Physical Discipline in the Home

Rochelle Urlich*

I: INTRODUCTION

In New Zealand parents and guardians are given a number of rights[1] over their children. Section 3 of the Guardianship Act 1968 defines "guardianship" as including "[t]he right of control over the upbringing of a child". This includes the right to discipline a child. Society gives parents significant autonomy in bringing up their children. It is the parent's responsibility to set and maintain reasonable boundaries for the child's behaviour,[2] and as long as parents meet a reasonable standard of child-rearing, the state will not intervene. Traditionally, the law has allowed parents to use physical force to discipline their children. Consequently, parents have a defence to an act that would otherwise be considered assault. This article considers various arguments against the use of physical punishment in the home. The writer questions the validity of the statutory defence, and examines the possibilities for reform of the law.

* BA

1 "Parental privilege" may be a more accurate term. However, the writer will continue to refer to "rights" as this is what most parents believe they have.

2 See, for example, s 14(1)(d) Children, Young Persons, and Their Families Act 1989.

II: THE CURRENT LEGAL POSITION

At common law, the parent could lawfully "correct the child being under age in a reasonable manner".[3] In *R v Hopley*,[4] it was assumed *sub silentio* that the correction referred to includes physical punishment.[5] Lord Cockburn CJ held that parents "may for the purpose of converting what is evil in the child inflict moderate and reasonable corporal punishment".[6]

In New Zealand this common law right has been given statutory recognition in s 59 of the Crimes Act 1961, which states that a parent, or person acting in place of a parent, is justified in using force by way of correction, if the force used is reasonable in the circumstances.[7] The section thus limits the parent's right to punish. The act of hitting must be by way of correction only, therefore the motive for infliction of pain is crucial.[8] Punishment administered to satisfy passion or rage is unlawful.[9] The force administered must also be reasonable. Section 59(2) provides that the reasonableness of force is a question of fact. What has been considered reasonable previously may not be reasonable in light of current child-rearing practices, so older case law will not necessarily govern modern judicial thinking.[10]

Various factors have been taken into account in determining whether force is reasonable. Possibly the most crucial consideration is the age and maturity of the child.[11] The infliction of force may well be unreasonable, either because the child is too young, or conversely, is too mature to be disciplined physically. Other considerations include the child's powers of endurance,[12] the physique and strength of the child,[13] and the state of the child's health.[14] Also relevant is the type of offence,[15] the type of punishment, and the circumstances in which punishment occurred.[16] In addition, it has been accepted in New Zealand that cultural beliefs will be taken into account.[17] However, a decision whether or not the force that has been administered is reasonable is left to the discretion of each individual judge.

3 1 Bl Com 452.
4 2 F & F 202; 175 ER 1024.
5 Caldwell, "Parental Physical Punishment and the Law" (1989) 13 NZULR 370, 371.
6 Supra at note 4, at 206; at 1026.
7 This no longer applies to teachers: s 139A Education Act 1989.
8 See *R v Drake* (1902) 22 NZLR 478 (CA).
9 *R v Hopley*, supra at note 4, at 206; at 1026 per Lord Cockburn CJ. See also *R v Terry* [1955] VLR 114, 117 per Sholl J.
10 See Caldwell, supra at note 5, at 375; *Kendall v Director-General of Social Welfare* (1986) 3 FRNZ 1, 12 (DC).
11 See Caldwell, ibid, 376.
12 *R v Hopley*, supra at note 4, at 206; at 1026.
13 *R v Terry*, supra at note 9, at 116; *Hansen v Cole* (1890) 9 NZLR 272, 281.
14 *Mansell v Griffin* [1908] 1 KB 160, 168; *R v Mackie* [1973] Crim LR 54.
15 See Caldwell, supra at note 5, at 378-9 for a discussion of types of offences.
16 *White v Weller, Ex parte White* [1959] Qd R 192, 200.
17 *Erick v Police*, noted [1985] NZ Recent Law Review 227.

One difficulty, however, is that most parents are unaware of any legal fetters on their discretion to punish their children. It is not until violent damage is done to a child that the reasonableness of the discipline comes into question. A further difficulty is that s 59 of the Crimes Act 1961 sets out a statutory protection for parents against criminal assault, but offers no protection to the child.

III: ARGUMENTS AGAINST PHYSICAL DISCIPLINE

Physical punishment has always been considered an important and necessary part of child-rearing.[18] This article questions this and presents four challenges to this assertion. First, the argument that physical discipline is ineffective. Second, the association of physical punishment with child abuse. Third, the link between physical punishment and violence generally, and fourth, the new focus on children's rights.

1. Physical Discipline is Ineffective

It has commonly been assumed that physical discipline is an effective way to control children and to mould their behaviour to socially acceptable standards. The validity of this assumption has been called into question by research into the effect of physical punishment. The group, Ending Physical Punishment of European Children ("EPOCH"), has extensively researched the issue of physical discipline. They put forward a persuasive argument that in order to be effective, a disciplinary technique must set external limits on children's behaviour. This, it is argued, will keep children safe and acceptable to their parents and others. Moreover, a successful technique must help children to develop the self-discipline that will replace external controls (control by parents) with internal controls (the child's conscience).[19]

Physical punishments do neither of these. They do not show children at which point behaviour becomes unacceptable. This is because children are only smacked when the limits have already been overstepped. Furthermore, physical punishments cannot help to develop self-discipline because they tell children only that they have done wrong without either describing their undesired behaviour or suggesting preferable alternatives.[20] Therefore, when parents rely on physical punishment as a method of discipline, children are less likely to build up their own systems of control.

---

18 Research shows that New Zealand parents rely on corporal punishment in disciplining their children. However, the use of alternative methods is now more widely practised. See Maxwell, "Physical Punishment in the Home in New Zealand" (Office of the Commissioner for Children, 1993).

19 EPOCH, "Creating a no-smacking society" (unpublished) p5.

20 Ibid.

A major purpose of disciplining children is to teach them responsibility for their actions. Physical discipline does not achieve this goal, for while it affects a child's immediate behaviour, it does not achieve any long-term reform.[21]

2. Association of Child Abuse with Corporal Punishment

Child abuse is often the result of physical discipline which has gone too far.[22] Contrary to common perceptions, the methods of inflicting child abuse are often the same as those employed in ordinary discipline:[23]

> [Parents] do not as a rule resort to cruel and unusual practices such as inflicting wounds with lighted cigarettes, hot irons .... They just hit out.

Both physical punishment and physical abuse are on the same continuum of violence. Physical abuse occurs when the parents step over the fine line that currently distinguishes moderate and reasonable punishment from punishment which causes physical injury and is classified as child abuse. The problem is that there is no clear point on the continuum where the quality and quantity of physical force becomes legally impermissible. Judicial discretion ensures the line will move back and forward along the continuum.

It is ironic that although child abuse is not tolerated by our society, the disciplinary methods which often lead to it are.[24] Thus, while it is a concern of society to reduce levels of child abuse, allowing the physical punishment of children makes it unlikely that this will occur. Research shows a greater incidence of child abuse in countries that have developed permissive attitudes to the use of physical force than in countries that have not.[25] Currently, hitting children is acceptable unless severe physical injuries happen to occur. Instead, society must recognise that hitting children is unacceptable whatever the physical consequences. Some commentators argue that the key to understanding child abuse is understanding the central role that physical force plays in child-rearing.[26] An exception that condones the use of force for correcting a child sets a standard that can lead to abuse.

---

21 Leach, "What's Wrong With Hitting Children? A Review of Research" (unpublished) p2.

22 Ritchie and Ritchie, *Spare the Rod* (1981) 62. The authors claim that 90 percent of child abuse cases are physical punishment that has gone too far. See also Department of Social Welfare, *There Are No Superparents* (1989) 4.

23 Ritchie and Ritchie, ibid, 65-6.

24 Ibid, 67.

25 Ibid.

26 See, for example, Gil, *Violence Against Children* (1979) 134 and 141; Ritchie and Ritchie, supra at note 22, at 67.

3. The Link Between Physical Punishment and Violence Generally

There is evidence to suggest that physical punishment can cause a range of undesirable outcomes including domestic violence, aggression, violent criminality, and juvenile delinquency.

Physical discipline teaches children that violence is a legitimate means of problem solving.[27] This suggests that it is acceptable both to use violence to overcome interpersonal problems, and to strike out at an easy target to relieve frustration.

Leach argues that parental physical punishment may have greater potential for harm than similar punishment outside the home, because children model their behaviour more closely on that of their parents or parental substitutes than on outside authority figures.[28] This aggression, which may not harm the child itself, may harm others, since "[c]hildren who are beaten tend in their turn to beat and to bully".[29]

Physical punishment is predictive of later delinquency and violent criminality. The Newson study suggests that of those who have a criminal record before the age of 20, common variables include having been smacked or beaten once a week or more at 11 years, and having had a mother with a high commitment to corporal punishment.[30] National committees in the United States, West Germany (prior to unification), and Australia looking into the levels of violence in their societies have concluded that, in order to combat the problem, physical punishment of children has to end. To have any chance of preventing violence in society, children need to be raised rejecting violence as a method of problem solving.[31]

4. Children's Rights

Recent developments suggest that parents' rights to punish physically are eroding as children's rights emerge.

Historically children had few rights and the law offered them little protection.[32] Children's treatment and upbringing were considered the exclusive domain of the father. Children's rights were protected only when they intersected with the rights of fathers, and the state seldom intervened. The state played a

27 Wightman, "Australian Attitudes to Corporal Punishment" Fourth Australasian Conference on Child Abuse and Neglect, Griffith University, Queensland (unpublished 1993) p5.

28 Leach, "Should Parents Hit Their Children?" (1993) 6 The Psychologist 216, 218.

29 Association of Educational Psychologists, *Submission to Department of Education and Science* (1977), cited in Leach, ibid, 218.

30 Newson, *The Extent of Parental Physical Punishment in the UK* (1989) 26.

31 See Leach, supra at note 21, at p4.

32 See Eekelaar, "The Emergence of Children's Rights" (1986) 6 Oxf J Leg Stud 160, 166.

minimal role, intervening between parent and child only if the minimum standards of care had been breached.[33]

However, in recent decades children's rights have emerged, often in tandem with mothers' rights to custody of and access to children.[34] The principle underlying this development is the welfare of the child. As the interest of the state in the wellbeing of its future citizens has grown, there has been a change from the concept of the child being owned by the parent to the child as an autonomous person with his or her own rights.[35] The question remains as to whose rights prevail.

The judgment of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[36] is the leading authority on the conflict between parents' and children's rights. The judgment indicates that parents' rights do exist in relation to the person and the property of the child, but that the common law does not treat such rights as sovereign or beyond review or control. Parental rights exist for the benefit of the child:[37]

> The principle of the law ... is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.

When a parent's right of control is no longer needed that right ceases to exist:[38]

> The underlying principle ... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.

The implications of *Gillick* for physical discipline are not certain. One view is that parents will still have power to control a child by use of physical force whenever it is "reasonable to do so".[39] On this view physical force is reasonable if it promotes the child's welfare.[40]

Eekelaar has argued that the *Gillick* decision goes further than simply proposing that the parent's right to punish should be exercised for the child's welfare.[41] He argues that once a child is able to understand the nature and consequences of a course of action, a parent is no longer legally permitted to force a child to act against his or her wishes. This is the case even if to do so would be in the child's best interests.[42] On its face this argument appears to give children concrete rights,

33 Ibid, 168.

34 Hoggett, *Parents and Children. The Law of Parental Responsibility* (4th ed 1993) 7.

35 See, generally, Eekelaar, supra at note 32.

36 [1986] 1 AC 112.

37 Ibid, 184 per Lord Scarman.

38 Ibid, 186.

39 Sedley, "Wider implications of Gillick" (1986) 26 Childright 17, 18.

40 Ibid.

41 Eekelaar, "Gillick - further limits on parents' rights to punish" (1986) 28 Childright 9.

42 Ibid, 10. See also Freeman, "Time to stop hitting our children" (1988) 51 Childright 5, 7-8.

but it is likely that in any case the judge's view of what is in the best interests of the child will still be the determining factor.[43] It is inevitable that in deciding whether a child has the capacity to make his or her own decisions a judge will be influenced by the merits of the child's actions in the particular case.

Accordingly, the child's purported right to protection from violence is still subservient to the parent's right to punish physically, and cannot be characterised as a full right. The writer suggests that this is unjust and in breach of New Zealand's international law obligations. Having ratified the United Nations Conventions on the Rights of the Child, New Zealand is obliged to recognise that children have rights. Article 19.1 of the Convention sets out the relevant provision concerning physical punishment of children:[44]

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

New Zealand is obliged to educate children and adults about the Conventions principles and provisions.[45] It must be recognised that children have rights, and that they are entitled to be treated with equal concern and respect.

Section 59 of the Crimes Act 1961 is inconsistent with the words of Article 19,[46] which forbids physical violence towards children. It is also inconsistent with the principle behind the article, since by allowing physical discipline we are not treating children with equal concern and respect. Children have a right to be free from violence and to be protected like every other person.

IV: LAW REFORM

In order to change society's attitudes towards physical discipline, parents need to be re-educated about child-rearing. However, re-education alone is not enough. Law reform is required to make any significant impact.[47]

The Scottish Law Commission has concluded that it would be going too far to criminalise ordinary safe smacks of the sort occasionally resorted to by many parents. However, they concluded that it should be unlawful to strike a child with a stick, belt or other implement, or in such a way as to cause, or to risk causing, pain or discomfort lasting more than a short period of time.[48] The writer submits

43 Freeman, ibid.

44 See *The United Nations Convention on the Rights of The Child* (Office of the Commissioner for Children 1992) 16.

45 Ibid, Art 42. See Henaghan, "The Legal Significance of the UN Convention of the Rights of the Child" Children No 9 (June 1993) 11.

46 Ludbrook, "New Zealand Law, Policy and the UN Convention" Children No 9 (June 1993) 3.

47 Leach concludes that psychological literature suggests that "the use - and abuse - of parental physical punishment is unlikely to end without external intervention such as legal change." Supra at note 28, at 220.

48 Hoggett, supra at note 34, at 15.

that this is not a satisfactory solution. The evidence suggests that for physical punishment to be effective, it needs to be severe:[49]

> Studies on laboratory animals and institutionalised human subjects have established that "when punishment is sufficiently intense the targeted behaviour can be completely suppressed".

It is unlikely that the mild forms of physical discipline currently permitted will be sufficient to be effective as a form of discipline in controlling children's behaviour. If smacks are ineffective they are not necessary at all. Furthermore, because mild smacking is ineffective, there is a risk of escalation. The Newson study found that two thirds of the parents surveyed had smacked babies before they were a year old.[50] By the time these children had turned four, the frequency and severity of physical punishment had escalated, and three out of four were smacked or spanked weekly.[51] Once the children reached seven, some parents had moved on from bare hands to straps, sticks and other implements.[52] Allowing even mild forms of physical discipline creates an environment in which escalation can occur.

1. The Swedish Model

Sweden started a process of reform in the 1960s and legislation was enacted specifically banning the physical punishment of children in 1979. Sweden was the first country to give children the same legal protection from assault as other citizens. Five countries have now banned physical punishment.[53] However, Swedish law reform did not result from an overwhelming majority of the population rejecting physical punishment. When the law was introduced, surveys showed that a majority was in favour of allowing physical punishment. However, between 1965 and 1981 the number of people who believed that children should be raised without physical punishment increased from thirty-five percent to seventy percent.[54]

The changes brought about in Sweden were incremental. In 1957 the penal code was amended to abolish the special rule giving parents the right to chastise. In 1958, all forms of corporal punishment in schools were forbidden and this was extended to social institutions in 1960.[55] Despite these reforms, children were still being assaulted in their homes. The parenthood code was amended to remove the

49 Leach, supra at note 28, at 217, quoting Van Houten, "Punishment: From the Animal Laboratory to the Applied Setting" in Axelrod & Apsche (eds), *The Effects of Punishment on Human Behaviour* (1983) 20.

50 Newson, supra at note 30, at 4.

51 Ibid.

52 Ibid, 10.

53 Sweden (1979), Finland (1984), Denmark (1986), Norway (1987), and Austria (1989).

54 Leach & Newell, "Violence Breeds Violence. The Case Against Smacking" (unpublished) p6.

55 Sverne, "The Swedish Ban on Physical Punishment" (unpublished) p2.

provision which allowed parents to use physical punishment in bringing up children.[56] In addition, a provision was added which explicitly stated that a child may not be subjected to corporal punishment nor other injurious treatment.

Despite these reforms, no amendment was made to the penal code. The new provision in the parent code was not to be linked to a rule of prosecution or to any penalty for violating the provision. The aim was not to prosecute parents, but to tell them that physical discipline is not an acceptable way to bring up children.[57]

It is clear that the law was instrumental in changing attitudes. However, it was successful because parents were given sufficient information on alternatives. Vital to this was the accompanying education campaign. Information was spread by newspapers, radio and television, and a publication was produced on which famous Swedes commented. A novel initiative had the new provision printed on milk cartons to ensure maximum publicity.[58] Clearly, both legal reform and community education are necessary if parental attitudes are to be changed.[59] Furthermore, it must be made clear *why* the law has been changed.

In Sweden, some parents still physically punish their children. However, law reform has been successful in reducing physical punishment.[60] Well-meaning parents have not been treated as criminals. Prosecutions against parents for assault through chastisement are rare. Instead, the family is corrected and helped by the child care service or child psychiatry.[61] In one instance, the case of a teacher who hurt a pupil went to the Supreme Court. The teacher was convicted of assault, however he was not sentenced to any punishment.

2. Reform of New Zealand Law

In the writer's view, it is logical for New Zealand to follow this step by step approach. Corporal punishment is already banned in schools.[62] The next step is to ban corporal punishment altogether. In conjunction with this, an education programme on the harm caused by physical punishment is required in order to begin changing attitudes. This is at least in keeping with New Zealand's international obligations to protect our children.[63]

Caldwell argues that only once a campaign has successfully changed parental attitudes should a provision removing the common law defence be enacted.[64] This

56 Ibid.

57 Ibid, p3-4.

58 Ibid, p5.

59 Freeman, supra at note 42, at 8.

60 Sverne, supra at note 55, at p6 is convinced that the hard kinds of physical punishment have disappeared.

61 It appears that municipal social boards or child organisations address complaints of assault on children rather than the police. Ibid, p7-8.

62 Supra at note 7.

63 Supra at note 44.

64 Caldwell, supra at note 5, at 386-7.

point is persuasive. The right to punish children physically is a well entrenched custom in New Zealand and it should not be removed without providing effective alternatives.

Removing the statutory right will be the first step in telling parents that physical punishment is no longer an acceptable way of disciplining children. Until parents are educated about other effective methods of discipline that do not harm children, the common law right must still exist so parents are not left floundering, or feeling that their actions are criminal.

Following a change in parental opinion, it will be appropriate to enact a provision specifically removing the common law defence to use force against children. The Swedish model is a good example to follow in that the primary purpose in reforming the law is to protect children, not to prosecute parents for acts of physical punishment that at the moment are regarded as lawful. Caldwell has suggested that the Solicitor General's consent be required before any prosecution.[65]

Such reforms to New Zealand law will benefit both our children, and our society immeasurably.

65 Ibid, 387.