11.00

CONTRIBUTORY NEGLIGENCE

11.01 Contributory Negligence--Adult--Definition

When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that proximately contributed to cause the [alleged] [injury] [death] [property damage].

Notes on Use

This instruction should be used whenever "contributory negligence" is a jury issue and IPI B10.03 is not given. If IPI B10.03 is given, this instruction should not be used, since it is incorporated into IPI B10.03.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

It is reversible error to omit the element of proximate cause in an instruction defining contributory negligence. *Schmidt v. Anderson*, 301 Ill.App. 28, 42, 49-50; 21 N.E.2d 825, 831, 834-835 (1st Dist.1939); *Wilkerson v. Cummings*, 324 Ill.App. 331, 340; 58 N.E.2d 280, 283 (1st Dist.1944); *Alexander v. Sullivan*, 334 Ill.App. 42, 78 N.E.2d 333 (3d Dist.1948); *Buehler v. White*, 337 Ill.App. 18, 24; 85 N.E.2d 203, 206 (3d Dist.1949); *Barenbrugge v. Rich*, 141 Ill.App.3d 1046, 490 N.E.2d 1368, 1373; 96 Ill.Dec. 163, 168 (1st Dist.1986).

This instruction was approved in *Blacconeri v. Aguayo*, 132 Ill.App.3d 984, 478 N.E.2d 546, 88 Ill.Dec. 231 (1st Dist.1985).

11.02 Contributory Negligence As To Fewer Than All Plaintiffs

The issue of contributory negligence does not apply to the plaintiff[s] [name(s) of such plaintiff(s)].

Notes on Use

This instruction should be given when there is evidence raising an issue of fact as to the contributory negligence of one or more but fewer than all of the plaintiffs.

11.03 Presumption That Child Under Seven Years is Incapable of Contributory Negligence

You must not consider the question of whether there was contributory negligence [on the part of [name]], because, under the law, a child of the age of [the plaintiff] [name]] is incapable of contributory negligence.

Notes on Use

The name of the plaintiff may be used if desired.

This instruction may be used only when the plaintiff or decedent was a minor under the age of seven at the time of the occurrence.

Comment

A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983).

11.04 Parent's Negligence Not an Issue

Contributory negligence of the parent(s) is not an issue in this case.

Notes on Use

This instruction may be given where the parent is not a party in interest other than as next friend or guardian, but there is evidence from which the jury might conclude that the parents of the child were guilty of negligence which contributed to the child's injury. It should not be given, e.g., if there is a contribution claim against the parent(s), or the trial court determines that the conduct of the parent(s) is properly an issue in the case.

This instruction may not be appropriate in a wrongful death action because negligence of the parents will bar their recovery. This brief instruction is designed to state the rule without calling undue attention to the parents' negligence. For a stronger statement of the rule, which may be more useful in cases where the negligence of the parents is so obvious that the jury may already be considering its significance, see IPI 11.05. These two instructions are alternatives, and it is not necessary to give both of them.

11.05 Negligence of Parents Not Imputed

If you find that the [mother] [father] [parents] of [child's name] [was] [were] negligent, that negligence shall not be charged against [child's name], and it does not prevent or reduce a recovery by [child's name] if he is otherwise entitled to recover.

Notes on Use

The instruction may be given where the parent is not a party in interest, other than as next friend or guardian, and there is evidence from which the jury might conclude that the parents of the child were guilty of negligence which contributed to the child's injury. *Brownell v. Village of Antioch*, 215 Ill.App. 404, 411 (2d Dist.1919); *Duffy v. Cortesi*, 2 Ill.2d 511, 516-517; 119 N.E.2d 241, 244-245 (1954); *Sheley v. Guy*, 29 Ill.App.3d 361, 366; 330 N.E.2d 567, 571 (4th Dist.1975), *aff'd*, 63 Ill.2d 544, 348 N.E.2d 835 (1976).

Where the parents are both real parties in interest and nominal plaintiffs suing on behalf of a minor, use IPI B11.06.

This instruction is an alternative to IPI 11.04. For an explanation of the difference, *see* Notes on Use to IPI 11.04.

B11.06 Contributory Negligence Claimed--Parents, Child Seven or Over, Parent's Cause of Action Not Assigned To Child

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for his injuries. The second claim is brought by his [father] [mother] who seeks compensation for money spent or amounts for which [he] [she] has become liable for reasonably necessary [expenses] [and for loss of earnings of the child during his minority].

Child's Claim

If you should find that the child was contributorily negligent and if the contributory negligence of the child was 50% or less of the total proximate cause of the child's injury, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child. If the contributory negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The (father's) (mother's) negligence, if any, does not affect the amount, if any, to which the child is entitled on his own claim.]

Parent's Claim

As to the [father's] [mother's] claim, the [father's] [mother's] damages must [first] [also] be reduced by the percentage of contributory negligence of the child, if any. [If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the (father's) (mother's) negligence proportionately further reduces the damages to which the (father) (mother) would have been entitled. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the (father's) (mother's) claim.]

Notes on Use

This instruction is appropriate for negligence cases only.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was “reckless,” but not if it was “intentional.” Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton conduct, this instruction should not be used. If plaintiff claims both intentional and reckless willful and wanton conduct, this instruction should be modified.

If the parent's claim has been assigned to the child, use IPI B11.06.01.

This instruction should be used only where the child and his parents are suing in the same lawsuit for their respective damages arising from the same occurrence. *Meece v. Holland Furnace Co*., 269 Ill.App. 164, 178 (3d Dist.1933).

If the child is under the age of seven, this instruction must be modified. A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 404; 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983). See IPI 11.03.

If there are other legally recognized elements of damages claimed by the parents, and if those damages are reducible by the parent's contributory negligence, then those elements should be added at the end of the first paragraph of this instruction.

If there is no issue as to the parents' contributory negligence, either (1) omit the bracketed portion of the last paragraph or (2) omit this entire instruction. Separate verdict forms for the child's claim and the parent's claim, each showing the damages reduced by the child's contributory negligence, if any, may be sufficient to apprise the jury that the child's contributory negligence reduces both claims and thereby obviate the need for this instruction. The choice between these options is discretionary in each case.

On the issue of the use of “value” or “expense” for medical care, treatment and services, see 30.06 Notes on Use.

Comment

When a minor is tortiously injured, his parent can recover his medical and hospital expenses, since the parent is liable for those expenses under the Family Expense Act (750 ILCS 65/15). *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 429-430; 104 Ill.Dec. 165, 166-167 (1st Dist.1986); *Curtis v. County of Cook*, 109 Ill.App.3d 400, 440 N.E.2d 942, 947; 65 Ill.Dec. 87, 92 (1st Dist.1982). Similarly, a parent is entitled to the earnings of his minor child (*Ferreira v. Diller*, 176 Ill.App. 447 (3d Dist.1912); *Barrett v. Riley*, 42 Ill.App. 258 (2d Dist.1891)), and therefore can recover the child's lost earnings during the child's minority (*Stafford v. Rubens*, 115 Ill. 196, 3 N.E. 568 (1885)).

Since the parent's action is derivative, it is subject to any defenses available against the child. *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 430; 104 Ill.Dec. 165, 167 (1st Dist.1986); *Jones v. Schmidt*, 349 Ill.App. 336, 110 N.E.2d 688 (4th Dist.1953).

The parent's negligence is not imputed to the child (*Rahn v. Beurskens*, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966); *Romine v. City of Watseka*, 341 Ill.App. 370, 91 N.E.2d 76, 80 (2d Dist.1950)), but it is a defense with respect to the parent's claim (Payne v. Kingsley, 59 Ill.App.2d 245, 207 N.E.2d 177, 180 (2d Dist.1965); *City of Pekin v. McMahon*, 154 Ill. 141, 39 N.E. 484 (1895)). This is true even if the parent's claim has been assigned to the child. *Reimers v. Honda Motor Co.*, 150 Ill.App.3d 840, 502 N.E.2d 428, 430; 104 Ill.Dec. 165, 167 (1st Dist.1986); *Kennedy v. Kiss*, 89 Ill.App.3d 890, 412 N.E.2d 624, 628; 45 Ill.Dec. 273, 277 (1st Dist.1980); *Rahn v. Beurskens*, 66 Ill.App.2d 423, 213 N.E.2d 301 (4th Dist.1966).

The child's contributory negligence operates as a defense to the parent's claim. *Kennedy v. Kiss*, 273 Ill.App. 133 (2d Dist.1933).

As yet, there are no reported decisions in Illinois as to the effect of contributory negligence by both the parent and child after the adoption of comparative fault. The method reflected in this instruction, successive reductions, is consistent with the theory of the previous decisions and with the method adopted in other jurisdictions. *See, e.g., White v. Lunder*, 66 Wis.2d 563, 225 N.W.2d 442, 449-450 (1975).

B11.06.01 Contributory Negligence Claimed--Parents, Child Seven or Over, Parent's Cause of Action Assigned To Child

This lawsuit involves two distinct but related claims. The first is brought by the child who seeks damages for his injuries. The second claim originally belonged to the child's [father] [mother] but it has been assigned to the child for recovery by the child in this lawsuit. This second claim, called the parent's claim, is also brought by the child and seeks compensation for money spent or amounts for which the [father] [mother] has become liable for reasonably necessary [expenses] [and for loss of earnings of the child during his minority].

Child's Claim

As to the child's claim for damages, if you should find that the child was contributorily negligent and if the contributory negligence of the child was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the damages to which the child would otherwise be entitled must be reduced in proportion to the amount of negligence attributable to the child. If you should find that the contributory negligence of the child was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on both claims. [The (father's) (mother's) negligence, if any, does not affect the amount, if any, to which the child is entitled on his own claim.]

Parent's Claim

As to the parent's claim brought by the child in this case, those damages must first be reduced by the percentage of contributory negligence of the child, if any. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was 50% or less of the total proximate cause of the injury or damage for which recovery is sought, then the (father's) (mother's) negligence proportionately further reduces the damages, if any, to which the parent would have been entitled, and thus the parent's claim must be reduced accordingly. If you find that the (father) (mother) was negligent and that the (father's) (mother's) negligence was more than 50% of the total proximate cause of the injury or damage for which recovery is sought, then the defendant shall be found not liable on the (father's) (mother's) claim.

Notes on Use

This instruction is appropriate for negligence cases only.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was “reckless,” but not if it was “intentional.” Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton conduct, this instruction should not be used.

If plaintiff claims both intentional and reckless willful and wanton conduct, this instruction should be modified. If there is no issue as to the parents' contributory negligence, this instruction is unnecessary and may be omitted.

This instruction should be used only where the parent has assigned to his child the right to recover those elements of damages which were, in the first instance, recoverable by the parents. If such an assignment has not been made, and if a parent is bringing such a claim in the same lawsuit, then use IPI B11.06.

If the child is under the age of seven, this instruction must be modified. A child less than seven years old is deemed incapable of contributory negligence. *Toney v. Marzariegos*, 166 Ill.App.3d 399, 404; 519 N.E.2d 1035, 1038; 116 Ill.Dec. 820, 823 (1st Dist.1988); *Mort v. Walter*, 98 Ill.2d 391, 457 N.E.2d 18, 75 Ill.Dec. 228 (1983). See IPI 11.03.

If there are other legally recognized elements of damages claimed by the parents, and if those damages are reducible by the parent's contributory negligence, then those elements should be added at the end of the first paragraph of this instruction.

On the issue of the use of “value” or “expense” for medical care, treatment and services, see 30.06 Notes on Use.

Comment

See Comment to IPI B11.06.

This instruction was drafted to accommodate the common practice of the parents assigning their right to recover these elements to their child. In the case of such an assignment, the defenses originally available against a parent remain as issues in the case. The contributory negligence of both the child and the parents must be considered by the jury. In order to increase the logical clarity of the instruction in that regard, the term “parent's claim” has been adopted to describe those assigned elements of damages. The jury will already have been informed of the origin of the claim, and the description of the necessary operation of the potential negligence of both the child and the parents is rendered less prolix by the use of this term.