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CHILD (IN CIVIL WRONGS)

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An inquiry into the notion of "child" can be undertaken in many areas of law, each of which offers insight into the contours and significance of the term. In a complementary way, paying attention to the "child" has the capacity to enrich our understanding of the preoccupations particular to any legal domain under scrutiny. In this short essay, the law governing the rapport between wrongdoing and consequential suffering is explored as both relevant to, and revealed by, children. Childhood, while sometimes referred to as carefree, is marked by the fundamental elements of the private law of civil wrongs: restraint, responsibility, and repair.

An anonymous and untitled poem, published in the *Oxford Book of Poetry for Children*, introduces this reflection on the "child" in the law of civil wrongs:

Don't-care didn't care;
Don't-care was wild.
Don't-care stole plum and pear
Like any beggar's child.

Don't-care was made to care,
Don't-care was hung;
Don't-care was put in the pot
And boiled till he was done.

If we take the striking message of the poem seriously—as, no doubt, young readers are meant to—we learn that children who *do* care control their comportment, keep their hands off others, and thus avoid the horrendous consequences that otherwise await them. Children are prompted to laugh—somewhat nervously—at the prospect of having the capacity to care boiled into them. This dramatic lesson on care reminds us that individual comportment, scope of responsibility, and obligation to restore are not only the foundations of the language and law of civil liability, but also crucial pieces of childhood from infancy through adolescence.

We begin with the intersection of childhood and the allocation of responsibility for the consequences of one's behaviour. We then turn to pro-

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tected interests and injury, with specific attention to children. Teaching this area of law in an integrated or "transsystemic" way provokes a particularly rich inquiry into the "child" as juridical concept and construct: issues that might otherwise remain marginal emerge and enhance our critical understanding of restraint, responsibility, and repair. That is, the "child" as focal point brings together norms, words, and sources from various normative systems, all of which are concerned with how we behave, react, repair, and resolve.

Failing to take the requisite degree of care, or to act as the reasonable person would in the circumstances, is the trigger for responsibility in the tort of negligence and according to the general obligation set out in article 1457 of the *Civil Code of Quebec*. Confronted with a young producer of harm, the law is forced to unpack its reasonableness standard. The child is obviously neither a "reasonable man" nor a "*bon père de famille*." But can children be held to a "reasonable person" norm, such that their harmful actions are labeled "wrongdoing"?

A glance at common law tort textbooks shows that the traditional site for the consideration of children is a section on "infants, married women and lunatics," albeit sometimes less colourfully named. The message is that individuals requiring special consideration are those traditionally defined as less able in some way, and thus impossible to subject to the expectations of the "reasonable man." If officially labeled infants, children are never accountable for their harmful actions; they can be careless without consequence.

The simplicity of such an analysis belies its unsatisfactory nature. Particularly in the age range corresponding to the development of capacity, understanding, and responsibility, the jurisprudence reveals a range of responses that deepens an appreciation of child as wrongdoer. The extended stage in childhood of "becoming responsible" provokes an array of possible approaches to the liability of young people, nicely captured by the Australian case of *McHale v. Watson*. In assessing the responsibility of a twelve-year-old boy who sharpens and then throws a metal dart at a post—resulting in injury to a female companion positioned at precisely the angle of rebound—three judges apply three distinct standards, recognizable as the possibilities available in any system of liability for the harmful effects of one's behaviour.

One judge compares our protagonist to the "average" twelve-year-old boy—a non-normative test which quickly slides into a "boys will be boys" attitude, but that expresses patience in waiting for the moment at which careless youth shifts into accountable adulthood. Our potential wrongdoer is subjected to the standard according to which his peers behave, rather than that expressing how they "should" behave. The second judge insists that the harmful nature of the activity invites an adult level of responsi-

bility, corresponding to an appropriate level of protection for the victim of adolescent carelessness. While admittedly not grounded in the reality of youth, the assumption of maturity is imposed such that a child engaging in harmful action—particularly if usually associated with adult actors—takes on adult obligations. The third judge offers an attempt to merge the normative expectations of "reasonable" behaviour with an acknowledgement of age, thus suggesting a "reasonable twelve-year-old (boy)" standard according to which our alleged tortfeasor is compared to a reasonable counterpart in his peer group, defined by children of "like age, intelligence, and experience."

Never addressed head-on is the relationship of capacity to responsibility. That is, where does an assessment of a young person's ability to tell right from wrong fit with the requirement that he shape his behaviour accordingly? Not surprisingly, given the place of "endowment with reason" in the depiction provided by the *Civil Code of Lower Canada* and the *Civil Code of Quebec* of the person susceptible to fault-based liability, we find further insight into that connection in Quebec jurisprudence. In *Ginn c. Sisson*, a six-year-old boy throws stones at a little girl at the bus stop with unfortunate consequences. Throwing stones at someone, imagined as an act disentangled from the person doing the throwing, is found "objectively wrongful." Is it thus a "fault" leading to liability on the part of a young child? Yes, says the judge, given that our six-year-old understood that what he did was wrong and subject to punishment by his parents. The case confronts the difficult link between understanding and acting, or knowing and doing, and does so with clear willingness to impose adult consequences on young people.

McHale and *Ginn* provide particularly striking examples of the spectrum of possible answers found across legal systems to the question of civil liability of a harm-causing child. They also draw attention to the relationship between young people and the adults who oversee the development of their sense of responsibility. In a regime whereby one person may be required to answer for the injury-producing actions of others, the parent's role and responsibility is theoretically integrated into the analysis. Thus article 1459 of the CCQ presumes fault on the part of a parent when their child harms another. In the absence of such a regime, there is no such presumption; instead, a separate claim against a parent is required. The separate claim must show a link between the parent's own wrongdoing and the injury suffered, and the acknowledgement of the connection between parent and child is accordingly muted.

Albeit expressed with different degrees of explicitness depending on system and structure, the child's relationship to parents plays an important role in assigning responsibility. Parents who show reasonableness in bringing up their children and supervising day-to-day activities in an age-appropriate way can meet the presumption under the CCQ. Similarly,

the possibility of pointing to a careless parent as the principal cause of the harm produced by a young person's actions dissipates as that young person grows up. The child becomes responsible through relationships, guidance, and experience, and the law's construction of both "child" and "responsibility" incorporates that reality into its language and decision-making.

The context of contributory negligence in the law of civil wrongs complicates the picture. Here, the child can be actor and victim at the same time: actor in the sense of bringing misfortune upon themselves, and victim in the sense of being subjected to the consequences of another's wrongdoing. Contribution is usually assessed according to the self-protective measures taken by the victim: the less careful the victim, the less responsible the wrongdoer.

At times, we might acknowledge that youth goes hand-in-hand with an underdeveloped capacity to avoid danger: for example, in *Saper v. Calgary*, a young girl who walked in front of a bus, sure that she could stop the traffic by holding out her arm in front of her, was labeled naive and incapable of contributory negligence. In stark contrast, however, that very immaturity on the part of a young victim might serve to absolve the wrongdoer of all liability. In the Quebec case of *Brisson c. Potvin*, typically read with respect to causation in law, another young girl whose path was blocked by a truck parked across the sidewalk skipped into the street and was hit by an oncoming car. The scope of the truck driver's responsibility was reduced to zero by the child victim—in the wrong place at the wrong time and seemingly for the wrong reasons. On the one hand, then, the childishness of the victim can excuse her failure to look out for her own safety; on the other, it can serve to underscore her responsibility for her own misfortune.

The image of child as victim turns our attention away from the capacity for self-restraint and toward the promise of repair. Two distinct and challenging issues, located across traditions in the law of civil wrongs, receive heightened attention if viewed through the lens of the child victim. The first is that of vicarious liability, specifically that of institutional defendants charged with the care or education of children. It is no surprise that the leading vicarious liability cases in the Supreme Court of Canada focus on the strict liability of residential or recreational institutions for children. The striking vulnerability of child victims to the abusive actions of the institutions' employees underscores the revised "test" for vicarious liability (whether expressed in article 1463 of the CCQ, or rooted in master-servant law), a test that turns on the material connection between the nature of the enterprise and the harmful actions of its staff.

The second, and related, issue is that of the limits on recognized injury in the private law of civil wrongs. The claims of survivors of harm suffered in residential schools for Canada's Indigenous children illustrate the

difficult juxtaposition of "child" and "protected interests." Thus, the long-term loss of language and culture may be significant in the lives of individuals and communities, but resistant to meaningful recognition by private law. In other words, physical and sexual harms are concrete enough to be counted (even if not fully compensated) by a legal system that traditionally has difficulty with intangible needs. On the other hand, the kinds of harms experienced as children and recounted in the narratives of residential school survivors pose a striking challenge even to legal systems known for their generous acknowledgment in principle of all human injuries.

As we have seen across a spectrum of issues, childhood in the law of civil wrongs is a time of heightened susceptibility combined with increasing responsibility. Maurice Sendak, renowned author of children's literature, created two characters who bring to a close this reflection on the "child" in an area of law concerned with wrongdoing and restoration. Max, of *Where the Wild Things Are*, plays, acts without restraint, and joins the wild things knowing he will always be welcomed home. Mickey, of *In the Night Kitchen*, dreams, flies to the Milky Way, and escapes his parents and his pyjamas, knowing that he will wake up warm in his bed. Both children find ways to negotiate a period of life that isn't simply carefree or joyful. In law, it often seems that children neither play nor dream. As responsible actor, the child surpasses the limits of the game by hurting someone else; as injured victim, the child cannot dismiss fears as dreams or make-believe. And yet, the stories of Sendak's fictional children who play and dream coexist with those of children defined and directed by law. Together they offer lessons for young lives, together they shape the relations and interactions of real children.

References

Blishen, Edward, ed, *Oxford Book of Poetry for Children* (New York: Franklin Watts, 1963) 29.

Brisson c Potvin [1948] BR 38 (Qc).

Ginn c Sisson [1969] CS 585 (Qc).

Kasirer, Nicholas, "The *infans* as *bon père de famille*: 'Objectively Wrongful Conduct' in the Civil Law Tradition" (1992) 40:2 Am J Comp L 343.

Manderson, Desmond, "From Hunger to Love: Myths of the Source, Interpretation, and Constitution of Law in Children's Literature" (2003) 15:1 L & Literature 87.

McHale v Watson (1966) 115 CLR 199, [1966] ALR 513.

Saper v Calgary (City of) (1979), 21 AR 577, 1 ACWS (2d) 172 (QB).

Sendak, Maurice, *In the Night Kitchen*, 1st ed (New York: Harper & Row, 1970).

———, *Where the Wild Things Are*, 1st ed (New York: Harper & Row, 1963).

Van Praagh, Shauna, "'Sois Sage'— Responsibility for Childishness in the Law of Civil Wrongs" in Jason W Neyers, Erika Chamberlain & Stephen G A Pitel, eds, *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 63.