UIC Law Review

Volume 10 | Issue 3 Article 8

Spring 1977

The In Loco Parentis Status of Illinois Schoolteachers: An Unjustifiably Broad Extension of Immunity, 10 J. Marshall J. Prac. & Proc. 599 (1977)

James A. Wille

THE IN LOCO PARENTIS STATUS OF ILLINOIS SCHOOLTEACHERS: AN UNJUSTIFIABLY BROAD EXTENSION OF IMMUNITY

INTRODUCTION

Although parents may choose not to do so, they have long understood their right to use physical force to discipline their children for misbehavior. To the extent that such discipline does not constitute willful or wanton misconduct, Illinois parents enjoy immunity from liability for their use of corporal punishment, even where injury to the child results.[1]

What parents may not realize, however, is that under a doctrine known as *in loco parentis*,[2] Illinois schoolteachers enjoy the same immunity as parents when disciplining a student in school. This legal protection applies even if a particular school board or district has a policy against the use of corporal punishment,[3] and even if the teacher may have sanctions imposed upon him by his employer for disregarding the school's prohibition against corporal punishment. Thus, parents may be surprised to learn that if their child is injured by a teacher's disciplinary spanking, that teacher has an affirmative defense under Illinois law,[4] even though the teacher was negligent in inflicting the corporal punishment and was also disregarding the school's policy against such punishment.

More alarming is the plight of the Illinois schoolchild who has been injured by a teacher's negligence in nondisciplinary school-related activities. In *Kobylanski v. Chicago Board of Education*,[5] the Illinois Supreme Court recently held that those

---

1. *See generally* text accompanying notes 50-65 *infra*.

2. "In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." BLACK'S LAW DICTIONARY 896 (4th ed. rev. 1968).

3. *See generally* Estep, *School Discipline Is Just a Whack Away*, Chicago Tribune, Nov. 2, 1976, at 1, col. 1.

4. The School Code provides in relevant part:

> Teachers and other certificated educational employees shall maintain discipline in the schools, including school grounds which are owned or leased by the board and used for school purposes and activities. 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 relation 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.

ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975).

5. 63 Ill. 2d 165, 347 N.E.2d 705 (1976).

sections of the School Code which deal with the duty of teachers to maintain discipline[6] were intended to confer the status of *in loco parentis* on teachers in nondisciplinary as well as disciplinary matters. The court reasoned that teachers standing *in loco parentis* should be subjected to no greater liability than parents, who are liable to their children for willful and wanton misconduct, but not for negligence.[7] The impact of this decision is that certificated educational employees are not liable for negligent conduct resulting in injury to students as long as such conduct occurs within any activity connected with the school program.

That teachers and other certificated school employees in Illinois stand in the relation of parents and guardians to their pupils is not disputed. The purpose of this comment is to analyze the reasoning and impact of cases construing this *in loco parentis* relationship in Illinois schools. An analysis of relevant cases provides insight into what is, and what should be, the scope of protection afforded to teachers by this parental relationship to their students.

FOUNDATION FOR THE IN LOCO PARENTIS CONCEPT

A combination of the statutory law affecting schoolteachers and their employers and the common law of parental immunity forms the foundation of protection afforded Illinois schools and schoolteachers for wrongful acts committed upon their students. A clearer understanding of *in loco parentis* protection will result from tracing the development of this statutory and common-law foundation.

Historical Perspective of School Immunity

The statutory *in loco parentis* protection of schools and schoolteachers is a relatively recent development in Illinois law.[8] Formerly, protection of schools and teachers against negligence suits or other tort actions was based on an agency concept. In 1898, the Illinois Supreme Court determined that a board of education was an agent of the state.[9] The court reasoned that

6. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975). *See* note 4 *supra*.

7. 63 Ill. 2d at 173, 347 N.E.2d at 709.

8. House Bill 691, which added sections 24-24 and 34-84a to the School Code, was passed June 28, 1965, and approved July 13, 1965. Act of July 13, 1965, 1965 Ill. Laws 1459.

9. Kinnare v. City of Chicago, 171 Ill. 332, 335, 49 N.E. 536, 537 (1898) (a board of education erecting a school building pursuant to duties imposed upon it by statute, being merely the agent of the state, was held not liable in damages, as master, for the negligent acts of its workman).

because the state, as sovereign, does not submit its action to the judgment of courts, and is therefore not liable for the torts of the agents through whom it acts, then the board of education should likewise be exempted for the negligent acts of its servants unless such liability is expressly provided by the statute creating such agency.[10] The rule that school districts are not liable for the torts or negligence of their agents unless their liability is expressly provided by statute was reiterated in subsequent cases.[11]

The Molitor Case

Until 1959, school districts, as municipal agents of the state, were immune from tort liability because the state itself was immune from such liability. In *Molitor v. Kaneland Community District No. 302*,[12] however, the Illinois Supreme Court shook the foundations of the common law doctrine of municipal tort immunity. *Molitor* involved a child who was injured when the school bus in which he was riding ran off the road, hit a culvert, exploded and burned. The complaint, alleging that the school district was negligent, was dismissed by the circuit court on the ground that the school district, as an agent of the sovereign state, was immune from tort liability. The Illinois Supreme Court reversed in a lengthy opinion which re-examined municipal tort immunity and held it no longer to be the law of Illinois.[13] The court stated the problem with a rhetorical question:

> 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 employees acting in the 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

10. *Id.*

11. *See* Chicago City Bank & Trust Co. v. Board of Educ., 386 Ill. 508, 54 N.E.2d 498 (1944), *cert. denied*, 323 U.S. 734 (1944) (a school district is a quasi-municipal corporation and is not liable for a breach of duty of its officers); Leviton v. Board of Educ., 374 Ill. 594, 30 N.E.2d 497 (1940) (quasi-municipal corporations are not liable to individuals injured by the tortious conduct of the officers or servants of such corporations); Lindstrom v. City of Chicago, 331 Ill. 144, 162 N.E. 128 (1928) (as school districts are created *nolens volens* by the general law to aid in the administration of state government and are charged as such with duties purely governmental in character, they are not liable for the torts or negligence of their agents unless such liability is expressly provided by statute).

12. 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960).

13. The court stated that "[t]he doctrine of school district immunity was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity." *Id.* at 25, 163 N.E.2d at 96.

> without any responsibility to its victims, while any individual or private corporation would be called to task in court for such tortious conduct?[14]

Justice Klingbiel's opinion isolated the two prevailing justifications for governmental immunity: that the sovereign can do no wrong; and that immunity protects public funds and property. The court noted that the Revolutionary War was fought to abolish the divine right of kings, which is the basis of sovereign immunity.[15] Further, the court found it incredible that the medieval absolutism of sovereign immunity should exempt various branches of government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the individual who suffers the injury.[16] Justice Klingbiel reasoned that the burden of damages should be distributed among the entire community constituting the government, where it could be borne without hardship upon any individual.[17]

The second theory of governmental immunity—the protection of public funds and public property theory—seeks to prevent the diversion of tax money, in this case school funds, to the payment of damage claims.[18] It is based on the argument that school districts would be bankrupt and education impeded if school districts were called upon to compensate children negligently injured by the district's agents and employees. The premise behind this theory seems to be that it is better for the individual to suffer than for the public to be inconvenienced.

The court observed that the protection of public funds theory could not justify school tort immunity when public education constituted one of the biggest businesses in the country.[19] The court noted that the abolition of school tort immunity in California, Tennessee, New York, Washington and other states did not result in bankruptcy and shut-down of the schools in those states. The diversion of tax funds argument was also held to be fallacious in light of the provisions of the Illinois School Code authorizing appropriation for transportation purposes,[20]

---

14. *Id.* at 20, 163 N.E.2d at 93.
15. *Id.* at 22, 163 N.E.2d at 94.
16. *Id.* at 21, 163 N.E.2d at 94.
17. *Id.*
18. *See* Thomas v. Broadlands Community Consol. School Dist. No. 201, 348 Ill. App. 567, 109 N.E.2d 636 (1952) (if taxes, which are raised for specific governmental purposes, could be diverted to the payment of damage claims, then the important work which every municipality must perform would be seriously impaired).
19. 18 Ill. 2d at 22, 163 N.E.2d at 94.
20. ILL. REV. STAT. ch. 122, § 17-6.1 (1957) (current version at ch. 122, §§ 29-1 to 29-16 (1975), *as amended by* Act of July 22, 1976, § 1, 1976 Ill. Laws 1306 (ILL. REV. STAT. ch. 122, § 29-5 (1976 Supp.))).

issuance of bonds for the payment of claims,[21] and expenditures of school tax funds for school bus liability insurance.[22] The court found no valid reason why school funds properly spent to pay liability insurance premiums could not be spent to pay the liability itself in the absence of insurance.[23]

The court concluded that the rule of school district tort immunity was unjust, unsupported by any valid reason, and had no rightful place in modern society.[24] The abolition of such immunity would encourage school districts to exercise greater care. School districts would also be encouraged to carry adequate insurance to spread the risk of accident, just as other costs of education are spread over the entire district.[25]

Post-Molitor Legislation

Shortly after *Molitor* was announced, the legislature nullified the decision by enacting a series of bills granting absolute and total immunity to park districts generally,[26] the Chicago Park District,[27] forest preserve districts,[28] and counties.[29] Further, the legislature limited the damages recoverable from public school districts and private nonprofit schools to $10,000 for each cause of action.[30] The first time the Illinois Supreme Court had occasion to review any of the new legislation on its merits, the statute granting total immunity to park districts was held unconstitutional in *Harvey v. Clyde Park District*.[31]

Harvey involved injury to a minor suffered while using a slide maintained by the defendant park district. The court, speaking through Justice Schaefer, reviewed the statutory pattern that had developed in Illinois, and concluded that "the statute relied upon by the defendant is arbitrary, and unconstitu-

21. ILL. REV. STAT. ch. 122, § 19-10 (1957) (current version at ILL. REV. STAT. ch. 122, § 19-8 (1975)).
22. ILL. REV. STAT. ch. 122, § 29-11a (1957) (current version at ILL. REV. STAT. ch. 122, § 29-9 (1975)).
23. 18 Ill. 2d at 23, 163 N.E.2d at 95.
24. *Id.* at 25, 163 N.E.2d at 96.
25. *Id.*
26. Act of July 9, 1959, 1959 Ill. Laws 782 (originally codified at ILL. REV. STAT. ch. 105, § 12.1-1 (1959)); Act of July 9, 1959, 1959 Ill. Laws 782 (originally codified at ILL. REV. STAT. ch. 105, § 491 (1959)).
27. Act of July 22, 1959, 1959 Ill. Laws 2020 (originally codified at ILL. REV. STAT. ch. 105, § 333.2a (1959)).
28. Act of July 22, 1959, 1959 Ill. Laws 1954 (originally codified at ILL. REV. STAT. ch. 57½, § 3a (1959)).
29. Act of July 22, 1959, 1959 Ill. Laws 1890 (originally codified at ILL. REV. STAT. ch. 34, § 301.1 (1959)). Although *Molitor* applied only to school districts, the reasoning and the rationale relied upon left no doubt that the concept would be extended to other local governmental entities. Latturner, *Local Governmental Tort Immunity and Liability in Illinois*, 55 ILL. B.J. 28, 29 (1966).
30. ILL. REV. STAT. ch. 122, §§ 825, 829 (1959).
31. 32 Ill. 2d 60, 203 N.E.2d 573 (1965).

tionally discriminates against the plaintiff."[32] To illustrate the discriminatory situation that existed, Justice Schaefer pointed out that if the child had been injured on a slide negligently maintained by the city or village, there was no statutory bar to recovery; if the slide was negligently maintained by a school district, only limited recovery was possible by statute; but if the slide was negligently maintained by a park district, the statute barred recovery.[33]

Though the court in *Harvey* held that the statute involved was unconstitutional, it did not say that any grant of immunity would be unconstitutional per se. On the contrary, the court recognized that there may be valid policy reasons that would move the legislature to grant immunity. The court then attempted to instruct the General Assembly on an acceptable scheme, noting that it would be "feasible . . . to classify in terms of types of municipal function, instead of classifying among different governmental agencies that perform the same function."[34] The court also suggested that if exceptions to liability were to be made, the "discretionary function" exception found in the Federal Tort Claims Act would be permissible.[35] *Harvey* made it clear that all existing statutes giving total or partial immunity to any type of local government would meet the same fate, and indeed subsequent cases have so indicated.[36]

Tort Immunity Act

Shortly after the Illinois Supreme Court in *Harvey* had offered instructive dicta on acceptable classifications for exceptions to governmental tort liability,[37] the legislature responded

32. It is important to note that the unconstitutional discrimination results not from treating governmental units in different ways, but from making an individual's recovery depend solely on which governmental unit happens to be involved. *Id.* at 65, 203 N.E.2d at 576.

33. *Id.* at 67, 203 N.E.2d at 577.

34. The Federal Tort Claims Act (28 U.S.C. §§ 1346 (b), 2671-80) provides, in part, that the waiver of immunities provided for in the Act would not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680 (1970).

35. 39 Ill. 2d 136, 233 N.E.2d 549 (1968).

36. *See* Treece v. Shawnee Community Unit School Dist., 39 Ill. 2d 136, 233 N.E.2d 549 (1968), where the court implied that a $10,000 limitation on tort recovery from public school districts would be held invalid. *See also* Haymes v. Catholic Bishop of Chicago, 41 Ill. 2d 336, 243 N.E.2d 203 (1968), where the court held that a $10,000 limitation on tort recovery from private nonprofit schools was unconstitutional. Thus, the legislature's attempt to replace the loss of total immunity of school districts with limited liability in 1959 was rendered ineffective by the supreme court's decisions in *Harvey*, *Treece* and *Haymes*.

37. *See* text accompanying notes 33-34 *supra*.

with the Local Governmental and Governmental Employees Tort Immunity Act.[38] This Act applies to local public entities including all local governmental bodies, municipal and quasi-municipal corporations, and school boards and districts.[39] In accordance with the *Harvey* requirement, all provisions apply to each type of governmental entity; no special treatment is given to any particular form of local government. The statute applies to any injury to person or property.[40]

Basic to the Tort Immunity Act is the fact that a government acts or fails to act through its employees. Therefore, most governmental liability depends upon the doctrine of respondeat superior.[41] In an action brought against a governmental employee individually, arising out of an act or omission within the scope of his employment, the Tort Immunity Act shifts the burden of defense and judgment to the public entity by requiring it either to appear and defend the claim or to indemnify the employee completely for all court costs and judgments or settlements.[42] When the governmental entity is sued directly for the act or omission of an employee, besides having any defense that would be available to a private person,[43] it may assert the nonliability of the employee as an absolute defense.[44]

The general basis of the immunity of a local public entity in respondeat superior actions is summed up in one key section which states that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused."[45] The remainder of the Act consists of provisions which set forth specific applications of, or exceptions to, this general rule.

The School Code Sections on Discipline

Just prior to the enactment of the Tort Immunity Act,[46] the

38. Local Governmental and Governmental Employees Tort Immunity Act, 1965 Ill. Laws 2982 (codified at ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1975) (amended 1976)) [hereinafter cited as Tort Immunity Act].
39. ILL. REV. STAT. ch. 85, § 1-206 (1975).
40. *Id.* § 1-204.
41. "Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." BLACK'S LAW DICTIONARY 1475 (4th ed. rev. 1968).
42. ILL. REV. STAT. ch. 85, § 2-302 (1975).
43. *Id.* § 2-110.
44. *Id.* § 2-109.
45. *Id.* § 2-201.
46. House Bill 691, which added sections 24-24 and 34-84a to the

Illinois General Assembly approved two additions to the School Code.[47] These sections require teachers and other certificated educational employees to maintain discipline in the schools and on the school grounds.

For the legal protection of the teachers, and, as a result of the Tort Immunity Act, of their employers, the School Code additions confer *in loco parentis* status upon the teachers:

> 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.[48]

By reason of these additions, which confer parental status upon teachers, all of common law parental immunity is incorporated into the School Code.

Parental Immunity

Under sections 24-24 and 34-84a of the School Code, teachers assume the same liability for their wrongful acts toward students as the students' parents would assume had they committed the same wrongful act toward their children.[49] Therefore, parents' liability for wrongful acts committed upon their children is determinative of teachers' liability when the teachers are standing *in loco parentis*. The following Illinois cases define the limits of parental liability and/or immunity for torts to their children.

The first Illinois Supreme Court case concerning parental liability to children was *Nudd v. Matsoukas*.[50] In *Nudd*, the defendant was driving his car with his wife and two minor children on a foggy, wet night. He drove through a stop light at an excessive rate of speed and collided with another auto, resulting in the death of the defendant's wife and one child. His other child was severely injured. The plaintiff filed an action for willful and wanton misconduct on behalf of the surviving child.

School Code, was approved June 28, 1965, and was enacted July 13, 1965; Act of July 13, 1965, 1965 Ill. Laws 1459. House Bill 1963, which enacted the Tort Immunity Act, passed June 30, 1965, and was enacted August 13, 1965; *see* note 38 *supra*.

47. Act of July 13, 1965, 1965 Ill. Laws 1459 (codified at ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975)). *See* note 4 *supra*. The pertinent wording of each section is identical. Section 34-84a applies to cities with a population greater than 500,000 and section 24-24 applies to all others.

48. *Id.*

49. *Id.*

50. 7 Ill. 2d 608, 131 N.E.2d 525 (1956).

The supreme court reviewed the Illinois appellate court decisions on parental immunity. The court noted that the rule of parental immunity was first stated in *Hewlett v. George*,[51] an 1891 Mississippi case, without citation of authority. Four years later, an Illinois appellate court adopted the rule of parental immunity from tort liability in *Foley v. Foley*,[52] also without citation of authority. The doctrine was restated in *Meece v. Holland Furnace Co.*,[53] another appellate court case. The supreme court in *Nudd* did not consider these appellate court cases as sufficient authority to preclude the court's examination of the basic policy issues behind granting tort immunity to parents.[54]

The only justification that the court found for the rule of parental immunity was a reluctance to create litigation and strife between members of the family unit. The court held that while this policy might justify immunity from suits for negligence within the scope of the parental relationship, it could not justify immunity from suits for willful and wanton misconduct on the part of a parent.[55] The court reasoned that no social benefit could derive from the toleration of willful and wanton parental misconduct, and that depriving a child of redress for such misconduct would not foster family unity.[56]

In 1968, in *Schenk v. Schenk*, a new dimension was added to the parental tort immunity doctrine.[57] In *Schenk*, a father sued his seventeen year old unemancipated daughter for injuries he sustained when she negligently ran into him with an automobile while he was a pedestrian on a public street. Although the roles of the plaintiff and defendant were reversed from the usual parental immunity cases, the appellate court handled this by treating the issue as family immunity rather than as parental immunity.

Since the duty breached by the daughter in the operation of the auto was the same duty owed by her to all pedestrians using the public streets, the cause of action did not arise out of any father-daughter or family relationship. From this the court concluded that family immunity from tort liability applied only when the wrongful act occurred while the parties were engaged in conduct arising out of the family relationship or in the fur-

51. 68 Miss. 703, 9 So. 885 (1891).
52. 61 Ill. App. 577 (1895).
53. 269 Ill. App. 164 (1933). The statement of parental immunity was not necessary to the holding of the case because the suit was against the father's employer.
54. 7 Ill. 2d at 617, 131 N.E.2d at 530.
55. *Id.* at 619, 131 N.E.2d at 531.
56. *Id.*
57. 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968).

therance of the usual family objectives.[58] Thus, the appellate court added a new element to the defense of family or parental immunity: the tort must occur between parent and child while acting in their family roles or functions.

In *Schenk* the appellate court also noted that in some other states the parental immunity doctrine had eroded "like the all-day sucker in the hands of a small child until there isn't much left but the stick itself."[59] However, it reviewed *Nudd* and concluded that the foundation for the parental immunity doctrine discussed therein was still sound.[60] Furthermore, the court reasoned that abolition of parental immunity would result in a flood of litigation, and it found that the assumption of the role of father by either the courts or the state was foreign to our way of life.[61]

In 1970, parental immunity in a negligence case was at issue in *Cosmopolitan National Bank of Chicago v. Heap*.[62] The bank, as guardian for an unemancipated minor child, sued the father for the child's personal injuries caused by the father's negligence in permitting a loose, ill-fitting stairway rug to be used in the family home. The appellate court, noting that the Illinois Supreme Court had never been called upon to apply the parental immunity doctrine to a mere negligence case, decided to apply the doctrine to this negligence case on the basis of the supreme court's dicta in *Nudd*[63] and the appellate court's holding in *Schenk*.[64] Thus the father was found not liable.[65]

From the preceding cases, it is evident that parental immunity is not applicable when the parent commits a willful and wanton wrongful act upon his unemancipated child. However, to promote the public policy against creation of family strife and to prevent a flood of litigation, the parental immunity doctrine will be invoked to protect the parent from liability for negligent acts upon his child unless such acts do not arise out of the family relationship or in furtherance of the usual family objectives.

Case Construction of Teachers' Tort Immunity

Since the enactment of the Tort Immunity Act and the

58. *Id.* at 204, 241 N.E.2d at 14.
59. *Id.*
60. *See* text accompanying notes 55-56 *supra.*
61. 100 Ill. App. 2d at 205-06, 241 N.E.2d at 15.
62. 128 Ill. App. 2d 165, 262 N.E.2d 826 (1970).
63. *See* text accompanying notes 55-56 *supra.*
64. *See* text accompanying notes 60-61 *supra.*
65. *Cosmopolitan* was a First District Appellate Court case. In Johnson v. Myers, 2 Ill. App. 3d 844, 277 N.E.2d 778 (1972), the Second District Appellate Court held that when the family relationship had been dissolved by death of the negligent parent, the policy behind the rule of family immunity ceases and the injured child could recover damages from the deceased parent's estate.

sections on teacher discipline in the School Code, the Illinois courts have had several opportunities to construe the immunity of teachers and their employers. When reviewing cases involving tort suits on behalf of students, it should be borne in mind that although the School Code commands teachers to maintain discipline, it protects them by granting them *in loco parentis* status; and it is the common law which provides the scope of parental immunity thereby granted to the teachers. In addition, not only does the Tort Immunity Act give other defenses to teachers, but it also grants to their employers the same immunities which the teachers enjoy. The interplay of these statutes and the common law is often determinative of whether or not the student will recover damages. Absent willful and wanton negligence,[66] a teacher's immunity from tort liability can best be understood by an examination of the circumstances under which the student may suffer a wrongful act.

Corporal Punishment

Physical force is one method of maintaining discipline in schools.[67] The use of physical force by a teacher was at issue in *City of Macomb v. Gould.*[68] In *Gould*, a teacher was at a high school football game, and had the duty of keeping the crowd away from the playing field. When an injured player was taken to the sidelines, some students pressed near to get a closer look. The teacher ordered the students back into the stands, and, as they retreated, one of them uttered a groan. The teacher spun that student around and started hitting him repeatedly on the face. Six witnesses testified they saw the teacher strike the student with a closed fist as well as with an open hand. A police officer stopped the fight.

The teacher was charged with violating a city ordinance prohibiting fighting. His defense was that he was enforcing discipline, and that as a teacher he had the right to use corporal punishment. Recognizing that a well defined standard between what is reasonable and what is malicious disciplinary conduct

66. The definition of willful and wanton negligence which has been repeatedly cited by the Illinois courts was enunciated in *Schneiderman v. Interstate Transit Lines, Inc.* as:

> A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through carelessness when it could have been discovered by the exercise of ordinary care.

394 Ill. 569, 583, 69 N.E.2d 293, 300 (1946).

67. *See* note 3 *supra.*

68. 104 Ill. App. 2d 361, 244 N.E.2d 634 (1969).

does not exist, the court held that though a teacher may enforce discipline by punishing with a switch or a paddle, clubbing over the head is a malicious and unreasonable use of force. The court affirmed the teacher's conviction and found it unnecessary to consider the teacher's *in loco parentis* status due to the finding of willful and wanton negligence.[69]

Not all punishment for misbehavior in school is physical. *Wexell v. Scott*[70] involved verbal punishment. In *Wexell*, the teacher called her eleven year old student worthless, undependable and incompetent, and declared further that he was unfit ever to marry; and that if he did, his children would be ashamed of him. Wexell contended that he suffered great mental anguish, requiring the care of a physician as a result of this intentional tort. He agreed that a teacher stands *in loco parentis* in the disciplining of children in the classroom and may inflict corporal punishment. The issue was whether the same principles apply in the use of verbal chastisement as apply in the use of corporal punishment.

The court restated its belief that the teacher stands *in loco parentis*, and held that disparaging comments about a pupil may be necessary and perhaps conducive to proper educational discipline, in the absence of negligence or wantonness. While not agreeing with the teacher's choice of words, the court observed that there are few students who have not been belittled by their parents for their shortcomings, and no liability should be imposed for similar chastisement during that part of the day when the teacher assumes the role of parent.[71]

Sometimes a teacher may discipline a student for misbehavior which took place in part on school property and in part away from school property. In *People v. DeCaro*,[72] for example, a Chicago public school teacher appealed a conviction of criminal battery on two students.[73] The teacher testified that the two students in question had used obscene and defamatory language toward him and that another student had informed him that the victims had written obscene words about the teacher in the snow near their home. Although neither of the two eleven year old boys was a student in the teacher's class, he talked to them at his desk in front of his own students. However, when one of the boys used vulgar language, he took them into the adjoining cloakroom. The boys testified that the teacher then hit them eight to twelve

69. *Id.* at 364, 244 N.E.2d at 635-36.
70. 2 Ill. App. 3d 646, 276 N.E.2d 735 (1971).
71. *Id.* at 648, 276 N.E.2d at 736.
72. 17 Ill. App. 3d 553, 308 N.E.2d 196 (1974).
73. ILL. REV. STAT. ch. 38, § 12-3(a)(1) (1975).

times on their buttocks and back of their legs with a twelve inch ruler. Their bruises lasted from one to two weeks and pictures of them were admitted into evidence.

The teacher contended that he stood *in loco parentis* to the students and that he had a duty to discipline them. He further asserted that a teacher must be allowed broad discretion in carrying out his responsibilities. The state did not challenge the teacher's right to inflict corporal punishment, but maintained that a teacher may only use reasonable force to discipline students who are properly under his authority, and that such authority does not extend to children outside a teacher's class. The state also argued the teacher used excessive force and acted maliciously.

In reversing the teacher's conviction,[74] the court reasoned that the teacher could not have ignored the actions and attitudes of the two boys without forfeiting the respect of all the students in the school and without creating a climate which would be detrimental to the educational process.[75] The court found the punishment was of a traditional nature applied to the traditional place and did not constitute a malicious or wanton disregard for the physical welfare of the boys, even though it unfortunately resulted in bruises.

Therefore, as long as the teacher's methods are not willful or wanton misconduct, his *in loco parentis* status will protect him from liability for infliction of corporal punishment in disciplinary situations. If the school district prohibits corporal punishment, the teacher may be answerable to his employer for his acts, but not answerable to the injured student.

Negligent Supervision and Failure to Maintain Discipline

A teacher may also be liable in tort for failure to act in a situation which proximately results in an injury to a student. The following cases deal with allegations of insufficient supervision and injuries caused by others due to alleged breakdowns in the teachers' responsibility to maintain discipline.

In *Woodman v. Litchfield Community School District No. 12*,[76] an eight year old student was kicked in the head by a fellow student while she was picking up papers from the floor of her classroom at the request of the teacher. Woodman alleged that at the time of the incident, the teacher permitted other students to move about the room in a disorderly fashion in the

74. 17 Ill. App. 3d at 556, 308 N.E.2d at 198.
75. *Id.*
76. 102 Ill. App. 2d 330, 242 N.E.2d 780 (1968).

area where the plaintiff was located. The trial court granted the school district's motion to strike the complaint, based on the provision of the Tort Immunity Act which states: "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."[77] Rather than amend, Woodman elected to stand on the complaint. The court dismissed the cause of action, from which order the student appealed.[78]

Woodman argued that the section of the Tort Immunity Act relied upon in dismissal of her complaint did not apply because it deals with property conditions or use of public property. Since her injury did not arise out of any alleged condition or use of school property, but only as a result of negligent conduct on that site, she contended that the physical condition of the property or its use were insignificant. The court strictly construed the section of the Tort Immunity Act in question, and said that failure to supervise an activity on public property does not impose liability upon this defendant, unless another section of the Act specifically created a duty to supervise a particular type or category of activity.[79] The court held that activities which occur in a classroom did not fall within this exception.

In affirming the dismissal of Woodman's complaint, the court also relied on a second section of the Tort Immunity Act and on the School Code. Section 2-109 of the Act provides: "A local public entity is not liable for injury resulting from an act or omission of its employee where the employee is not liable." The court reasoned that since a teacher was not liable for mere negligence in supervision or maintenance of discipline because of the *in loco parentis* status conferred by the School Code, then the school district was also free from such liability under the Tort Immunity Act.

Finally, reasoning that the teacher had a statutory duty to maintain discipline, including the supervision of the movement of children in the classroom, the court held that a third section of the Tort Immunity Act also was applicable. By that section "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton negligence."[80] Since no willful and wanton negligence of the teacher was alleged, the dismissal of Woodman's complaint was affirmed.[81]

77. ILL. REV. STAT. ch. 85, § 3-108(a) (1975).
78. 102 Ill. App. 2d at 331, 242 N.E.2d at 781.
79. *Id.* at 332, 242 N.E.2d at 781.
80. ILL. REV. STAT. ch. 85, § 2-202 (1975).
81. 102 Ill. App. 2d 334, 242 N.E.2d at 782.

As the *Woodman* case evidences, teacher and school district liability or immunity is based both on common law and on two areas of statutory law. *Fustin v. Board of Education*[82] further demonstrates that this interplay requires an injured student to use care in drafting his complaint.

The plaintiff in *Fustin* was a player on the visiting team involved in a varsity basketball game with the defendant's high school. Without provocation a player on the host team struck the plaintiff in the face with his fist, causing injuries. Fustin's complaint alleged that he was in the exercise of due care; that the game was controlled, managed and supervised by the defendant through its agents; and charged the defendants with numerous acts or omissions of negligence in supervision of its offending player and of the game. The complaint also charged that the defendant, through its agents, failed to maintain discipline of the players participating in an activity, in violation of section 24-24 of the School Code.[83]

Relying on various sections of the Tort Immunity Act,[84] the board of education filed a motion to dismiss the complaint as insufficient, as a matter of law, to allege a cause of action. At the hearing on the defendant's motion to dismiss, Fustin was granted leave to amend his complaint by insertion of the following: "That the defendant has contracted for liability insurance to the extent prayed for in the prayer of the plaintiff's complaint."[85] The school board admitted the insurance allegation. After a hearing, the trial court ordered the complaint as amended dismissed and ordered judgment for the defendant, from which order Fustin appealed.

The appellate court noted that except for the insurance coverage of the board of education, the issue of negligence due to improper supervision and enforcement of discipline was the same as that in *Woodman*,[86] and that the decision in

82. 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968).

83. ILL. REV. STAT. ch. 122, § 24-24 (1975). *See* note 4 *supra*.

84. ILL. REV. STAT. ch. 85, §§ 3-108, 2-201 and 2-109 (1975). Section 3-108 provides that "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." Section 2-201 provides that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused."
Section 2-109 provides that "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."

85. 101 Ill. App. 2d at 116, 242 N.E.2d at 310.

86. 101 Ill. App. 2d 330, 242 N.E.2d 780 (1968). Both *Woodman* and *Fustin* were Fifth District Appellate Court cases decided on the same day, November 20, 1968.

Woodman[87] would be dispositive of *Fustin*. Fustin argued that the defenses provided by the Tort Immunity Act were not available to the defendant because under the Act the insurance contract must contain a waiver of those defenses.[88]

The court found Fustin's insurance argument lacking in two respects. First, section 9-103 of the Tort Immunity Act provides a waiver of defenses against liability which may be imposed under *this* Act.[89] Fustin alleged common law negligence and violation of the School Code, but not liability under the Tort Immunity Act. Second, the plaintiff failed to allege that the insurance was contracted for pursuant to the authority of the Tort Immunity Act which requires that the policy contain such a waiver of defenses clause. School districts have authority to purchase liability insurance under the School Code,[90] and such insurance acquired prior to the enactment of the Tort Immunity Act does not limit the defenses under the Act.[91] Therefore, the appellate court affirmed the judgment for the school board.

While supervising students in order to maintain discipline, teachers are not subject to an extraordinary standard of care; the standard is that of the reasonable man under the circumstances. This standard was applied in *Mancha v. Field Museum of Natural History*,[92] which involved injury to a student while on a class trip to a museum. When the fifty students and two teachers arrived at the museum, the students were allowed to divide into smaller groups and to view the exhibits without supervision. Mancha, who was of Mexican descent, joined a group of black students. Mancha's complaint alleged that he was beaten by several white youths, not connected with the school, for being

---

87. *See* text accompanying notes 76-81 *supra*.

88. The insurance provision of the Tort Immunity Act provides:

(a) A local public entity may contract for insurance against any loss or liability which may be imposed under this Act . . . .

(b) 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 nonliability 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 by this Act.

ILL. REV. STAT. ch. 85, § 9-103 (1975).

89. *Id.*

90. ILL. REV. STAT. ch. 122, §§ 10-20.20, 34-18.1 (1975). The School Code requires each school district's board of education to insure or indemnify and protect any teacher against financial loss and expense arising out of any suit or claim of negligence, violation of civil rights, or wrongful act, provided such teacher was acting within the scope of his duties.

91. 101 Ill. App. 2d at 118-19, 242 N.E.2d at 310-11.

92. 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972).

a "nigger lover", and suffered serious injuries as a result of the attack.

In addition to charges against the Field Museum, Mancha charged that the school district was negligent in permitting the students to leave the school premises without adequate supervision. He also charged that the teachers who were assigned to the class trip were negligent in failing to supervise the activities of the plaintiff while on the premises of the museum.

The trial court dismissed the plaintiff's third amended complaint for failure to state a cause of action against any of the defendants. The basis for the trial court's dismissal was that the common law duty of the defendants to exercise reasonable care on such a trip did not extend to the risk of foreseeing and guarding against an assault on a student by an outsider.[93]

The appellate court agreed that an assault on a twelve year old boy in the Field Museum is not an occurrence which a reasonable man would anticipate. They reasoned that a teacher cannot be required to watch the students at all times while in school, on school grounds, or engaged in school-related activity.[94] In dicta, the court also stated that the Tort Immunity Act and the School Code offered to the school district and teachers additional defenses of immunity for negligence in supervision and maintenance of discipline.

In the preceding three cases the courts have determined that a teacher is immune from liability when he fails to supervise students in his custody who are injured as a result of a breakdown in discipline. Therefore, a teacher is not liable for injury sustained by students in his custody when he acts or fails to act in a disciplinary situation, absent willful and wanton misconduct.

Negligent Supervision Alone

In certain school activities, a student may suffer injury not inflicted by a teacher, or another student, or an outsider, but rather incurred due to mere negligent supervision of an activity. Under such circumstances, discipline is generally not a factor and the lack of adequate supervision of the student's actions is the sole question determinative of a teacher's tort liability.

For example, *Merrill v. Catholic Bishop of Chicago*[95] dealt with the issue of whether a nonprofit private school and its staff were liable for personal injuries suffered at the school by the student due solely to negligent supervision of the student. In

93. *Id.* at 700, 283 N.E.2d at 900.
94. *Id.* at 702, 283 N.E.2d at 902.
95. 8 Ill. App. 3d 910, 290 N.E.2d 259 (1972).

Merrill a twelve year old parochial school student was sent by his teacher to a room to cut from a coil lengths of wire to be used for making sculptures in art class. While doing so he was struck in the eye by the end of the wire on the coil, causing loss of vision in that eye. The trial court dismissed Merrill's complaint for failure to state a cause of action because only negligence was charged, when the *in loco parentis* status of schoolteachers under the School Code requires willful and wanton misconduct in order for a teacher to be held liable.

Merrill argued that the School Code *in loco parentis* status of teachers was limited to disciplinary situations and to public schoolteachers. In a short opinion, the appellate court concluded that the activity directed by the teacher was part of the activities of the school program and, therefore, falls within the *in loco parentis* status of teachers as provided by the School Code as interpreted in *Woodman*.[96] *Woodman* held that the School Code "would protect a teacher from liability for mere negligence *in supervision* or maintaining discipline because of the status conferred."[97] In dealing with the contention that *in loco parentis* status is limited to public schoolteachers, the court cited *Haymes v. Catholic Bishop of Chicago*,[98] and said it could see no reason why section 24-24 of the School Code should not be equally applicable to private schools.[99] The judgment of the trial court dismissing Merrill's complaint was therefore affirmed.

Though the Illinois Supreme Court had not decided a case involving a school district's liability for negligent injury to a student since *Molitor, Kobylanski v. Chicago Board of Education*[100] dealt with that issue. In *Kobylanski* the Illinois Supreme Court decided an appeal involving two consolidated cases which presented the common issue of whether teachers and school districts can be held liable for injuries to students resulting from allegedly negligent conduct by teachers, or whether the greater burden of willful and wanton misconduct must be proved in order to impose liability.

In the first of the consolidated cases, Barbara Kobylanski suffered spinal injuries when she fell while attempting to perform a knee-hang exercise from gymnastic rings used in her seventh grade physical education class. Prior to her fall, the teacher had given instructions to the class on the performance of

---

96. *See* text accompanying notes 76-81 *supra*.
97. 102 Ill. App. 2d 330, 333-34, 242 N.E.2d 780, 782 (1968) (emphasis added).
98. 41 Ill. 2d 336, 243 N.E.2d 203 (1968). *See* note 36 *supra*.
99. 8 Ill. App. 3d at 911, 290 N.E.2d at 260.
100. 63 Ill. 2d 165, 347 N.E.2d 705 (1976).

this exercise. Kobylanski's amended complaint was filed under the Tort Immunity Act[101] and alleged that the school district and the teacher negligently failed to provide proper instruction and supervision. The defendants denied the allegations of negligence and set forth, as an affirmative defense, section 34-84a of the School Code[102] which, they maintained, required the plaintiff to prove willful and wanton misconduct in order to recover. Kobylanski did not contend that the evidence presented at trial was sufficient to establish willful and wanton misconduct. Following the plaintiff's case in chief, the trial court directed a verdict in favor of the defendants. The Appellate Court, First District (2nd Division), affirmed.[103]

In the second of the consolidated cases, *Chilton v. Cook County School District No. 207*,[104] Suzanne Chilton suffered spinal injuries when attempting to perform a front-drop maneuver on a trampoline in her required high school physical education course. Chilton had experienced some difficulty in performing the front-drop exercise, but had been encouraged by her instructor not to be fearful. Chilton's second amended complaint was predicated upon common-law negligence and alleged that the school district failed to provide proper supervision, failed to require increased supervision as trampoline accidents occurred more frequently, and failed to test beginners in order to determine who was capable of taking a trampoline course. The complaint also charged that the teacher failed to properly supervise the class, and forced Chilton to perform the maneuver after it became obvious that she lacked confidence and had considerable difficulty in performing it.

The trial court refused to instruct the jury that a willful and wanton standard, rather than a negligence standard, was applicable and held that section 24-24 of the School Code applied only to teacher-student disciplinary situations. Chilton did not contend that the evidence was sufficient to find willful and wanton misconduct. The jury returned a verdict in favor of Chilton against the school district only. The school district, at trial and on appeal, argued that Chilton's complaint failed to allege willful and wanton misconduct as required by section 24-24 of the School Code. The Appellate Court, First District (5th Division), affirmed.[105]

---

101. ILL. REV. STAT. ch. 85, §§ 1-101 to 10-101 (1975) (amended 1976).
102. ILL. REV. STAT. ch. 122, § 34-84a (1975). *See* note 4 *supra*.
103. Kobylanski v. Chicago Bd. of Educ., 22 Ill. App. 3d 551, 317 N.E.2d 714 (1974).
104. 26 Ill. App. 3d 459, 325 N.E.2d 666 (1975).
105. *Id.*

The Illinois Supreme Court, in a four to three decision, interpreted the disciplinary sections of the School Code, which grant *in loco parentis* status to teachers. Justice Kluczynski, writing for the majority, found that the language of the School Code disciplinary sections was intended to confer *in loco parentis* status in nondisciplinary as well as disciplinary matters.[106] The majority cited *Woodman*,[107] *Fustin*,[108] *Mancha*[109] and *Merrill*[110] as support for this finding. Also, the court's construction of the Code was based on the specific wording of the Code, which provides that "[i]n all matters relating to the discipline in *and conduct of the schools* and the school children, teachers stand in the relation of parents and guardians to the pupils."[111] The majority then reasoned that since physical education is a required part of the conduct of the schools,[112] the *in loco parentis* status of teachers applied to the activity in which Kobylanski and Chilton were injured.[113]

In construing the meaning of the *in loco parentis* status of teachers, the majority relied on *People v. Ball*[114] which held that in situations involving the imposition of corporal punishment, teachers enjoy no greater rights, nor are they entitled to any greater protection, than parents. From this holding, the majority reasoned that teachers should not be subjected to any greater liability than parents, who are liable to their children for willful and wanton misconduct, but not for mere negligence.[115] The majority concluded that teachers are not liable for mere negligence in nondisciplinary and disciplinary matters, and that an injured student must prove willful and wanton misconduct in order to establish liability of the teachers and school districts.[116] Therefore, the court affirmed *Kobylanski* and reversed *Chilton*.

The dissenting opinion written by Justice Goldenhersh attacked virtually every point of the majority opinion. As to the

106. 63 Ill. 2d 165, 171-72, 347 N.E.2d 705, 708 (1976).
107. 102 Ill. App. 2d 330, 242 N.E.2d 780 (1968). *See* text accompanying notes 76-81 *supra*.
108. 101 Ill. App. 2d 113, 242 N.E.2d 308 (1968). *See* text accompanying notes 82-91 *supra*.
109. 5 Ill. App. 3d 699, 283 N.E.2d 899 (1972). *See* text accompanying notes 92-94 *supra*.
110. 8 Ill. App. 3d 910, 290 N.E.2d 259 (1972). *See* text accompanying notes 95-99 *supra*.
111. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975) (emphasis added in the opinion). *See* note 4 *supra*.
112. *Id.* §§ 27-5 to 27-7.
113. 63 Ill. 2d at 172, 347 N.E.2d at 708.
114. 58 Ill. 2d 36, 317 N.E.2d 54 (1974) (in affirming teacher's conviction of criminal battery for use of excessive force in paddling disobedient student, the court said teachers should be subject to the same standard of reasonableness which has long been applicable to parents in disciplining their children).
115. 63 Ill. 2d at 172-73, 347 N.E.2d at 709.
116. *Id.* at 173, 347 N.E.2d at 709.

interpretation of the language of sections 24-24 and 34-84a of the School Code, the dissenting justices construed the second sentence[117] to properly read "all matters related to the discipline in the schools and the conduct of the school children."[118] They criticized the majority's use of the phrase "conduct of the schools" as having been taken out of context and as having been given independent significance.[119] The dissent contended that if the word "conduct" refers to the schools rather than to the school children, then the following sentence, which provides that "[t]his relationship shall extend to all activities connected with the school program,"[120] is redundant.[121] In addition, in arguing that the Code is inapplicable to nondisciplinary matters, the dissent pointed out that section 24-24 is headed "Maintenance of Discipline" and section 34-84a is headed "Teachers shall maintain discipline."[122]

The dissent disagreed with the majority's use of *Fustin* and *Woodman* as support for their proposition that sections 24-24 and 34-84a of the Code applied to all activities connected with the school program. The dissent pointed out that *Fustin* was decided solely on the basis of the Tort Immunity Act,[123] and that *Woodman* decided a question of teacher liability in the course of maintaining discipline.[124]

If, as the majority held, sections 24-24 and 34-84a of the School Code grant *in loco parentis* status to teachers and their school district employers in all activities within the conduct of the schools, then, in Justice Goldenhersh's opinion, the constitutional validity of those sections of the Code is doubtful. In his view, *Harvey*[125] firmly established the principle that classification 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. The majority decision in the present case found the defendant school districts not liable for negligent conduct which, according to the dissenting opinion, would subject other governmental units to liability.

Finally, the dissenting opinion noted that the majority, and apparently all the parties in the appeal, accepted as settled law

---

117. *See* note 4 *supra*.
118. 63 Ill. 2d at 176, 347 N.E.2d at 711.
119. *Id.*
120. *See* note 4 *supra*.
121. 63 Ill. 2d at 176, 347 N.E.2d at 711.
122. *Id.*
123. 63 Ill. 2d at 177-78, 347 N.E.2d at 711-12. *See* text accompanying notes 82-91 *supra*.
124. 63 Ill. 2d at 178, 347 N.E.2d at 712. *See* text accompanying notes 76-81 *supra*.
125. 32 Ill. 2d 60, 203 N.E.2d 573 (1965). *See* text accompanying notes 31-34 *supra*.

that a parent is not liable for injuries to his child absent willful and wanton misconduct. The dissent pointed out that the Illinois Supreme Court has never decided that question.[126] In conclusion, Chief Justice Ward, Justice Schaefer and Justice Goldenhersh, all in dissent, would reverse the judgment in *Kobylanski* and affirm the judgment in *Chilton.*

The Illinois Supreme Court has thus construed the *in loco parentis* status of teachers as applicable to any activity within the conduct of the schools. Therefore, teachers and school districts are not liable for injury to a student in nondisciplinary as well as disciplinary situations, absent willful and wanton misconduct.

Infringement of Civil Rights

Not all suits for damages brought by students against teachers and school districts arise out of physical injuries to the students. Any United States citizen who is deprived of his constitutional rights by a person acting under color of state authority may bring suit for damages against the violator of that citizen's rights.[127]

In *Picha v. Wielgos,*[128] a thirteen year old student, alleging a violation of her constitutional right to privacy, sued the principal of her school for damages after the principal ordered her searched for illegal drugs. The principal caused the police to be called and, after their arrival, he had the school nurse and the school psychologist search the student. No drugs were found.

The principal moved for a directed verdict on the grounds that he was immune from liability under *Wood v. Strickland.*[129] *Wood* held that in the special context of school discipline, a school official is immune from liability for damages in a suit brought by a student under the Civil Rights Act of 1871, unless the official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or unless the official took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[130] Thus *Wood* held that an award of damages to the student will be appropriate only if the school official has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his

126. 63 Ill. 2d at 178-79, 347 N.E.2d at 712. *See* text accompanying notes 50-65 *supra.*
127. 42 U.S.C. § 1983 (1970).
128. 410 F. Supp. 1214 (N.D. Ill. 1976).
129. 420 U.S. 308 (1975).
130. *Id.* at 322.

action cannot be characterized as being in good faith.[131] In *Picha*, Judge Flaum held that the student possessed settled, undisputed constitutional rights, and that there was sufficient evidence to permit a jury to consider whether these rights had been violated by the lack of good faith in the principal's actions.[132]

In denying the principal's motion for a directed verdict, the court noted the *in loco parentis* status of Illinois school officials. The court found that the activities of a school official or teacher standing *in loco parentis* must be considered the activities of a state official, and the constraints which flow from the Bill of Rights are applicable.[133] As an example of the constraints placed on a state official who stands *in loco parentis*, Judge Flaum stated that a parent could make his child salute the flag without being subject to a civil rights suit, but a schoolteacher could not enforce the same commandment without violating the student's first amendment rights.[134] As another example, he noted that a parent may arbitrarily punish his child whereas a teacher may not.[135] Judge Flaum reasoned that a state can no more limit its civil rights obligations by means of the *in loco parentis* doctrine than it can explicitly grant immunity to a public official for misuse of his office.[136]

In the context of constitutional law, the court found that an *in loco parentis* statute was an expression of a substantial state interest against which a student's constitutional rights must be balanced.[137] The district court concluded that when Picha was searched, her constitutional right not to be searched by school officials who were in contact with the police was violated, unless the intrusion was justified by the state's interest in maintaining the order, discipline, safety, supervision and education of the student within the school.[138]

Therefore, the immunity of a teacher arising out of his *in loco parentis* status is not absolute when a student's civil rights are violated. For the *in loco parentis* immunity defense to be valid, the student's behavior must be in violation of certain state interests.

---

131. *Id.*
132. 410 F. Supp. at 1216.
133. *Id.* at 1217.
134. *Id.* (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).
135. *Id.* (citing Boykin v. Fairfield Bd. of Educ., 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975)).
136. *Id.* at 1218.
137. *Id.* at 1219.
138. *Id.* at 1221.

APPLICATION OF PARENTAL IMMUNITY TO SCHOOLTEACHERS

As has been noted, the School Code confers *in loco parentis* status on schoolteachers.[139] The supreme court has interpreted the School Code as applying this status in disciplinary as well as nondisciplinary matters.[140] The reasonableness of the *in loco parentis* status of teachers in disciplinary matters has never been questioned in an Illinois case, but the reasonableness of the status in nondisciplinary matters is disputed.[141] To analyze the application of parental immunity to teachers, it is necessary to understand the nature of parental immunity and its justification, and then to evaluate the appropriateness of applying it to teachers in the school setting.

Justification for Parental Immunity

The Illinois Supreme Court has not yet decided on its merits the issue of whether a parent is immune from liability for negligent acts causing injury to his child.[142] Taking into consideration the supreme court's dicta[143] and the appellate court decisions on this issue,[144] the supreme court would probably find immunity for a parent's negligent injury to his child. On the appellate level, the common law of Illinois is that parents are immune from liability for their negligent acts committed while the parent and injured child were engaged in conduct arising out of the family relationship or in furtherance of the usual family objectives.[145] This qualified parental immunity in Illinois is justified on two public policy grounds: a desire to maintain domestic serenity, and the fear of a flood of litigation.

Domestic Serenity

In *Nudd v. Matsoukas*,[146] the supreme court balanced the social benefit of domestic serenity against the injustice of allowing an injured child to go without redress for willful and wanton parental misconduct. In favoring redress for the child, the court found that the only justification for parental immunity was a reluctance to create litigation and strife between members of the family. Thus, although lawsuits by children against their par-

139. ILL. REV. STAT. ch. 122, §§ 24-24, 34-84a (1975). *See* note 4 *supra*.
140. Kobylanski v. Chicago Bd. of Educ., 63 Ill. 2d 165, 171-72, 347 N.E.2d 705, 708 (1976). *See* text accompanying notes 106-26 *supra*.
141. *See* text accompanying notes 107, 117-22 *supra*.
142. *See* text accompanying note 126 *supra*.
143. *See* text accompanying notes 55, 115 *supra*.
144. *See* text accompanying notes 57-58, 62-65 *supra*.
145. *See* text accompanying note 58 *supra*.
146. 7 Ill. 2d 601, 131 N.E.2d 525 (1956). *See* text accompanying notes 55-56 *supra*.

ents should not be encouraged since they tend to disturb the cordial family relationship and render parental discipline ineffective, exceptions to this justification for parental immunity do exist.

A breakdown in the cordial family relationship is going to occur whenever one family member sues another, especially if they reside in the same household. Yet this domestic serenity foundation is outweighed by the public policy of permitting redress for injury of a family member when such injury occurs outside the scope of acts considered in furtherance of family objectives.[147]

One major family objective and duty is to raise children to become responsible adults. To accomplish this objective, it is often necessary to establish behavioral standards, and, in many circumstances, it is necessary to enforce these standards with physical discipline. The purpose of discipline is to make a child's misbehavior a painful experience. This is important since from early in life children can distinguish between their actions resulting in pain and those resulting in encouragement. The infliction of pain upon another is generally actionable at law, but to allow a child to bring a lawsuit against his parent every time he is disciplined would destroy the means of implementing a legitimate family purpose and duty of the parents. The child would be the ultimate loser.

Flood of Litigation

In *Schenk v. Schenk*,[148] the appellate court opposed the total abolition of parental immunity because that would result in a flood of litigation, with the courts or the state assuming the role of father of the family. This justification for retaining parental immunity is questionable.

The flood of litigation argument in support of parental immunity is purely speculative; it is an assertion which has not been subjected to verification. Eleven states have either abolished or rejected the parental tort immunity rule.[149] In these

147. *See* text accompanying note 58 *supra*.

148. 100 Ill. App. 2d 199, 241 N.E.2d 12 (1968). *See* text accompanying notes 59-61 *supra*.

149. The following states have judicially abolished parental immunity: Arizona in Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); California in Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Kentucky in Rigdon v. Rigdon, 465 S.W.2d 921 (Ky. 1970); Michigan in Plumbley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); New Hampshire in Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); New Jersey in France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1970); New York in Graney v. Graney, 43 App. Div. 2d 207, 350 N.Y.S.2d. 207 (1973), *aff'd*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d.

states, no measurable increase of litigation by children against their parents has occurred, and the courts have not intruded upon the traditional family structure to any objectionable degree. Therefore, the flood of litigation argument for justification of parental immunity is tenuous.

Reasonableness of Application to Teachers

The concept of *in loco parentis* status of Illinois schoolteachers did not originate with the addition of sections 24-24 and 34-84a to the School Code in 1965, but rather existed in Illinois common law prior to its inclusion in the School Code. In *Drake v. Thomas*,[150] the court held that a teacher stands *in loco parentis* because the authority of a teacher over his pupil is a delegation of at least a portion of parental authority where corporal punishment is involved.

Recently, in *Kobylanski*, both injured students argued that sections 24-24 and 34-84a of the School Code represent a mere codification of the common law rule in Illinois that a teacher stands in the place of a parent for purposes of discipline, including the administration of corporal punishment.[151] Regardless of whether the *in loco parentis* status of teachers is common law or codified, the reasons for applying parental immunity to school teachers must be analyzed.

Disciplinary Matters

If the sole purpose of parental immunity is to reduce litigation and strife between members of the family unit,[152] then its application to teachers through *in loco parentis* standing is unreasonable since teachers are not members of the student's family. A student's tort action seeking a remedy for his teacher's negligent conduct would have no disruptive effect on the student's intra-family cordiality.

However, when a teacher disciplines a student for individual misbehavior or disruption of the educational process, the teacher is helping the student's parents accomplish the objective

---

859 (1974); Pennsylvania in Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); and Virginia in Smith v. Kauffman, 212 Va. 181, 183 S.E.2d 190 (1971).

The following states have rejected parental immunity without having been previously committed to the rule: Alaska in Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); and Hawaii in Petersen v. Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970).

150. 310 Ill. App. 57, 33 N.E.2d 889 (1941).

151. Brief for Appellant Kobylanski at 24-25, Brief for Appellant Chilton at 20, Kobylanski v. Chicago Bd. of Educ., 63 Ill. 2d 165, 347 N.E.2d 705 (1976).

152. *See* text accompanying note 55 *supra*.

of guiding their children to responsible adulthood through conformity with behavioral standards. Since discipline may involve pain or injury, whether inflicted upon the student at home or at school, teachers must have the same standards of immunity from liability for negligent disciplinary acts as parents do.

While enforcing behavioral standards, the teacher should be immune for his negligent acts, absent willful and wanton misconduct, just as a parent is immune from liability for the same acts. In the school setting, it would then be reasonable for the teacher to have *in loco parentis* immunity in any action he takes where a student is violating a school regulation or disrupting the educational process.[153]

Nondisciplinary Matters

In *Kobylanski*, the supreme court held that the *in loco parentis* standing of teachers applied to nondisciplinary as well as disciplinary matters.[154] They based their decision on the wording of the School Code without discussion of the reasonableness of their interpretation of the wording.[155] By finding *in loco parentis* standing for teachers in all matters relating to the conduct of the schools, the court granted broad immunity without any reasonable justification in terms of parental immunity.

Reduction of litigation and strife between family members is not achieved by the *in loco parentis* status of teachers in nonbehavioral matters because teachers are not members of the student's family. A student's guidance to responsible adulthood is not enhanced by barring redress for injury caused by the teacher's negligent nondisciplinary act. In fact, a student's respect for his teacher may be destroyed when the student learns that his teacher may act irresponsibly with impunity.

It may be argued that parents have delegated the duty to educate their children to the schools, and therefore the teachers have parental immunity in any matters of school conduct. However, Illinois children between the ages of seven and sixteen years must be enrolled in school, and any child enrolled in grades one through twelve must attend.[156] Since parents are compelled by law to send their children to school, they have no discretionary power to delegate the education of their children to

153. While not all schools employ corporal punishment, in those that do, it is only part of an integrated disciplinary procedure. Detention and suspension play a more important role in maintenance of discipline. Estep, *School Discipline Is Just A Whack Away*, Chicago Tribune, Nov. 2, 1976, at 1, col. 1.

154. 63 Ill. 2d at 171-72, 347 N.E.2d at 708.

155. *See* text accompanying notes 111-13 *supra*.

156. ILL. REV. STAT. ch. 122, §§ 26-1, 26-2 (1975).

the schools. Therefore, parental immunity in nondisciplinary conduct of the schools is not conferred upon the teachers by parental consent.

No public policy or social benefit is promoted when a teacher is free from liability for failure to properly instruct a student in an activity which may subject the student to injury. When a student is injured in a physical education class, or industrial arts class, or driver education class because of the teacher's failure to properly instruct or observe that student's performance, nobody benefits by the teacher's immunity from negligence except the culpable teacher. Therefore, extension of the *in loco parentis* status of teachers to all matters relating to the conduct of the school is unreasonable and unjustifiable.

The Special Legislation Problem

The constitutionality of the application of *in loco parentis* status to teachers in all matters relating to the conduct of the schools has been questioned.[157] The basis for a constitutional attack on such a broad extension of immunity for teachers lies in the Illinois Constitution's prohibition against special legislation.[158]

In *Harvey v. Clyde Park District*,[159] the supreme court gave guidelines for legislation conferring tort immunity which, if followed, would avoid the special legislation problem. The court advised that legislation which would grant immunity to governmental agencies and their employees according to the type of function engaged in would be constitutional. Subsequently, the supreme court held that a statute classifying persons or objects is not unconstitutional because it affects one class and not another. However, it must affect all members of the same class alike, and must not be arbitrary, but based upon some substantial difference in circumstances properly related to the classification.[160]

While it is true that a child injured on a trampoline, because of careless supervision by an instructor, may have a

157. *See* text accompanying note 125 *supra*.

158. "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." ILL. CONST. art. IV, § 13 (1970).

159. 32 Ill. 2d 60, 203 N.E. 2d 573 (1965). *See* text accompanying notes 31-35 *supra*.

160. Hamilton Corp. v. Alexander, 53 Ill. 2d 175, 290 N.E.2d 589 (1972) (issue was whether the Forcible Entry and Detainer Act requirement that notice of appeal be filed within five days after judgment was a denial of equal protection because in other cases a notice of appeal may be filed within 30 days of judgment; held: no denial of equal protection).

remedy if the injury occurred at a YMCA but no remedy if it occurred in a physical education class at school, it does not necessarily follow that the School Code's grant of *in loco parentis* immunity is special legislation and therefore unconstitutional. Applying the function test, the grant of *in loco parentis* status to teachers in all matters relating to the conduct of the schools falls within the function of teaching in schools. Applying the arbitrariness test, school districts may be in a class with other insured public entities and teachers may be in a class with other school employees, but school districts and teachers are also in a class by themselves because of the unique role they play in the educational development of school age children in Illinois.[161] Since all school districts and teachers are similarly treated under sections 24-24 and 34-84a of the School Code, there is no violation of the constitutional prohibition against special legislation.[162]

CONCLUSION

As a result of *Kobylanski*, a teacher is immune from liability for his wrongful acts causing physical injury to a student in all matters relating to the conduct of the school, absent willful and wanton misconduct. Under the doctrine of *in loco parentis* which is incorporated in the School Code and interpreted by the Illinois Supreme Court, the teacher and his employer are not liable to the student for injuries caused by negligence, regardless of the fact that the student was not misbehaving at the time. The reasonableness of this immunity in nondisciplinary matters is very questionable, since it is not related to any valid public policy or social benefit.

On the other hand, a teacher is liable to the student for damages when the teacher in bad faith violates an established constitutional right of the student, unless such an intrusion of the student's rights is outweighed by the need for maintaining order, discipline and safety in the schools—all matters involving the student's behavior.[163] Thus, a teacher's immunity from liability under the *in loco parentis* concept is broader when the student is physically injured than when a student's constitutional rights are violated.

At common law, teachers have immunity from liability for their negligent acts in disciplinary matters. A reasonable as-

161. Kobylanski v. Chicago Bd. of Educ., 63 Ill. 2d 165, 175, 347 N.E.2d 705, 710 (1976).
162. *Id.*
163. *See* text accompanying notes 133-38 *supra.*

sumption is that the drafters of sections 24-24 and 34-84a of the School Code intended to codify the existing common law doctrine of *in loco parentis* status of teachers. If this assumption is valid, then the General Assembly has the responsibility of clarifying its intentions by eliminating the immunity of teachers in nondisciplinary matters.

James A. Wille