PARENTAL RESPONSIBILITY FOR THE ACTS OF CHILDREN

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In this essay the writer addresses the policies which render parents responsible for the wrongdoing of their children. The author examines and questions the current vogue for such parental responsibility legislation. He concludes that such are inspired by social trends in other jurisdictions and so should be viewed with scepticism.

Dans cet essai, l'auteur s'addresse aux politiques qui rendent les parents responsable des méfaits de leurs enfants. L'auteur examine et questionne la vogue courante pour la législation sur la responsabilité des parents, et il conclut que cette législation est inspirée par les tendances des territoires autre que le Canada et alors nous devrions les résister.

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Introduction

In recent years there has been increasing concern about the problem of crime, and particularly youth crime in Canada. Despite overwhelming statistical evidence to the contrary there is a common perception among Canadians that an epidemic of crime has taken hold in this country.[1] Federal and provincial political parties have, to varying degrees, climbed on the "get tough" bandwagon. This attitude is clearly reflected in proposed legislation to replace the *Young Offenders Act*, as least in so far as the commission of serious offences is concerned.[2]

Most of the reactions to the perceived problem of youth crime in Canada have been imported from the United States. The recent introduction of "tough love" programmes and boot camps for young offenders provide examples. This is also true of the latest addition, parental responsibility legislation. Popular in virtually all American states for many years, legislation which makes parents both civilly and criminally responsible for the acts of their children has attracted the attention of several provincial governments in Canada. We appear to be witnessing yet another example of an American solution to a non-existent Canadian problem.

This paper will examine the responsibility of parents for the wrongs committed by their children. It will be argued that under current Canadian law there are substantial consequences for parents, both civilly and criminally. The

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[1] "In 1994, nine out of ten Canadians believed that youth crime is on the increase - despite quite widespread media coverage of police statistics prepared by Statistics Canada that showed a stable trend in overall youth crime for the previous two years." *A Review of the Young Offenders Act and the Youth Justice System in Canada, Report of the Federal-Provincial-Territorial Task Force on Youth Justice*, August 1996, at 14. The report also suggests, at pp. 14-19 that Canadian attitudes toward crime have been greatly influenced by American media presentations of crime in that country. The Report notes, at 18 : "There are clear differences between public perceptions of youth crime in Canada and the reality. The violent youth crime rate in Canada is, for example, far lower than in the United States and, in Canada (unlike the U.S.), per capita rates of homicides involving youths have not increased in the past few decades." A recent study indicated that the national homicide rate in Canada is at a 30 year low. Homicide Survey, Canadian Centre for Justice Statistics, October 1998, as reported in the *Globe and Mail* (28 October 1998) A3. In 1997, 884.2 assaults were reported for every 100,000 people in the province of Ontario. This was down from 1,020.9 in 1994 and from 1,124.6 in 1991. *Globe and Mail* (9 February 1999) A2.

[2] *Young Offenders Act*, R.S.C. 1985, c. Y-1. The proposed legislation provides for increased penalties in the case of serious offences. See *Youth Criminal Justice Act*, Bill C-3, Second Session, Thirty-Sixth Parliament, 48 Elizabeth II, 1999, First Reading, October 14, 1999, ss. 41, 61. It is important to note that the proposed legislation does attempt to strike a balance between the need to protect society and the needs of young persons caught up in the system This philosophy is indicated in the opening words of the preamble: "Whereas society should be protected from youth crime through a youth criminal justice system that commands respect, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons..."

paper will also explore and comment upon provincial parental responsibility legislation in force in Manitoba and being considered elsewhere. Ultimately it will be suggested that such developments are misguided and unnecessary.

I. *Civil Responsibility*

This section of the paper will examine the current state of Canadian law with regard to the civil responsibility of children and their parents. The purpose of this discussion is to support the argument that parental responsibility legislation is unnecessary and redundant and that existing law provides both an adequate and effective response to damage and injury caused by children. A brief comment on two other potential bases of parental responsibility, contract law and human rights legislation, is also provided.

(a) *Children*

When a young person causes damage to person or property recovery is difficult and in many cases virtually impossible. Many potential actions are never initiated for the simple reason that children tend to lack assets sufficient to satisfy judgements.[3] Similarly, absence of liability insurance or its limited coverage tends to discourage litigation.[4]

Although children may be found responsible for both intentional torts and negligence, establishing liability is much more difficult than in cases involving adults. In the case of intentional torts there is no general immunity for children and there is no clear age limit for responsibility.

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[3] Professor Fleming notes that "...children as defendants are rarely worth powder and shot, except in regard to adult activities like driving, with a certain background of insurance." Fleming, J., *The Law of Torts*, 8th ed. (The Law Book Company Ltd.) at 682. Where a plaintiff has succeeded in judgment against a young person it is possible to renew the judgment until such time as he/she has sufficient assets. See, for example, Rule 60, Rules of Civil Procedure, R.R.O. 1990, Regulation 194. In Ontario, the *Limitations Act*, R.S.O. 1990, C. L.15, s. 45 provides that an action upon a judgment shall be commenced within twenty years after the cause of action arose.

[4] Homeowner insurance policies may provide coverage for damage caused by children of the policy holder. Many injured parties may be unaware of these coverages. While homeowners with mortgages will carry these policies, in many, perhaps most cases, homeowners without mortgages and tenants do not. In addition the policies generally provide that there is no coverage if the loss is due to any intentional or criminal act. Another common exemption provides there will be no coverage for bodily injury or property damage due to negligent supervision. See *Scott* v. *Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445. See also *Newcastle (Town)* v. *Mattatall, Porter and Harris et al.* (1988), 87 N.B.R. (2d) 238 (N.B.C.A.) in which the New Brunswick Court of Appeal refused to give effect to a clause excluding coverage for intentionally caused damage on the basis that the insurers had failed to prove an intentional setting of fires which caused damage to an arena. The Court accepted the trial judge's finding that the fires were set for the purpose of providing light and that the burning of the arena was accidental.

However, children under the age of four are probably beyond the reach of tort liability.[5] It is suggested that children below that age lack the capacity to form the requisite intention.[6]

Where an action in negligence is contemplated, the courts will use the two step test proposed in *McEllistrum* v. *Etches*[7] and more fully developed in *Heisler* v. *Moke*[8]. Under this test the first step involves a subjective evaluation of the particular child. The question is whether this child, based on age, intelligence, experience, general knowledge and alertness is capable of being negligent. If so, the second step involves an objective evaluation of whether the child exercised the care to be expected from a child of like age, intelligence, and experience.[9] Again, children of "tender years", that is children up to the age of five, appear to be immune from actions framed in negligence.[10]

It is difficult to determine the age at which these special rules for children cease to operate. There is a substantial body of case law which holds that when young people engage in "adult activities" they will not be accorded special treatment. Rather, they will be required to live up to the standard of the reasonable person. Thus far, the "adult activities" doctrine has been used primarily in cases involving various types of motorized vehicles.[11] The doctrine has not been applied in cases involving young skiers, golfers and

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[5] Linden, A., *Canadian Tort Law*, 6th ed., (Butterworths, 1997), at 38. See also Alexander, E., Tort Liability of Children and Their Parents" in D. Mendes de Costa, ed. *Studies in Canadian Family Law* (Butterworths, 1972) 845 at 854. The Ontario Law Reform Commission was not prepared to recommend a minimum age, rather the Commission felt that the age of responsibility was best left to the courts to determine. Ontario Law Reform Commission, *Report on Family Law, Part I, Torts* (Department of Justice, 1969) at 76.

[6] *Tillander* v. *Gosselin*, [1967] 1 O.R. 203, affirmed 61 D.L.R. (2d) 192 (C.A.). See also *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C.S.C.)(5 year old not liable); *Garratt* v. *Dailey* (1955), 46 Wash. 2d 197 (S.C.)(5 year old liable); *Baldinger* v. *Banks* (1960), 201 N.Y.S. 2d 629 (S.C.)(6 year old liable); *Ellis* v. *D'Angelo* (1953), 253 P. 2d 675 (Cal., Dist.C.A.)(4 year old liable). The age of criminal responsibility in Canada was, until recently, seven years of age. It is now twelve. See *Criminal Code*, R.S.C. 1985, c. C-46, s. 13.

[7] *McEllistrum* v. *Etches* (1956), 6 D.L.R. (2d) 1 (S.C.C.).

[8] *Heisler* v. *Moke* (1971), 25 D.L.R. (3d) 670 (Ont. H.C.)

[9] *Heisler* v. *Moke* (1971), 25 D.L.R. (3d) 670, 672-674 (Ont. H.C.). Many of the cases have involved allegations of contributory negligence on the part of the child plaintiff. *McEllistrum* v. *Etches* (1956), 6 D.L.R. (2d) 1 (S.C.C.) was such a case. Professor Klar has cited several contributory negligence cases which applied *McEllistrum* v. *Etches*. He also identifies cases where the test has been applied to children as defendants. See Klar, L., *Tort Law*, 2nd ed., (Carswell, 1996) at 257, note 51. See also Linden, *supra* note 5 at 136-40.

[10] Linden, *supra* note 5 at 137.

[11] *Dellwo* v. *Pearson* (1961), 107 N.W. (2d) 859 (Minn. S.C.) (motorboat); *Ryan* v. *Hickson* (1974), 7 O.R. (2d) 352 (H.C.J.) (snowmobile); *McErlean* v. *Sarel* (1987), 61 O.R. (2d) 396 (C.A.) (motorized trail bike); *Neilsen* v. *Brown* (1962), 374 P. (2d) 896 (Ore. S.C.) (automobile).

hunters on the basis that these are not activities normally engaged in only by adults.[12]

The difficulty of the "adult activity" doctrine is well illustrated in the recent case of *Nespolon* v. *Alford*.[13] A highly intoxicated teenager was given a ride by a group of his friends. The young man asked them to let him off which they did. Shortly thereafter another driver ran over the intoxicated teenager causing his death. The driver suffered nervous shock and brought an action to recover damages from the estate of the deceased and his friends who had dropped him off. The majority of the Court held that the fourteen year old deceased could not foresee that by getting drunk at a friend's house he could cause a driver to suffer post-traumatic stress disorder. Accordingly he neither owed nor breached any duty of care to a passing motorist. The other defendants, both age sixteen were also found not to be negligent on the basis that there was no causal connection between dropping the deceased off and the driver's injury. Abella J.A. also held that the reasonableness of the boys' behaviour had to be considered in light of their age and experience. She concluded that although they were engaged in an adult activity (driving), the specific alleged negligent act of dropping off the deceased was not a "particularly adult activity" and therefore there was no basis for holding the boys to an adult standard. Based on their experience there was no reason for them to suspect the deceased was at risk.[14] In dissent, Brooke J. A. supported the trial judge's conclusion that on the facts of this case nervous shock was foreseeable. However, he also indicated that rather than treating this conduct as an "adult activity" the proper question was whether these young men exercised the care expected of a youth of like age, intelligence and experience. Using this test, rather than comparing the defendants to the test of the reasonable adult, Brooke J.A. would have dismissed the appeals and held liable all three defendants.[15]

The upper age limit for the two step test has been described as "rather rubbery."[16] Although there are no clear judicial pronouncements on this issue, provincial age of majority legislation has been suggested as the appropriate guideline.[17] Since the age of majority may vary from province to province an

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[12] Binchey, W., "The Adult Activities Doctrine in Negligence Law" (1985), 11 William Mitchell L. Rev. 733, 750-55. In *Robertson* v. *Butler* (1985), 32 C.C.L.T. 208 (N.S.S.C.), a case involving the use of a motor bike by a fifteen year old, the Court used the adult activity doctrine to determine a question of contributory negligence. Professor Irvine describes this approach as an "illigitimate extension" of previous decisions. See Irvine, J., "Annotation" (1985), 32 C.C.L.T. 209. Professor Klar is also highly critical of this decision, although for somewhat different reasons: "The court also held, at 217, that `a parent may be vicariously liable for negligent acts committed by his or her child with the knowledge or consent of the parent.' This principle was neither explained nor backed by authority and is contrary to accepted principle." Klar, *supra* note 9 at 256, n. 46.

[13] *Nespolon* v. *Alford* (1998), 40 O.R. (3d) 355 (Ont. C.A.). The case report notes that an application for leave to appeal was filed in the Supreme Court of Canada on 16 September 1998.

[14] *Nespolon* v. *Alford* (1998), 40 O.R. (3d) 355, 365-367 (C.A.) per Abella J.

[15] *Nespolon* v. *Alford* (1998), 40 O.R. (3d) 355, 375-79 (C.A.) per Brooke J.A.

[16] Linden, *supra* note 5 at 137.

[17] *Ibid.* at 138.

alternative suggestion would incorporate the age limits established by federal criminal and elections legislation. In that case the age limit would be set at eighteen years of age.[18] Many commentators maintain that no arbitrary maximum age should be established.[19]

Most older young persons (those between the ages of ten and eighteen) are unlikely to be found incapable of being negligent. They will be evaluated on the basis of the modified objective test which compares their conduct to that of a person of like age, intelligence and experience.[20] The vast majority of cases which have used the two step subjective/objective analysis have involved children below the age of ten.[21]

Thus, in many cases where a young person has caused a personal injury or property damage there is little point in bringing an action against the child personally. Very young children will have a total immunity to civil actions. In the case of older children they will be protected by the two step test described above. Young persons who have the capacity to commit tortious acts will still receive the advantage of a modified objective test which compares their conduct, not to that of the reasonable person but rather to a person of like age,

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[18] The *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 2(1) provides that a "young person" is a person who is twelve years of age or more but under eighteen years of age. A person who has attained the age of eighteen years is an "adult". The *Canada Elections Act*, R.S.C. 1985, c. E-2, s.50 provides that a Canadian citizen who has attained the age of eighteen years is qualified as an elector.

[19] "...there appears to be little clinical or empirical data concerning a child's psychological or physical development that validates the various universally applied age levels or `age-stagism' principles." Wilson, J. and Tomlinson, M., *Wilson: Children and the Law*, 2nd ed. (Butterworths, Toronto, 1986) at 296. See also Alexander, *supra* note 5 at 860.

[20] See *Lutley* v. *Jarvis* (1992), 113 N.S.R. (2d) 201 (T.D.). The case involved a twelve year old boy riding a motor bike on a highway. Rather than using the adult activities doctrine the Court used the objective branch of the two step test without discussion of the first branch. See also *Christie* v. *Slevinsky* (1981), 12 M.V.R. 67 (Alta. C.A.)(an eleven year old driving a dune buggy) and *Assiniboine School Division* v. *Hoffer* (1970), 16 D.L.R. (3d) 703 (Man Q.B.); affd. 21 D.L.R. (3d) 608 (Man. C.A.); affd. 40 D.L.R. (3d) 480 (S.C.C.) (a fourteen year old driving a snowmobile).

Professor Linden notes that some courts have preferred to use a simplified test, focussing on a "child of corresponding age", without reference to the more subjective criteria of "intelligence and experience." Linden, *supra* note 5 at 139.

[21] An exception is found in *Belzile* v. *Dumais* (1986), 69 N.B.R. (2d) 142 (Q.B.) A twelve year old boy was found negligent as a result of damage caused by improper storage of gasoline in a basement. See also *Parrill* v. *Genge* (1994), 125 Nfld. & P.E.I.R. 27 (Nfld. T.D.) where a fifteen year old boy was found both capable of being negligent and in fact negligent in the operation of a snowmobile. In *Ryan* v. *Hickson* (1974), 7 O.R. (2d) 352 (H.C.J.), a case involving a twelve year old snowmobiler the Court also adopted the two step approach.

In *McHale* v. *Watson* (1966), 39 A.L.J.R. 459 (Aust. H.C.), a case involving a twelve year old, the court used an objective test based on a child of comparable age. In *Heisler* v. *Moke* Addy J. indicated that he would have preferred to follow this approach but felt bound by the Supreme Court of Canada decision *McEllistrum* v. *Etches* (1956), 6 D.L.R. (2d) 1 (S.C.C.) which included "intelligence and experience" in the evaluation. It should be noted that in *McEllistrum* the child was six and in *Heisler* the child was nine. See *Heisler* v. *Moke* (1971), 25 D.L.R. (2d) 670, 673 (Ont. C.A.) per Addy J.

intelligence and experience.[22] Finally, with success comes the difficult task of securing judgment from persons with no assets.[23] Accordingly, injured parties often look to parents for compensation.

(b) *Parents*

The common law has been reluctant to hold one individual responsible for the acts of another.[24] In keeping with this position Canadian courts have held that as a general proposition, and subject to a few legislated exceptions, parents are neither strictly nor vicariously liable for the damage or injury caused by their children.[25] A regime of strict responsibility would hold the parent liable automatically upon the occasion of the event.[26] On the other hand, if the

[22] Professor Klar suggests that the standard of care is relaxed even further when the child is a plaintiff: "...the law's relaxed standard towards children is most often displayed in cases where the child is not a defendant but a plaintiff, in reference to a claim that the child was contributorily negligent. Although in theory the standard of reasonable conduct should be the same whether it is being applied to a defendant or to a plaintiff, in practice this may not be the case. The consequence of departing from the objective standard of care in the case of a defendant is to risk leaving an injured plaintiff without compensation, a result which may seem harsh, especially when insurance is involved. Conversely, the consequence of applying too high a standard of care to a plaintiff might be to deprive the victim of needed compensation, which will be paid, in many cases, by an insurer. The pressure thus clearly exists to relax the standard for plaintiffs, but not to do so for defendants." Klar, *supra* note 9 at 256.

[23] "What is to be gained by a successful lawsuit against a child of six, who probably has no assets? Normally, there will be no insurance coverage for the plaintiff to look to. Perhaps he may hope that the child's parents will feel some moral obligation to pay...Maybe he is prepared to wait for his judgment, and writ of execution, until the child debtor becomes a wage-earner in ten or fifteen years or inherits money." Ontario Law Reform Commission, *supra* note 5 at 75. At 76 the Commission noted that criminal injuries compensation schemes generally fail to provide full compensation - such schemes impose financial caps and are often limited to recovery for criminal conduct causing personal injury. Non-criminal negligent conduct and property damage would not be covered. See *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C.24, ss. 5, 19.

[24] A succinct summary of the philosophy underlying the common law's reluctance to impose liability on one party for the tortious act of another can be found in Klar, *supra* note 9 at 350-51.

[25] *File* v. *Unger* (1900), 27 O.A.R. 468 (C.A.); *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214 (C.A.); *Corby* v. *Foster* (1913), 13 D.L.R. 664 (Ont. C. A.); *Bobby* v. *Chodiker*, [1928] 3 W.W.R. 392 (Man. K.B.); *Hook* v. *Davies*, [1939] 1 W.W.R. 539 (B.C.S.C.); *Heath* v. *Green*, [1941] 1 W.W.R. 601 (Sask. K.B.); *Schmidt* v. *Munch*, [1947] 3 D.L.R. 159 (Ont. C. A.); *Hatfield* v. *Pearson* (1956), 6 D.L.R. (2d) 593 (B.C.C.A.); *Paterson* v. *Hardy* (1967), 62 W.W.R. 219 (Sask. Q.B.); *Bishop* v. *Sharrow* (1975), 8 O.R. (2d) 649 (H.C.J.); *Michaud* v. *Dupuis* (1977), 20 N.B.R. (2d) 305 (Q.B.); *Delowsky* v. *Aiello* (1980), 119 D.L.R. (3d) 240 (B.C.S.C.); *Taylor* v. *King* [1993] 8 W.W.R. 92 (B.C.C.A.). For a discussion of legislation see Legislating Parental Responsibility, *infra*.

[26] "I suppose a parent could be held strictly liable for damage caused by his child by anology to dangerous animals. As a parent I find the analogy not inapt. Or from an historical perspective a child, as a form of personal property, might be subject to deodand. Not an unattractive possibility, at least to a parent." Alexander, *supra* note 5 at 846.

principle of vicarious liability was adopted, liability would depend on a finding of fault on the part of the child.[27] This approach would present some difficulty since, as noted above, the special tests established for determining the fault of young persons would preclude liability in many instances.

The Ontario Law Reform Commission has identified three exceptions to the common law position which imposes no general responsibility on parents for damage caused by their children. First, parents may be held responsible on the principle of agency where the child was doing something on their behalf, such as running an errand. Second, parents will be responsible if they direct or encourage the child to cause damage. Third, parents will be liable if they are negligent in failing to control or supervise the child.[28] Although the concept of parental fault will not provide compensation in all cases, unlike vicarious responsibility, it is not dependant on proof of fault on the part of the child. The parent could be found at fault even if the child could not.[29] However, liability based on parental fault obviously requires proof of fault on the part of the parent. A parent could be faultless even if the child was not.[30] There are of course many instances where both parent and child are held responsible.[31]

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[27] *Ibid* at 847. See also Ontario Law Reform Commission, *supra* note 5 at 77.

[28] Ontario Law Reform Commission, *supra* note 5 at 77.

[29] *Lochlin* v. *West* (1927), 32 O.W.N. 19 (C.A.); *Ellis* v. *D'Angelo* (1953), 253 P. 675 (Calif.); *Sgro* v. *Verbeek* (1980), 111 D.L.R. (3d) 479 (Ont. H.C.J.); *Hache* v. *Savoie* (1980), 31 N.B.R. 631 (Q.B.). In some cases the action was taken against only the parent although a possible action was available against the child who actually caused the injury. See *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214 (C.A.); *Moran* v. *Burroughs* (1912), 27 O.L.R. 539 (C.A.); *Black* v. *Hunter*, [1925] 4 D.L.R. 285 (Sask. C.A.); *Edwards* v. *Smith*, [1941] 1 D.L.R. 736 (B.C.C.A.); *Starr and McNulty* v. *Crone*, [1950] 4 D.L.R. 433 (B.C.S.C.); *Ingram* v. *Lowe* (1974), 55 D.L.R. (3d) 292 (Alta. C.A.); *Pasheri* v. *Beharriell* (1987), 61 O.R. (2d) 183 (Dist. Ct.).

[30] Alexander, *supra* note 5 at 847. See *File* v. *Unger* (1900), 27 O.A.R. 468 (C.A.); *Turner* v. *Snyder* (1906), 16 Man. R. 79 (K.B.); *Bobby* v. *Chodiker*, [1928] 3 W.W.R. 392 (Man. K.B.); *Heath* v. *Green*, [1941] 1 W.W.R. 601 (Sask. C.A.); *Alain* v. *Hardy*, [1951] S.C.R. 540; *Hatfield* v. *Pearson* (1956), 6 D.L.R. (2d) 593 (B.C.C.A.); *Streifel* v. *Strotz* (1957), 11 D.L.R. (2d) 667 (B.C.S.C.); *Paterson* v. *Hardy* (1967), 62 W.W.R. 219 (Sask. Q.B.); *Pollock* v. *Lipkowitz* (1970), 17 D.L.R. (3d) 766 (Man. Q.B.); *Lalarge* v. *Blakney* (1978), 92 D.L.R. (3d) 440 (N.B.S.C.); *Delowsky* v. *Aiello* (1980), 119 D.L.R. (3d) 240 (B.C.S.C.); *Lutley* v. *Jarvis* (1992), 113 N.S.R. (2d) 201 (N.S.S.C.); *Taylor* v. *King*, [1993] 8 W.W.R. 92 (B.C.C.A.); *Trevison* v. *Springman*, [1997] B.C.J. No. 2557 (C.A.).

[31] *Kennedy* v. *Hanes*, [1940] 3 D.L.R. 499 (Ont. C.A.) (uncle/nephew relationship rather than parent/child); *School Division of Assiniboine South No. 3* v. *Hoffer* (1971), 21 D.L.R. (3d) 608 (Man. C.A.); *Ryan* v. *Hickson* (1974), 7 O.R. (2d) 352 (H.C.J.); *Bishop* v. *Sharrow* (1975), 8 O.R. (2d) 649 (H.C.J.); *Michaud* v. *Dupuis* (1977), 20 N.B.R. (2d) 305 (Q.B.); *Floyd* v. *Bowers* (1978), 21 O.R. (2d) 204 (H.C.J.); *Belzile* v. *Dumais* (1986), 69 N.B.R. (2d) 142 (N.B.Q.B.); *Segstro* v. *McLean*, [1990] B.C.J. No. 2477 (S.C.); *Laplante (guardian ad litem of)* v. *Laplante* (1992), 93 D.L.R. (4th) 249 (B.C.S.C.).

Examples of cases in which neither parents nor children were found liable include *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C.S.C.); *Strehlke* v. *Camenzind*, [1980] 4 W.W.R. 464 (Alta. Q.B.); *Christie* v. *Slevinski* (1981), 12 M.V.R. 67 (Alta. Q.B.); *Chiasson* v. *Hebert* (1986), 74 N.B.R. (2d) 105 (Q.B.). See also *Montesanto* v. *Diubaldo* (1927), 60 O.L.R. 610 (C.A.) and *Schmidt* v. *Munch*, [1947] 3 D.L.R. 159 (Ont. C.A.).

Professor Alexander has explored the rationale for each of the identified bases of parental responsibility:

> If I were free to choose among these bases of imposing liability on children and their parents for damage caused by children I suppose my choice would depend on what I was trying to accomplish...For example, if accident prevention is a purpose of tort law, and if it is thought that parents are in a position to advance this purpose because of their ability to control and discipline their children, this might be best done by imposing strict liability on parents. Accident prevention would be effected by increased parental supervision, at least if parents had to personally bear the financial consequences of strict liability for damage caused by their children...If punishment is a purpose of tort law it might be effected best where children cause damage by imposing liability on them and their parents on the basis of personal fault.And they could not be allowed to insure against liability because that would defeat the purpose...If compensation of the injured is a purpose of tort law it might be best effected by imposing strict liability on children and their parents. And to be sure of compensation it might be necessary to compel at least parents to take out insurance...If loss-distribution on the basis of who is in the best position to absorb the loss is a purpose of tort law it might be effected best by imposing the loss on the person in the best position to insure. Where children cause damage this might vary from case to case: sometimes the parent might be in the best position to insure against a particular loss; sometimes the victim might be; presumably the child would never be...It may be that because of the availability of insurance...the emphasis today is on the compensation and loss-distribution purposes. If the important purposes of tort law today are compensation and loss-distribution I doubt whether the best way of accomplishing them, where children cause damage, is by tort actions (whatever their bases) against chiland parents...Would these modern tort purposes not be better accomplished by society assuming general responsibility for compensating accident victims.[32]

Despite the concerns expressed by Professor Alexander and many others[33] about the adequacies of modern tort law to deal with this issue it seems clear, that for the foreseeable future, responsibility of parents for damage caused by children will be based on general principles of negligence law.[34]

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[32] Alexander, *supra* note 5 at 847-49.

[33] "The Commission does not believe that any change in tort law with regard to parental responsibility is warranted. It considers that it would be unfair on parents to make them strictly or vicariously liable for damage caused by their children. Parenthood is a sufficiently demanding state in these times as it is. That a parent should be asked to do more than take reasonable care in the supervision and control of their children would be both impractical and unjust...Parental responsibility is not, in the view of the commission, the solution to the problem of how the loss should be borne when a child has inflicted damage on some innocent third person...the solution, if there is one, may lie in society assuming the burden." Ontario Law Reform Commission, *supra* note 5 at 80.

[34] The Civil Code of Quebec bases responsibility on fault. Article 1459 states: "A person having parental authority is liable to reparation for injury caused to another by the act or fault of the minor under his authority, unless he proves that he himself did not commit any fault with regard to the custody, supervision or education of the minor." See Brierly, J. and Macdonald, R., *Quebec Civil Law, An Introduction to Quebec Private Law* (Toronto: Emond Montgomery Publications Limited, 1993) at 452-53.

Teachers, schools and other institutions will be held to the standard of the "reasonably careful parent", both with regard to injuries caused to young people and injuries caused by young people under their supervision. See Alexander, E. "Tort Responsibility of Parents and Teachers for Damage Caused by Children" (1965), 16

Normally in an action for negligences the injured party is required to show, on a balance of probabilities, a failure to exercise reasonable care.[35] However, in Ontario, section 68 of the *Family Law Act* reverses the onus and provides that the parent must show "reasonable supervision and control" over the child.[36] In deciding whether or not a parent has acted with reasonable care the courts have considered three principle factors: (1) the age of the child; (2) the activity and its potential danger with its resulting degree of necessary supervision or prior instruction and warning; and (3) knowledge by the parent of prior acts or propensities of the child.[37]

U.T.L.J. 165; *Myers* v. *Peel County Board of Education* (1981), 37 N.R. 227 (S.C.C.); Hoyano, L., "The Prudent Parent: The Elusive Standard of Care" (1984), 18 U.B.C.L.R. 1; *Jerabek* v. *Accueil Vert-Pre d'Huberdeau* (1995), 26 C.C.L.T. (2d) 208 (C.S. Que.); Kouri, P., "The Liability of Legal Persons Entrusted with the Custody, Supervision or Education of Minors" (1995), 27 C.C.L.T. (2d) 234. There are often legislative obstacles to recovery when the supervision is provided by government. For example, in *MacAlpine* v. *H(T.)*, [1991] 5 W.W.R. 699 (B.C.C.A.) two youths, who were permanent wards of the superintendent of family and child services for the province of British Columbia had been placed in the care of a "special care parent". When they destroyed some property and started a fire an action was taken against the superintendent and the special care parent. The action against the special care parent was dismissed on the basis that he had not been negligent in his supervision of the boys. The action against the superintendent was dismissed due to an immunity provision found in section 23 of the *Family and Child Service Act*, S.B.C. 1980, c. 11. The legislation provided that no person was liable for anything done or omitted in good faith. In a dissenting opinion Wallace J.A. would have extended the protection of the legislative immunity to the special care parent as well.

[35] "The rule in tort is that the party who alleges a fact has the burden of proving it. Thus, in the context of the negligence action, the plaintiff has to prove all of the factual requirements necessary to support the cause of action, namely, that the plaintiff was a reasonably foreseeable victim, the defendant's conduct was negligent, the plaintiff suffered compensable injury, and this injury was caused by the defendant's negligence...In order to discharge the civil burden of proof, the party alleging facts must prove them on the balance of probabilities, or on the preponderance of the evidence." Klar, *supra* note 9 at 407-08.

[36] Section 68 of the *Family Law Act*, R.S.O. 1990, c. F-3 states:

> 68. In an action against a parent for damage to property or for personal injury or death caused by the fault or neglect of a child who is a minor, the onus of establishing that the parent exercised reasonable supervision and control over the child rests with the parent.
>
> Quaere whether the reverse onus would operate in the case of a very young child who lacked the capacity for "fault or neglect."

[37] Wilson and Tomlinson, *supra* note 19 at 301. Cases in which parents were held liable on the basis that there was a "known propensity" of a child toward personal or property damage include *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214 (C.A.); *Black* v. *Hunter*, [1925] 4 D.L.R. 285 (Sask. C.A.); *Ellis* v. *D'Angelo* (1953), 253 P. 2d. 675 (Calif.); *Bishop* v. *Sharrow* (1975), 8 O.R. (2d) 649 (H.C.J.); *Michaud* v. *Dupuis* (1977), 20 N.B.R. (2d) 305 (Q.B.); *Segstro* v. *McLean*, [1990] B.C.J. No. 2477 (S.C.). In some cases the absence of a known propensity is a key factor in a finding of no responsibility on the part of a parent. See *Corby* v. *Foster* (1913), 13 D.L.R. 664 (Ont. C.A.); *Streifel* v. *Strotz* (1957), 11 D.L.R. (2d) 667 (B.C.S.C.); *Taylor* v. *King*, [1993] 8 W.W.R. 92 (B.C.C.A.); *Trevison* v. *Springman*, [1997] B.C.J. No. 2557 (C.A.).

Most parents, and probably their neighbours as well, are likely to agree with the suggestion that younger children are active, unpredictable, and have certain inherent propensities to cause damage to themselves and others. Accordingly, since parents are in the best position to exercise supervision and control, the common law imposes an obligation on them to do so. Knowledge of the inherent propensity to cause damage is imputed to parents. Thus, parents can not escape liability simply by proving that the child had never done that sort of thing before, or that if they had, the parent did not in fact know about it.[38]

As children grow older the parental duty to supervise and control diminishes. This follows from the view that as the child grows older, so also do expectations that the child will conform to adult standards of behaviour.[39] Further, as children grow older there are also fewer situations in which parents have the ability to control them.[40] However, depending upon the dangerous nature of the activity, and given the fact that older children have the ability and opportunity to inflict greater injury, in many cases a very high standard of parental supervision should be required. Cases involving motorized vehicles, firearms and flammable materials are obvious examples.[41] In one case, due to the extremely dangerous nature of the activity (using a torch to cut apart a car) a father was held responsible for

[38] Alexander, *supra* note 5 at 864-65. The author cites *Carmarthenshire County Council* v. *Lewis*, [1955] A.C. 549 (H.L.) as authority for this proposition. He notes that although the case involved a teacher and a nursery school, their duty was equated to that of a careful mother. I have been unable to find a more current or clear judicial statement to the effect that knowledge of inherent propensity to cause damage is imputed to the parents of younger children. In *Edwards* v. *Smith*, [1941] 1 D.L.R. 736, 745 (B.C.C.A.) per O'Halloran J.A., a case involving an 11 year old boy using a spring gun the Court noted that children are curious, mischievous and that "the ordinary nature of boys cannot be ignored."

[39] Wilson, *supra* note 19 at 301. See *File* v. *Unger* (1900), 27 A.R. 468 (C.A.); *Bobby* v. *Chodiker*, [1928] 3 W.W.R. 392 (Man. K.B.); *Hook* v. *Davies*, [1939] 1 W.W.R. 539 (B.C.S.C.); *Alain* v. *Hardy*, [1951] S.C.R. 540: *Lelarge* v. *Blakney* (1978), 92 D.L.R. (3d) 440 (N.B.S.C.).

[40] Alexander, *supra* note 5 at 867.

[41] *Black* v. *Hunter*, [1925] 4 D.L.R. 285 (Sask. C.A.) (a nine year old using a gun); *Lochlin* v. *West* (1927), 32 O.W.N. 19 (C.A.)(a two, four and six year old playing with matches); *Kennedy* v. *Hanes*, [1940] 3 D.L.R. 499 (Ont. C.A.) (a sixteen year old using an air gun); *Edwards* v. *Smith*, [1941] 1 D.L.R. 736 (B.C.C.A.)(an eleven year old using a spring gun); *Starr and McNulty* v. *Crone*, [1950] 4 D.L.R. 433 (B.C.S.C.) (a fourteen year old shooting an air rifle); *Ryan* v. *Hickson* (1974), 7 O.R. (2d) 352 (H.C.J.) (a twelve year old snowmobiler); *School Division of Assiniboine South No. 3* v. *Hoffer* (1971),21 D.L.R. (3d) 608 (Man. C.A.)(a fourteen year old snowmobiler); *Ingram* v. *Lowe* (1974), 55 D.L.R. (3d) 292 (Alta. C.A.) (a nine year old firing a pellet gun); *Bishop* v. *Sharrow* (1975), 8 O.R. (2d) 649 (H.C.J.)(a fifteen year old shooting a gun); *Floyd* v. *Bowers* (1978), 21 O.R. (2d) 204 (H.C.J.) (a thirteen year old shooting a gun); *Belzile* v. *Dumais* (1986), 69 N.B.R. (2d) 142 (N.B.Q.B.) (a twelve year old staring a fire with improperly stored gasoline); *Laplante (Guardian ad litem of)* v. *Laplante* (1992), 93 D.L.R. (4th) 249 (B.C.S.C.)(a sixteen year old driving a car).

the damage caused by his twenty year old son.[42] On the other hand there are many cases where despite the dangerous nature of the activity parents have been exonerated on the basis that the instruction and/or supervision provided was reasonable in the circumstances.[43]

Imposition of an arbitrary maximum age ending parental responsibility seems ill advised. On the other hand, it has been suggested that when children reach the age of seventeen or eighteen and are judged by the adult standard of negligence the parental duty to use reasonable care to supervise and control an adolescent should cease.[44]

When the issue of parental responsibility arises, particularly in the case of younger children, there is a question as to whether liability should always fall on both parents. Professor Alexander has argued that the parent having the ability to control the child in the particular situation should bear the duty. He concludes that since the mother has been historically in the best position to supervise and control the conduct of a young child, in most cases, only the mother should be legally responsible for a failure to use reasonable care to do so. On the other hand, improper firearms instruction would usually indicate a failure on the part of a father.[45] It is important to remember that these comments were made more than twenty-five years ago when the roles and responsibilities of mothers and fathers were defined somewhat differently than they are today. It would be a mistake to assume that only mothers supervise younger children and that only fathers teach hunting and fishing skills. Professor Alexander is entirely correct in suggesting that an action should be brought against only one parent when only one parent is negligent. A non-negligent parent can not be held responsible simply on the basis of family relationship.

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[42] *Pasheri* v. *Beharriell* (1987), 61 O.R. (2d) 183 (Div. Ct.).

[43] *Montesanto* v. *DiUbaldo* (1927), 60 O.L.R. 610 (C.A.)(a fifteen year old firing a gun); *Heath* v. *Green*, [1941] 1 W.W.R. 601 (Sask. K.B.)(a fifteen year old shooting a rifle); *Schmidt* v. *Munch*, [1947] 3 D.L.R. 499 (Ont. C.A.)(a nine year old shooting an arrow); *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232 (B.C.S.C.)(a five year old shooting an arrow); *Hatfield* v. *Pearson* (1956), 6 D.L.R. (2d) 593 (B.C.C.A.)(a thirteen year old using a gun); *Streifel* v. *Strotz* (1957), 11 D.L.R. (2d) 667 (B.C.S.C.)(a fourteen and a fifteen year old stealing a car); *Patterson* v. *Hardy* (1967), 62 W.W.R. 219 (Sask. Q.B.)(a ten year old shooting a BB gun); *Pollock* v. *Lipkowitz* (1970), 17 D.L.R. (3d) 766 (Man. Q.B.)(a thirteen year old throwing acid on another child); *Delowsky* v. *Aiello* (1980), 119 D.L.R. (3d) 240 (B.C.S.C.)(an eleven year old shooting a pellet gun); *Strehlke* v. *Camenzind*, [1980] 4W.W.R. 464 (Alta. C.A.)(a six and eight year old playing with matches); *Christie* v. *Slevinski* (1981), 12 M.V.R. 67 (Alta. C.A.)(an eleven year old driving a dune buggy); *Chaisson* v. *Hebert* (1986), 74 N.B.R. (2d) 105 (Q.B.)(a thirteen year old driving a three wheel motorcycle); *Lutley* v. *Jarvis* (1992), 113 N.S.R. (2d) 201 (N.S.S.C.)(a twelve year old riding a motor bike); *Taylor* v. *King*, [1993] 8 W.W.R. 92 (B.C.C.A.)(a nine year old playing with matches).

[44] Alexander, *supra* note 5 at 870.

[45] *Ibid.* at 870-71.

(c) *Contract Law*

Before moving to a discussion of the criminal responsibility of parents for the acts of children, two other areas of potential liability should be noted. First there are some limited circumstances in which parents may be held accountable for debts assumed by their children.

With certain exceptions the common law provides that contracts entered into by children are voidable at the instance of the child.[46] The exceptions include contracts for necessaries and contracts of service and employment.[47] These contracts, if beneficial to the child, will be seen as prima facie binding upon the child.[48] Young people may also enter contracts of apprenticeship, contracts of marriage, separation or paternity agreements and contracts which allow them to place their own children for the purpose of adoption or with a Children's Aid Society.[49]

Parental responsibility may arise in the context of a contract for necessaries. In general when a parent has given no authority and has not entered into a contract, the parent will not be liable for a debt contracted by a child, even for necessaries. On the other hand, the near relationship between parent and child, with knowledge on the parent's part of a liability being incurred, furnishes presumption of approbation unless the contrary is shown.[50] However, pursuant to legislation in Ontario, where a person is entitled to recover against a minor in respect of the provision of necessaries for the minor, parents who have an obligation to support the minor are jointly and severally liable with the minor. Where parents are jointly and severally liable under this provision their liability

[46] Wilson, J., *supra* note 19 at 276. At 276-77 the authors add: "Certain contracts are voidable in the sense that they are valid and binding upon all parties unless the child repudiates them before, or within a reasonable time after, the attainment of his majority. Other contracts are voidable in the sense that they are not binding upon the child unless ratified by him when he reaches the age of majority."

[47] *Ibid.* at 278-80. See also *Canadian Encyclopedic Digest*, Third Edition, Ontario, Volume 16, *Infants and Children*, at 106-07. At 278 Wilson and Tomlinson note: "Under common law, necessaries have been held to be those things which the child requires for his living, health and education and any ancillary items a child would be expected to require in order to secure his necessaries. Note that the term 'necessaries' is a relative expression to be construed with reference to the child's age, needs and standard of living."

[48] *Ibid.* With regard to contracts of service or employment the authors note, at 279: "In determining whether the contract is for the benefit of the child, the court will look upon the terms of the contract, comparing them with the terms generally used by employers in the field of trade in which the child is to be engaged, and whether the terms of the contract will allow protection to the child, the opportunity for secure employment, the means for maintaining himself, and whether the contract provides fair compensation for the child's services." They also note, at 277 that "If a contract is found to be detrimental to the interests of the child, a court will find it to be void ab initio even if it is a contract for necessaries of life. That is, it is invalid from the outset and neither of the parties can sue one another on the basis of its terms."

[49] *Ibid.* at 280-81.

[50] *Canadian Encyclopedic Digest*, *supra* note 47 at 106.

to each other will be determined in accordance with their obligation to provide support.[51]

(d) *Human Rights Legislation*

The use of human rights legislation creates an alternative and innovative approach to providing compensation for injury caused by children. In *Guzman* v. *T.*[52] the complainant was a female domestic worker whose responsibilities included the care of the respondents' two teenage sons, aged thirteen and fifteen. She alleged that the thirteen year old boy had sexually harassed her for a period of three months causing her to terminate her employment. The boy was not named as a respondent. Rather, the complainant maintained that the parents were liable for the alleged harassment.

The Council of Human Rights found that the conduct to which the boy subjected the complainant constituted sexual harassment and was contrary to section 8 of the *Human Rights Act*.[53] The boy was found to have engaged in a number of bizarre, and in some cases, quite threatening behaviours. The parents minimalized the boy's conduct. He was told to discontinue but there was no effort to seek professional help. At one point, despite their knowledge of his behaviour, the parents left the country for several weeks. The Council found that given the persistent and aberrant nature of the conduct the parents response was inadequate and ineffectual. They had failed to provide the complainant with a healthy work environment.[54]

In reaching this decision the Council indicated that they were unaware of any human rights cases which had found parental liability for the acts of a child in an

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[51] *Family Law Act*, R.S.O. 1990, c. F-3, ss. 45(2), 45(3). Although the legislation uses the word "necessities" rather than "necessaries" there is no indiction this was intended to alter the scope of the legislation. In a comment on this legislation Hainsworth, T.W., *Ontario Family Law Act Manual*, second edition (Canada Law Book, 1998), at 45-2 states: "It must be remembered that by virtue of the extended definition of `parent' contained in s. 1(1) a minor could have several parents by virtue of the `settled intention' test...if there is no obligation to provide support by a parent by reason of the operation of s. 31(2) it would appear that the parent could seek full indemnity from the child, Where more than one parent would be jointly and severally liable, some form of proportional contribution in accordance with the test established in *Paras* v. *Paras*, [1971] 1 O.R. 130, 2 R.F.L. 328 (C.A.) would have to be applied." Section 31(2) provides that parents have no obligation to provide support to young persons who have reached the age of sixteen or who have removed themselves from parental control.

[52] *Guzman* v. *T.*, [1997] B.C.H.R.T.D. No. 1 (B.C. Council of Human Rights).

[53] *Guzman* v. *T.*, [1997] B.C.H.R.T.D. No. 1 (B.C. Council of Human Rights) at para. 66. Section 8 of the *Human Rights Act*, S.B.C. 1984, c. 22 provided that no person shall discriminate against a person with respect to employment or any term or condition of employment, because of the sex of that person. At para. 38 of the decision the Council cited *Janzen* v. *Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.) for the principle that sexual harassment is a form of discrimination on the basis of sex.

[54] *Guzman* v. *T.*, [1997] B.C.H.R.D.T. No. 1 at para. 87.

employment context. However, the Council went on to hold that case law relating to claims that parents are liable for the tortious conduct of their children supported the view that such a finding should be made in an appropriate human rights case.[55]

In the result, having determined that the respondents were liable for the sexual harassment of the complainant by their son the Council issued a cease and desist order. They also awarded damages of $6,500 for injury to her feelings, dignity and self-respect, and a further $1,053.62 for lost wages.[56]

II. *Criminal Responsibility*

This section of the paper will examine the issue of criminal responsibility of parents for the acts of their children by tracing developments from the *Juvenile Delinquents Act* to the *Young Offenders Act* and its proposed replacement, the *Youth Criminal Justice Act*. The potential for prosecution under the *Criminal Code* is also discussed. It will be suggested that in some circumstances criminal prosecutions against parents are available and warranted and can provide an effective response to harm caused by their children.

(a) *Juvenile Delinquents Act*

Prior to its repeal in 1984 the *Juvenile Delinquents Act*[57] imposed criminal liability on parents in a variety of circumstances. Section 20(2) of the *Act* provided that where a child was adjudged to be a juvenile delinquent the Court had the power to make an order upon the parent or parents of the child to contribute to the child's support "such sum as the court may determine".[58] The Court also had the power to order that a fine, damages or costs awarded be paid by the parent or guardian of the child, instead of by the child, where the Court was satisfied that the parent or guardian had conduced to the commission of the offence by neglecting to exercise due care.[59]

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[55] *Guzman* v. *T.*, [1997] B.C.H.R.D.T. No. 1 (B.C. Council of Human Rights) at para. 106. At para. 125 the Council added: "In summary, while employer-employee relationships differ from parent-child relationships with respect to liability in that parents cannot exercise the ultimate measure of control over their children which employers can, namely 'firing' their children for discriminatory conduct, I am of the view that the principles relevant to the determination of employer liability apply to the unique situation of a child's discriminatory conduct toward a parent's employee. These principles are (a) the employer's control over its employees, (b) its knowledge of the impugned conduct and (c) the sufficiency of its response in remedying the discriminatory situation. In short, I am of the view that the case law permits a human rights tribunal, on appropriate evidence, to find parents liable for discrimination by their child against their employee."

[56] *Guzman* v. *T.*, [1997] B.C.H.R.T. No 1 (B.C. Council of Human Rights) at paras. 125, 126, 141 and 145.

[57] *Juvenile Delinquent Act*, R.S.C. 1970, C. J-3.

[58] *Juvenile Delinquent's Act*, R.S.C. 1970, c. J-3, s. 20(2).

[59] *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 22.

Clearly the most controversial provision in the *Juvenile Delinquents Act* relating to jurisdiction over adults involved the offence of contributing to delinquency. Section 33 of the *Act* stated that any person who knowingly and wilfully aided, caused, abetted or connived at the commission by a child of a delinquency, or did any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent was liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years, or to both. A parent or guardian who knowingly neglected to do that which would directly tend to prevent the child being or becoming a juvenile delinquent or to remove the conditions that rendered or were likely to render the child a juvenile delinquent was similarly liable. Further, it was not a valid defence either that the child was of too tender years to understand or appreciate the nature or effect of the conduct of the accused, or that notwithstanding the conduct of the accused the child did not in fact become a juvenile delinquent.[60]

Under this incredibly vague definition of prohibited conduct the courts attempted, often successfully, to encompass a broad range of activities including sexual activities with a juvenile, sexual activities between adults in the presence of juveniles, living in adultery, indecent exposure, rape and sexual assaults, eloping with a juvenile for the purpose of marriage, supplying intoxicants to juveniles and their families, being present in a place where juveniles were consuming intoxicants, receiving stolen goods from a juvenile and contributing or conniving to such matters as speeding violations and accidental shootings.[61] In one case the impugned conduct involved family bathing in the nude.[62]

(b) *The Young Offenders Act - The Youth Criminal Justice Act*

The *Young Offenders Act*[63], which came into force on April 2, 1984 virtually eliminated the youth court's jurisdiction over adults.[64] The offence of contributing to delinquency was not included in the legislation and there was no authority to order parents to contribute to the child's support. Further, apart from

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[60] *Juvenile Delinquents Act*, R.S.C. 1970, C. J-3, s. 33.

[61] For a complete list of authorities corresponding to the various activities see Wilson, L., *Juvenile Courts in Canada* (Toronto: Carswell, 1982) at 137-38.

[62] *Re Strom*, [1930] 1 W.W.R. 878 (Man. K.B.).

[63] *Young Offenders Act*, R.S.C. 1985, c. Y-1.

[64] "The *Young Offenders Act*, in many respects, recognizes the important role that parents play in the lives of young persons. Parents are required to be notified when the youth is charged under the act, have a role to play in respect of the taking of a statement from a youth and may provide input when the court makes determinations regarding the young person. However, while parents have responsibility for the `care and supervision of their children' they are not, under the *Young Offenders Act*, responsible for the crimes committed by their children and they cannot, under the Act, be ordered to compensate victims of these crimes or to otherwise be sentenced for the crimes committed by their children." Platt, P., *Young Offenders Law in Canada*, 2nd ed. (Butterworths, 1995) at 32.

situations where parents wilfully induced or assisted a young person to breach a court order, they could not be fined or otherwise held responsible for the acts of their children.[65] The *Youth Criminal Justice Act*, which received first reading in the House of Commons on October 14, 1999 continues this approach.[66]

The fact that the youth court can not order parents to make financial restitution for the acts of their children precipitated an interesting attempt to end run the legislation in the mid 1990's. Department stores began to send letters to parents of young shoplifters seeking compensation for the incremental costs associated with shoplifting such as employing security staff and surveillance equipment.[67] In *B.(D.C.)* v. *Arkin*[68], following such a request, which included a threat of legal action, the boy's mother sent a cheque for $225 to the company. She honestly and mistakenly believed she was required to make such payment. The shoplifted goods themselves, which were returned undamaged, were worth less than $60. The mother subsequently launched an action in small claims court to recover the money. She was successful. The Court noted the general rule that parents are not liable for the torts of their children simply by virtue of their status as parents. Although parents can be held responsible based on their own negligent conduct there was no evidence to suggest negligence in this particular case.[69] Jewers J. also indicated that had the company actually taken the matter to court "...the claim had no prospect whatsoever of succeeding."[70] Accordingly, the Court ruled that the plaintiff was entitled to a refund on the ground of monies paid under a mistake.

In terms of parental responsibility, the proposed replacement for the *Young Offenders Act* does contain one important addition. At the present time, there is a considerable divergence of opinion as to whether young people have, or should have, the right to publicly funded legal counsel regardless of their

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[65] Under s. 50 of the *Young Offenders Act*, R.S.C. 1985, c. Y-1 it is an offence to wilfully induce or assist a young person to breach or disobey a term or condition of a disposition. The offence can be prosecuted summarily or by indictment in which case the accused is liable to imprisonment for a term not exceeding two years. Section 7.2 of the *Young Offenders Act* creates a summary conviction offence for any person who wilfully fails to comply with an undertaking to abide by such conditions as the youth court justice may specify as part of an order placing a young person in the care of a responsible person rather than detaining them in custody.

[66] *Youth Criminal Justice Act*, Bill C-3, Second Session, Thirty-Sixth Parliament, 48 Elizabeth II, 1999, First Reading, October 14 1999, sections 135, 138. Under section 138 the penalty for wilful failure to comply with an undertaking has been increased to include possible prosecution as an indictable offence with a maximum penalty of two years. The suggestion in the media that these provisions in the new proposed legislation represent a dramatic change in direction is simply not the case. See "New youth law to crack down on offenders - and parents", *Toronto Star* (7 March 1999) A8 and "Law would toughen youth justice", *Globe and Mail* (8 March 1999) A7.

[67] Bala, N., *Young Offenders Law* (Irwin Law, 1997) at 54.

[68] *B.(D.C.)* v. *Arkin* [1996] 8 W.W.R. 100 (Man. Q.B.); leave to appeal refused [1996] 10 W.W.R. 689 (Man. C.A.).

[69] *B.(D.C.)* v. *Arkin* [1996] 8 W.W.R. 100, 104 (Man. Q.B.) per Jewers J.

[70] *Ibid.*

parent's financial status.[71] The *Youth Criminal Justice Act* provides that the provinces will be able to establish programs to recover the costs of a young person's counsel from the young person or the parents of the young person.[72]

(c) *The Criminal Code*

Canadian courts have steadfastly resisted attempts to incorporate the concept of vicarious responsibility into Canadian criminal law.[73] However, the *Criminal Code* does create a few opportunities for parental responsibility. Parents can be charged as parties to an offence if they aid, abet, or counsel the commission of an offence by their children.[74] This includes situations where because of age the child, himself or herself, can not be charged.[75] It has been suggested that these provisions are not applicable to circumstances of general parental neglect to supervise or control a child. Such failure could not be construed as encouraging an offence. Rather, the parent's actions must relate directly to and be intended to encourage the commission of the offence.[76]

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[71] Bala, N., *supra* note 67 at 173-74. See "Parents role in youth court debated", *Globe and Mail* (13 August 1998) A10 for a comment on the debate in the province of Ontario. In a recent decision *R.* v. *M.(B.)* (1999), 28 C.R. (5th) the Ontario Court of Appeal examined earlier conflicting decisions and ruled that youth court judges must consider parental means before deciding whether or not to direct that a youth receive state funded counsel. Professor Bala is critical of the decision and notes that although there is a call for "some enquiry" the Court acknowledges that there is no legal authority to require parents to pay for counsel for their children. See Bala, N. "Trying to Make Parents Pay for Their Children's Lawyers", (1999) 28 C.R. (5th) 140. See also *C.(S.T.)* v. *R.* (1993), 81 C.C.C. (3d) 407 (Alta. Q.B.); *R.* v. *C.R* (1998), 18 C.R. (5th) 313 (Ont. Prov. Ct.); *R.* v. *M(B.)* (1998), 18 C.R. (5th) 319 (Ont. Prov. Ct.) and Anand, S., "Does the Staff Model Offer a Solution to the Issue of Court Ordered Youth Legal Aid?" (1998) 18 C.R. (5th) 328.

[72] *Youth Criminal Justice Act*, Bill C-3, Second Session, Thirty-Sixth Parliament, 48 Elizabeth II, 1999, First Reading (14 October 1999). Section 25(10).

[73] "A doctrine of vicarious responsibility makes A automatically responsible for the wrongdoing of B solely on the basis of a prior relationship and irrespective of A's act or fault.....Given that the most fundamental consideration of modern substantive criminal law theory is that the criminal sanction should only be imposed on the basis of individual conduct and fault, the notion of vicarious responsibility seems ill-suited for criminal law.....In sum, the fundamental principles of an individual act and individual fault militate against the use of vicarious responsibility in the criminal law. Our courts are becoming increasingly resistant to the doctrine even when it is resorted to by a legislature." Stuart, D., *Canadian Criminal Law* 3d ed. (Toronto: Carswell, 1995) at 569-75. The author cites several decisions which have rejected the use of vicarious responsibility. They include *Canadian Dredge and Dock Company* v. *R.*, [1985] 1 S.C.R. 662; *Bhatnager* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217; *R.* v. *Stevanovich* (1983), 36 C.R. (3d) 174 (Ont. C.A.) and *R.* v. *Burt* (1987), 60 C.R. (3d) 372 (Sask. C.A.).

[74] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 21, 22.

[75] *Criminal Code*, R.S.C. 1985, c. C-46, s. 23.1.

[76] Report of the Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 478. The authors add: "Even if a parent knew his adolescent child was about to commit an offence and took no action, the parent could not be charged with omitting to do anything for the purpose of aiding an offence because there is no statutory or common law duty for a parent to act in these circumstances."

The offence of criminal negligence may be an appropriate charge in some limited circumstances. The *Code* provides for offences of criminal negligence causing death and criminal negligence causing bodily harm.[77] Despite a considerable amount of confusion it now appears that the Supreme Court of Canada will use an objective test to establish criminal negligence. An accused will be seen to have been criminally negligent if their conduct demonstrates a marked and substantial departure from that which we would expect of a reasonable person.[78]

A recent case from Manitoba provides an example of alleged parental criminal negligence. An eight year old boy shot and killed his thirteen year old cousin who was babysitting him. Police found four rifles and shotguns stored illegally in the house. Two weapons had illegally sawed off barrels. They also found a considerable amount of easily accessible ammunition. The stepfather and mother of the boy were charged with possession of a prohibited weapon and causing death by criminal negligence. Ultimately the accused pleaded guilty to the weapons charges and the charge of criminal negligence causing death was stayed.[79]

A very similar case arose in Alberta. Two boys, aged thirteen and eleven, along with three other minors, had been left unsupervised by adults in a home which a youth court judge described as "a veritable arsenal of guns, ammunition and knives." The boys were playing with the guns and the thirteen year old unintentionally shot and killed the younger boy. The youth was found guilty of manslaughter. Despite a great deal of public criticism there were no charges, not even weapons charges, brought against the parents of the young offender. This was particularly surprising since the Youth Court Judge noted that police evidence showed that at least three guns and a large supply of ammunition were not properly secured.[80]

Charges of criminal negligence in cases of commission such as in the examples above should not present insurmountable problems for the Crown. Where parental conduct creates a situation of danger culminating in physical injury or death, and such conduct demonstrates a marked and substantial departure from reasonable conduct, a guilty verdict should follow.[81] A parent who leaves weapons, toxic or

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[77] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 220, 221. "Criminal negligence" is defined in s. 219.

[78] See *R.* v. *Tutton* (1989), 69 C.R. (3d) 289 (S.C.C.); *R.* v. *Waite* (1989), 69 C.R. (3d) 323 (S.C.C.); *R.* v. *Anderson* (1990), 75 C.R. (3d) 50 (S.C.C.). See also *R.* v. *Nelson* (1990), 75 C.R. (3d) 70 (Ont. C.A.): *R.* v. *Ubhi* (1994), 27 C.R. (4th) 332 (B.C.C.A.); Stuart, D., *supra* note 73 at 231-36; Stuart D., "Criminal Negligence: Deadlock and Confusion in the Supreme Court" (1989), 69 C.R. (3d) 331 and Healy, P., "Anderson: Marking Time or a Step Back on Criminal Negligence" (1990) 75 C.R. (3d) 58.

[79] *Globe and Mail* (26 November 1996) D11, (18 December 1996) A4 and (9 June 1997) A4.

[80] "A show of ultimate machoism", *National Post* (16 September 1999) A3.

[81] This approach is suggested by the case of *R.* v. *Miller*, [1983] A.C. 161 (H.L.). See the discussion in Stuart, *supra* note 73 at 82 and Ziff, B., "A Comment on *R.* v. *Miller*" (1984) 22 Alta. L.R. 281.

corrosive chemicals, and perhaps even car keys, within easy reach of children should be held both civilly and criminally responsible.

The question of criminal responsibility becomes much more difficult when an omission is involved. Under general criminal law theory an accused will only be held responsible for a failure to act when there is a duty to act. Such duties may be created by statute or at common law.[82] In the context of the current discussion the issue will be, for the purposes of establishing criminal responsibility, what obligations of affirmative action are properly imposed upon parents.

It seems almost beyond debate that parents will not be held to have a broad general obligation to be perfect, or even good parents, the failure of which could result in criminal prosecution. Rather, assuming a demonstrated causal link, it is suggested that an "egregious circumstance of parental omission" could form the basis for a prosecution.[83] For example, if the child had a known, and perhaps even recently demonstrated propensity for violence, an appropriate parental response should be required.

It has been suggested that a negligence offence of this nature may represent an undue state interference into the privacy and integrity of the family, and of parent-child relations. For example, in some cases parents would be expected to report their concerns about pending violence to law enforcement authorities. This would create a rather obvious tension between parent and child. It has also been suggested that some parents, knowing they could be held criminally liable for the actions of their children, would compound the problem by asking their children to leave home.[84] The counter argument asks us to weigh the competing values, the privacy of parent-child relations and a compelling public interest in preventing serious harm to other persons, including other children who comprise a substantial proportion of the victims of violent crime by young offenders. It is suggested that the protection of other vulnerable persons justifies the intrusion into family relations.[85]

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[82] There is an ongoing debate as to whether a criminal omission can be bases on a non-criminal duty. Following its decision in *R.* v. *Thornton* (1993), 21 C.R. (4th) 215 (S.C.C.) the Supreme Court of Canada "may" be on the verge of creating a general duty to act when the failure to do so foreseeably creates the risk of bodily injury or death. See Stuart, D., *supra* note 73 at 85-93.

[83] This phrase is taken from the Report of the Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 485. At 484, the Task Force identified a long list of elements that need to be satisfied to make out a valid negligence offence: "avoidance of vagueness and over-inclusiveness; a statutory duty of care which provides clear and fair notice of the standard of care (behaviour) expected; knowledge (or foresee ability) by the accused; the capacity of the accused to act and to appreciate the risk; wanton or reckless disregard; a causative link between the harm done and the negligence (causation); and proof of conduct (or failure to act) which reveals a marked and substantial departure from what would be expected of a reasonably prudent person in the circumstances." These elements are more properly described as proposed inclusions advanced in a series of conflicting judgments. See Stuart, *supra* note 73 at 231-36.

[84] Report of the Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 485-86.

[85] *Ibid.* at 487. Ultimately the Task Force supported the status quo and recommended against the creation of a new parental negligence based offence.

It may be possible to avoid the difficult task of establishing criminal negligence based on an omission. This can be accomplished by characterizing the act as one of commission on the basis that there was an initial positive act and the conduct should be viewed as continuous.[86] Thus, the failure to act as a good parent would be characterized as a positive act of bad parenting. If the conduct showed a sufficient level of marked and substantial departure it could form the basis for a charge of criminal negligence.

This approach could be argued in a recent and highly publicized case from Alberta. A five year old was struck and killed by a van while riding his bike. His parents have been charged with criminal negligence causing death on the basis that they let the child ride his bike without proper supervision. Apparently the child had almost been hit on several other occasions and the police had warned the parents to provide better supervision.[87] This case has been compared with the case a few months earlier, also from Alberta and described above, where no charges were laid after a thirteen year old boy shot and killed an eleven year old in a home where the children were unsupervised and guns were available. The case is further complicated by allegations of racism. The parents in this case are aboriginal and the parents in the earlier case involving the use of guns were white.[88]

In trying to hold parents criminally responsible for the acts of their children far more convoluted options may be available. For example, section 215 of the *Code* creates a legal duty on parents to provide necessaries of life for a child under the age of sixteen years.[89] Could it be argued that the failure to provide proper supervision, culminating in death or injury inflicted by the child, and subsequently leading to state intervention and removal of the child to a custodial facility, constitutes a failure to provide necessaries to the child? If so, and if the failure to fulfil the duty shows a marked and substantial departure, can a conviction for criminal negligence be maintained?

Rather than stretching basic principles to the breaking point it is clearly time to think carefully about options for reform.[90] One such option would involve

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[86] Stuart, *supra* note 73 at 81. *Fagan* v. *Commissioner of Metropolitan Police*, [1969] 1 Q.B. 439 (C.A.) is cited as an example.

[87] "Albertans charged in son's death", *Globe and Mail* (20 September 1999) A3.

[88] See the text which accompanies footnote 80. See "Alberta parents charged with negligence in son's bike death", *National Post* (20 September 1999); "Parents charged in boy's death question motive", *National Post* (21 September 1999) A4 and "Criminal charges in son's cycling death creating controversy", *Globe and Mail* (25 September 1999) A3.

[89] *Criminal Code*, R.S.C. 1985, c. C- 46, s. 215.

[90] Professor Stuart has been the leading voice calling for an overhaul of the law in this area: "The time has come for a forthright and radical change of policy. We must recognize that criminal responsibility for omissions is already quite widespread and legitimate. The major concerns are inconsistencies, anomalies and unacceptable vagueness as to when such responsibility arises. The key principle of legality militates against the existence of any criminal responsibility in Canada which is not clearly enunciated in a statute. However, we have seen that our courts now clearly recognize that the source of legal duties can be found in the common law." Stuart, *supra* note 73 at 92. His discussion of the ever expanding concept of "necessaries" can be found at 88-90.

the creation of "good samaritan" legislation which would require citizens, including parents, to act (or at least notify authorities) when they become aware of danger to others.[91] Thus, parents who found their children making bombs or preparing a cache of weapons in the basement would be expected to call the police. A far more difficult situation arises when parents have simply overheard conversations which included vague threats of physical violence to classmates.[92] A "reasonable person" test is likely to become the standard by which we measure the failure to act.

III. *Legislating Parental Responsibility*

As noted earlier, at common law, parents are neither strictly nor vicariously liable for damage or injury caused by their children. There are exceptions created by legislation. For example, under provincial legislation parents are held responsible for a child's negligence when the child is driving the family car.[93] Another example is provided by legislation in some provinces which provides that a pupil and his or her parents are jointly and severally liable for damage to school property caused by the intentional or negligent act of the pupil.[94] In a recent case, *Coquitlam School District No. 43* v. *Clement*[95] several young people started a fire on school property which ultimately caused over $3 million dollars in damage. The British Columbia Court of Appeal found the students and the students' parents jointly and severally liable but did express some serious reservations about that province's legislation:

> The section has the capacity to inflict upon parents, by imposing liability quite irrespective of fault on their part, a harsh and perhaps unjust burden of potentially ruinous dimensions. In this case damages of some $3 million are alleged. These, however, are matters for the legislature. It may be that the legislature will consider whether the section now serves a social purpose sufficient to justify the hardships which it can create.[96]

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[91] Wilson, L., "The Defence of Others - Criminal Law and the Good Samaritan" (1988) 33 McGill Law Review 756.

[92] On April 20, 1999 two young gunmen, aged eighteen and seventeen, staged a tightly choreographed assault on their own school in a suburb of Denver, Colorado. They entered the school with more than thirty homemade bombs and four guns, killing twelve fellow students, a teacher and themselves. They injured twenty three others. It has been suggested that their parents had some knowledge of their plans and should be prosecuted. How much they knew and how much they should be required to know before assuming an obligation to notify authorities will be key issues if, in fact, the matter is ever prosecuted. See *Globe and Mail*, "Parents of gunmen could face charges", (26 April 1999) A14 and *Globe and Mail*, "Blaming parents misguided, experts say", (27 April 1999).

[93] *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192.

[94] *School Act*, S.A. 1988, c. S-3.1, s. 11(1)(a). In a comment on this section the *Canadian Encyclopedic Digest*, *supra* note 47 at 132 states, incorrectly it would seem, that this provision "merely codifies the vicarious liability of parents at common law for the negligent acts of their children."

[95] *Coquitlam School District No. 43* v. *Clement* [1999] B.C.J. No. 301 (B.C.C.A.) The legislation under consideration was section 10 of the *School Act*, R.S.B.C. 1996, c. 412.

[96] *Coquitlam School District No. 43* v. *Clement*, [1999] B.C.J. No. 301, p. 12 (B.C.C.A.) per Esson J.

The province was quick to respond to these comments. The day after the judgement was released a government spokesperson indicated that given the increasing incidence of vandalism with its attendant cost to taxpayers there was no intention to repeal or alter the legislation. It was noted that between 1992 and 1996 the province had recovered more than $700,000 from parents.[97]

In recent years there has been a growing interest in much more broadly based legislative initiatives. Much of this interest has been sparked by the fascination of some Canadian legislators with all things American. In the United States all states have statutes making it a crime for parents to contribute to the delinquency of their children. In addition, as at the end of 1998, thirteen states have enacted statutes making parents criminally responsible for failing to supervise their children who commit delinquent acts. Twenty three states have statutes making parents responsible for restitution in cases of loss or damage caused by their children and in nearly all states the parents of a delinquent minor can be held liable for the costs of confinement and/or services provided their children. These can include such things as the child's support while in an institution, the costs of probation supervision, costs of court and legal services and payment for alcohol and other drug abuse services.[98] Parental responsibility legislation also exists in Europe, New Zealand and Australia.[99]

The idea of bringing parental liability legislation to Canada is not new. In 1966, a private member's bill was introduced in the Ontario provincial legislature.

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[97] "B.C. not prepared to reconsider parental liability, ministry says" *Globe and Mail* (18 February 1999) A2.

[98] Szymanski, L. (1998) "Criminal Responsibility of Parents for Child's Delinquent Acts", NCJJ Snapshot, 4(2). Pittsburg, PA: National Centre for Juvenile Justice; Szymanski, L., (1996),"Parental Responsibility for the Delinquent Acts of Their Children: Summary of State Legislation" NCJJ Snapshot, 1(2). Pittsburg, PA: National Center for Juvenile Justice; See also Schmidt, P., "Dangerous Children and the Regulated Family: The Shifting focus of Parental Responsibility Laws" (1998) 73 N.Y.U. L.Rev. 667 and Hornick, J., Bala, N. and Hudson J., *The Response to Juvenile Crime in the United States: A Canadian Perspective* (Canadian Research Institute for Law and the Family, Calgary, 1995) at 31-33.

[99] "European civil law is somewhat different than English common law: in European civil law, a child's harmful acts can be attributed to the parent. In England and Wales, there are parental liability provisions which are quite similar to the former provisions of section 22 JDA. A youth court may require a parent or guardian to pay a fine, damages or costs of prosecution `unless' (ie. presumptively) the court is satisfied that the parent or guardian has not conduced to the offence by neglecting to exercise due care of the child or young person. While the court may consider such an assessment in the case of young persons (fourteen or older), the court must do so in the case of a child under fourteen. If ordered, the fine or costs are imposed on the parents, instead of on the child. In New Zealand, the youth court may make an order for the costs of prosecution, or compensation or restitution, against the parent if the accused child is under sixteen years of age. There is no statutory test (e.g. conducing) but the youth court must afford the parents an opportunity to make representations and an order may be appealed by the parent." Report of the Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 472-73. In Australia, until recently, only the Northern Territory had enacted parental responsibility legislation. See Fleming, *The Law of Torts*, 8th ed. (The Law Book Company Ltd., 1992), at 683. See the *Children (Protection and Parental) Act 1997 (NSW)*, No. 78, Assented to 10 July 1997.

Bill 16, introduced by Mr. G.H. Peck, contained provisions which would have made parents responsible for damage caused to public property by acts of wilful misconduct of their children. Liability in respect of each act would not have exceeded $100. The bill did not proceed to second reading.[100]

Thirty years later, amidst great fanfare[101], the province of Manitoba introduced *The Parental Responsibility Act*.[102] The stated purpose of the legislation is to hold parents accountable for property damage caused by their children.[103] Despite objections, the legislation does not seek to provide compensation in cases of personal injury.[104] The parent of a child who deliberately damages the property of another is liable for up to $5,000.[105] Thus, parents will not be liable for the unintentional or negligent acts of the child. Also, parents will not be liable if they can show that they exercised reasonable supervision over the child and made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that resulted in the property loss.[106]

An initial response to the legislation causes one to ask "why bother?" Liability under common law can include both personal injury and property damage, can include both intentional and unintentional acts of children, and is not subject to a cap of $5,000. The perceived advantage of a reverse onus is illusory. Justice Linden has identified the many exceptions to the general principle that the plaintiff must plead and prove negligence on a balance of probabilities. He concludes: "These exceptions are becoming so numerous that one might conclude that a new principle is emerging to the effect that the defendant, not the plaintiff, now bears the burden of proof, save for exceptional circumstances."[107] In any event, as noted earlier, a legislated reverse onus is already provided in some jurisdictions.[108]

The experience in Manitoba seems to confirm the suggestion that parental responsibility legislation is nothing more than a matter of optics, that is, governments attempting to look tough on crime when in fact the legislation has virtually no impact. Between September of 1997 and April of 2000, a grand total of thirteen actions have been initiated in Manitoba. Only two have been

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[100] Ontario Law Reform Commission, *supra* note 5 at 79.

[101] Harper, C., "Manitoba Bill puts parents on the hook for damage caused by kids", *Ontario Lawyers Weekly* (28 June 1996) 3; Sheppard, R., "The parent trap", *Globe and Mail* (3 July 1996) A13.

[102] *The Parental Responsibility Act*, S.M. 1996 c. 61. Proclaimed in force September 22, 1997.

[103] *The Parental Responsibility Act*, S.M. 1996, c. 61, s. 2.

[104] "...the NDP opposition has argued that the Vodrey bill does not go far enough - that it should also apply to assaults, not just to property damage." Sheppard, *supra* note 98 at A13.

[105] *The Parental Responsibility Act*, S.M. 1996, c. 61, s. 3. Section 5 of the Act provides that the action will be commenced in the Small Claims Court.

[106] *The Parental Responsibility Act*, S.M. 1996, c. 61, s. 7.

[107] Linden, *supra* note 5 at 228.

[108] Section 68 of Ontario's *Family Law Act*, R.S.O. 1990, c. F-3 creates a reverse onus and provides that where a child causes personal injury or property damage the parent must show "reasonable supervision and control" over the child.

successful. Professor David Deutscher of the Faculty of Law, University of Manitoba describes the legislation as a "non-issue."[109]

Nevertheless, Manitoba's legislation has attracted a considerable amount of national interest. In Ontario, despite spirited opposition in the provincial legislature and widespread condemnation in the media[110], Bill 55, *An Act To Make Parents Responsible for the Wrongful Acts Intentionally Committed by Their Children*[111] received third reading on May 17, 2000.[112] This legislation is virtually identical to the Manitoba initiative although the cap has been increased to $6,000.[113] Members of the provincial legislatures in Alberta and British Columbia have expressed support for similar legislation.[114]

Quebec probably stands alone in rejecting the get-tough philosophy which has become so popular with politicians in the rest of the country.[115] A kinder, gentler approach is simply not attractive to voters.[116] As politicians scramble to get on the bandwagon important questions regarding the need for and demonstrated effectiveness of such legislation have been pointedly ignored.

Conclusion

At the present time there does not appear to be strong support for either re-enactment of "contributing to delinquency" provisions or the creation of a

[109] "Critics doubt law can make parents pay", *Windsor Star* (4 April 2000) A11. See also Ontario Hansard, 1st Session, 37th Parliament, (13 April 2000) at 15-17.

[110] Ontario Hansard, 1st Session, 37th Parliament, (13 April 2000) at 1-30, (16 April) at 1-28, (18 April) at 1-31, (19 April) at 1-33 and (25 April) at 1-29. Speakers cited critical editorials in the Hamilton Spectator, the Ottawa Citizen, the Brantford Expositor, the North Bay Nugget and the Sudbury Star.

[111] *Parental Responsibility Act, 2000*, Bill 55, 1st Session, 37th Legislature, Ontario, 49 Elizabeth II, 2000.

[112] Ontario Hansard, 1st Session, 37th Parliament, May 17. The legislation came into force on August 15, 2000.

[113] *Parental Responsibility Act*, 1st Session, 37th Legislature, Ontario, 49 Elizabeth II, 2000, s. 2.

[114] McLean, A, M.P.P., Simcoe East, *News Release, "McLean wants law making parents responsible for their children"* (12 May 1998).

[115] L. Gagnon, "Quebec's soft-love approach to young offenders", *Globe and Mail* (13 March 1999) D3.

[116] "The strongest, albeit quiet, divide between Quebec and (a large part of) the rest of Canada arose last spring when Justice Minister Anne McLellan tabled her proposal for reforming the Young Offenders Act. While most English speaking commentators and several provincial governments (notably Ontario's) praised its get-tough approach - and, of course, the Reform Party thought it wasn't tough enough - the bill was greeted in Quebec with a great deal of skepticism...Quebec has a soft-love approach to youth crime. And it wants to keep it that way because it seems to pay off. It refers the smallest proportion of young offenders to court - and has the lowest rate of delinquency...This law smacks of pure demagoguery. It seems to have been modelled to please Ms. McLellan's pro-Reform constituency in Alberta in the wake of the horrible slaying of Reena Virk in Victoria, whose attackers received a light sentence. But the fact is that, despite the odd widely publicized crime, statistics show that youth criminality has not increased in Canada." *Ibid.*

specific *Criminal Code* offence which would criminalize parental incompetence. The recent Task Force on Youth Justice rejected the option of bringing back an offence of contributing to delinquency on the grounds that such offences are vague and fail to provide clear and fair notice of the standard of parental care expected; they do not adequately define a causative link between the parent's conduct and the child's criminal conduct; and they establish vicarious criminal liability, a concept foreign to the criminal law.[117] As noted earlier, the Task Force also rejected creation of a specific parental negligence provision primarily on the basis that a criminal offence of that nature would represent an undue state intrusion into the parent-child relationship and the privacy and integrity of the family.[118] However, the Task Force was not adverse to provincial legislative initiatives which seek to facilitate civil recovery from negligent parents.[119]

There are a number of arguments advanced to support and oppose criminal and/or civil responsibility for parents of delinquent children. The primary rationale for parental liability laws is general and specific deterrence. It is suggested that the threat of criminal sanctions or financial liability will promote better parenting and thereby reduce youth crime rates. A second rationale maintains that egregious conduct should be punishable, especially when the young person commits an offence involving death or serious personal injury and regardless of whether or not that punishment will have a deterrent effect. Finally, in respect of parental financial responsibility, it is argued that legislation can provide a more reliable source of compensation to innocent victims and, in respect of the costs of services to young offenders, reduced costs to government.[120]

In addition to the concerns about vagueness and vicarious liability, there are a number of other arguments against parental liability laws. There is a clear contradiction when we demand that young people be held accountable for their acts and then enact legislation which states that parents should be held responsible for the same acts. The concern is the implicit message to young people that it is not themselves but their parents who are responsible. Traditionally the state has been reluctant to prescribe standards or criminalize conduct in respect of parent -child relations, except in extreme cases, such as child abuse or neglect. It is argued that the criminal law cannot and should not attempt to legislate good parenting. It is also noted that in many cases, perhaps the majority, parents simply do not have sufficient control of their children, particularly the older ones, to justify criminal liability. Similarly, there is an implicit assumption that poor parenting causes delinquency. This notion reflects a simplistic and erroneous view of the causes of delinquency. Imposing liability on parents may actually exacerbate existing problems in the parent-child relationship. In this regard it should be noted that since many parents of young offenders are disadvantaged, sanctions or financial liability might be

[117] Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 483.

[118] *Ibid.* at 485.

[119] *Ibid.* at 496-97.

[120] *Ibid.* at 469.

disproportionately applied to the poor, in particular the growing population of single mothers.[121]

Perhaps the most important argument against developing this new regime of legislation is the fact that there is no evidence to suggest that these laws are effective in reducing delinquency or in improving parenting skills.[122] An early American study, conducted by the Department of Health, Education and Welfare in 1963, examined sixteen states that had enacted civil parental liability statutes and compared the crime rates in those states with those in the rest of the country. The study revealed that the rate of delinquency in the sixteen states that had enacted parental liability statutes was slightly higher during 1957-1962 than was the national average.[123] In Canada, the Department of Justice Committee

[121] *Ibid.* at 469-70. See Bala, *supra* note 67 at 53. We can anticipate a series of constitutional challenges to parental liability legislation in Canada. While a detailed discussion of potential Charter challenges is beyond the scope of this work it is fairly safe to predict that based on the American experience the likelihood of success will be very much an uphill battle. Thusfar there has been only one successful challenge to state legislation, *Corley* v. *Lewless*, 27 Ga. 745, 182 S.E. 2d 766 (1971). See Geis, G. and Binder, A., "Sins of Their Children: Parental Responsibility for Juvenile Delinquency" (1991), 5 Notre Dame J.L., Ethics & Public Policy 303, at 310-12; Weinstein, T., "Visiting the Sins of the Child on the Parent: the Legality of Criminal Parental Liability Statutes" (1991), 64 Southern California Law Review 859, at 871-900 where the author argues that California's parental liability legislation violates the constitutionally protected right of substantive due process, denies protection from cruel and unusual punishment and is void for vagueness. However, in 1993 the California Supreme Court found the legislation to be constitutionally valid. See *Williams* v. *Garcetti*, 853 P.2d 507 (Cal. 1993). For additional discussion of the constitutional controversies see Humm, R., "Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children" (1991), 139 Univ. of Penn. L.R. 1123 at 1133-44: Cahn, N., "Pragmatic Questions About Parental Liability Statutes" (1996) Wisconsin Law Rev. 399 at 412-15.

[122] See Casgrain, M.," Parental Responsibility Laws: Cure for Crime or Exercise in Futility" (1990), 37 Wayne Law Review 161; Geis and Binder, *ibid.*; Weinstein, *ibid.*; Humm, *ibid.*; Cahn, *ibid.*; Chapin, L., "Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States" (1997) 37 Santa Clara Law Review 621 and Schmidt, P., "Dangerous Children and the Regulated Family: The Shifting Focus of Parental Responsibility Laws" (1998), N.Y.U. L.R. 667. Casgrain, at p. 186 provides a direct and succinct summary of the overwhelming opinion of American academics: "Parental responsibility statutes are ineffective. The punishment, training classes, fines, or jail sentences do nothing to improve the family and may worsen the situation. From the relatively few cases prosecuted each year, no evidence exists that these cases impact on parental or juvenile behaviour."

[123] Weinstein, *ibid.* at 878. At 878-79 the author identifies three possible explanations for this surprising result: "First, juvenile crime may have increased because of the statute. Former New York governor Harriman suggested that the statutes might 'lead to added strain in families where relationships are already tense and might even give to troublesome delinquents a weapon against their parents which they would not hesitate to use.' A second possible explanation is that there is no relationship between the statutes and juvenile crime because 'juvenile delinquency is not necessarily a function of lack of parental supervision and training.' A final explanation is that the study might have been statistically invalid and objective results might not have been possible. Given the multitude of variables and lack of statistical data from which to make a longitudinal study, statistical uncertainty may be unavoidable."

on Juvenile Delinquency, which reported in 1965, was clearly concerned about the possible implications of such studies:

> Before considering these proposals, we think it important to emphasize that the "punish the parent" approach has been repudiated by almost everyone who has made a careful study of the matter...Professor Tappan speaks of "punish the parent" laws as a "singularly futile expression" of the "recognition of the family's vital relationship to delinquency", and notes that "it has been fairly generally agreed that this approach has succeeded no more than could have been expected." Indicative of the controversy that this question has caused are the emphatic comments of still another noted authority on juvenile court legislation: "Wherever the concept takes hold that parents who fail should be punished, it should be exposed as a delusion..."
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> So far as we have been able to judge from the limited accounts available, wherever the "punish the parent" approach has been attempted the results have been at best inconclusive, and more probably negative. Indeed, an objection that has been made to provisions of this kind is that they themselves contribute to delinquency., in that their use often creates a number of conditions that promote delinquency. Generally, it seems, the effect is to aggravate still further an already disturbed family relationship. The parent tends to respond to punishment by increasing his hostility to, and rejection of, the child. Moreover, such a law places a tremendous weapon in the hands of an angry child. Cases have been recorded of children causing substantial monetary damage as a way of getting even with parents, who they expect will be fined or required to make restitution. The writers of one article have commented in this connection: "Parents, whether good or bad, cannot easily be turned into deputy sherrifs. Nor, in a democracy, do we take happily to the idea that one person may be held a hostage for the good behaviour of another.[124]

There has been very little research in this area in the past thirty years. The available evidence, although often anecdotal and equivocal, has done little to alleviate the questions and concerns expressed in the Department of Justice Report. An example is provided by the experience in California where, in 1988, that state introduced the most widely heralded of the American statutes, *The Street Terrorism Enforcement and Prevention Act*.[125] The legislation was passed in response to public concerns about youth gangs. The statute imposed a duty of care on parents to exercise reasonable care, supervision, protection and control over their minor children. Failure to fulfil that duty which caused, or tended to cause a person under the age of eighteen to become a juvenile delinquent was an offence punishable by up to a year in jail and/or a $2500 fine, or probation for up to five years. Thusfar, there is no evidence that the enactment of this legislation brought about any decrease in the rate of juvenile crime. In fact, the juvenile violent crime index rate actually increased.[126] Other examples are available:

> A study in the 1940's examined the effects of enforcement of the offence of contributing to delinquency in Toledo, Ohio over a ten year period. Despite progressively increasing and fairly frequent enforcement, which was well publicized and principally

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[124] Department of Justice Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada* (Ottawa: Queen's Printer, 1965) at 201-03. See also Bala, *supra* note 67 at 65.

[125] *Street Terrorism Enforcement and Prevention Act*, Cal. Penal Code, s. 272 (West. Supp. 1996).

[126] Report of the Federal-Provincial-Territorial Task Force on Youth Justice, *supra* note 1 at 474.

> directed to "inadequate" parents, no evidence was found that punishing parents had an effect on delinquency rates.
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> New Hampshire, which stands alone among American states because it does not have a parental liability statute, has a rate of youth crime that is not significantly different from its neighbouring New England states and which is notably lower than that for the United States as a whole.
>
> In 1986, Wisconsin enacted a "grandparent liability" law which allowed parents to be made financially responsible for the children of unwed teenage mothers. It allowed for fines of up to $10,000 and possible two year jail terms. One purpose of the law, like similar delinquency provisions, was to encourage the parents of teenage girls to take more responsibility for their adolescent children, thereby reducing the incidence of unwed teenage pregnancies. After the law was enacted, unwed teenage pregnancies increased.[127]

While it would be indefensible to argue that parental liability legislation has been proven to fail and perhaps even promote delinquent conduct, there appears to be a complete lack of evidence to suggest that such legislation has any positive impact. In recent years it has become increasingly common for Canadian politicians to target particular groups as scapegoats - the poor, welfare recipients, unions, teachers, etc. Now it appears to be the turn of the parents of delinquent children. However, the vehicle for this attack, parental liability legislation, *may* be counterproductive, and, as suggested above, it is probably unnecessary. Existing tort law provides relatively effective access to compensation and our criminal law is flexible enough to meet the demands of the public. The "get tough", "punish the parents" philosophy underlying the recent Canadian legislative initiatives should be seen for what it is, and the entire matter should be given thoughtful and serious reconsideration.

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[127] *Ibid.* at 475-76.