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CHANGING PATTERNS IN ILLINOIS' SCHOOL TORT IMMUNITY

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The past two decades have witnessed conflicting changes in Illinois' judicial and legislative interpretations of the type of tort immunity granted teachers and school districts. Until 1959, Illinois courts applied the doctrine of sovereign immunity to school districts, their employees, and agents, considering the school district to be a quasi-municipal corporation.[1] In *Molitor v. Kaneland Community Unit District No. 302*,[2] the Illinois Supreme Court rejected this concept of sovereign immunity of quasi-municipal corporations, holding that school districts and their employees would henceforth be liable in tort for negligence.[3] Legislative reaction was swift. Before the final decision was handed down in *Molitor* in 1959, the Illinois General Assembly passed legislation which limited school district tort liability to $10,000[4] and granted full immunity to other quasi-municipal corporations.[5] In 1965, in an attempt to regain a measure of the school district sovereign immunity lost in *Molitor*, the Illinois General Assembly amended the Illinois School Code to include a broad grant of *in loco parentis* authority to teachers in school districts.[6] This grant of parental immunity did indeed protect teachers

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1. Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536 (1898) is the principal case establishing Illinois' adherence to the sovereign immunity doctrine in regard to public schools. *See generally* Franklin, *Tort Liability of Schools*, 1958 U. ILL. L.F. 429.

2. 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960), *modified on other grounds*, 24 Ill. 2d 467, 182 N.E.2d 145 (1962).

3. 18 Ill. 2d at 21, 163 N.E.2d at 96.

4. 1959 Ill. Laws 2060, ILL. REV. STAT. ch. 122, §§ 821-31 (1975). The statute was subsequently held unconstitutional in Treece v. Shawnee Community Unit School Dist. No. 84, 39 Ill. 2d 136, 233 N.E.2d 549 (1968). *See also* Haymes v. Catholic Bishop of Chicago, 41 Ill. 2d 336, 243 N.E.2d 203 (1968).

5. Law of June 30, 1959, ch. 57½, § 3a, 1959 Ill. Laws 1954 (repealed 1965) (affects forest preserves); Law of June 30, 1959, ch. 34, § 301.1, 1959 Ill. Laws 1890 (repealed 1967) (counties), Law of June 30, 1959, ch. 105, § 12-1, 1959 Ill. Laws 782 (repealed 1967) (park districts).

6. ILL. REV. STAT. ch. 122, § 24-24 (1975) (applicable to municipalities of less than 500,000 population); ILL. REV. STAT. ch. 122, § 34-84a (1975) (applicable to municipalities of greater than 500,000 in population). Both sections are identical in providing the following:

Teachers and other certified educational employees shall maintain discipline in the schools. In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and

from tort liability. The Illinois Supreme Court in *Kobylanski v. Chicago Board of Education*[7] found the amended provisions of the Illinois School Code to extend *in loco parentis* status to all activities of the school program, whether disciplinary or non-disciplinary. Thus, an action would lie against schools and educators only for willful and wanton misconduct.[8] A recent decision by the Illinois Supreme Court, *Gerrity v. Beatty*,[9] and subsequent appellate decisions may portend an erosion of the *Kobylanski* rule of blanket school tort immunity from negligence.

This article will briefly review the background of school tort immunity and parental immunity in Illinois, including a presentation of the significant *Molitor* case. Post-*Molitor* interpretations of school tort immunity, both legislative and judicial, will then be explored, especially the amended provision of the Illinois School Code which granted the board *in loco parentis* authority to teachers. The case of *Kobylanski v. Chicago Board of Education*[10] will be fully discussed. Finally, the 1978 Illinois Supreme Court case of *Gerrity v. Beatty*[11] and later appellate decisions will be analyzed.

Historical Background of School Tort Immunity in Illinois

The doctrine of sovereign immunity has its foundation in the feudal concept, "[T]he King can do no wrong."[12] Thus, the state was not answerable in its courts of law for its negligent acts or omissions. *Russell v. Men of Devon*[13] is customarily cited as the first judicial articulation of this rule. Although the doctrine was perhaps unsuited to a republican form of government, as some writers have suggested,[14] it gained ready acceptance in the United States.[15] The Illinois Supreme Court first applied the doctrine of sovereign immunity to school dis-

supervision of the pupils in the absence of their parents or guardians. Nothing in this Section affects the power of the board to establish rules with respect to discipline.

7. 63 Ill. 2d 165, 347 N.E.2d 705 (1976). A second case, Chilton v. Cook County School Dist. No. 207, Maine Twp., 26 Ill. App. 3d 459, 325 N.E.2d 666 (1975) was consolidated in the *Kobylanski* decision.

8. 63 Ill. 2d at 175, 347 N.E.2d at 710.

9. 71 Ill. 2d 47, 373 N.E.2d 1323 (1978).

10. 63 Ill. 2d 165, 347 N.E.2d 705 (1976).

11. 71 Ill. 2d 47, 373 N.E.2d 1323 (1978).

12. W. Prosser, Law of Torts (4th ed. 1971).

13. 2 Term Rep. 671, 100 Eng. Rep. 359 (1788).

14. *See, e.g.*, Borchard, *Governmental Liability in Tort*, 34 Yale L.J. 1, 6 (1924); Green, *Freedom of Litigation*, (III) *Municipal Liability for Torts*, 38 Ill. L. Rev. 355, 356 (1943-44) (hereinafter referred to as Green).

15. *See, e.g.*, Hill v. City of Boston, 122 Mass. 344, 23 Am. Rep. 332 (1877); Ham v. Mayor of New York, 70 N.Y. 459 (1877); Wixon v. City of Newport, 13 R.I. 454, 43 Am. Rep. 35 (1881).

tricts in 1898. In *Kinnare v. City of Chicago*,[16] the court stated:

> [T]he state acts in its sovereign capacity, and does not submit its action to the judgment of courts, and is not liable for the torts or negligence of its agents, and a corporation created by the state as a mere agency for the more efficient exercise of governmental functions is likewise exempted from the obligation to respond in damages, as master, for negligent acts of its servants to the same extent as is the state itself, unless such liability is expressly provided by the statute creating such agency.[17]

As the doctrine of sovereign immunity developed, distinctions were drawn between municipal corporations, such as cities, villages, and towns, and the quasi-municipal corporations, such as school districts. Quasi-municipal corporations were afforded complete immunity from negligence[18] while municipal corporations, although immune for acts of negligence arising out of the exercise of their governmental function, were answerable for negligence in the conduct of proprietary functions.[19] Thus, a municipal corporation was seen to enjoy "two kinds of powers: one governmental and public, and to the extent they are held and exercised . . . clothed with sovereignty; the other private, and to the extent they are held and exercised . . . a legal individual."[20]

The distinctions in immunity between quasi-municipal and municipal corporations and the further distinctions in the character of municipal functions added to the erratic legislative response to judicially created rules of immunity. These distinctions also led to inequitable results and uncertain interpretations of sovereign immunity. As one commentator noted, the doctrine failed to differentiate immune activities from those to which liability would attach on any rational grounds.[21] The discrimination inherent in the application of the immunity doctrine was recognized by the Illinois Supreme Court in a 1964 case involving Illinois' statutory park district immunity:

> Many of the activities that frequently give rise to tort liability are common to all governmental units. The operation of automobiles is an obvious example. From the perspective of the injured party . . . there is no reason why one who is injured by a park district truck should be barred from recovery, while one who is injured by a city or village truck is allowed to recover, and one injured

16. 171 Ill. 332, 49 N.E. 536 (1898).
17. *Id.* at 335, 49 N.E. at 537.
18. Leviton v. Board of Educ., 374 Ill. 594, 30 N.E.2d 497 (1940); Lake County v. Cuneo, 344 Ill. App. 2d 242, 100 N.E.2d 521 (1951).
19. Merrill v. City of Wheaton, 379 Ill. 504, 41 N.E.2d 508 (1942); Gebhardt v. Village of La Grange Park, 354 Ill. 234, 188 N.E. 372 (1933).
20. Lloyd v. Mayor of New York, 5 N.Y. 369, 374, 55 Am. Dec. 347 (1851).
21. *See* Green, *supra* note 14, at 376.

> by a school district truck is allowed to recover only within a prescribed limit. And to the extent that recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of section 22 of article IV [of the Illinois constitution].[22]

Thus, the Illinois Supreme Court expressed dissatisfaction with the evolution of a doctrine which through both legislation and judicial interpretation could act to permit, limit, or deny recovery, based not on the character of the negligent act, but on the quality of "sovereignty" of the governmental tortfeasor.

As early as 1921, the doctrine had come under attack in Illinois,[23] although the courts were several decades behind in responding to scholars' challenges. As one commentator noted:

> A municipal corporation today is an active and virile creature capable of inflicting much harm. Its civil responsibility should be coextensive. The municipal corporation looms up definitely and emphatically in our law, and what is more, it can and does commit wrongs. This being so, it must assume the responsibilities of the position it occupies in society.[24]

The immunity established in *Kinnare* was, nonetheless, upheld by Illinois courts. In *Lindstrom v. City of Chicago*,[25] the Illinois Supreme Court declared the basis for the rule to be that a school district was created solely to aid government administration. Unlike private concerns, quasi-municipal corporations were seen to exist merely to aid in the orderly administration of sovereign functions.[26] Perforce, they were cloaked in the sovereign's immunity. Immunity from tort liability followed dissemination of governmental functions.[27]

As the doctrine of sovereign immunity persisted, a basis for immunity other than nonjusticiable sovereignty came to be promulgated. This was the "public fund" or "no fund" doctrine.[28] In brief, the rationale was that various governmental undertakings were done for the public benefit, as distinguished from activities of the government in its private or proprietary function. The government then acted as agent for its citizens in performing functions like education.[29] Since public

22. Harvey v. Clyde Park District, 32 Ill. 2d 60, 65, 203 N.E.2d 573, 576 (1964).

23. *See* Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 380 (1922).

24. Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28, 42 (1921).

25. 331 Ill. 144, 162 N.E.128 (1928). *See also* Nagle v. Wakey, 161 Ill. 387, 43 N.E. 1079 (1896); Wilcox v. City of Chicago, 107 Ill. 334, 47 Am. Rep. 434 (1883); Town of Waltham v. Kemper, 55 Ill. 346, 8 Am. Rep. 652 (1870).

26. 331 Ill. at 146, 162 N.E. at 130.

27. *Id.*, 162 N.E. at 131.

28. Bailey v. City of New York, 3 Hill 531 (N.Y. 1842) was the first case to delineate this distinction. For a discussion of this distinction, *see* Barnett, *The Foundations of the Distinction Between Public and Private Functions*, 16 OR. L. REV. 250 (1937).

29. *See* Casner & Fuller, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

functions were funded by taxes, the government was viewed as custodian and protector of public funds.[30] The diversion of such funds held in the public trust to the payment of claims for injuries, it was feared, would hinder essential governmental functions. Further, school districts, supported solely by taxes, were circumscribed by legislative directives in the use of educational tax funds. Absent legislation expressly granting the power to pay damage claims, school districts (and other quasi-governmental entities) were thought to lack authority to direct the payment of such claims, or to levy taxes for such purposes.[31]

Some erosion of the doctrine manifested in *Thomas v. Broadlands Community Consolidated School District No. 201*,[32] in which it was held that a school district might be liable in tort to the extent of available liability insurance, upon the rationale that the "public fund" was therefore conserved. The school district thus enjoyed the unique opportunity to determine *sua sponte* whether it would be answerable for its tortious acts.

MOLITOR V. KANELAND COMMUNITY UNIT DISTRICT NO. 302

On May 21, 1959, the Illinois Supreme Court rendered its opinion in *Molitor v. Kaneland Community Unit District No. 302*.[33] In the seminal opinion written by Justice Klingbiel, the court abolished the sovereign immunity doctrine as applied to school districts, holding that school districts and their employees would be liable in tort for their negligent acts and omissions.[34] Thomas Molitor, the minor plaintiff, filed a complaint in negligence for severe burns received when a school bus in which he was a passenger left the road, struck a culvert, exploded, and burned. The complaint was dismissed by the trial court, and the appellate court affirmed.[35] The case then came before the Illinois Supreme Court on a certificate of importance.

The court in *Molitor* reflected at length on the development of the doctrine of sovereign immunity and the various theories developed in justification of the doctrine, as well as scholars' criticisms. The court

30. *See, e.g.*, MCQUILLAN ON MUNCIPAL CORPORATIONS § 353.24 (3d ed. 1977).

31. Chicago City Bank & Trust Co. v. Board of Educ., 386 Ill. 508, 54 N.E.2d 498 (1944); Leviton v. Board of Educ., 374 Ill. 594, 30 N.E.2d 497 (1940).

32. 348 Ill. App. 567, 109 N.E.2d 636 (1952). *See also* Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill. 1954); Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81 (1950).

33. 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

34. *Id.* at 20, 163 N.E.2d at 93.

35. Molitor v. Kaneland Community Unit Dist. No. 302, 20 Ill. App. 2d 555, 155 N.E.2d 841 (1959).

rejected the public fund doctrine, commenting that its rationale appeared to be "that it is better for the individual to suffer than for the public to be inconvenienced."[36] Nor was the existence of nonpublic fund assets (*e.g.*, liability insurance) influential, since "it would allow the wrong-doer to determine its own liability."[37] Further, the court disagreed with the argument that the imposition of tort liability would impoverish school districts and impair the educational process, stating, "We do not believe that in this present day and age, when public education constitutes one of the biggest businesses in the country, that school immunity can be justified on the protection of public funds theory."[38]

The concept of sovereign immunity was cursorily dismissed by the court in *Molitor* as an archaic, absolutist doctrine lacking viability in a democratic society. The court also remarked that imposition of tort liability might tend to reduce school accidents in encouraging districts to exercise greater care in the selection and employment of its agents. Clearly, however, the fundamental basis of the *Molitor* decision is found in the following statement by the court:

> It is a basic concept underlying the whole law of torts today that liability follows negligence, and that individuals and corporations are responsible for the negligence of their agents and employees acting in course of their employment. The doctrine of governmental immunity runs directly counter to that basic concept. What reasons, then, are so impelling as to allow a school district, as a quasi-municipal corporation, to commit wrongdoing without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?[39]

An acerbic dissent was filed by Justice Davis, joined by Justice Hershey.[40] After raising the traditional justifications for perseverance of the doctrine of sovereign immunity, the dissent notably attacked the great irony of the majority opinion in *Molitor*. In its initial opinion of May 21, 1959, the majority overruled the court-related concept of governmental immunity, interpreting in dicta a portion of the Illinois School Code[41] whereby immunity was waived by the purchase of insurance as an expression of legislative dissatisfaction with the immunity doctrine.[42] After rehearing, the final opinion was published on Decem-

36. 18 Ill. 2d at 16, 163 N.E.2d at 94.
37. *Id.*
38. *Id.*
39. *Id.* at 20, 163 N.E.2d at 93.
40. *Id.* at 29, 163 N.E.2d at 98 (Davis, J., dissenting).
41. ILL. REV. STAT. ch. 122, § 29-11a (1957).
42. 18 Ill. 2d at 14, 163 N.E.2d at 92.

ber 16, 1959. In the interim, the legislature had passed a series of laws granting tort immunity to park districts, forest preserve districts, the Chicago Park District, and Illinois counties, and granting school districts a limited tort immunity.[43] Under the 1959 revision of the Illinois School Code, a $10,000 limitation was placed on public and private schools' tort liabilities in relation to their proprietary functions and full immunity was extended to their governmental function.[44]

In Loco Parentis and Parental Immunity in Illinois

The 1959 revision of the Illinois School Code was declared unconstitutional in 1968 by the Illinois Supreme Court in *Treece v. Shawnee Community Unit School District No. 84*.[45] Since many of the other 1959 immunity statutes were ultimately declared unconstitutional by the courts as well,[46] once again the Illinois General Assembly began mounting a defense to the courts' forays against governmental immunity. The activities of the General Assembly culminated in the Illinois Tort Immunity Act of 1965[47] and sections 24-24 and 34-84a of the Illinois School Code.[48]

The 1965 revision of the Illinois School Code in sections 24-24 and 34-84a included the grant of *in loco parentis* authority to teachers in school districts. This legislative grant of parental immunity provided that:

> Teachers . . . shall maintain discipline in the schools . . . . In all matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.[49]

43. *See* text accompanying notes 4-6 *supra*.
44. Ill. Rev. Stat. ch. 122, §§ 821-31 (1975).
45. 39 Ill. 2d 136, 233 N.E.2d 549 (1968).
46. Lorton v. Brown County Community Unit Dist. No. 1, 35 Ill. 2d 362, 220 N.E.2d 161 (1966) (school); Hutchins v. Kraject, 34 Ill. 2d 379, 215 N.E.2d 274 (1966) (county); Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1964) (parks); Walker v. Forest Preserve Dist., 27 Ill. 2d 538, 190 N.E.2d 296 (1963) (forest preserve); List v. O'Connor, 19 Ill. 2d 337, 167 N.E.2d 188 (1960) (parks). *See also* Haymes v. Catholic Bishop of Chicago, 41 Ill. 2d 336, 243 N.E.2d 203 (1968).
47. Ill. Rev. Stat. ch. 85, §§ 1-101 to 10-101 (1975). For history and analysis of the Act, *see* Baum, *Tort Liability of Local Governments and Their Employees: An Introduction to the Illinois Immunity Act*, 1966 U. Ill. L.F. 981; Cotteleer, *Illinois School Tort Immunity: 1959 to the Present*, 2 Loy. Chi. L.J. 131 (1971); Latturner, *Local Governmental Tort Immunity and Liability in Illinois*, 55 Ill. B.J. 28 (1966).
48. Ill. Rev. Stat. ch. 122, §§ 24-24, 34-84a (1975).
49. *Id.*

The minimum requisite for recovery under this statute was proof of willful and wanton misconduct.[50]

According to the statutory wording and subsequent judicial interpretation,[51] parental immunity was the basis for the sections 24-24 and 34-84a immunity grant to teachers. This basis was an outgrowth of the development of parental immunity in Illinois.

In 1956, the Illinois Supreme Court in *Nudd v. Matsoukas*,[52] addressed the doctrine of parental immunity in the context of a negligence action brought by an unemancipated minor for injuries sustained as a result of his father's willful, wanton, and reckless operation of a motor vehicle.[53] Defendant's motion to dismiss the action as contrary to public policy was granted by the trial court and the judgment was affirmed by an intermediate appellate court.

On appeal, the defendant relied primarily on two Illinois court holdings[54] to the effect that a minor is barred, absent statutory authorization, from suing a parent or an individual standing *in loco parentis*. The *Nudd* court indicated, however, that there was severely conflicting precedent with regard to this issue and that, moreover, the instant case was distinguishable from the traditional context for invoking the doctrine of parental immunity. The Illinois Supreme Court indicated that *Nudd* involved something more than simple negligence because the complaint contained "an allegation of wilful and wanton misconduct."[55] The court referred to a number of jurisdictions that allow unemancipated minors to bring tort actions against their parents. The *Nudd* court focused on an Oregon Supreme Court holding[56] which limited parental immunity to conduct within the scope of parental authority.[57] Finding the Oregon limitation persuasive, the Illinois

50. Kobylanski v. Chicago Board of Educ., 63 Ill. 2d 165, 347 N.E.2d 705 (1976).

51. *Id.*

52. 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

53. *Id.* at 609, 131 N.E.2d at 526. The plaintiff's damage claim named both his father and the driver of the other vehicle involved in the accident as defendants. The complaint also contained a wrongful death claim against the defendant-father for the deaths of his wife and another child which occured in the same accident.

54. *Id.* at 611, 131 N.E.2d at 530. The cases that the defendant relied on were Foley v. Foley, 61 Ill. App. 577 (1895) and Meece v. Holland Furnace Co., 260 Ill. App. 164 (1933). According to the *Nudd* court, the parental immunity rule was first enunciated in Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). 7 Ill. 2d at 617, 131 N.E.2d at 530.

55. *Id.*, 131 N.E.2d at 530.

56. Cowgill v. Boock, 189 Or. 282, 218 P.2d 445 (1950). In *Cowgill*, the administrator of a deceased minor's estate brought suit against the administrator of the child's father's estate. Both father and child had died as a result of the father's operation of an automobile while under the influence of alcohol.

57. *Id.* at 293, 218 P.2d at 456. The *Cowgill* court stated:

To hold that such drunken action is within the scope of parental authority would outlaw

Supreme Court held that "public policy should [not] prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent."[58] In so ruling, the Illinois Supreme Court held that the parental immunity doctrine, as a judicial creation, was subject to interpretation and modification by the courts.[59]

The *Nudd* limitation to the parental immunity doctrine was reaffirmed by the Illinois Supreme Court in *Mroczynski v. McGrath*.[60] In *Mroczynski*, an incompetent sued the estate of his father for damages arising out of various alleged torts.[61] The defendant raised a number of defenses including that of parental immunity from tort liability to offspring. The *Mroczynski* court found that none of the father's acts, as alleged by the plaintiff, constituted tortious conduct. Nevertheless, the court held, *inter alia*, that the plaintiff's complaint alleging willful misconduct stated a cause of action which would survive a motion to dismiss on the basis of parental immunity. The court cited *Nudd* and adopted its rationale that the public policy underpinnings of the parental nonliability rule were not furthered by including willful torts within the scope of the immunity.[62]

An unusual fact pattern provided the Appellate Court of Illinois for the Fourth District with an opportunity to apply, by analogy, the parental immunity doctrine and its attendant limitations. In *Schenk v. Schenk*,[63] a father who had been struck down and injured by an automobile operated by his seventeen-year-old, unemancipated daughter sought to recover for his injuries. No allegation of willful or wanton conduct was made. On motion of the defendant, the trial court dismissed the complaint for failure to state a cognizable claim.[64]

> the child and close all courtrooms to her. Surely public policy does not demand such a holding. [A]n injury inflicted upon an unemancipated child by the father while in a drunken condition is not within the scope of parental authority. . . . The mantle of parental non-liability was never intended for a case such as this.

Id., 218 P.2d at 456.

58. 7 Ill. 2d at 619, 131 N.E.2d at 531.

59. *Id.*

60. 34 Ill. 2d 451, 216 N.E.2d 137 (1966).

61. *Id.* at 452-53, 216 N.E.2d at 138-39. Plaintiff sought a declaratory judgment voiding the provision in his father's will which disinherited him. The complaint asked, in the alternative, that the father's estate be held in trust for the plaintiff's support and financial aid. Plaintiff also prayed for damages, including punitive damages, for abandonment, destruction of the family unit, termination of the parents' relationship by divorce, denial of uninterrupted financial aid, accumulation of a large estate at plaintiff's expense, denial of a normal home, parental affection, care, comfort, companionship and the guidance of a normal father-child relationship, resulting in severe emotional distress and mental suffering being inflicted on the plaintiff.

62. *Id.* at 454-55, 216 N.E.2d at 139.

63. 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968).

64. *Id.* at 201-02, 241 N.E.2d at 12. According to the appellate court, the trial court's dismissal was predicated on the absence, from the plaintiff's complaint, of any allegation of willful or

In the appellate court, the plaintiff argued that parent-child immunity should not extend to conduct that does not fall within the purview of the parental relationship. Citing both *Nudd* and *Mroczynski*, the court held that the public policy which supports immunity for parents also militates for nonliability for children sued by their parents.[65] The court also held that the same limitations that have been placed on parental immunity also attach to the immunity conferred upon offspring.

The court in *Schenk* interpreted *Nudd* as positing a two-part inquiry for determining whether particular conduct is actionable. This inquiry states that where the injury is willful, wanton, intentional, or criminal, then it is actionable whether or not it falls within the parent-child relationship. But, even if the misconduct is *not* willful, wanton, intentional, or criminal, it may still be actionable so long as it falls beyond the scope of the family relationship.

On the facts in *Schenk*, the court found that neither the father, in crossing the city street, nor the daughter, in negligently operating the vehicle, "were to any extent performing a duty arising out of the family relationship or engaged in any enterprise having for its purpose the furtherance of the family relationship."[66] Without setting out its reasoning, the court held that "reason and justice require that the immunity rule should not stand as an insuperable bar to redress for injuries" arising from misconduct beyond the scope of the family relationship.[67]

The *Schenk* court declined, however, to completely discard the parent-child immunity rule. Pointing to *Mroczynski* and other cases involving attempts to recover damages from parents for lack of affection, disruption of family life, failure to provide a pleasant home, or for the breaking up of a home by divorce, the court indicated that a "flood of litigation" would result from an unequivocal disavowal of the family immunity rule.[68] According to the court, ordinary negligence within the family context "is but the product of the hazards incident to inter-family living and common to every family."[69]

The *Schenk* distinction, that parental immunity does not extend to

wanton misconduct by the defendant. This, in turn, implies that the parental immunity rule was being applied in reverse—as a bar to a parent's tort action against a child.

65. *Id.* at 202, 241 N.E.2d at 13. The court held that if the underlying "public policy involved is in the interest of the State in maintaining harmony, avoiding strife, and insuring a proper atmosphere of cooperation, discipline and understanding in the family" then there is "no persuasive reason why a like policy is not equally involved in a parent's suit against the child for his tortious conduct."

66. *Id.* at 203, 241 N.E.2d at 14.

67. *Id.* at 206, 241 N.E.2d at 15.

68. *Id.* at 205-06, 241 N.E.2d at 15.

69. *Id.* at 206, 241 N.E.2d at 15.

activities apart from the direct parent-child relationship, has been followed in other appellate rulings. In *Johnson v. Myers*,[70] the court held that parental immunity did not act as a bar to minors' actions against their mother for alleged ordinary negligence in operating an automobile. Further, the court in *Gulledge v. Gulledge*[71] declined to accord *in loco parentis* standing to grandparents.

Most recently the Appellate Court of Illinois for the Fourth District held that parental nonliability did not bar a child's recovery for injuries sustained as a result of a parent's negligent maintenance of a condition on her land. In *Cummings v. Jackson*,[72] a child was struck by a car adjacent to her home, where untrimmed trees obstructed motorists' vision. The court reasoned that the landowner's duty to remove visual obstructions was one owed primarily to the general public, and only incidentally owed to family members.[73] Therefore, the court found, under the *Schenk* exception, that the injury did not arise from the family relationship and parental immunity would not bar the child's claim against her mother.[74]

POST-*MOLITOR* INTERPRETATIONS OF SCHOOL TORT IMMUNITY AND *IN LOCO PARENTIS* AUTHORITY

The 1965 Illinois School Code grant of *in loco parentis* authority in sections 24-24 and 34-84a was subsequently interpreted by the courts as a grant of full immunity to teachers from liability for negligence. In *Woodman v. Litchfield Community School District No. 12*,[75] a student sought damages for injuries sustained when kicked in the head by a fellow student during classroom activity. The complaint alleged that the teacher who had directed the activity was acting as an agent of the defendant school district and that said teacher was negligent and careless in supervising the children in the class room. The defendant moved to dismiss the complaint, relying on a provision in Illinois' Local Governmental and Governmental Tort Immunity Act[76] that conferred upon public entities and employees an immunity from liability

70. 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972). However, in Cosmopolitan Nat'l Bank of Chicago v. Heap, 128 Ill. App. 2d 165, 262 N.E.2d 826 (1970), a child's recovery against a father for negligent maintenance of a stairway, resulting in injury to the child, was held to be barred by the doctrine.

71. 51 Ill. App. 3d 972, 367 N.E.2d 429 (1977).

72. 57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978).

73. *Id.* at 70, 372 N.E.2d at 1128.

74. *Id.*

75. 102 Ill. App. 2d 330, 242 N.E.2d 780 (1968).

76. ILL. REV. STAT. ch. 85 (1975) [hereinafter referred to as the Illinois Tort Immunity Act].

arising out of a failure to supervise an activity on public property.[77] The trial court granted the motion to dismiss.

On appeal to the Appellate Court of Illinois for the Fifth District, the plaintiff presented alternative arguments.[78] First, plaintiff argued that the statutory provision relied on by the trial court in dismissing the complaint dealt exclusively with the use of public property or with the condition of such property.[79] Since her injury did not arise directly from the use or condition of public property, the plaintiff argued that the statute was inapposite on the specific facts. The court did not agree, holding that the "section specifically covers 'an activity' on public property."[80]

The plaintiff's second argument urged that the school district, by undertaking to provide supervision, assumed the duty to ensure that said supervision was adequate and not careless or negligent. The appellate court dismissed this argument with some rather roundabout reasoning. The court cited another provision of Illinois' Tort Immunity Act[81] which provides that local public entities are absolved from liability for the acts of an employee where the employee is not individually liable. Then, the court invoked the statutory grant of parental immunity given Illinois teachers and found that the parent/guardian status would attach in the instant case and would insulate the individual teacher from tort liability.[82] Since there was no wilful or wanton conduct alleged, the court held the exceptions set out in *Nudd v. Matsoukas*[83] and *Mroczynski v. McGrath*[84] to be inapplicable. Consequently, the court ruled that the teacher's nonliability stood as a bar to any action against the school district arising out of the teacher's alleged negligence.[85]

Fustin v. Board of Education of Community Unit District No. 2[86] involved an action for damages brought by a high school basketball

77. ILL. REV. STAT. ch. 85, § 3-108(a) (1975). Section 3-108(a) provides, in pertinent part:
Except as otherwise provided by this Act . . . neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property.
78. 102 Ill. App. 2d at 331, 242 N.E.2d at 780.
79. *Id.*
80. *Id.* at 332, 242 N.E.2d at 781.
81. ILL. REV. STAT. ch. 85, § 2-109 (1975). Section 2-109 provides:
A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.
82. ILL. REV. STAT. ch. 122, § 24-24 (1965).
83. 7 Ill. 2d 608, 131 N.E. 2d 525 (1956). *See* text accompanying notes 43-50 *supra.*
84. 34 Ill. 2d 451, 216 N.E.2d 137 (1966). *See* text accompanying notes 60-62 *supra.*
85. 102 Ill. App. 2d at 330, 242 N.E.2d at 782.
86. 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968).

player who sustained injuries when struck in the face by an opponent during the course of an inter-school varsity basketball contest. The plaintiff alleged that the game was controlled, managed, and supervised by the defendant's agents and that those agents committed acts or omissions of negligence by failing to control the player who attacked the plaintiff. The defendant moved to dismiss the complaint on virtually the same grounds as did the defendant school district in *Woodman*.[87] The *Fustin* court adopted the language of the *Woodman* holding to the extent that it was applicable to the *Fustin* facts,[88] and affirmed the dismissal of plaintiff's complaint.

The plaintiff in *Fustin* had argued on appeal that the defendant's agent knew or had reason to know of the temperament of the attacking player and had acted negligently in allowing that player to participate in a contest where it was reasonably foreseeable that physical contact might result.[89] The appellate court characterized the alleged misconduct as a necessary exercise of discretion and judgment associated with the coaches' and physical education directors' employment responsibilities. In rejecting the plaintiff's argument, the court held that a type of quasi-judicial immunity cloaks public employees who exercise discretionary powers in the course of their duties.[90] The court in *Fustin* cautioned, however, that the quasi-judicial immunity does not preclude liability for willful or wanton conduct on the part of public employees.

In *Mancha v. Field Museum of Natural History*,[91] the Appellate Court of Illinois for the First District reviewed a tort action arising out of a class trip to a museum. The group was comprised of about fifty students escorted by two teachers. Upon arrival at the museum, the students were allowed to separate into groups and walk about without supervision. During the course of the unsupervised viewing, the plain-

87. The Appellate Court of Illinois for the Fifth District decided both *Woodman* and *Fustin* on the same day. The defendant in *Fustin* also relied upon the Illinois School Code, ILL. REV. STAT. ch. 122, § 24-24 (1975). *See* text accompanying notes 75-85 *supra*.

88. 101 Ill. App. 2d at 116-17, 242 N.E.2d at 310. *Fustin* included an allegation of liability insurance indemnification on the part of the defendant school district which was not an element in *Woodman*.

89. *Id.* at 119, 242 N.E.2d at 311. The plaintiff relied specifically on Molitor v. Kaneland Comm. Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

90. *Id.* at 121-22, 242 N.E.2d at 312. The court quoted from the Illinois Supreme Court holding in People *ex rel.* Munson v. Bartels, 138 Ill. 322, 328, 27 N.E. 1091, 1092 (1891), in stating:

> When the officer has the authority to hear and determine . . . the propriety of doing an act, he is vested with judicial power. An officer will be regarded as being clothed with judicial or quasi-judicial functions when the powers confided to him are so far discretionary that he can exercise or withhold them according to his own judgment as to what is necessary and proper.

91. 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972).

tiff was attacked by a group of youths not associated with the school or the field trip.

The plaintiff alleged, in his complaint, that the school district acted negligently in allowing the students to depart from the school premises without adequate supervision. The plaintiff also alleged that the two teachers who accompanied the class to the museum were negligent in their failure to properly supervise the activities of their pupils. The trial court held that plaintiff's complaint failed to state a cause of action against any of the defendants and dismissed the suit.[92]

In affirming the dismissal, the appellate court held that although the school district and the teachers did have a duty to exercise reasonable care in the control and supervision of the students, the incident which gave rise to the instant suit was not a reasonably foreseeable consequence of a trip to a museum. The court stated that "[a] teacher cannot be required to watch the students at all times while in school, on the grounds, or engaged in school-related activity."[93] According to the court, the burden of nearly constant surveillance "would . . . discourage schools and teachers from affording opportunities to children to enjoy the many extracurricular activities."[94]

The court in *Mancha* also indicated that the teachers were immune from tort liability by virtue of the *Woodman* interpretation of the Illinois School Code and the Tort Immunity Act. The *Mancha* court cited *Woodman* for the proposition that section 24-24 of the Illinois School Code would protect a teacher from liability for ordinary negligence in failing to properly supervise or discipline students.[95] The court held that the actions and omissions of the teachers in the *Mancha* case were neither willful nor wanton misconduct and, therefore, did not fall beyond the scope of the statutory immunity provision.

Merrill v. Catholic Bishop of Chicago[96] provided the Appellate Court of Illinois for the Second District with an opportunity to examine the section 24-24 immunity provision in the context of a tort suit against a non-profit private school and its staff. The plaintiff, a seventh

92. *Id.* at 700, 283 N.E.2d at 900. The plaintiff's complaint also contained a number of allegations and claims against the Field Museum, most of which were derived from the common law doctrine of "attractive nuisance" as well as from property law.

93. *Id.* at 702, 283 N.E.2d at 902.

94. *Id.*

95. *Id.* at 703, 283 N.E.2d at 902. The *Woodman* interpretation is that with regard to supervision and discipline, teachers stand in the relation of parents and guardians to the pupils, and, as a consequence, enjoy the same immunity for acts of ordinary negligence committed in the course of their duties that a parent would for mere negligence in the context of the family relationship.

96. 8 Ill. App. 3d 910, 290 N.E.2d 259 (1972).

grader, was blinded in one eye while cutting wire from a coil at his teacher's direction. The trial court granted the defendant's motion to dismiss because the plaintiff failed to allege wanton or willful misconduct. In affirming the dismissal, the appellate court relied on the *Woodman* construction of the Illinois School Code section 24-24 provision previously invoked in *Fustin* and *Mancha*. The *Merrill* court stated, "[w]hile Section 24-24 is contained in the public school code we cannot see any reason why it should not be equally applicable to private schools."[97]

KOBYLANSKI V. CHICAGO BOARD OF EDUCATION

It was not until 1976, in *Kobylanski v. Chicago Board of Education*,[98] that the Illinois Supreme Court addressed the provisions of sections 24-24 and 34-84a of the Illinois School Code.[99] In a four-three decision, the court held that those sections applied to nondisciplinary and disciplinary matters and extended to all aspects of the school program. *Kobylanski* was decided along with *Chilton v. Cook County School District No. 207, Maine Twp.*[100] In the lower courts, the trial court had directed a verdict in favor of the defendants in *Kobylanski*, and in *Chilton* a jury returned a verdict against the school district. Each verdict was affirmed on appeal,[101] leave to appeal was granted, and the cases consolidated for hearing before the Illinois Supreme Court.

Both *Kobylanski* and *Chilton* arose out of injuries sustained in school physical education classes. Each complaint alleged negligent supervision or failure to provide proper supervision of students learning to perform gymnastic maneuvers. In neither case was it alleged that the plaintiff had proved willful and wanton misconduct on the part of plaintiff's teachers or schools. Noting that the case was one of first impression, the court found that sections 24-24 and 34-84a conferred upon educators *in loco parentis* status, which status the court found, without elucidation, to confer blanket immunity from negligence.[102]

It was plaintiffs' contention that *in loco parentis* status was limited to disciplinary situations in which the teacher was fulfilling a parental

97. *Id.* at 911, 290 N.E.2d at 260.
98. 63 Ill. 2d 165, 347 N.E.2d 705 (1976).
99. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975).
100. 26 Ill. App. 3d 459, 325 N.E.2d 666 (1975).
101. 22 Ill. App. 3d 551, 317 N.E.2d 714 (1974); 26 Ill. App. 3d 459, 325 N.E.2d 666 (1975).
102. 63 Ill. 2d at 170, 347 N.E.2d at 708. The court merely cited Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E.2d 137 (1966) and Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

role. The Illinois Supreme Court rejected such an interpretation of the statute, relying upon the statutory wording, "In all matters relating to the discipline in *and conduct of the schools*, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program . . . ."[103] Since physical education classes were a required part of school curriculum, the court in *Kobylanski* reasoned that supervision of these classes was an "activity connected with the school program"[104] to which immunity would attach irrespective of the disciplinary or the non-disciplinary character of the activity.

It was alternatively argued by plaintiffs in *Kobylanski* that any immunity from negligence accorded by sections 24-24 and 34-84a was waived by the defendant school districts' purchase of liability insurance, under the waiver provisions of section 9-103(b) of the Illinois Tort Immunity Act.[105] Because the adoption of the pertinent sections of the Illinois School Code preceded enactment of the Illinois Tort Immunity Act, the court relied upon section 2-111 of the latter which provides, "Nothing contained herein shall operate to deprive any public entity of any defense heretofore existing . . . ."[106] The court declined to consider any possible waiver of immunity, stating:

> The immunity conferred upon educators by sections 24-24 and 34-84a, however, is not derived from the Tort Immunity Act, but is the result of a legislative determination that educators should stand in the place of a parent or guardian in matters relating to discipline, the conduct of the schools and the school children. It is this status as parent or guardian which requires a plaintiff to prove wilful and wanton misconduct in order to impose liability upon educators. Accordingly, the waiver provision of section 9-103(b) is inapplicable to the present factual situations.[107]

103. 163 Ill. 2d at 173, 347 N.E.2d at 703 quoting ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975) (emphasis supplied by the court).

104. 63 Ill. 2d at 173, 347 N.E.2d at 708.

105. *Id.*, 347 N.E.2d at 709. Section 9-103(b) of the Illinois Tort Immunity Act provides as follows:

> Every policy for insurance coverage issued to a local public entity shall provide or be endorsed to provide that the company issuing such policy waives any right to refuse payment or to deny liability thereto within the limits of said policy by reason of the non-liability of the insured public entity for the wrongful or negligent acts of itself or its employees and its immunity from suit by reason of the defenses and immunities provided in this Act.

ILL. REV. STAT. ch. 85, § 9-103(b) (1967). Section 34-18.1 of the School Code requires districts of greater than 500,000 population to purchase insurance, but does not contain the waiver of immunity requirement of section 9-103(b).

106. ILL. REV. STAT. ch. 85, § 2-111 (1975).

107. 63 Ill. 2d at 174, 347 N.E.2d at 710. An incisive analysis of the waiver agreement in *Kobylanski* is contained in Kerwin, *Tort Liability for Illinois Schools under Section 9-103 of the Illinois Tort Immunity Act*, 25 DEPAUL L. REV. 441 (1976).

A strong dissent was filed by Justice Goldenhersch, joined by Chief Justice Ward and Justice Schaefer.[108] The dissent characterized the majority's construction of the Illinois School Code immunity provisions as "a distortion of the language,"[109] urging that the statutes should apply solely to disciplinary matters. The dissenting justices further did not concur with the majority's precedential treatment of the Illinois Tort Immunity Act. The justices felt that the Illinois School Code and the Tort Immunity Act ought to be read *in pari materia*.[110] Citing *Harvey v. Clyde Park District*[111] and *Stubblefield v. City of Chicago*,[112] the dissent expressed doubt as to the constitutionality of sections 24-24 and 34-84a, since under the *Harvey* doctrine "classifications designed to confer immunity on a local governmental entity must be based, not on the nature of the entity, but on the type of activity or function involved."[113] Finally, the dissent differed with the majority's reading of the two Illinois cases[114] interpreting parental tort immunity. The dissenting justices did not feel that these cases establish parental immunity as a total bar to actions sounding in negligence.[115]

POST-*KOBYLANSKI* INTERPRETATIONS OF ILLINOIS SCHOOL TORT IMMUNITY LAW

In 1978, the Illinois Supreme Court presented the first post-*Kobylanski* opinion on school tort immunity. *Gerrity v. Beatty*[116] was brought by a high school student who sustained serious injury in an inter-school football game. The student filed suit against the school district, alleging negligence in furnishing defective and ill-fitting ath-

108. 63 Ill. 2d at 176, 347 N.E.2d at 711 (Goldenhersch, J., dissenting).

109. *Id.* The dissenting opinion proferred the following analysis:

> It seems clear that the statutes apply only to discipline. To reach a contrary interpretation requires a distortion of the language of the second sentence of these sections. Properly construed, that sentence refers to 'all matters related to the discipline in the schools and the conduct of the school children.' The phrase 'and conduct of the schools,' which is emphasized by the majority opinion, does not stand alone. The words 'discipline in' cannot refer to 'school children'; those words refer to the 'schools.' Similarly, the words 'conduct of' do not relate to 'the schools'; they refer to 'the school children.' If the phrase 'conduct of the schools' is to be torn from its context and given independent significance, the following sentence, which provides that '[t]his relationship shall extend to all activities connected with the school program,' is rendered redundant.

Id.

110. *Id.*

111. 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

112. 48 Ill. 2d 267, 269 N.E.2d 504 (1971).

113. 63 Ill. 2d at 178, 347 N.E.2d at 712.

114. Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); Mroczynski v. McGrath, 34 Ill. 2d 451, 216 N.E.2d 137 (1966).

115. 63 Ill. 2d at 176, 347 N.E.2d at 711.

116. 71 Ill. 2d 47, 373 N.E.2d 1323 (1978).

letic equipment.[117] The trial court granted the school district's motion to strike the count on the ground that under section 34-84a of the Illinois School Code,[118] as construed by *Kobylanski v. Chicago Board of Education*,[119] the student could not recover unless he proved willful and wanton conduct on the part of the school personnel.[120] The Illinois Supreme Court allowed the appeal to be transferred,[121] the trial court having found there to be no just reason for delaying enforcement and appeal.[122]

The majority opinion of the Illinois Supreme Court by Justice Underwood first considered the general rule of parental immunity from suits brought by children for mere negligence as it had been extended to the *in loco parentis* authority of school districts by Illinois School Code Sections 24-24 and 34-84a.[123] The court concluded that its previous holdings in *Kobylanski*, *Mroczynski*, and *Nudd* plus the terms of sections 24-24 and 34-84a had conferred *in loco parentis* status to school districts in nondisciplinary as well as disciplinary situations.[124] Thus, the plaintiff students in these cases had to prove willful and wanton misconduct in order to recover.[125]

The court found in *Gerrity*, however, that the facts of the case did not bring it within the intended scope of sections 24-24 and 34-84a of the Illinois School Code.[126] The trial court in *Gerrity* had concluded that *Kobylanski* did "not distinguish between discipline, supervision and furnishing of equipment, but extended to any and all conduct of the schools including the furnishing of equipment for athletic teams."[127]

The Illinois Supreme Court disagreed with the interpretation by the trial court. The supreme court determined that the *Kobylanski* decision dealt with the teacher-student relationship "in matters relating to the teacher's personal supervision and control of the conduct or physical movement of the student."[128] The court noted that *Merrill v. Catho-*

117. *Id.* at 52-53, 373 N.E.2d at 1326.
118. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975).
119. 63 Ill. 2d 165, 347 N.E.2d 705 (1976).
120. 71 Ill. 2d at 49, 373 N.E.2d at 1324.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* *See* text accompanying notes 52-62 and 98-115 *supra*.
125. 71 Ill. 2d at 49, 373 N.E. 2d at 1324.
126. *Id.* at 51, 373 N.E.2d at 1325.
127. *Id.*
128. *Id.*

lic Bishop,[129] *Mancha v. Field Museum of Natural History*,[130] *Fustin v. Board of Education*,[131] and *Woodman v. Litchfield Community School District No. 12*[132] also dealt with this same personal student-teacher relationship which sections 24-24 and 34-84a were designed to protect. The court noted that these sections:

> reflect a legislative determination that the orderly conduct of the schools and the maintenance of a sound learning atmosphere require that there be a personal relationship between teacher and student in which the teacher has disciplinary and supervisory authority similar to that which exists between parent and child. It is evident that this relationship would be seriously jeopardized if teachers and school districts were amenable to ordinary negligence actions for accidents occurring in the course of the exercise of such authority.[133]

The Illinois Supreme Court, however, distinguished *Gerrity* from the *Kobylanski*-type situation. The court found that *Gerrity* did not allege negligence arising out of the personal teacher-student relationship, but rather alleged negligence in connection with what the court considered to be the "separate function"[134] of furnishing athletic equipment which was alleged to be inadequate and defective and "which was known, or which in the exercise of ordinary care should have been known, to be liable to cause injury to the plaintiff."[135] The court in *Gerrity* distinguished the public policy considerations of authorizing and, indeed, encouraging teachers to have broad discretion in matters relating to the teacher's personal supervision and control of the conduct or physical movement of the student from the situation where the school district has allegedly provided inadequate and defective athletic equipment.[136] The Illinois Supreme Court concluded:

> On the contrary, public policy considerations argue rather strongly against any interpretation which would relax a school district's obligation to insure that equipment provided for students in connection with activities of this type is fit for the purpose. To hold school districts to the duty of ordinary care in such matters would not be unduly burdensome, nor does it appear to us to be inconsistent with the intended purposes of sections 24-24 and 34-84a of the School Code.[137]

Thus, the court held that *Kobylanski* was not controlling in *Gerrity*

129. 8 Ill. App. 3d 910, 290 N.E.2d 259 (1972). *See* text accompanying notes 96-97 *supra*.
130. 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972). *See* text accompanying notes 91-95 *supra*.
131. 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968). *See* text accompanying notes 86-90 *supra*.
132. 102 Ill. App. 2d 330, 242 N.E.2d 780 (1968). *See* text accompanying notes 75-85 *supra*.
133. 71 Ill. 2d at 51, 373 N.E.2d at 1325.
134. *Id.* at 52, 373 N.E.2d at 1326.
135. *Id.*
136. *Id.*
137. *Id.*

where the facts of the case fell outside the scope of sections 24-24 and 34-84a of the Illinois School Code.

Several subsequent appellate court decisions have followed the rule of *Gerrity*, and other appellate courts have carved exceptions to *Kobylanski*. *Thomas v. Chicago Board of Education*[138] was factually similar to *Gerrity*. An injured high school football player brought suit against the Board of Education and his coaches. He alleged that his coaches were negligent in inspecting and testing equipment; that their supervision was negligent, in requiring students to play on synthetic turf; that the Board was negligent in providing inadequately trained coaches; and, that his coaches were negligent in their supervision and training of the school football team. Portions of his complaint were dismissed by the lower court. On appeal, the court followed the *Gerrity* rationale, finding that a cause of action was stated for the supply of defective equipment, and for failure to inspect the equipment. The court expanded on *Gerrity* in two corollaries: The plaintiff's coaches were held individually liable in ordinary negligence for furnishing defective equipment, and for failing to inspect it.[139] Further, the court distinguished section 1-101 of the Tort Immunity Act,[140] which affords immunity to public employees in the exercise of discretionary functions, stating: "We believe the distinction articulated by the court in *Gerrity* in the context of the School Code likewise is applicable to the Tort Immunity Act: the furnishing of equipment to athletic teams is a function separate and apart from the exercise of discretionary authority."[141] The Tort Immunity Act had not been discussed in *Gerrity*.

In *Edmondson v. Chicago Board of Education*,[142] the appellate court held that teacher's aides and school community representatives are not "teachers" within the definition of the School Code,[143] and thus are not entitled to the immunity granted therein. The Tort Immunity Act,[144] however, would have afforded immunity for a failure to supervise, but for the purchase of insurance by the Board of Education. Addressing a point raised but not resolved in *Gerrity* or *Kobylanski*, the

138. 60 Ill. App. 3d 729, 377 N.E.2d 55 (1978).
139. *Id.* at 733-34, 377 N.E.2d at 57.
140. ILL. REV. STAT. ch. 85, § 1-101 (1977).
141. *Id. See also* Lynch v. Board of Education of Collinsville Community Unit School District No. 10, County of Madison, 5th Dist. No. 78-393 (May 16, 1979). However, in Cipolla v. Bloom Twp. H.S. Dist. No. 206, 26 Ill. Dec. 407, 388 N.E.2d 31 (1979), the court held to the *Kobylanski* standard and required plaintiff to plead and prove willful and wanton misconduct where injuries arose out of an alleged failure to supervise.
142. 62 Ill. App. 3d 211, 379 N.E.2d 27 (1978).
143. ILL. REV. STAT. ch. 122, § 34-84 (1977).
144. ILL. REV. STAT. ch. 85, § 3-108 (1977).

court found that section 9-103 of the Tort Immunity Act,[145] which provides for waiver of immunity in the event insurance is purchased, was controlling as to the defendant Chicago Board of Education. The Board, then, by its purchase of insurance, waived immunity and was liable in ordinary negligence for teacher's aides' failure to supervise.

Most recently, in *O'Brien v. Township High School District 214*,[146] it was held that the furnishing of medical treatment by teachers, coaches, or student trainers is an activity outside the teacher-student relationship, and is therefore controlled by *Gerrity* rather than *Kobylanski*. *O'Brien* involved a high school football player whose infected leg was treated with unsterilized instruments by a student trainer, resulting in severe osteomyelitis. The reviewing court held that such a situation was not within the ambit of the teacher-student relationship, stating, "When medical treatment is undertaken by a school or its agent, public policy considerations dictate an obligation to ensure that it is competently rendered. To hold school districts to an ordinary care standard in this area does not seem unduly burdensome."[147]

CONCLUSION

It appears that Illinois law no longer grants full parental immunity to school districts and their employees. *Schenk v. Schenk*[148] has been followed by at least two courts[149] and it now appears that Illinois courts recognize at least two exceptions to the rule of parental immunity: where the act complained of is willful, wanton, or reckless and where the act complained of falls outside the ambit of the family relationship. The parallels to be drawn from the relaxation of the rule of parental immunity and school immunity based on *in loco parentis* will certainly deserve judicial consideration.

Finally, the Illinois Supreme Court's most recent ruling, *Gerrity v. Beatty*, as well as later appellate court cases, echo the "scope of the relationship" distinction drawn in *Schenk*. Thus, although *Kobylanski* remains the law with respect to the direct relationship of teacher-pupil supervision and discipline, *Gerrity* and subsequent appellate decisions have clearly carved a major exception to *Kobylanski*'s absolutist inter-

145. ILL. REV. STAT. ch. 85, § 9-103 (1977).
146. 1st Dist. No. 77-1673 (June 28, 1979).
147. *Id.*
148. 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968).
149. Cumming v. Jackson, 57 Ill. App. 3d 68, 372 N.E.2d 1127 (1978); Gulledge v. Gulledge, 51 Ill. App. 3d 972, 367 N.E.2d 429 (1977); Johnson v. Myers, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972).

pretation of the Illinois School Code's immunity provisions and may signal the beginning of an approach to school immunity based not on dogma, but upon analysis of the nature and extent of the teacher-student relationship.