The Law of Spanking

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A person commits an assault when . . . without the consent of another person, he applies force intentionally to that other person, directly or indirectly . . .

Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Criminal Code, sections 265(1) and 43

Introduction

The freedom and choice of parents to discipline their children in the manner they choose, free from interference by the state, raises the question of where the line ought to be drawn between acceptable physical discipline and criminal assault. In a family (non-criminal) law context, spanking may also be viewed as child abuse. Social science research is inconclusive, showing both positive and negative impacts of corporal (physical) punishment.

About half the countries of Europe have made all forms of corporal punishment illegal in schools only. The other half make it illegal in both schools and homes. About half of the American states have illegalized corporal punishment in schools. The other half do not regulate it but allow parents to rule it out at school. Some 67% of Americans approve of spanking.

In Canada, there is no legal distinction between corporal punishment in the home and at school, although – along with the rest of the developed world – the practice in both places appears to be in decline. It would be difficult to find a strap in any modern Canadian school, much less one that has been recently pressed into service.

When is it the crime of assault, and when is it acceptable parenting? This article sets out the current law of spanking in Canada.

Section 43 of the *Criminal Code*

Parents, and guardians and teachers who stand in the role of parents, may "correct" children with "force" that "is reasonable under the circumstances." This prevents a criminal charge of assault and, if such a charge is laid, it provides a defence.

Early Cases Interpreting the Provision

The child must be *under the care* of the corrector, so a bystander adult in a shopping mall cannot use this section to justify smacking another's badly behaving child. Likewise, one child correcting another child in the playground. A babysitter in care of the child will be able to use this defence: *R v Murphy.*

A mentally disabled adult in a residential institution is neither a "child" nor a "pupil". In

> Degrading, inhuman or harmful force will never be excused. Using

the 1984 case of *Nixon v R*, a counsellor who used physical force on "a mentally retarded adult" under his supervision received no benefit of section 43. Similarly in the same year in *Ogg-Moss v R*, another counsellor could not claim he was "standing in the place of a parent" or a "schoolteacher" to correct a "child" or "pupil". It probably did not help his case that he hit a severely handicapped twenty-one year old patient several times on the forehead with a large metal spoon after he had spilled his milk.

objects or blows and slaps to the head are unreasonable.

The force must be used for the *purpose of correction*. If the child is too young or is disabled to understand, this offers no defence to the assault.

The customs and standards of one's original culture must give way to what is acceptable in contemporary Canadian culture. Other foreign cultures may abide more force than Canada will accept: *R v Baptiste* (Ontario, 1980). Nor can religious beliefs be invoked to justify unreasonable force: *R v Poulin* (NL, 2002).

The *Canadian Foundation* Case

The Supreme Court of Canada considered the reasonable force defence in 2004 in *Canadian Foundation for Children, Youth and the Law v Canada*. The Foundation sought a declaration that section 43 be held invalid under the *Charter of Rights,* sections 7 (loss of right to security of the person not according with principles of fundamental justice), 12 (freedom from cruel and unusual punishment) and 15 (equality regardless of age). A 6 to 3 majority of the Court upheld section 43 on all *Charter* grounds and further clarified the parameters of "force … reasonable under the circumstances."

(a.) Section 7 Loss of Right to Security of the Person not According With Principles of Fundamental Justice

(i) Principle of Fundamental Justice?

In 2004, the Supreme Court of Canada approved of spanking, properly restrained, under the *Charter of Rights*. It must be for educative or corrective purposes and the child must be able to benefit from it. The child cannot suffer from a disability and must be between the age of two and twelve.

The Foundation argued that children must enjoy independent procedural rights under the *Charter* to due process in the representation of their interests. The majority disagreed: the law does not provide procedural rights for alleged victims of an offence. Even if it did, children's interests are represented at trial by the Crown prosecutor who will discharge this duty properly.

(ii) Best Interest of the Child?

A principle of fundamental justice must be a "legal principle, that is vital or fundamental to our societal notion of justice and be capable of being identified and applied in situations in a manner that yields predictable results." The best interest of the child is not a principle of fundamental justice because society does not always raise the best interests of the child over all other concerns in the administration of justice and "reasonable people may well disagree about the results that this application will yield."

(iii) Is Section 43 too vague or overbroad?

The category of person who is entitled to the section 43 defence is not be too vague. Since the force must be "by way of correction" and must be "reasonable under the circumstances", the section was also not too broad.

For spanking to be corrective, it must be capable of educating the child and the child must be capable of benefiting from it. Children under two years of age and those suffering mental disability cannot benefit from spanking since they have not sufficiently developed cognitively to understand the purpose of spanking.

Reasonable corrective force is a standard long recognised in criminal jurisprudence. What is "reasonable in the circumstances" can be determined from international treaty obligations, judicial interpretation from an objective standpoint and expert evidence. Evidence shows that corporal punishment of teenagers induces aggressive behaviour so the defence will not be available in relation to children over 12 years of age. The section is not too broad.

(b.) Section 12 Cruel and Unusual Treatment or Punishment

Section 43 only allows for corrective force that is reasonable. Therefore, it can never rise to the level of being "cruel and unusual". Any spanking "so excessive to outrage standards of decency" would not attract section 43 protection.

(c.) Section 15 Equality

Section 15(1) of the *Charter* ensures "equality before and under the law" and the "right to equal protection . . . without discrimination . . . based on age". The Foundation said "section 43 would permit conduct against children that would otherwise be criminal in the case of adult victims" and therefore the section "decriminalization discriminates against children". Although children are vulnerable and their physical integrity is profound, the majority of the Court found section 43 was Parliament's attempt to balance a safe environment for all children and a child's dependence on "parents and teachers for guidance and discipline, to protect and promote their healthy development within society." The section is "firmly grounded in the actual needs and circumstances of children".

Conclusion

Spanking, the intentional striking of a child, is technically an assault. To decriminalize and regulate this physical form of child discipline, more than 125 years ago Parliament enacted section 43 of the *Criminal Code* where it is captioned "Protection of Persons in Authority".

In 2004, the Supreme Court of Canada approved of spanking, properly restrained, under the *Charter of Rights*. It must be for educative or corrective purposes and the child must be able to benefit from it. The child cannot suffer from a disability and must be between the age of two and twelve. The spanking may only be of a insignificant and temporary nature. What is "reasonable under the circumstances" will be a subjective consideration in light of all the circumstances in the case, including according to societal standards, experts and treaties. Degrading, inhuman or harmful force will never be excused. Using objects or blows and slaps to the head are unreasonable. The corrector's frustration, temper or abusive personality will also undermine the correction and remove the defence.

Despite *Canadian Foundation*, spanking continues to be highly controversial. The 6 to 3 majority almost a generation later might be reversed under a largely re-constituted Supreme Court. A new court challenge might yield a new result.

There have been many legislative attempts to have section 43 repealed or amended, with at least 17 private member's bills being tabled in Parliament since 1994, the latest one last year. None have yet succeeded.

The federal government announced it intends to enforce all of the recommendations of the Truth and Reconciliation Commission. One of these recommendations is to repeal section 43: "the Commission believes that corporal punishment is a relic of a discredited past . . . and has no place in Canadian schools or homes."

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