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.

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).