

# Kids' Causes of Action

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Children are often the forgotten potential plaintiffs in domestic torts cases. However, they may possess causes of action against their parents or third parties. Statutes of limitation for most of these claims are tolled until the children reach majority, so lawsuits may be filed even years after the cause of action arose. The two primary categories of claims involve child abuse and custodial interference, with each category giving rise to several distinct causes of action.

## Need for a remedy

Children who are abused and neglected may continue to suffer from ongoing abuse and neglect. Even if circumstances change, the damage done may have long-term effects. Severe or chronic abuse or living in a chaotic,

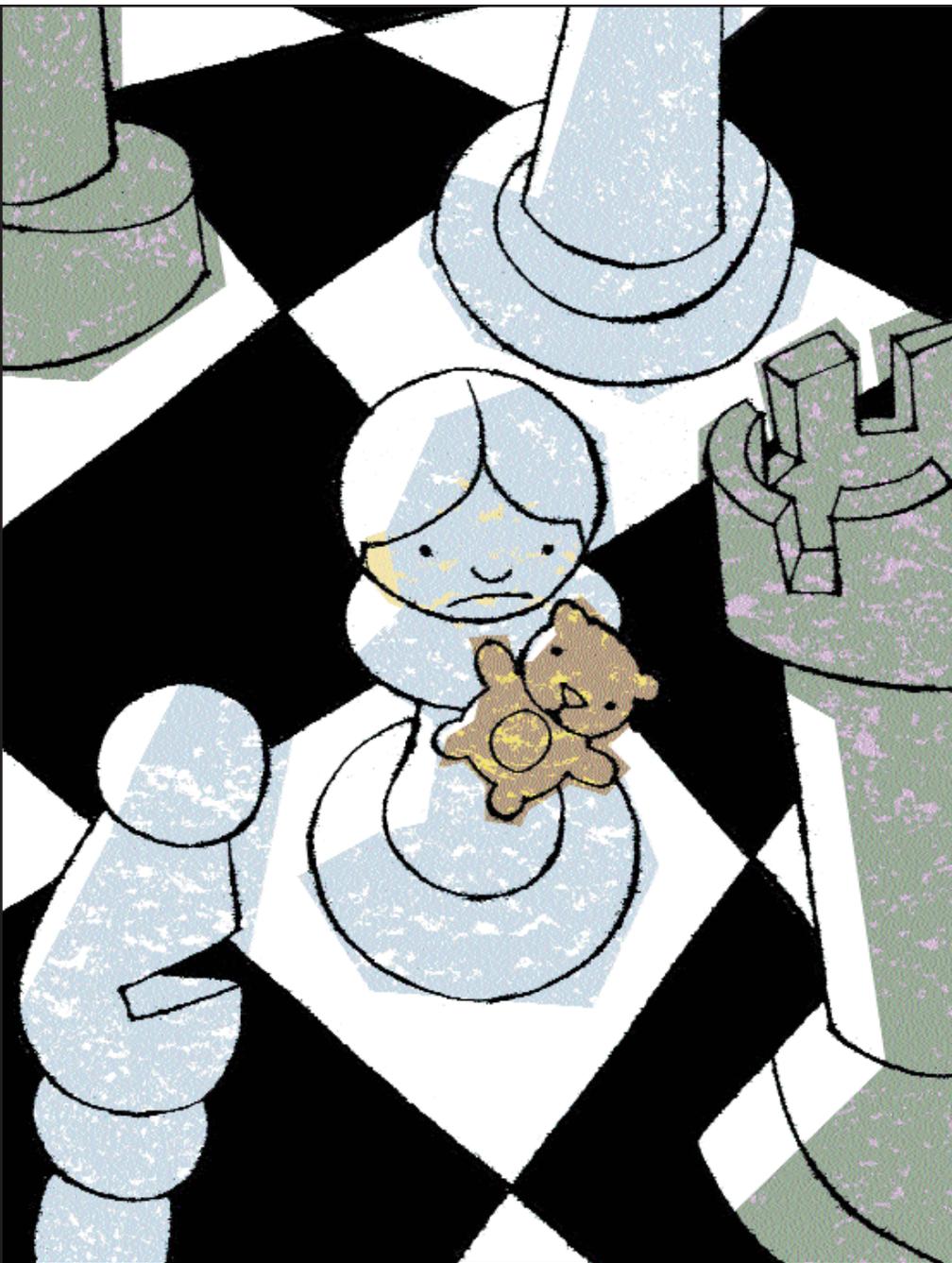
violent household in the earliest years of a child's life can actually alter the development of neuronal connections in a child's brain, which may permanently affect the child's ongoing development. Some physical injuries result in permanent physical disabilities. Abuse and neglect also shape a child's self-concept and ability to form safe and meaningful relationships with life-long consequences. Children who are raised without appropriate models of safe parenting often are unable to provide effective parenting for their own children, perpetuating a cycle of abuse and neglect.

Most legal responses to child abuse during the child's minority address either the custody and visitation rights of abusive parents or involve a criminal prosecution. Intervention by child protective services may result in the breakup of the family, often with the child being the person removed from all things familiar and placed in the foster care system. Such intervention may result in numerous changes in placement and loss of relationships

with family and friends, including the separation of siblings. Few resources are available to assist children once they "age out" of the system, and many children become homeless or incarcerated within the first year or two after leaving foster care.

Unless the abuse is particularly severe, most child abuse and neglect cases never involve criminal prosecution. Even when abuse is prosecuted, victim restitution funds and orders are rarely sufficient to cover the child's long-term financial needs for medical and psychological help. They certainly do not cover the more intangible losses suffered by the child.

Tort law may provide an avenue for achieving redress for the child victims of domestic torts and may provide the only remedy for the long-term consequences of the abuse. Where the tort is an intentional one, punitive damages may be available. In addition to monetary recovery, however, a successful tort action also may provide therapeutic benefit for the child, holding the abuser accountable. For



other children, even if they wait to file until they are adults, reopening the issue may increase the damage. Therefore, any consideration of filing a domestic tort on behalf of a child or an adult abused as a child should include a careful weighing of all of the potential risks and benefits.

### Identifying causes of action

Physical and sexual abuse give rise to causes of action for the intentional assaults and batteries by the abuser. Battery requires a showing that the defendant acts intending to cause a harmful or offensive contact with the

person of the other or a third person, or an imminent apprehension of such a contact, and that (b) an offensive contact with the person directly or indirectly results. Restatement (Second) of Torts § 20 (1965). Although the act of battery must be intended, the abuser does not need to intend harm to the child. Assault requires that the defendant:

acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and that the other is thereby put in such imminent apprehension.

Restatement (Second) of Torts § 21 (1965).

The Restatement (Second) of Torts provides that “bodily contact is offensive if it offends a reasonable sense of personal dignity.”

Restatement (Second) of Torts § 19 (1965).

Physical and sexual child abuse should satisfy this requirement. Physical and sexual abuse also may constitute intentional infliction of emotional distress, which requires proof that the defendant acted intentionally or recklessly, that the conduct was extreme or outrageous, that the wrongful conduct caused emotional distress, and that the emotional distress is severe. Restatement (Second) of Torts § 8A (1965).

Some states also recognize a cause of action for negligent infliction of emotional distress. Most physical and sexual abuse results in emotional injury, even if the abuser was not aware of that consequence. It is the abuser’s lack of awareness of foreseeable emotional injury that constitutes the gravamen of the tort of negligent infliction of emotional distress. However, some courts will not allow a negligence

claim when it is based on abusive conduct that clearly is intentional.

In some factual scenarios, physical and sexual abuse may involve false imprisonment (Restatement (Second) of Torts § 35 (1965)) or negligent transmission of a sexually transmitted disease. A nonabusing parent who fails to reasonably protect the child also may be liable for a negligent tort. The child may have a cause of action for intentional infliction of emotional distress for violence inflicted on another family member in the child's presence if the violence was extreme and outrageous and the child suffered severe emotional distress. Restatement (Second) of Torts § 46(2) (1965).

An implied cause of action may be based on the doctrine that violation of a criminal statute is negligence per se. To rely on this cause of action, the child must be an intended beneficiary of protection extended by the criminal statute. It is apparent that the child is an intended beneficiary of criminal child abuse and neglect laws and criminal liability for failure to report suspicions of such abuse and neglect.

A number of jurisdictions recognize a cause of action for intentional interference with custodial rights. Fewer states recognize a cause of action for interference with visitation. Restatement (Second) of Torts § 700 describes the tort of causing a minor child to leave or not to return home, described as:

One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent.

The Comment to that section provides that the:

temporary absence of a child who is too young to perform service or the abduction of a hopeless invalid is actionable as well as the abduction of a child who actually renders service to the parent. The depriva-

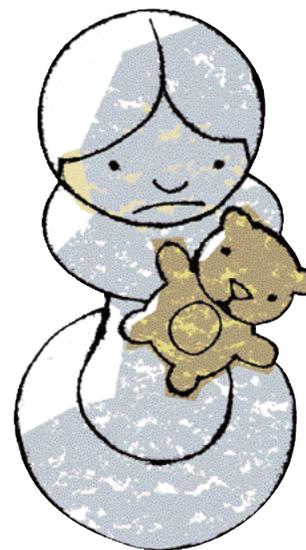
tion to the parent of the society of the child is itself an injury that the law redresses.

Restatement (Second) of Torts §700, Comment (d) (1965).

Custodial interference often constitutes a crime, therefore, giving rise to an implied civil cause of action based on violation of a criminal statute. Custodial interference also gives rise to intentional or negligent infliction of emotional distress. However, some jurisdictions find that a cause of action that essentially alleges parental alienation is not recognized where a "heart balm" statute or case law has abolished claims for alienation of affections. Where the cause of action is recognized, tort liability also may be imposed on a third party who conspires with or aids a parent to do a criminal or unlawful act or a lawful act by unlawful means in removing the child from the custodial parent.

### **Collateral estoppel**

When a finding of abuse is made in a family law, child welfare, or criminal action, that finding generally will collaterally estop the abuser from denying the abuse in a subsequent tort action, provided that the abuser was a party to the previous action and actually litigated the abuse issue. If the defendant was convicted of a felony charge of abuse or custodial interference, the conviction should be admissible in the tort action. If the previous action involved a higher standard of proof, such as a termination of parental rights or criminal action, the plaintiff should be permitted to relitigate the abuse in an action requiring proof only by a preponderance of the evidence. Further, if the child was not represented by counsel in the previous action, collateral estoppel may not apply to preclude the tort action. Finally, the tort action may be plead in a way to involve different legal issues. Given the different purposes and standards that apply in family, child welfare, and criminal actions,



## **An implied cause of action may be based on the doctrine that violation of a criminal statute is negligence per se**

plaintiffs should be able to bring their tort actions in most circumstances.

Abusive or negligent parents are obvious potential defendants. However, there also may be third party or institutional defendants. For example, under state mandatory reporting laws, certain people are required to report suspected abuse or neglect. Doctors, nurses, psychologists, counselors, teachers, and day-care workers are among those most often included as mandated reporters. If any such people interacted with the child and had suspicions that the child was being maltreated but did not report the suspicion to child protective services or law enforcement, the breach of that duty may give rise to a child's cause of action.

Third parties, including parents, who facilitate abuse also may be held liable. Parents also may have liability for failure to protect children in their care or to protect other children from

foreseeable abuse by their child or spouse. Schools, day-care centers, or other entities that have the part-time care of children may be liable for negligent supervision if they fail to prevent a child under their care from being abused. Third parties who contribute to the circumstances surrounding the abuse also may be held liable under a negligence theory.

### Statutes of limitation and repose

Statutes of limitation and repose are important in children's domestic torts. In most circumstances, statutes of limitation are tolled during a child's minority. Opinions are split as to whether they may be tolled after the child reaches majority based on delayed discovery, particularly as applied to child sexual abuse. The delayed discovery issue may occur when the victim is aware of the abuse but not reasonably aware that the damages were caused by the abuse or when the victim does not recall the abuse because of the trauma associated with it. Some states may permit tolling the statute only in the second situation.

Statutes of repose are applied differently.

A statute of repose...limits the time within which an action may be brought and is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. Unlike an ordinary statute of limitations that begins running upon accrual of the claim, the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or any injury has resulted.

54 C.J.S. Limitations of Actions § 4, at 20-21 (1987).

The statute of repose may not be tolled during the child's minority. A number of states, however, have specific provisions in their statutes of repose to permit later filing of a cause

of action related to child abuse. *See, e.g.*, Fla. Stat. Ann. § 95.11(7) ("An action founded on alleged abuse...or incest...may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later."); Va. Code Ann. § 8.01-249(6) (cause of action accrues in actions "for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy...or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist.").

### Immunity

Parents and others who are legally responsible for children's care (such as foster parents) have a privilege to reasonably discipline their children, including administration of reasonable corporal punishment. If the punishment is unnecessarily degrading or inflicts serious or permanent harm, the privilege does not apply. Restatement (Second) of Torts § 150, Comment (e) (1965). Child abuse, by definition, involves something more than "reasonable" corporal punishment. Reasonableness takes into account the severity of the child's offense, and the age and sex of the child. *Id.*, Comments (c) and (d). Further, if the force is imposed primarily for a purpose other than proper training, education, or discipline, it is not privileged, even if it would have been privileged if applied for a proper purpose. Restatement (Second) of Torts § 151 (1965).

The Comment to this section indicates, for example, that the privilege

would not apply if the force is imposed "to satisfy a violent antipathy." A traditional bar to recovery for torts committed by a parent against a minor child is the parental immunity doctrine. That immunity was conferred upon parents to further the public policy of "preserving domestic tranquility." Most states have either abrogated the doctrine of parental immunity, particularly with respect to intentional torts, or held that it never existed.

Physical and sexual child abuse, by definition, exceed the reasonably accepted boundaries of parental care and control. Therefore, in those cases, parental immunity is not likely to shield the abuser. The Restatement (Second) of Torts rejects the doctrine of parental immunity except with respect to reasonable force or confinement for control, training, and education. Restatement (Second) of Torts § 895G(1) (1965).

For children in state care, the state may have sovereign immunity. Further, in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the U.S. Supreme Court held that the state had no constitutional duty to protect a child after receiving reports of possible abuse by a parent not in state care, but left open the possibility of imposition of such a duty for children in care. Following *DeShaney*, several courts have recognized that the state may have a duty to protect children who are in foster care.

### Insurance coverage

Many tort defendants, especially family members, lack assets sufficient to justify the filing of an action. A major deterrent to the filing of all kinds of domestic torts is the lack of insurance coverage out of which to fund recovery for damages. For example, most homeowner's policies exclude coverage for intentional torts. Where not precluded by parental immunity, generally it is a good idea to plead at

least one negligence count (often negligent infliction of serious emotional distress), even when the conduct itself appears to be intentional, to permit recovery against the tortfeasor's home owner's insurance policy. However, even when framed as a negligent claim, many policies specifically exclude coverage for child abuse generally or sexual abuse in particular. Many liability policies for businesses and organizations also include exclusions, particularly for child sexual abuse.

### Preserving children's claims

Because child abuse and custodial interference involve tort liability under at least some theory, an attorney in any case involving those issues, whether in a family law, child welfare, or other context, must recognize, preserve, and inform the client or the client's guardian of the tort action, even if the attorney does not intend to initiate the action. This notice should be provided in writing. Failure to do so may result in malpractice liability exposure.

Family law attorneys who are not experienced in tort cases may be professionally and financially ill-equipped to handle a tort action. In such a case, refer the client to a competent tort attorney or recommend that he or she seek such counsel, emphasizing that a statute of limitations is involved. Associating with tort counsel can be an excellent way to handle these cases, with one attorney having the experience of tort litigation (and the finances to carry the litigation) and the other having expertise in the substantive child abuse or custodial interference issues.

Evidence developed during the family law or child welfare case may prove to be important in a tort action, whether pursued at the same time or years later. Witness depositions and statements, photographs, medical and psychological records, criminal and child welfare court records, and other evidence should be collected where

appropriate. File destruction policies should take into consideration the possibility that such materials may be necessary or useful in the event the child wishes to pursue the tort claims as an adult.

### Filing the case

Upon reaching majority, the child may file his or her own court action. However, it may be appropriate to file an action during the child's minority, even though the statute of limitations may be tolled, both because the child may need the funds recovered and also because the witnesses and other evidence may be more readily available. It is important to consider whether the full extent of the child's damages are known or reasonably predictable if the action is filed during the child's minority. Because children lack standing to file actions on their own behalf, an adult will need to file on the child's behalf as "next friend" or guardian ad litem. The court may accept the designation in the pleadings or may require a formal motion to be appointed as the child's next friend or guardian ad litem.

### Conclusion

Although family law attorneys most often address the immediate concerns involved in child abuse cases—finding an appropriate custodial placement for the child and ensuring adequate protection—it is important to recognize that the circumstances presented in the family law or child welfare case also give rise to potential claims, which should be recognized and preserved. Even if the tort action is not pursued at the time, the attorney should anticipate that an action may be filed in the future. **FA**

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