete the family's resources.[15] The logic is that is a child were able to recover from his parents and the injured child had other siblings, the funds available to the other siblings would be drained. Essentially, advocates for the immunity would agree that the injured child would recover the money at the siblings' expense.

In our view, the public-policy balancing act, which once may have favored the parents, has shifted over time to favor the injured child. The logic behind these justifications does not fit today's society.

The erosion of the parental immunity doctrine in Illinois

As time went on, the obscure, hard-line language and policy rationale in *Foley* caused Illinois courts to carve out numerous exceptions to the parent-child immunity doctrine.[16] Illinois court cases following *Foley* realized that many of the public policy concerns behind the rule preventing injured minors from suing their parents were no longer applicable.

In *Nudd v. Matsoukas*, for example, the Illinois Supreme Court abolished parent-child immunity for tort claims arising from a parent's willful and wanton conduct.[17] Similarly, in *Schenk v.*

Irrigation Dist., 26 Cal App 2d 385, 389, 79 P2d 419 (4th D 1938); *Strahorn v Sears, Roebuck & Co*, 50 Del 50, 52, 123 A2d 107, 108 (1956); *Rickard v. Rickard*, 203 So2d 7, 8 (fla D Ct App 1967); *Luster v Luster*, 299 Mass 480, 481, 13 NE2d 438, 439 (1938); *London Guarantee & accident Co v Smith*, 242 Minn 211, 214-15, 64 NW2d 781, 784 (1954); *Palcsey v Tepper*, 71 NJ Super 294, 296, 176 A2d 818, 819 (1962); *Nahas v. Noble*, 77 NM 139, 140-41, 420 P2d 127, 128 (1966); *Small v Morrison*, 185 NC 577, 118 SE 12, 13 (1923); *Tucker v Tucker*, 395 P2d 67, 68, 1964 OK 89 (1964); *Matarese v Matarese*, 47 R1 131, 131 A 198 (1925); *Logan v Reaves*, 209 Tenn 631, 636 354 SW 2d 789, 791 (1962); *Aboussie v Aboussie*, 270 SW 2d 636, 638 (Tex Ct App 1954); *Lusk v Lusk*, 113 W Va 17, 166 SE 538 (1932); *Wick v Wick*, 192 Wis 260, 212 NW 787, 789 (1927).

[13] See, e.g., *Fugate v Fugate*, 582 SW2d 663, 668 FN8 (Mo 1979). Id at 668, auoting Comment: *The Child's Claimi for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 San Diego L Rev 231 (1975).

[14] See, e.g., *Barlow v Iblings*, 261 Iowa 713, 718, 156 NW2d 105, 107-108 (1968).

[15] *Orefice v Albert*, 237 So2d 142, 145 (Fla 1970).

[16] See, e.g., *Nudd* (cited in note 4); *Larson* (cited in note 4); *Cummings* (cited in note 4); *Johnson* (cited in note 4); *Schenk* (cited in note 4).

[17] *Nudd* at 619, 131 NE2d at 531.

Schenk, the fourth district appellate court proclaimed that the doctrine of parental immunity would not bar recovery for conduct wholly unrelated to the objectives or purpose of a family itself. There, a father brought an action against his daughter, a minor, for injuries that he sustained when she hit him with a car on a public street, which, the court wrote, had no connection to the "family relationship."[18]

In 1978, 10 years after *Schenk*, the fourth district appellate court in *Cummings v. Jackson* carved out yet another exception to parental immunity. There, the plaintiff's mother violated a city ordinance by not trimming the tress around her home. The minor plaintiff alleged that one of the untrimmed trees obstructed the view of a driver who struck and injured her. The court refused to extend parent-child immunity to the mother who violated a city ordinance and breached a duty owed to the general public.[19]

In *Johnson v. Myers*, the minor passenger plaintiffs alleged that their mother, who had since passed away, had injured them in a motor vehicle collision. The second district held that the underlying polices of the parental immunity doctrine were no longer served once the family relationship has been severed by the mother's death.[20] Finally, 25 years ago in *Larson v. Buschkamp*, the court determined that neither the doctrine of parent-child tort immunity nor the Illinois contribution statute provided a substantive bar to third parties seeking contribution from a negligent parent.[21]

The *Cates* decision and preserving parental authority

These four Illinois cases left questions about the scope of the parental-immunity doctrine. Those were answered by the Illinois Supreme Court in the 1993 decision in *Cates v. Cates*[22] In examining *Foley* and its progeny, the *Cates* court reviewed the three major public policy considerations that previous Illinois appellate courts had consistently relied upon: (1) preserving family harmony, (2) discouraging fraud and collusion, and (3) preserving parental authority and discipline.[23]

Family harmoney. The *Cates* court concluded that "the traditional policy of family harmony is no longer viable [and no longer convincingly] affords a sufficient basis for the [parental immunity] rule."[24] The supreme court's rejection of the family-harmony justification is consistent with the rend among courts and commentators across the country.[25]

Logic and reason dictate that it is not the *lawsuit* that causes disruption to a family, but *rather the*

---

[18] See, e.g., *Schenk* at 206, 241 NE2d at 15.
[19] *Cummings* at 71, 372 NE2d at 1129.
[20] *Johnson* at 846, 277 NE2d at 779.
[21] *Larson* (cited in note 4).
[22] 156 Ill 2d 76, 619 NE2d 715 (1993).
[23] Id at 92-96, 619 NE2d at 723-25
[24] Id at 96, 619 NE2d at 724-25, citing *Schenk* at 204-05, 241 NE2d at 14.
[25] See, e.g., Martin J. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 New Eng L Rev 1161, 1165 (Summer 1991); See also W. Prosser, *Handbook of the Law of Torts*, 866 (4th Ed 1971).

tortious act of the parent that brought about the injuries to the minor.[26]

Fraud and collusion. The *Cates* court also acknowledged that the availability of liability insurance diminished the adversity of parties.[27] Indeed, the legislature has recognized the importance of insurance by mandating liability insurance for Illinois motorists.[28] The *Cates* court also recognized that "even in cases where collusion and fraud may exist, our adversarial legal system, through its skilled attorneys, discovery, examinations and evidentiary reviews is adequately equipped to deal with such problems."[29]

The *Cates* court's reasoning finds further support in the Illinois legislature's abolition of husband-wife tort immunity.[30] While the doctrines of parent-child and husband-wife tort immunity are different, "each... has been typically supported by the same public policies."[31]

Parental authority. The *Cates* court concluded that the only conceivable public policy that supports parent-child immunity is preservation of parental authority and discipline. Therefore, immunity affords very limited protection to conduct inherent to the parent-child relationship, including the exercise of parental authority and supervision over the child or the exercise of discretion in providing care.

Parental immunity and parents' business activities

Over the last 50 years, the trend in the Illinois courts has been to curtail the use of the parental immunity doctrine The rest of the country has been in step with Illinois. Most notably, the strongest and soundest trend denying parental immunity concerns torts arising during a parent's business activity.

Courts from other jurisdictions have refused to extend the immunity doctrine to cases where a parent negligently causes harm to his or her child while the parent is engaged in acts within the course and scope of his or her business or vocation, regardless of whether the parent is also, technically speaking, "supervising" the activities of the child at the time.[32] This approach eliminates the futility of inquiring into the degree of "parenting" present at the time of the

---

[26] *Cates* at 100, 619 NE2d at 727 (The supreme court acknowledged that scholars unanimously agree "more often than not, it is the injury, if anything, which disrupts the family.").

[27] Id at 101-02, 619 NE2d at 727.

[28] 625 ILCS 5/7-601 (the statute requires all persons who operate, register or maintain registration of a vehicle to be used on a public highway shall be covered by liability insurance).

[29] *Cates* at 101, 619 NE2d at 727.

[30] 750 ILCS 65/1.

[31] *Cates* at 102, 619 NE2d at 728.

[32] See, e.g., *Terror Mining Company, Inc. v Roter*, 866 P2d 929 (Colo 1994); see also *Stamboulis v Stamboulis*, 401 Mass 762, 519 NE2d 1299 (1988); *Dunlap v Dunlap*, 84 NH 352, 150 A 909 (1930); *Signs v Signs*, 156 Ohio St 566, 103 NE2d 743 (1952); *Felerhoff v Felderhoff*, 15 Tex Sup J 118, 473 SW2d 928 (1971); *Worrell v Worrell*, 174 Va 11, 4 SE2d 343 (1939); *Borst v Borst*, 41 Wash 2d 642, 251 P2d 149 (1952); *Lusk* (cited in note 12).

negligently caused injury.

Parental duties vis a vis business undertakings are ordinarily distinct and exist independently of one another; as such, tort immunity predicated upon notions of the preservation of family harmony, domestic felicity, parental authority, and so forth, lacks both a logical and public policy justification for extension of the same immunity to activities that are sufficiently separate and distinct from parental acts.[33]

The expansion of in loco parentis immunity

Cates identifies the underlying rationales used to limit parent-child immunity, yet it creates an ambiguous definition of who is actually entitled to the privilege. Therein lies the confusion in Illinois.

the longstanding trend in Illinois is to restrict the applicability of parental immunity. As such, logic would dictate that the loco parentis should also be limited. For example, any attempt to extend the in loco parentis immunity to the boyfriend or girlfriend of a minor victim's parent would be counter trend.

In fact, the two key Illinois cases on point, *Lawber v. Doil*[34] and most recently *Nichol v. Stass*[35], do not extend the doctrine broadly. In *Lawber*, for example, the appellate court held that a stepfather, who was the husband of a child's natural mother, was immune under the in loco parentis immunity doctrine for the wrongful death of a child.[36]

It is understandable that courts have been circumspect. Extending the in loco parentis immunity doctrine to those outside the family frustrates the public purpose of encouraging legitimate family units. A boyfriend's relationship with a minor, for example, is much different than the stepfather's legal relationship as was established in *Lawber*.

Moreover, in *Lawber,* the deceased child's mother and stepfather stood to gain from any recovery from the lawsuit. The court, in applying the in loco parentis immunity doctrine to the child's stepfather, did so to prevent "the likelihood the tortfeasor parent could benefit from his or her own malfeasance through the marital relationship."[37] Those facts are crucial in distinguishing aspects of the *Lawber* case. Based on *Cates* And its progeny, a different result would have been likely if the injured child had survived.

From a different perspective, the Illinois Supreme Court held in *Nichol* that foster parents may be entitled to a limited grant of parental immunity for negligent torts against foster children in their

---

[33] *Trevarton* at 423, 378 P2d at 642.

[34] 191 Ill App 3d 323, 547 NE2d 752 (4th D 1989).

[35] 192 Ill 2d 233, 735 NE2d 582 (2000).

[36] *Lawber* at 326, 547 NE2d at 754 ("Defendant here was not a casual acquaintance of the family, nor a temporary guardian of the child. He was the husband of the child's natural mother...").

[37] Id.

care.[38] In that case, a minor drowned in a toliet while under the care of his foster parents. Again the court stated that such immunity could only exist when the conduct at issue was inherent to the parent child relationship.

While a court could wisely acknowledge that a relationship between a foster parent and forst child is not identical to that of a parental relationship, the majority felt that a denial of such immunity would be inconsistent with the public policies supporting the doctrine.[39] Specifically, the court relied on the *Cates* justification and recognized that the need for parents to retain "parental authority" and "discipline" were equally applicable to foster parents.[40]

Although Illinois courts have extended parental immunity to foster parents, the Illinois Supreme Court refused in 2003, in *Wallace v. Smyth*, to apply the immunity to residential care facilities and their employees based on the fact that such a relationship fails to parallel a parent-child relationship.[41]
The issue in *Wallace* was whether a corporate entity that housed children enjoyed the protection of parental immunity; the high court held that it did not. A 12-year-old was placed at Maryville Academy for a 90-day assessment, during which time he died as the result of physical restraint by Maryville employees. In heeding the fears of many in expanding the doctrine to a corporate entity, the court stated:

> Clearly, neither the conduct nor the relationship is the sole consideration. Both remain important in determining who is cloaked with immunity. That is, application of the doctrine depends upon more than the performance of so-called "parental" responsibilities; we also consider whose performance is at issue.[42]

The court held that despite the noble motives of Maryville, the employees exercised their "professional responsibilities" in handling children and were *not* parents despite the similarities in their responsibilties.[43]

All the policy considerations discussed by the *Wallace* court fail to lend any weight to the extension of the in loco parentis to a "boyfriend" or "girlfriend." If such a policy is espoused, what it next? Will immunity attach to babysitter, neighbors, aunts, uncles, brothers, sisters and any other person spending any amount of time, anywhere, with that child?

---

[38] *Nichol* (cited in note 35). (Note that the issue of parental immunity was never raised by the defendant at the trial or appellate level. While the Illinois Supreme Court did not determine if the defendant was entitled to parental immunity, the court remanded the issue to the trial court.)

[39] Id. at 245, 735 NE2d at 987.

[40] Id.

[41] *Wallace v Smyth*, 203 Ill 2d 441, 786 NE2d 980 (2003).

[42] Id at 451, 786 NE2d at 987.

[43] Id at 451-52, 786 NE2d at 987 ("[W]e conclude that, while the parental immunity doctrine logically reaches foster parents, it cannot stretch to cover a corporate entity and its employees.").

A close reading of *Cates* and its progeny lead to the conclusion that preserving parental authority and discipline remains the only viable policy justification for Illinois courts today in upholding parents immunity. Court within and beyond Illinois have been cautious I extending this doctrine. For example, no court has extended immunity to a boyfriend or girlfriend.[44] To date, the furthest the doctrine has been extended is to grandparents[45] and step-parents,[46] both members of the family.

Conclusion

The original intent of the parent-child immunity doctrine was the prohibit a minor form suing a parent for personal injuries. Over time, court shave created a series of exceptions and chipped away at the immunity. Courts have recognized the importance of the protection of an injured child.

However, cases expanding the in loco parentis doctrine may be broadening the scope of the immunity. If courts continue to grant parties who offer housing, care, and education to children the protection of parental immunity, then summer camps, daycare centers, medical and psychological treatment facilities, grandparents and other relatives or non-relatives of the child will seek shelter under the doctrine. This is not in the best interest of minor children, nor is it consistent with the original intent of the doctrine.

This inconsistency in treatment of the two doctrines should be addressed by Illinois courts. The best approach would be to limit the in loco parentis doctrine to conform to the trend protecting the rights of injured minors.

Jeffrey J. Kroll, jjk@cliffordlaw.com is a partner with Clifford Law offices, a plaintiff's personal injury firm. He teaches trial advocacy at Northwestern Law School. Sean P. Driscoll is an associate with Clifford Law Offices.

---

[44] See, for example, *Littlejohn v Barillaro*, 2006 WL 1681051, *4 (Conn Super). But see *State v Curtis*, 877 So2d 1188, 1190 (La App 2d Cir 2005) and *T.B. v L.R.M.* 567 Pa 222, 234, 786 A2d 913, 920 (2001).

[45] Compare *Thomas v Inmon*, 268 Ark 221, 222-233, 594 SW2d 853, 854 (1980) with *Ryan v Yarbrough*, 355 Ill App 3d 342, 347, 823 NE2d 259, 264 (2d D 2005) and *Busillo v Hetzel*, 58 Ill App 3d 682, 685, 374 NE2d 1090, 1092 (1st D 1978).

[46] *London Guarantee & Accident Co., Ltd v Smith*, 242 Minn 211, 211, 64 NW2d 781, 782 (1954).