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ILLINOIS LAW MANUAL

CHAPTER VI
OTHER CAUSES OF ACTION

C. CHILD CARE LIABILITY

1. Liability In General

In determining whether an owner or occupier of land is at fault for injuries to children, liability depends on the ordinary rules of negligence. Generally, there is no distinction between the general duty of reasonable care owed to minors as opposed to adults. Those entrusted with the care and control of children are not insurers of the children's safety, but they must exercise reasonable care. Dennison v. Prior, 252 Ill. App. 3d 57 (1993). One particular rule applying to liability for injuries to children stems from a child's inability to appreciate certain risks. Other rules relating specifically to children and childcare arise from certain relationships between children and adults, and are also created by statute. Overall, the responsibility for a child's safety lies primarily with the parents, whose duty it is to see that the child's behavior does not involve danger to himself. Mostafa v. City of Hickory Hills, 287 Ill. App. 3d 160, (1st Dist. 1997); Driscoll v. C. Rasmussen Corp., 35 Ill. 2d 74 (1966); Restatement (Second) of Torts, Section 316.

Regarding trespassing children, an exception to the general rule that a landowner owes no duty of care to such trespassing child was first announced in Kahn v. James Burton Co., 5 Ill. 2d 614 (1955). The Supreme Court stated that if:

1) a landowner knows or should know that young children habitually frequent the vicinity of a dangerous instrumentality on land;
2) the instrumentality is likely to cause injury to the children because they cannot appreciate the risk involved due to their immaturity, and
3) the expense of remedying the danger is slight compared to the risk to the children; then the landowner has a duty to exercise reasonable care - as opposed to merely refraining from willful and wanton misconduct - to avoid injury to the children.

Perri v. Fukama Restaurant, 335 Ill. App. 3d 825 (1st Dist. 2002); See also Luu v. Kim, 196 Ill. 2d 544 (2001)

However, a landowner does not have a duty to protect a child from danger when the danger is open and obvious. In Mt. Zion State Bank & Trust v. Consolidated Communications, Inc., 169 Ill. 2d 110 (1995), the Supreme Court held that a utility company was not liable for the death of a six-year-old child when it left a pedestal near a fence, making it possible for the child to climb over the fence into a pool and drown. The court explained that the company exercised reasonable care, since the danger of the pool was open and obvious and the pedestal presented no foreseeable harm.

Until recently, parents enjoyed immunity from ordinary negligence actions brought against them by their children. However, this immunity was partially abrogated in Cates v. Cates, 156 Ill. 2d 76 (1993). Under Cates, parents are immune only for conduct "inherent to the parent-child relationship."[1] Parents may be held liable to their children for ordinary negligence in cases

[1] ..such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child. These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience, and culture, which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters. Cates,156 Ill. 2d at 105.

involving, for example, the negligent operation of a car, because such conduct is not inherent in the parent-child relationship. Foster parents who receive compensation for their role are entitled to limited parental immunity for negligence actions. Nichol v. Stass, 192 Ill. 2d 233 (2000); Wallace v. Smyth, 203 Ill.2d 441 (2002).

The Child Care Act, 225 ILCS 10/1, et seq., may be used as a basis for liability for injuries to a child. The Child Care Act sets forth the rules regarding the creation and administration of child welfare agencies, day care centers, foster homes, group homes, and transportation of children (such as school buses). The Child Care Act also contains provisions regarding licensing of the aforementioned facilities and services, as well as criminal penalties for failure to abide by those provisions.

The rules and regulations promulgated under the authority of the Child Care Act are found in Chapter 89 of the Illinois Administrative Code. 225 ILCS 10/1, et seq. Although neither the Child Care Act nor the rules in the Illinois Administrative Code have provisions relating to civil liability for violations, the Act does provide for criminal penalties. As such, the Child Care Act and/or the rules and regulations promulgated thereunder may be used as the basis for creating a standard of care, which could be used in a common law negligence action.

2. Analysis

Whether a party will be held liable for injuries to a child placed in his or her care depends on whether the supervising party exercised reasonable care under the circumstances. The plaintiff must prove that the defendant owed the child a duty, that the defendant breached that duty, and that the defendant's breach was the proximate cause of the child's injury.

An open and obvious risk is one which children are normally expected to avoid, such as the dangers of fire, water, and falling from a height. Jakubowski v. AldenBennett Construction

Co., 327 Ill. App. 3d 627 (1st Dist. 2002). See also, Mt. Zion State Bank & Trust v. Consolidated Communications, 169 Ill. 2d 110 (1995). In Englund, the court affirmed a judgment in favor of the defendants who were the owners of the premises where the plaintiff's daughter drowned. The child attended a birthday party at the defendants' home. The child was found lying facedown in an above ground swimming pool located in the defendants' back yard. The plaintiffs argued that the homeowners had a duty to supervise the child. However, the court agreed with the defendants' assertion that the pool presented an obvious danger of drowning to the child. Englund, 246 Ill. App. 3d at 477; compare Jackson v. TLC Associates, Inc., 185 Ill. 2d 418 (1998) (the danger of a submerged pipe on which 19-year-old plaintiff's decedent struck his head while diving was not open and obvious and had nothing to do with the inherently dangerous characteristics of a body of water); Ward v. Mid American Energy Co., 313 Ill. App. 3d 258 (2000) (dam owner's man-made currents were not open and obvious and created a duty on the owner to warn minors of the danger).

It could be argued that the Child Care Act and the rules contained in the Illinois Administrative Code may be used to establish a private right of action, even though they do not provide a civil remedy. A statute may be used to establish a private right of action when:

(1) The plaintiffs were members of the class for whose benefit the statute was enacted;

(2) The implication of a private right of action is consistent with the underlying purpose of the statute;

(3) The plaintiff's injury was one the statute was designed to prevent; and

(4) The implication of a private right of action is necessary to provide an adequate remedy for violations of the statute.

Fiumentoo v. Garrett Enterprises, Inc. 321 Ill. App. 3d 946 (2nd Dist. 2001).