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ILLINOIS LAW MANUAL

CHAPTER IX
SPECIAL DEFENSES

E. INTRA-FAMILY TORT IMMUNITY

Limited parental tort immunity is the only form of intra-family immunity recognized in Illinois. Parental tort immunity is extended to those *in loco parentis*, or "in place of the parent," as well as to the child's natural or legal parents. The Illinois legislature abolished spousal immunity in 1988 by amending The Married Women Act of 1874. Further, Illinois has never granted intra-family tort immunity to siblings, grandparents, or other family members unless they were *in loco parentis*.

1. Parental Immunity

Illinois law provides limited immunity to parents whose tortious acts injure their children. Parental tort immunity is limited to conduct inherent to the parent-child relationship that unintentionally injures the child. Brile v. Estate of Brile, 321 Ill. App. 3d 933 (2nd Dist. 2001). It does not extend to intentional torts and willful and wanton conduct. Nudd v. Matsoukas, 7 Ill. 2d 608 (1956); Wallace v. Smyth, 203 Ill. 2d 441 (2002). Conduct inherent to the parent-child relationship is conduct requiring the exercise of parental discretion in providing for the child's discipline, care, and supervision, which in turn requires the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience and culture which only a parent or child can bring to the situation. Brile, 321 Ill. App. 3d at 935, and Wallace, 203 Ill. 2d at 985. It includes activities such as maintaining the family home, providing medical treatment to the child, and providing supervision. Id. It does not include general conduct not directly related to parental tasks, such as operating an automobile or motorcycle. Cates v. Cates, 156 Ill. 2d 76 (1993).

> **Example**: A child is injured after slipping on a wet, freshly mopped floor in the family home. Mopping the floor is conduct necessary for the care and maintenance of the family home. Therefore, it is conduct inherent to the parent-child relationship, and parental immunity bars a suit by the child against the parent.

> **Example**: A parent's negligence causes an automobile accident and injures the child. Operating an automobile is not directly related to providing for the discipline, care, and supervision of the child. Further, the duty of care owed in operating an automobile is owed to the general public, not just the child. Therefore, operating an automobile is not conduct inherent in the parent-child relationship, and parental immunity does not bar a suit by the child against the parent.

Limited parental immunity applies not only to the child's natural or legal parents, but also to those standing *in loco parentis* to the child. Wallace, 203 Ill. 2d at 983. A person must undertake and be burdened by the obligations, financial and otherwise, inherent in parenting the child to be *in loco parentis*. The legislature has also granted *in*

loco parentis status to teachers supervising students at school and during school-related functions. 105 ILCS 5/24-24; Stiff v. Eastern Illinois Area of Special Education, 251 Ill. App. 3d 859 (1st Dist. 1993). Therefore, limited parental immunity extends to those who assumed the parental obligations of caring for and supporting the child, as well as school teachers with supervisory responsibility over students.

> **Example**: A toddler is injured after tumbling down a flight of stairs at her stepfather's home. The toddler was left in the sole care and supervision of the stepfather, who had not legally adopted the child. However, the child lived with the stepfather and the stepfather provided for the care and support of the child. The child and the child's mother are barred from bringing suit against the stepfather for negligent supervision because the stepfather is *in loco parentis* to the child, and supervising the child is inherent to the parent-child relationship.

> **Example**: A child is injured during a school-sponsored field trip. The child's parents bring suit against the school and the teachers for negligent supervision. Parental immunity bars the suit because teachers are, by statute, *in loco parentis* to students when supervising them at school and during school outings. Supervision of the child is inherent to the parent-child relationship.

The status of *in loco parentis* does not automatically extend to grandparents. In Busillo v. Hetzel, 374 N.E. 2d 1090, a First District case from 1978, the minor was being watched by the grandparent during the daytime hours and was injured when he ate some poisonous berries. The court held that the purpose of the parental immunity doctrine was to preserve family harmony, and that generally grandparents are not members of the family unit and have only temporary custody and control of the minor. Thus, the court reasoned that a suit by the minor against the grandparent would not disrupt the family harmony, and declined to extend immunity to the grandparent having only temporary custody and control over the child. Busillo also commented upon immunity not being favored by the courts. The Busillo court did not say a grandparent could never attain the status of *in loco parentis*, but no exception has been carved out for them as part of the parental tort immunity doctrine.

In 1989, the Fourth District in Lawber v. Doil, 547 N.E. 2d 752, further commented on Busillo, stating that the court in Busillo held that a person who merely exercised the parental attributes of affection, generosity and care, without assuming the usual financial burdens of parenthood, does not stand *in loco parentis* to a child. This assists us in attempting to determine when a grandparent could attain the status. Lawber is also important because it defines what is meant by financial burdens. Financial burdens do not mean financial contributions, such as for the upkeep of a child. The example given is the parent who is unemployed and contributes nothing financially. That parent still has the financial burden of the child, even though someone else might be financing it. In the case where a grandparent took the grandchild away for a week on vacation, it is likely the court would find that although the grandparent contributed to the minor financially during the week that he was with him, ultimately the financial burden of raising that child remained with the parents.

In 1993, the Supreme Court of Illinois discussed the history of the parent child tort immunity doctrine in Cates v. Cates, 619 N.E. 2d 715. The case talks about the policy considerations behind the doctrine (preservation of family harmony, discouragement of fraud and collusion, preservation of parental authority). Under these guidelines, we can see why a court is not likely to make any effort to find a person with temporary custody *in loco parentis*, as it does nothing to serve their purpose for granting the immunity. Unless a person takes over the major financial burdens of the child as well as the shaping of the child emotionally, it is unlikely that the person will be found to have attained the status of *in loco parentis* and be able to take advantage of this special defense.

The 2007 Fourth District case of Phillips v. Travell, 371 Ill. App. 3d 549 (2007), gives an

example of how a non-relative can become *in loco parentis*. In Phillips, the niece was living with her aunt when she was injured. The niece believed that the aunt had legal custody of her. The aunt believed she was financially responsible for the niece, including paying her medical bills. The court said whether or not the aunt had actual legal custody, her intent to take on all obligations of support and custody of the minor put her *in loco parentis*. The court specifically distinguished this from the grandparent in Busillo, who only had custody for a few days.

2. Spousal Immunity

The Illinois legislature abolished the defense of inter-spousal tort immunity in 1988 by amending the Married Women Act of 1874. The amendment states in part:

> A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried. A husband or wife may sue the other for a tort committed during the marriage.

750 ILCS 65/1.

The statute has further been amended to become the Married Persons Act, and all text has been altered to be unisex.

Armed with the legislature's unequivocal intent to permit inter-spousal lawsuits, some argued that family exclusions in insurance policies were now barred as violative of public policy. Illinois courts have plainly rejected this notion. See State Farm Mutual Auto. Ins. Co. v. Collins, 258 Ill. App. 3d 1 (1st Dist. 1994); Pekin Ins. Co. v. Willett, 301 Ill. App. 3d 1034 (2nd Dist. 1998). The public policy behind eliminating inter-spousal tort immunity was the expansion of legal rights and powers of married persons. It was not done to assure adequate compensation of injured parties. Id. Therefore, the public policy expressed by The Married Women Act does not impact family exclusion clauses in insurance policies.