Cleveland State Law Review

Volume 16 | Issue 1 Article

1967

Acting In Loco Parentis as a Defense to Assault and Battery

Norman D. Tripp

Acting "In Loco Parentis" as a Defense to Assault and Battery

Norman D. Tripp*

AN OFFER TO USE FORCE to the injury of another is an assault, and the use of that force is a battery, which usually includes an assault.[1] An assault and battery upon the person of another may be a criminal act. Courts generally hold, however, that a parent or one *in loco parentis* may inflict disciplinary corporal punishment upon a child without becoming criminally liable.[2]

It is recognized that the use of corporal punishment by a parent or one in loco parentis does not, in itself, constitute an assault and battery but is only the exercise of a legal right.[3] If, however, the force applied or the confinement imposed upon the child is primarily for a reason other than to correct, train, or educate the child, then it is not privileged, even though it is applied in an amount and on an occasion which otherwise would be privileged.[4]

Where one is in loco parentis, the rights, duties, and liabilities of such person are the same as those of the lawful parent.[5] One other than a parent, who has voluntarily assumed the function of controlling, training, or educating a child, is privileged to apply reasonable force or confinement as he believes to be reasonably necessary for the child's proper control, training, or education.[6]

A parent may restrict this right of punishment in one to whom he has entrusted his child, except in the case of a teacher who acts in a public capacity.[7] A parent may not withdraw the right to use corporal punishment from a teacher.[8]

The courts are constantly faced with the question of deciding whether a person is acting in loco parentis and, if so, whether his acts are to be considered wrongful or privileged.

---

* B.A., Univ. of Miami (Fla.); Casualty Claims Adjuster; Fourth-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

1 Harris v. State, 15 Okl. Cr. 369, 177 P. 122 (1919).

2 Annot., 89 A. L. R. 2d 399 (1963).

3 Prosser, Law of Torts, 139 (3d Ed. 1964); 1 Wharton, Criminal Law and Procedure 692-696 (12th Ed. 1957); Perkins, Criminal Law 878, 879 (1957).

4 Restatement (2d), Torts, Par. 151 (1965).

5 Leyerly v. United States, 162 F. 2d 79 (10th Cir. 1947); Perkins, *op. cit. supra* n. 3.

6 Restatement (2d), Torts, Par. 147 (1965).

7 *Id.* at 147, 152, 153.

8 *Id.* at 153; Perkins, *op. cit. supra* n. 3.

Persons In Loco Parentis

In Black's *Law Dictionary*,[9] in loco parentis is defined as follows:

> In the place of a parent; instead of a parent; charged factitiously with a parent's rights, duties, and responsibilities.

At common law, a relationship of in loco parentis arises by intention, not by chance, and is not dependent on formal legal adoption.[10] In order for such a relationship to exist, the person standing in loco parentis must have intended to assume, without formal legal approval or adoption proceedings, the duties and obligations of a parent. The relationship may arise if a person receives a child into his own family, undertaking the care and control of the child in the absence of its natural parents and holding the child out to the world as a member of the family. The child must remain in the home during this period although the relationship is intended to be only temporary and not permanent.[11]

In *Griego v. Hogan*,[12] the court stated that a relationship of in loco parentis exists,

> when a person undertakes the care and control of another in the absence of such supervision by the latter's natural parents and in the absence of formal legal approval. It is temporary in character and not to be likened to an adoption, which is permanent.

Whether the relationship of in loco parentis exists is a matter of intention to be deduced from the facts of the particular case.[13] Financial responsibility for a child's support is a factor tending to prove that the relationship exists.[14] Once established, the re-

---

[9] Black, Law Dictionary 896 (4th Ed. 1951).

[10] Niewiodowski v. United States, 159 F. 2d 683 (6th Cir. 1947), cert. den., 67 S. Ct. 1730, 331 U. S. 850, 91 L. Ed. 1859 (1947); see also Lewis v. United States, 105 F. Supp. 73 (N. D. W. Va. 1939); London Guarantee and Acc. Co. v. Smith, 242 Minn. 211, 64 N. W. 2d 781 (1954). Both cases say that at common law the person assumes parental obligations without adoption.

[11] Miller v. United States, 123 F. 2d 715 (8th Cir. 1942), reversed on appeal for procedural errors. 63 S. Ct. 192, 87 L. Ed. 179, 317 U. S. 192 (1942); Horseman v. United States, 68 F. Supp. 522 (D. C. Mo. 1946). This case stresses the question of intention; Bricault v. Deveau, 21 Conn. Supp. 486, 157 A. 2d 604 (1960). The court stressed assumption of the parental status and discharging parental duties; Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (Mo. App. 1913). Stresses holding the child out to the world as being a member of the family; Griego v. Hogan, 71 N. M. 280, 377 P. 2d 953 (1963). The court looks to the absence of supervision by the parents setting up a situation of temporary custody; Mott v. Iossa, 119 N. J. Eq. 185, 181 A. 689 (N. J. Chancery 1935); Trotter v. Pollan, 311 S. W. 2d 723 (Tex. Civ. App. 1958).

[12] *Supra* n. 11 at 295.

[13] 67 C. J. S., Person in Loco Parentis Generally, Par. 72 (1950).

[14] Strauss v. United States, 160 F. 2d 1017 (2nd Cir. 1947), cert. den., 67 S. Ct. 1741, 331 U. S. 850, 91 L. Ed. 1859 (1947).

lationship continues and the one claiming discontinuance has the burden of proving it.[15]

The relationship between a teacher and his pupil is one of in loco parentis,[16] and the relationship extends from the time the child leaves his home until he has returned.[17] A superintendent of city schools was held not to be in loco parentis to pupils under a statute that said teachers stand in loco parentis. The court construed the word *teacher*, as used in the statute, to mean *teachers* only, and held that the legislature did not intend to include *superintendent* within its meaning.[18]

Grandparents, as such, do not stand in loco parentis to grandchildren.[19] However, when the grandparents have exclusive custody, control, and care of the grandchildren, they may then stand in loco parentis to them.[20]

A brother or a sister, as such, does not stand in loco parentis,[21] and neither does a cousin.[22] However, a brother may, if he so intends, place himself in the position of being the lawful parent of his brothers and sisters. If they are completely dependent on him, he will stand in loco parentis to them.[23]

An individual authorized by a mother to raise and correct the mother's child has been held to be in loco parentis to the child.[24] A guardian stands in loco parentis to his ward.[25] Ordinarily a person cannot be in loco parentis to an adult who is not mentally or physically incapacitated.[26] In *Eitel v. State*,[27]

---

[15] Leyerly v. United States, *supra* n. 5; Hawkey v. United States, 108 F. Supp. 941 (E. D. Ill. 1952).

[16] Brooks v. Jacob, 139 Me. 371, 31 A. 2d 414 (1943); Roberson v. State, 22 Ala. App. 413, 116 S. 317 (1928).

[17] Cleary v. Booth, 1 Q. B. 465 (1893); Perkins, *op. cit. supra* n. 3.

[18] Prendergast v. Masterson, 196 S. W. 246 (Tex. Civ. App. 1917), rehear. den. (1917). The court felt that a teacher has an opportunity to know the student's traits, habits, and prior conduct and can more justly measure the punishment delivered than could a superintendent.

[19] Sutton v. Menges, 186 Va. 805, 44 S. E. 2d 414 (1947).

[20] Austin v. Austin, 147 Neb. 109, 22 N. W. 2d 560 (1946).

[21] United States v. Niewiodowski, *supra* n. 10.

[22] *Ibid.*

[23] Boyle v. Dealer's Transport Co., 184 Pa. Super. 38, 132 A. 2d 709 (1957). A brother placed himself as the lawful father of minor brothers and sisters of the half blood.

[24] Harris v. State, 115 Ga. 578, 41 S. E. 983 (1902); Fortinberry v. Holmes, 89 Miss. 373, 42 S. 799 (1907). The mother claimed she told defendant not to whip the child when she left him with the defendant. The court said if the defendant was to support, educate, and care for the child, he stood in loco parentis to the child and could punish him.

[25] Beaver v. Williams, 194 Ga. 875, 23 S. E. 2d 171 (1942).

[26] Howard v. United States, 2 F. 2d 170 (E. D. Ky. 1924).

[27] 78 Tex. Crim. 552, 182 S. W. 318 (1916). Guardian who forced ward to leave his home and support herself could not justify an assault and battery on her one year later by claiming to be in loco parentis.

the court held that a guardian who made his ward leave the guardian's home and live elsewhere and support himself, in effect emancipated him and ended the status of in loco parentis.

The fact of being a step-son, without more, is insufficient to give rise to the relationship of in loco parentis. The existence of such a relationship is a question of fact for the jury to decide.[28] Where a child lived with a man with whom her mother had maintained meretricious relations for some years, and the man treated the child as his own, these facts would support a jury finding of a relationship of in loco parentis, but would not establish the existence of such a status as a matter of law.[29]

Once a defendant in an assault and battery case is found to be standing in loco parentis to the plaintiff or complaining child, he may then assert as a defense his privilege to use reasonable force in discharging his responsibilities toward the child.

The In Loco Parentis Rule

Reasonable force for the correction or punishment of a child may be used by a parent or one standing in the place of the parent.[30] Such a person is not liable for the use of reasonable force which might otherwise be considered an assault and battery if such a relationship did not exist.[31] As stated earlier, the courts must find and establish whether or not the person claiming the protection of the rule is in loco parentis and therefore entitled to the privilege. If the person so charged is shown to be in loco parentis to the person accusing him of the assault, it then becomes a question of whether his act is one privileged by the rule.

There is a majority and a minority opinion construing the in loco parentis rule in the United States. The majority opinion looks to the reasonableness of the defendant's act and considers whether the person has willfully, wrongfully, and unlawfully assaulted the child.[32] The minority view holds that unless

---

[28] State v. Weber, 137 N. W. 2d 527 (Sup. Ct. Minn. 1965), rehear. den. (1965).

[29] Samborski v. Beck, 41 Pa. Dist. 387 (Phila. Cnty. 1941).

[30] Prosser, *op. cit. supra* n. 3.

[31] Annot., 89 A. L. R. 2d 399 (1963).

[32] State v. Hunt, 2 Ariz. App. 6, 406 P. 2d 208 (1965), the use of immoderate or excessive physical violence for correction is aggravated assault; Hinkle v. State, 127 Ind. 490, 26 N. E. 777 (1891), the jury decides the fact of reasonableness; Rowe v. Rugg, 117 Iowa 606, 91 N. W. 903 (1902); State v. Straight, 136 Mont. 255, 347 P. 2d 482 (1959); State v. Koonse, 123 Mo. App. 655, 101 S. W. 139 (1907), rehear. den. (1907), the defendant made a child walk five miles without shoes, while the defendant rode on horseback and struck the child with a whip. This was evidence of bad faith in that the defendant's acts were not for the child's benefit; Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903), punishment must be reasonable and moderate; Moreno v. State, 114 Tex. Crim. 559, 26 S. W. 2d 652 (1930);

(Continued on next page)

permanent injury resulted from the defendant's act or unless the act was done with malice, the defendant is within the rule's protection.[33] Where the punishment is for an improper purpose or is improper in itself, the rule will not apply.[34]

Some states have enacted statutes covering the torturing or punishing of another. The Ohio statute is typical of this type of legislation and reads as follows:

> No person shall torture, torment, or cruelly or unlawfully punish another, or wilfully and negligently deprive him of necessary food, clothing, or shelter.[35]

Where such laws are in effect, the courts have still allowed the in loco parentis rule to be a defense and have followed either the majority or the minority rule.[36]

Majority View of the In Loco Parentis Rule.

A parent or person in loco parentis, when inflicting punishment, must not exceed the bounds of moderation and reasonableness, and any acts that are cruel, merciless, unreasonable, and immoderate are unlawful.[37] Various factors should be considered in determining the reasonableness of an act. The following summary indicates what the courts have stated as being pertinent: (1) The actor's relationship to the child; (2) the age of the

---

(Continued from preceding page)

Carpenter v. Commonwealth, 186 Va. 851, 44 S. E. 2d 419 (1947), parent may punish but cannot exercise malevolence or the exhibition of uncontrolled passion; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859), Court looked to reasonable judgment of reasonable men to decide if punishment excessive; Steber v. Norris, 188 Wis. 366, 206 N. W. 173 (1925).

[33] Dean v. State, 89 Ala. 46, 8 S. 38 (1890), in this case, excessiveness of punishment alone will not convict; Suits v. Glover, 260 Ala. 449, 71 S. 2d 49 (1954), follows the *Dean* case; Fox v. People, 84 Ill. App. 270 (1899); People v. Green, 155 Mich. 524, 119 N. W. 1087 (1909), defendant caused lasting mischief; Heritage v. Dodge, 64 N. H. 297, 9 A. 722 (1887), a teacher is not liable for error in judgment where he acted in good faith and did not cause permanent injury; State v. Jones, 95 N. C. 488, 59 Am. Rep. 282 (1886); State v. Stafford, 113 N. C. 635, 18 S. E. 256 (1893); State v. Lutz, 65 Ohio L. Abs. 402, 113 N. E. 2d 757 (C. P. 1953), mere excessive or severe punishment is not enough to produce criminal liability on a teacher; Commonwealth v. Ebert, 11 Pa. Dist. 199, 3 J. L. R. 252 (1901); State v. McDonie, 89 W. Va. 185, 109 S. E. 710 (1921), rehear. den. (1921).

[34] Annot., 89 A. L. R. 2d 399 (1963).

[35] Ohio Rev. Code § 2901.18.

[36] Martin v. State, 11 Ohio N. P. (n. s.) 183, 21 Ohio Dec. 520 (C. P. 1910), affd., 87 Ohio St. 459, 102 N. E. 1132 (1912), the court stated that under a statute which restricted punishing a child under sixteen cruelly, liability depended on malice or permanent injury being shown; People v. Curtiss, 116 Cal. App. 771, 300 P. 801 (1931); State v. Henggeler, 312 Mo. 15, 278 S. W. 743 (1925); Fields v. State, 160 Tex. Crim. 545, 272 S. W. 2d 520 (Crim. App. 1954).

[37] People v. Curtiss, *supra* n. 36; Clasen v. Pruhs, *supra* n. 32; Stanfield v. State, 43 Tex. 167 (1875); Patterson v. Nutter, 78 Me. 509, 7 A. 273 (1886); Lander v. Seaver, *supra* n. 32; Hinkle v. State, *supra* n. 32; Steber v. Norris, *supra* n. 32; State v. Spiegel, 39 Wyo. 309, 270 P. 1064 (1928).

child; (3) the child's sex; (4) the child's physical and mental condition; (5) the nature of the offense and apparent motive; (6) whether the punishment or confinement is reasonably necessary and appropriate; (7) whether the punishment is disproportionate to the offense; (8) whether the punishment is necessarily degrading; (9) whether the punishment is likely to cause permanent injury or serious harm; (10) whether the punishment was inflicted for a salutary purpose; (11) whether the actors were free from malice; (12) the child's example on other children; (13) the kind of instrument used; (14) the extent or nature of the use of the instrument; (15) the sensitivity of the child; (16) the child's responsibilities; (17) the child's tolerance to pain; (18) and whether the child was old enough to understand the punishment.[38]

In *State v. Hunt,*[39] it was held that conduct is unreasonable where the person ceases to act in good faith and with the idea of correction, and acts with a malicious desire to inflict pain rather than to correct. The reasonableness of an act is a question of fact for the jury and if the evidence supports the verdict, the court will not change it.[40] Under the majority rule, there is no presumption of the correctness of the defendant's act.[41]

In *Clasen v. Pruhs,*[42] the Supreme Court of Nebraska followed the majority view. In an earlier case, the court upheld a verdict of guilty because a defendant in loco parentis struck a nine year old child on the side of the face and ear with her hand. Some days later the child's face and ear were still inflamed and swollen when examined by a physician.[43] In another case, a stepmother beat a child's head against a wall and was subsequently convicted.[44]

In *Willman v. State,*[45] the court held it was not necessary that the jury should believe the punishment was moderate. However if the jury should have a reasonable doubt as to the excessiveness of the punishment, they must acquit the defendant.[46]

---

[38] Annot, 2 Am. Jur., Proof of Facts, Par. 2, Assault and Battery Proof, and par. 7; Restatement (2d), Torts, par. 150 (1965); State v. Hunt, *supra* n. 32; State v. Straight, *supra* n. 32; State v. Henggeler, 312 Mo. 15, 278 S. W. 743 (1925).

[39] *Supra* n. 32.

[40] State v. Spiegel, *supra* n. 37; Clasen v. Pruhs, *supra* n. 32; State v. Black, 360 Mo. 261, 227 S. W. 2d 1006 (1950); State v. Straight, *supra* n. 32; State v. Washington, 104 La. 443, 29 S. 55 (1900); Hornbeck v. State, 16 Ind. App. 484, 45 N. E. 620 (1896); Hinkle v. State, *supra* n. 32.

[41] State v. Straight, *supra* n. 32. A statute providing that the use of force by one *in loco parentis* to correct, if reasonable, has been held not to permit a presumption that the punishment was necessary and reasonable.

[42] *Supra* n. 32.

[43] Whitner v. State, 46 Neb. 144, 64 N. W. 704 (1895).

[44] Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901).

[45] 63 Tex. Crim. 623, 141 S. W. 110 (1911).

[46] State v. Koonse, *supra* n. 32; State v. Henggeler, *supra* n. 38.

In Texas a defendant was guilty of assault and battery for hanging his nine year old step-son upside down and then proceeding to beat him.[47] Virginia courts have followed the same rule.[48] In *Rowe v. Rugg,*[49] a mother was found to have the authority to grant to another the right to punish her child, even though the father was alive and living in the household.

Minority View of the In Loco Parentis Rule

A parent or one in loco parentis acts in a judicial or quasi-judicial capacity. When he punishes a child, he is not liable for criminal assault because of an error in judgment or because it may appear to a fact finder that the punishment was not in line with the offense of the child.[50] A person becomes liable for such an offense only upon evidence that the punishment resulted in permanent injury or was inflicted with malice, express (i.e., with spite, hate, ill will, passion, anger, or motives of revenge), or implied (i.e., with wantonness or recklessness), and not in good faith and for purposes of correction.[51]

Alabama courts hold that the state must show the existence of malice or permanent injury and that the nature of the instrument used and the attending circumstances may be considered to show malice.[52] A verdict of guilty was affirmed against a man who beat a child for an hour with a rubber belt for wetting. He admitted he had lost his head, and this was evidence of malice.[53]

The use of a weapon, to be deadly, does not have to be deadly per se. It may become deadly through the manner of use.[54]

In *State v. Jones,*[55] the court said that if it allowed the jury to decide what conduct should be considered severe or unreasonable, it would be leaving the question of criminal liability to the jury to decide without a proper rule of law to guide them. This

---

[47] Moreno v. State, *supra* n. 32.

[48] Carpenter v. Commonwealth, *supra* n. 32. A mother left her child with a man and he beat the child.

[49] *Supra* n. 32. The child's aunt had administered the punishment.

[50] Cameron v. State, 24 Ala. App. 438, 136 So. 418 (1931).

[51] Griffin, Limits of Parent's and Teacher's Authority to Inflict Corporal Punishment, 15 Ohio St. L. J. 384 (1954); Restatement (2d), Torts, par. 147 (1965); Wharton, *op. cit. supra* n. 3; State v. Lutz, *supra* n. 33; teacher's punishment of child left bruise marks on the buttocks, but this was not permanent injury; Holmes v. State, 39 S. 569 (Ala. 1905); State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416 (1837); Commonwealth v. Seed, 5 Clark (Pa.) 78 (1851); Dowlen v. State, 14 Tex. App. 61, 4 Am. Crim. Rep. 49 (1883), this case construed a statute; Fox v. People, *supra* n. 33.

[52] Dean v. State, *supra* n. 33; Haydon v. State, 15 Ala. App. 61, 72 S. 586 (1916).

[53] Nicholas v. State, 32 Ala. App. 574, 28 S. 2d 422 (1946).

[54] State v. Cauley, 244 N. C. 701, 94 S. E. 2d 915 (1956).

[55] *Supra* n. 33.

would subject every exercise of parental correction of children to the supervision and control of jurors. Another court, in defining malice, felt it was correct to instruct the jury that general malice is wickedness, a disposition to do wrong, and a black and diabolical heart acting regardless of social duty and bent on mischief.[56]

In *People v. Green*,[57] a father who charged his twelve-year-old daughter with stealing, beat her with a whip, tied her hands behind her back, and left her in a room for three or four days, was convicted of assault and battery. The court stated that

> when the chastisement is cruel and unreasonable so as to negate the idea of good faith and shows evil passion, malice is established.

In *State v. McDonie*,[58] a stepfather beat his son to the point of death. The boy was scalded in a hot tub of water. The court held that if the treatment to which the son had been subjected resulted in serious injury, that fact alone would justify a conclusion that the punishment was unreasonable and would tend to show that the father acted with malice.

Rules Affecting Acts of a Teacher While in Loco Parentis

Teachers stand in loco parentis to pupils and their criminal liability is determined on nearly the same basis as others who stand in loco parentis. However, other rules which have a bearing on a teacher's liability for assault and battery supplement the majority and minority views.

Since a teacher may punish a child for disobeying a school rule, deciding whether the rule is reasonable or valid is a question of law for the court.[59] A rule requiring pupils to pay for school property which they may wantonly or carelessly break or destroy is not a reasonable rule, and therefore not one which a teacher may enforce by chastisement.[60] In *Anderson v. State*,[61] a boy who was new in school accidentally spoke out of turn. He apologized to the teacher but was still hit several times with a large stick. The court found insufficient cause for the punishment and held the teacher had used unauthorized force.

In another Tennessee case, a boy went into the school and opened all the windows and was punished for so doing. The

---

[56] State v. Atkins, 242 N. C. 294, 87 S. E. 2d 507 (1955).

[57] *Supra* n. 33.

[58] *Supra* n. 33.

[59] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605, 14 N. E. 68 (1887); State v. Davis, 158 Iowa 501, 139 N. W. 1073 (1913), rule requiring pupil to carry water not valid.

[60] State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266 (1888).

[61] 40 Tenn. (3 Head) 455 (1859).

court allowed the teacher to show that the punishment was such as was usual in the school and such as the parents might have expected their child to receive for doing wrong.[62]

A teacher may chastise a pupil for an act done away from school if the act is a violation of a school rule and tends to degrade the teacher or affects the decorum or morale of the school.[63]

The fact that the infliction of punishment results in injury because of a pre-existing or unusual condition of the pupil is not chargeable against a teacher when criminal liability is at issue unless he knew or should have known of this condition.[64]

A pupil who has reached his majority and voluntarily attends school subjects himself to school discipline.[65]

Various explanations have been offered in attempts to explain whether or not a teacher's authority to punish should be on the same level as that of parents. In some cases, courts have said that a parent has natural affections for the child which will restrain him in his acts of punishment but that the teacher does not have this same feeling, and thus the teacher cannot assume he has the same right as a parent to punish.[66] Another view considers that the teacher is impartial or contends that his education softens his heart.[67] According to another theory, the parent delegates authority to the teacher, and thus the teacher's authority can rise no higher than that of the parent. The weakness of this latter theory is shown by the fact that attendance is compulsory and thus the parent does not delegate any authority at all.[68] All of these theories are relatively unworkable. The best solution for establishing the teacher's authority with respect to corporal punishment is by following the in loco parentis rule as construed by either the majority or minority view.[69]

---

[62] Marlar v. Bill, 181 Tenn. 100, 178 S. W. 2d 634 (1944).

[63] Lander v. Seaver, *supra* n. 32, a student cursed a schoolmaster after school hours in front of other students; Hutton v. State, 23 Tex. App. 386, 5 S. W. 122 (1887), student punished for fighting with other boys away from school; R. v. Newport (Salop) Justices, 2 K. B. 416 (1929); Jones v. Cody, 132 Mich. 13, 92 N. W. 495 (1902), school stopped children from loitering in candy store after school; Dann, Notes and Comments, 11 Cornell L. Q. 266 (1926).

[64] Ely v. State, 68 Tex. Crim. 562, 152 S. W. 631 (Crim. App. 1912); Quinn v. Nolan, 70 Dec. Rep. 585; 5 Ohio Jur. 2d 121, Assault and Battery, par. 21.

[65] State v. Mizner, 45 Iowa 248 (1876).

[66] Steber v. Norris, *supra* n. 32; Lander v. Seaver, *supra* n. 32.

[67] Griffin, *op. cit. supra* n. 51; Commonwealth v. Seed, *supra* n. 51.

[68] See, 1 Bishop, Criminal Law, par. 886 (9th ed. 1923); 26 Ill. L. Rev. 815 (1932).

[69] Dodd v. State, 94 Ark. 297, 126 S. W. 834 (1910); Guyten v. Rhodes, 65 Ohio App. 163, 29 N. E. 2d 444 (1940); Miller, Resort to Corporal Punishment in Enforcing School Discipline, 1 Syracuse L. Rev. 247 (1949); 48 Ohio Jur. 2d 58, Schools, par. 176.

Majority View As Applied to Teachers In Loco Parentis

A leading case following the majority view is *People v. Curtiss.*[70] A teacher and a principal were charged with the violation of the penal code for punishing a child excessively. The court's opinion stated that the court is to decide if the punishment inflicted was justified, and the existence of permanent injury is not a necessary element to sustain criminal liability.

There is no distinction in the application of the test between punishment and acts of restraint incident to punishment. A teacher put his knee on the stomach of a pupil and sat on him while waiting for the boy's older sister to come and take him home. This act of restraint was held to be unreasonable.[71]

To prove assault and battery, it must be shown that a wrong was intentionally committed. The criminal intent of the teacher may be inferred from the unreasonableness of the method adopted or the excess of the force employed. The state has the burden of proof.[72]

As in other criminal matters, the teacher is presumed innocent and the state has the unshifting burden of proving guilt beyond a reasonable doubt.[73] The teacher may introduce evidence of the habitual misconduct of the pupil prior to his punishment in support of the reasonableness of his act.[74]

Finally, in *Territory v. Cox,*[75] the court stated that a teacher can cause a pupil a reasonable amount of temporary pain and the mere fact that marks and temporary pain result from the punishment inflicted, without any other evidence from which unreasonableness can be implied, will not support a conviction.

Minority Rule As Applied to Teachers In Loco Parentis

The minority rule allows teachers to inflict temporary pain upon a pupil without being criminally liable the same as the majority view.[76] However, as with the parents under the minority rule and unlike the majority view, there is a presumption of the correctness of the teacher's act which must be overcome by a showing of malice or permanent injury.[77]

When a teacher hit his pupil with his fist and then a tree limb and shouted he would kill him, it was held this was sufficient to show legal malice.[78]

---

[70] *Supra* n. 36.

[71] Calway v. Williamson, 130 Conn. 575, 36 A. 2d 377 (1944).

[72] Van Vactor v. State, 113 Ind. 276, 15 N. E. 341 (1888).

[73] People v. Mummert, 183 Mis. 243, 50 N. Y. S. 2d 699 (1944).

[74] Sheehan v. Sturges, 53 Conn. 481, 2 A. 841 (1885).

[75] 24 Hawaii 461 (1918).

[76] State v. Pendergrass, *supra* n. 51.

[77] Fox v. People, *supra* n. 33.

[78] Boyd v. State, 88 Ala. 169, 7 So. 268 (1890).

The fact that the punishment is unnecessarily excessive, without a showing of malice or permanent injury, is not enough to produce criminal liability under the minority view.[79]

Conclusion

The idea of correction must not be confused with the constant abuse of a child. A rule that finds criminal liability only upon a showing of permanent injuries or malice gives rise to such confusion. Anytime one person strikes another it is a serious matter, and especially if the person may not have any recourse under the law. The minority rule, requiring permanent injury or malice, does not protect a child from the constant harassment which may be more abusive than permanent injury. Public policy demands that the courts use a strong hand to protect children from any acts of unreasonable violence. The majority view is the most effective tool courts have for such purpose. It allows the public, through the jury, to decide how far a person standing in loco parentis should be allowed to go when inflicting corporal punishment. Under no circumstances should the person in loco parentis be the final arbitrator of what is and what is not excessive. It is the child's welfare that the courts must be concerned with, and a conviction for assault and battery should not depend on the showing of malice or whether the child was permanently injured.

---

[79] Drake v. Thomas, 310 Ill. App. 57, 33 N. E. 2d 889 (1941); Heritage v. Dodge, *supra* n. 33, a teacher is not liable for error of judgment if punishment is inflicted in good faith and without malice; Commonwealth v. Ebert, *supra* n. 33.