

Citation: *R. v. Atkinson*, 2003 YKTC 27

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Docket: T.C. No. 02-00240
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Stuart

R e g i n a

v.

Kathy Atkinson

Appearances:
Ludovic Gouaillier
Malcolm Campbell

Counsel for Crown
Counsel for Defence

REASONS FOR JUDGMENT

Introduction

[1] This case probes the boundaries of section 43 of the *Criminal Code*. Can a parent delegate nothing more than her power and responsibility to physically discipline her child?

[2] While this is an important legal question, this case raises a much more important community question. Why were the community and extended family not involved in resolving this conflict? A legal answer will not address the inappropriate behaviour of anyone in the events that led up to this charge of assault, nor will a legal answer mend the broken relationships within the family and community.

[3] As interesting as the legal questions might be, dragging this matter into court engages an expensive public process that is ill-equipped to resolve the underlying pressing family and community issues. There are numerous

alternatives, with or without the involvement of justice professionals, to engage families and communities in assuming responsibility for such matters. If families and communities are not encouraged and supported to take responsibility, the underlying problems will rarely be constructively addressed. Further, if they are not engaged, these problems will spawn more serious problems that, in turn, produce increasing pressures for even more expensive justice resources.

[4] It is not enough for the justice system to “allow communities a chance to be involved”. If the justice system genuinely supports prevention, earnestly believes in rehabilitating individuals, families and communities, then an all-out effort is needed to empower communities to take responsibility for crime and conflict.

[5] In this case, I did not do enough. I should have done more than simply ask for community involvement. I should have sought out community involvement. If the court is to function as a last resort, everyone in the justice system must exhaust every means to engage the community. These efforts must be an integral part of our responsibility, be supported throughout the system and included in our job descriptions. Further, significant resources that currently flow into justice agencies must be diverted into communities.

[6] Anyone with extensive field experience is acutely aware that excessive reliance upon the justice system exacerbates the underlying problems and weakens the coping capacities of families and communities. We have a part to play, but if we fail to engage families and communities, our part will grow in ways that worsen the destructive impact of crime. Our challenge is to make our part smaller, and make the part of families and communities much greater in dealing with conflict.

[7] I regret, in this case, our part was paramount and the community part apparently non-existent.

Facts:

[8] L.D., the daughter of Louise Dick, was slapped in the face by the accused, Kathy Atkinson. No bruises or blood resulted from the slap. L.D. was not physically hurt; "I was hurt because my mom never did nothing. My mom was sitting right there".

[9] Ms. Atkinson had been verbally abused and spat upon by L.D. the night before. Ms. Atkinson asked L.D.'s mother on two occasions if she could discipline Ms. Dick's daughter with a slap. Ms. Dick, after being appraised of the circumstances, agreed. Ms. Dick was present when the slap took place.

[10] L.D. had been misbehaving for some time. She had physically and verbally assaulted community elders (including spraying elders with paint and ketchup) and generally not attending to controls imposed by her mother.

Legal Issue:

[11] Were the actions of Ms. Atkinson covered by s. 43 of the *Criminal Code*?

Correction of Child by Force.

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

[12] In determining whether s. 43 applies, the law has developed four questions to consider:

1. Was the force used to correct or discipline misbehaviour?
2. Was reasonable force used?
3. Did the accused stand in the place of a parent?
4. Did the accused have care of the child?

[13] **(1) Was the force used to correct or discipline misbehaviour?** Any use of force that primarily derives from arbitrariness, caprice, anger, or bad humour cannot escape prosecution under the claim of corrective disciplinary action. Such force remains punishable as a crime (*Brisson v. Lafontaine* (1864), 8 L.C. Jur. 173).

[14] In most instances, the misbehaviour of children provokes not just disappointment and frustration, but also anger. These feelings are often present, especially at the moment of misbehaviour. The law does not call for neutralized feelings before the use of physical force. It does call for correction to be the primary purpose in using physical force.

[15] For a child experiencing a parent's anger, disappointment and frustration can be an instrumental part of a corrective measure. Achieving a state of detachment is not a precondition required by law for the use of disciplinary force (*R. v. Peterson* 1995 O.J. No. 1366 (Ont.Ct. (Prov.Div.)) at page 15).

[16] In this case, feelings of anger and frustration were present. Ms. Dick had grown increasingly frustrated with her inability to effectively change her daughter's behaviour. Ms. Atkinson was angered by L.D.'s verbal and physical assaults the previous night.

[17] Ms. Dick: Ms. Dick was asked in the morning and later that afternoon by Ms. Atkinson if Ms. Atkinson could slap Ms. Dick's daughter. Ms. Dick had time to think about this request and the impact it might have on her daughter. While her consent to allow Ms. Atkinson to slap her daughter may in part have been prompted by her frustration to affect her daughter's behaviour, the evidence sustains the view that her consent was primarily driven by the need to try something else. Further, she had been convicted of assaulting her daughter in the past. This may have confused her understanding of whether she could use force to discipline her daughter.

[18] A parent convicted of assaulting a child may believe that any use of force for discipline is prohibited. This is not so. Force is always legally permitted, if it falls within the ambit of s. 43. There may be exceptional cases where a past history of physical abuse renders a child particularly vulnerable to any physical disciplinary force. In such cases, the particular sensitivity of the child, if known by the parent, might render any use of force excessive. No evidence of any such unique vulnerability existed in this case.

[19] Ms. Atkinson: The previous night, Ms. Atkinson's anger was clear and naturally expected, given L.D.'s conduct. She may still have carried some anger into the moment she slapped L.D. Ms. Atkinson testified that she slapped L.D. "because she called me a slut". This answer provides evidence of both a reason for corrective measures and of an underlying motive. However, given the larger circumstances, particularly two prior requests of the parent, and the reasonable force used, this answer does not establish that her primary motive was based on anger or revenge. Further, as Ms. Atkinson was specifically delegated by a parent to use corrective force, her motives are less relevant than the parent's. Whether a parent can specifically delegate only the right to discipline is another question. The force authorized by Ms. Dick was primarily intended and used by Ms. Atkinson as a corrective measure.

[20] **(2) Was reasonable force used?** The test for assessing the reasonableness of the force used was ably set out in *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.):

In determining that question the court will consider, both from an objective and subjective standpoint, such matters as the nature of the offence calling for correction, the age and character of the child and the likely effect of the punishment on this particular child, the degree of gravity of the punishment, the circumstances under which it was inflicted, and the injuries, if any, suffered....

[21] Likely effect of punishment: L.D. testified that at the time she did not know why she was slapped. L.D. knew immediately thereafter. She ought to have had a good idea of why Ms. Atkinson slapped her, but perhaps not know that her mother had authorized the slap as a corrective measure. The failure of either Ms. Atkinson or Ms. Dick to tell L.D. she was to be punished raised some concerns. However, not enough to render the force used unreasonable from either a subjective or objective perspective.

[22] Nature of misbehaviour: L.D.'s conduct the previous night warranted a corrective response. She was abusive and disrespectful. Her conduct could easily have caused physical injury to Ms. Atkinson and have been the subject of criminal charges.

[23] Age and character of child: Although a young teenager, L.D. is mature for her age.

[24] Degree of gravity of punishment: The slap hurt only her feelings, and was appropriate given the nature of her misconduct.

[25] On all of these factors, from both objective and subjective perspectives, the force used falls within the degree of latitude a court grants to parents and those standing in the place of a parent in disciplining a child:

Within a range or band, reasonable parents can come to different and even opposite conclusions without one being unreasonable. A court cannot simply substitute its own view for that of a parent. The standard of review is not whether the parent was right or wrong or mistaken regarding the force used. Not every reasonable exercise or judgment is right, and not every mistaken exercise of judgment is unreasonable. As long as a parent's action falls within the band of reasonableness, no court would seek to replace a parent's judgment with its own (*R. v. Poulin*, [2002] P.E.I.J. No. 88 (P.E.I.S.C.)).

[26] **(3) Did the accused stand in the place of a parent?**

It follows, then, that at common law there are two ways in which a person could put himself 'in the place of a parent'. The first is to assume, in the absence or default of the natural parents, the parental duties that give rise to parental rights. The second is to have that right delegated to one by the natural parent (*R. v. Ogg-Moss*, [1984] 2 S.C.R. 173).

[27] Most of the cases are concerned with the existence and boundaries of an implicit delegation. In all of these cases whether a delegation of the parental right to discipline exists, depends upon the circumstances. For school teachers, baby sitters and school bus drivers, anyone whose function involves exercising care over a child, the delegation of disciplinary power depends principally on two factors: what the parents intended, and whether achieving the responsibilities undertaken requires that specific disciplinary powers be exercised over the child. With step parents, girl or boy friends of a parent, or other relatives who have care of the child, consideration includes, in addition to what parents intended, whether the adult has assumed financial responsibility for the support and care of the child (*Ogg-Moss, supra*, at page 10).

[28] Here, there is not an implicit, but an explicit delegation of the parental right to discipline a child. In this case, Ms. Dick delegated a very limited part of her authority: to discipline her daughter for a particular incident in a very specific manner.

[29] A parent may delegate all or part of their authority:

... the power to chastise was, at least at common law, the power of a parent (specifically the father) or of his direct delegate to discipline his offspring (*Ogg-Moss, supra*, at page 8).

[30] Nothing in s. 43 limits a parent's right at common law to directly delegate their disciplinary authority. Both an implicit and explicit delegation are subject to the same limits - reasonable force used for corrective purposes.

[31] **(4) Did the accused have care of the child?** Some cases subsume the two conditions that the accused is standing *in loco parentis*, and that the accused has the child in her care at the time, into one condition. In this case, the direct delegation of disciplinary authority embraced both conditions. Ms. Dick directly delegated the care of L.D. to Ms. Atkinson for only the time required to administer discipline. At that moment, Ms. Atkinson was standing in place as L.D.'s parent and had care of her. Ms. Atkinson's standing as a parent was limited to administering a corrective measure. The care delegated entrusted to Ms. Atkinson over L.D. encompassed using the reasonable corrective measure specifically approved by her mother.

[32] While this was a unique situation, similar situations could arise. A very ill or handicapped parent whose physical capabilities preclude exercising physical corrective measures may need help to exercise their disciplinary authority. If the force authorized is reasonable, used for corrective purposes and is subject to safeguards that prevent abuse, direct delegation of only the right to physically discipline falls within the protection of s. 43.

Summary:

[33] Ms. Dick had the authority to physically discipline her daughter. Either she wrongly believed she could not do so, because of her prior conviction, or she believed it was more effective if the person wronged administered the punishment. In assessing whether conduct falls within s. 43, the court is reluctant

to scrutinize the values or corrective strategy of a parent or person standing in place of a parent. See *Poulin, supra*, at para 24:

This Court will not intrude into the family beyond what is plainly outside acceptable in assessing whether force used was for a legitimate educational purpose.

[34] When the natural parent's authority is directly delegated to another, the focus of the court's scrutiny targets the purpose of the punishment, reasonableness of force used and whether there was any reasonable risk of the delegation being abused. Further, s. 43 must be strictly construed to limit the authorization s. 43 gives to an accused to interfere with the constitutional rights of children to be free of nonconsensual invasions of their physical security.

[35] Ms. Dick was asked twice and was present when the force was used. Ms. Dick had been drinking, but the evidence fails to establish that she was not aware of her responsibilities as a parent. It is not the court's task to assess the appropriateness of any correction measures, only to determine if the force used falls within the protective reach of s. 43. While at the outer limits of s. 43, the actions of Ms. Atkinson are covered by s. 43.

[36] Parents can directly delegate to another their authority to physically discipline their child if the circumstances do not subject the child to unreasonable risk, and the force used is reasonable and used for correction measures.

[37] Ms. Atkinson is acquitted.

Stuart T.C.J.