

### **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.

### **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.