

Children's Domestic Tort Claims

Ann M. Haralambie*

I. INTRODUCTION

Child abuse and neglect is a significant problem. Substantiated cases of abuse and neglect involved more than 900,000 children in 2003.¹ Children are often the forgotten potential plaintiffs in domestic torts cases. However, they do often 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. This article will outline those causes of action and provide some practical suggestions to pursuing domestic tort claims by or on behalf of children.

II. THE NEED FOR A REMEDY

Children who are abused and neglected may continue to suffer from ongoing abuse and neglect,² but even if the 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.³ 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 parent-

* Copyright © 2005 by Ann M. Haralambie. This article is based on an article that first appeared in Ann Haralambie, *Kids' Causes of Action*, 27 FAM. ADVOC. 30 (2005) and on information appearing in ANN M. HARALAMBIE, 2 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES ch. 20 (2d ed. 1993 & Supp. 2005) [hereinafter HARALAMBIE, HANDLING CHILD CUSTODY]. Ann Haralambie is a certified family law specialist in private practice in Tucson, Arizona.

1. CHILDREN'S BUREAU, DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT iii (2003).

2. For a discussion of different types of abuse and neglect and how to prove them, see HARALAMBIE, HANDLING CHILD CUSTODY, *supra* note *, at chs. 16-18. See also ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES: A GUIDE TO CUSTODY AND TORT ACTIONS (1999); JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES (2005). For a more detailed discussion of the law and practice involving child abuse torts, see DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE chs. 3-5, 9 (rev. ed. 2005).

3. See, e.g., ROBIN KARR-MORSE & MEREDITH S. WILEY, GHOSTS FROM THE NURSERY: TRACING THE ROOTS OF VIOLENCE (1997).

ing for their own children and may perpetuate a cycle of abuse and neglect.⁴

Most legal responses to child abuse during the child's minority either address the custody and visitation rights of the 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 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. Children have few resources to assist them once they "age out" of the system, and many become homeless or incarcerated within the first year or two after leaving foster care.⁵

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 violence and may provide the only remedy for the long-term consequences of the abuse. When the tort is an intentional one, punitive damages may be available. In addition to monetary recovery, however, a successful tort action may also provide therapeutic benefit for the child by 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.

III. IDENTIFYING CAUSES OF ACTION

A. *Assault and Battery*

Physical and sexual abuse give rise to causes of action for the intentional assaults and batteries by the abuser. Battery requires a showing that "(a) [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 (b) an offensive contact

4. See, e.g., Katherine C. Pears & Deborah M. Capaldi, *Intergenerational Transmission of Abuse: A Two-Generational Prospective Study of an At-Risk Sample*, 25 CHILD ABUSE AND NEGLECT 1439 (2001).

5. See, e.g., Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, CHILD TRENDS RESEARCH BRIEF (Child Trends, Wash., D.C.), Dec. 2002, at 5.

with the person of the other directly or indirectly results.”⁶ While the act of battery must be intended, the abuser does not need to intend to harm the child. Assault requires that “(a) [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 (b) the other is thereby put in such imminent apprehension.”⁷ The *Restatement (Second) of Torts* provides that “bodily contact is offensive if it offends a reasonable sense of personal dignity.”⁸ Physical⁹ and sexual¹⁰ child abuse clearly should satisfy this requirement.

B. *Intentional Infliction of Emotional Distress*

Physical and sexual abuse,¹¹ the failure to protect a child from such abuse, and custodial interference¹² may also give rise to claims for intentional infliction of emotional distress. That cause of action requires proof that the defendant acted intentionally or recklessly, that the conduct was extreme or outrageous, that the wrongful conduct caused the emotional distress, and that the emotional distress was severe.¹³

C. *Negligent Infliction of Emotional Distress*

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 conse-

6. RESTATEMENT (SECOND) OF TORTS § 18 (1965).

7. *Id.* § 21.

8. *Id.* § 19.

9. *See, e.g.*, *Gillett v. Gillett*, 335 P.2d 736, 738 (Cal. Dist. Ct. App. 1959) (involving stepmother who beat child so severely as to rupture her spleen and kidney, which had to be removed); *Treschman v. Treschman*, 61 N.E. 961, 962 (Ind. App. 1901) (involving stepmother who beat child on a number of occasions, causing significant loss of vision from damage to her optic nerves); *Doe v. Doe*, 551 S.E.2d 257, 257 (S.C. 2001) (involving children who sued father for assault and battery, who was criminally convicted of sexual abuse); *Steber v. Norris*, 206 N.W. 173, 174, 176 (Wis. 1925) (holding that damages of one dollar awarded to child against third party custodian who whipped him with a twisted, rubber whip on his bare flesh were grossly inadequate).

10. *See, e.g.*, *Wilson v. Wilson*, 742 F.2d 1004, 1004-05 (6th Cir. 1984) (reversing dismissal of child's action against her adoptive father for three years of molestation); *A.R.B. v. Elkin*, 98 S.W.3d 99, 101-02, 104-05 (Mo. Ct. App. 2003) (holding that “actual injury or damages is not a required element of proof in an assault and battery action” and concluding it was error for trial court to fail to award damages when father admitted touching his eleven-year-old son's genitals and having his son touch his genitals and admitted exposing his genitals to and masturbating in front of his seven-year-old daughter); *Elkington v. Foust*, 618 P.2d 37, 38 (Utah 1980) (allowing child to recover \$42,600 against adopted father for seven years of molestation).

11. *See, e.g.*, *L.C.H. v. T.S.*, 28 P.3d 915, 917-18 (Alaska 2001) (discussing child suit against step-grandfather for sexual abuse and intentional infliction of emotional distress).

12. *See, e.g.*, *Pittman v. Grayson*, 869 F. Supp. 1065, 1067 (S.D.N.Y. 1994) (discussing father's suit against mother and international airline company for interference with custodial rights, intentional infliction of emotional distress, and false imprisonment for removing his daughter from the United States in violation of a custody order).

13. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

quence. It is the abuser's lack of awareness of foreseeable emotional injury that constitutes the gravamen of the tort of negligent, as opposed to intentional, infliction of emotional distress. Some courts will not allow a negligence claim, however, when it is based on abusive conduct that is clearly intentional. Moreover, courts may hold that an insurance exclusion for intentional acts precludes coverage for negligence claims based on clearly intentional acts, depending on the actual language of the insurance policy.¹⁴

D. *Negligent Infliction of Prenatal Injuries*

Prenatal drug exposure can create lasting problems for children.¹⁵ Courts in various contexts are addressing the problems caused by mothers' illegal drug use during pregnancy. Most courts that have addressed the issue have declined to permit adjudication of the child as dependent and neglected based solely on prenatal drug exposure.¹⁶ Similarly, most courts reject protective custody or other prenatal remedies designed to safeguard viable fetuses from the mother's drug use.¹⁷ Whether such prenatal drug use gives rise to tort liability is still

14. See *infra* Part IV.E. (discussing insurance coverage).

15. See, e.g., DOUGLAS J. BESHAROV, WHEN DRUG ADDICTS HAVE CHILDREN (1994); MOTHERS, BABIES, AND COCAINE: THE ROLE OF TOXINS IN DEVELOPMENT (Michael Lewis & Margaret Bendersky eds., 1995); JANET Y. THOMAS, EDUCATING DRUG-EXPOSED CHILDREN: THE AFTERMATH OF THE CRACK-BABY CRISIS (2004); Vincent L. Smeriglio & Holly C. Wilcox, *Prenatal Drug Exposure and Child Outcome*, 26 CLINICS IN PERINATOLOGY 1 (1999).

16. See, e.g., *Starks v. State*, 18 P.3d 342, 343, 348 (Okla. 2001); *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 740 (Wis. 1997).

17. See, e.g., *T.H. v. Dep't of Health and Rehabilitative Servs.*, 661 So. 2d 403, 404 (Fla. Dist. Ct. App. 1995) (rejecting preventive bimonthly drug testing of pregnant mother of adjudicated dependent child); *Kruzicki*, 561 N.W.2d at 739 (rejecting protective custody of mother); see generally Deborah Appel, *Drug Use During Pregnancy: State Strategies to Reduce the Prevalence of Prenatal Drug Exposure*, 5 U. FLA. J.L. & PUB. POL'Y 103 (1992) (discussing the effects of prenatal drug exposure on the fetus, analyzing legislative and judicial responses to prenatal drug use, and recommending a public health approach to the problem); Amy Kay Boatright, Comment, *State Control over the Bodies of Pregnant Women*, 11 J. CONTEMP. LEGAL ISSUES 903, 908 (2000-01) (analyzing the constitutional rights of pregnant women, reviewing state responses to prenatal harm, and recommending "that the U.S. Supreme Court adopt a bright line rule . . . that a fetus' right to begin life with a sound mind and body is not assertable against its own mother" by any means, including by detainment or supervision); Michael T. Flannery, *Court-Ordered Prenatal Intervention: A Final Means to the End of Gestational Substance Abuse*, 30 J. FAM. L. 519 (1991-92) (analyzing standards for intervention with substance-abusing pregnant women; juxtaposing state, fetal, and maternal rights; and recommending that whether and when a court should intervene be determined according to what is most protective of the child and least intrusive to the mother, considering medical, social, financial, and psychological factors); Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299 (2002) (discussing state options for dealing with prenatal drug exposure and recommending an individualized determination that includes consideration of the resources actually available); Steven J. Ondersma et al., *Prenatal Drug Exposure and Social Policy: The Search for an Appropriate Response*, 5 CHILD MALTREATMENT 93, 94, 106 (2000) (recommending development of an "empirically based national policy regarding prenatal substance exposure"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1425, 1432 (1991) (examining the experiences of pregnant "poor Black women" and arguing that "punishing drug addicts who choose to carry their pregnancies to term unconstitutionally burdens the right to autonomy over reproductive decisions," helping "to perpetuate a racist hierarchy").

an unanswered question.¹⁸

E. Violation of Legislative Provision

An implied cause of action may exist based on the doctrine that violation of a criminal statute is negligence per se. *Restatement (Second) of Torts*, section 874A provides the following:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.¹⁹

In order to rely on this cause of action, the child must be an intended beneficiary of protection extended by the statute. It is apparent that the child is an intended beneficiary of criminal child abuse and neglect laws, so when the abuse or neglect is sufficiently severe as to constitute a criminal violation, an implied cause of action should apply. An abused or neglected child is also an intended beneficiary of laws mandating certain persons to report suspicions of child abuse and neglect; however, fewer courts have been willing to recognize a private cause of action for failure to report.²⁰ State law may give rise to a cause of action against the child welfare agency for negligence in investigating reports of child abuse.²¹

18. See generally Thomas M. Fleming, *Right of Child to Action Against Mother for Infliction of Prenatal Injuries*, 78 A.L.R. 4TH 1082 (1990) (analyzing cases concerning a child's cause of action against his mother for prenatal personal injury).

19. RESTATEMENT (SECOND) OF TORTS § 874A (1979).

20. See *Landeros v. Flood*, 551 P.2d 389, 390-91 (Cal. 1976) (holding that battered child is entitled to sue physician for failure to report); *Smith v. Jackson County Bd. of Educ.*, 608 S.E.2d 399, 403, 409-10 (N.C. Ct. App. 2005) (stating that "the duty to report child abuse is not the type of discretionary law enforcement function shielded by the public duty doctrine"); *Doe v. Roman*, No. 2001-AP-05-0044, 2002 WL 31732468, *5 (Ohio Ct. App. Dec. 4, 2002) (discussing mandatory reporting statute that "expressly imposes liability upon persons who fail to report," therefore no governmental immunity applies); cf. *Ward v. Greene*, 839 A.2d 1259, 1266-67, 1272-73 (Conn. 2004) (noting that mandatory reporting law creates duty of care owed only to children who are believed to have been abused or neglected); *Marcelletti v. Bathani*, 500 N.W.2d 124, 130 (Mich. Ct. App. 1993) (declining to extend statutory reporting duty to anyone other than the abused child). But cf. *Cuyler v. United States*, 362 F.3d 949, 954-55 (7th Cir. 2004) (declining to recognize a private cause of action for failure to report); *C.B. v. Bobo*, 659 So. 2d 98, 102 (Ala. 1995) (same); *Fischer v. Metcalf*, 543 So. 2d 785, 791 (Fla. Dist. Ct. App. 1989) (same); *Borne v. Nw. Allen County Sch. Corp.*, 532 N.E.2d 1196, 1203 (Ind. Ct. App. 1989) (same); *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 604 (Kan. 1991) (same); *Meyer v. Lindala*, 675 N.W.2d 635, 641 (Minn. Ct. App. 2004) (same); *Bradley v. Ray*, 904 S.W.2d 302, 314 (Mo. Ct. App. 1995) (same); *Marquay v. Eno*, 662 A.2d 272, 278 (N.H. 1995) (same); *Paulson v. Sternlof*, 15 P.3d 981, 984 (Okla. Civ. App. 2000) (same); *Doe v. Marion*, 605 S.E.2d 556, 562-63 (S.C. Ct. App. 2004) (same); *Arbaugh v. Bd. of Educ.*, 591 S.E.2d 235, 241 (W. Va. 2003) (same).

21. See, e.g., *Radke v. County of Freeborn*, 694 N.W.2d 788, 791 (Minn. 2005) ("[A] cause of action can be maintained for negligence in the investigation . . . of child abuse and neglect reports as required under [the child abuse reporting statute.];" cf. *Gilliam v. Dep't of Soc. & Health Servs., Child Protective Servs.*, 950 P.2d 20, 22 (Wash. Ct. App. 1998) (holding that the

F. *Other Causes of Action for Abuse and Neglect*

In some factual scenarios, physical and sexual abuse may involve false imprisonment²² or negligent transmission of a sexually transmitted disease. A non-abusing parent who fails to reasonably protect the child may also be liable for a negligence tort.²³ 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.²⁴ Some states recognize a cause of action against a child welfare agency for negligent placement in foster care.²⁵ Once the child is in state custody, a "special relationship" may exist between the agency and the child, giving rise to a duty to protect the foster child.²⁶

G. *Intentional Interference with Custodial Rights*

A number of jurisdictions recognize a cause of action arising out of intentional interference with custodial rights, at least when the plaintiff is the custodial parent.²⁷ Fewer states recognize a cause of

state is not entitled to absolute immunity for negligent investigation that resulted in a dependency action being filed against father for allegedly molesting his children).

22. For the elements of false imprisonment see RESTATEMENT (SECOND) OF TORTS § 35 (1965).

23. *See, e.g.*, *Sipes v. Sipes*, 936 P.2d 1027, 1030 (Or. Ct. App. 1997) (stating that the fact that the child's mother knew that his father abused him does not preclude a negligence claim for her failure to protect him).

24. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).

25. *See, e.g.*, *Savage v. Utah Youth Vill.*, 104 P.3d 1242, 1246 (Utah 2004) (noting that a placement agency has a special duty when placing children in foster homes to regard "the welfare of the child being placed and other persons in the home [and that it] is a reasonably foreseeable risk that a child with a known history of sexually abusing young children might sexually abuse again if placed in a home with young children").

26. Because of sovereign immunity, a child may be precluded from suing the state based solely on negligence. Most actions against state agencies are pleaded as civil rights claims. *See infra* Part III.H.

27. *See, e.g.*, *DiRuggiero v. Rodgers*, 743 F.2d 1009, 1017 (3d Cir. 1984) (applying New Jersey law); *Bennett v. Bennett*, 682 F.2d 1039, 1044 (D.C. Cir. 1982) (applying District of Columbia law); *Wasserman v. Wasserman*, 671 F.2d 832, 833-34 (4th Cir. 1982) (applying Maryland law); *Lloyd v. Loeffler*, 539 F. Supp. 998, 1005 (E.D. Wis. 1982), *aff'd*, 694 F.2d 489, 496 (7th Cir. 1982) (applying Wisconsin law); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978) (applying New York law); *Rayford v. Rayford*, 456 So. 2d 833, 834-35 (Ala. Civ. App. 1984); *Surina v. Lucey*, 214 Cal. Rptr. 509, 513 (Ct. App. 1985); *D & D Fuller CATV Constr., Inc. v. Pace*, 780 P.2d 520, 524 (Colo. 1989) (en banc); *Mathews v. Murray*, 113 S.E.2d 232, 235 (Ga. Ct. App. 1960); *Shields v. Martin*, 706 P.2d 21, 22-23, 27 (Idaho 1985); *Wolf v. Wolf*, 690 N.W.2d 887, 892 (Iowa 2005); *Brown v. Brown*, 61 N.W.2d 656 (Mich. 1953); *Kramer v. Leineweber*, 642 S.W.2d 364, 366 (Mo. Ct. App. 1982); *Plante v. Engel*, 469 A.2d 1299, 1300 (N.H. 1983); *LaGrenade v. Gordon*, 264 S.E.2d 757, 759 (N.C. Ct. App. 1980); *McBride v. Magnuson*, 578 P.2d 1259, 1260 (Or. 1978) (en banc); *Bedard v. Notre Dame Hosp.*, 151 A.2d 690, 692 (R.I. 1959); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986); *In re Marriage of Hall*, 607 P.2d 898, 901 (Wash. Ct. App. 1980); *Kessel v. Leavitt*, 511 S.E.2d 720, 765 (W. Va. 1998). *But see, e.g.*, *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990) (noting that no cause of action exists for intentional interference with custodial rights); *Zaharias v. Gammill*, 844 P.2d 137, 138 (Okla. 1992) (refusing to recognize the tort of intentional interference with custody, but pointing out that "Oklahoma already recognizes a cause of action in the parent or legal guardian of a child for the abduction or enticement of that child"); *cf. Hoblyn v. Johnson*, 55 P.3d 1219, 1227 (Wyo. 2002) (declining to recognize the tort of intentional interference with custodial rights under the facts presented and stating that

action for interference with visitation.²⁸ *Restatement (Second) of Torts*, section 700 describes the tort of causing a minor child to leave or not to return home as follows: "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."²⁹ Several states have recognized the section 700 tort.³⁰ It is interesting to note that the liability is to the *parent* and does not directly include liability to the child himself. It may be argued, however, that the child is similarly injured by being deprived of the companionship and care of the legally entitled custodian. The comment to section 700 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 deprivation to the parent of the society of the child is itself an injury that the law redresses.³¹

Custodial interference often constitutes a crime, thereby giving rise to an implied civil cause of action based on violation of a criminal statute.³² Custodial interference also may give rise to intentional or negligent infliction of emotional distress. Some jurisdictions, however, find that a cause of action, which essentially alleges parental alienation, is not recognized when a "heart balm" statute or case law has abolished claims for alienation of affections.³³ Custodial interference theories have included false imprisonment,³⁴ enticement,³⁵ unlawful interference with custody,³⁶ intentional infliction of emotional

even if the court "were inclined to recognize the tort . . . , the parents . . . failed to establish a prima facie case that the elements . . . [had been] met").

28. See, e.g., *Owens v. Owens*, 471 So. 2d 920, 921 (La. Ct. App. 1985); *Hixon v. Buchberger*, 507 A.2d 607, 607 (Md. 1986); *Politte v. Politte*, 727 S.W.2d 198, 198 (Mo. Ct. App. 1987); *McGrady v. Rosenbaum*, 308 N.Y.S.2d 181 (Sup. Ct. 1970); *Gleiss v. Newman*, 415 N.W.2d 845, 846 (Wis. Ct. App. 1987); *Cosner v. Ridinger*, 882 P.2d 1243, 1247 (Wyo. 1994).

29. RESTATEMENT (SECOND) OF TORTS § 700 (1977).

30. See, e.g., *Anonymous v. Anonymous*, 672 So. 2d 787, 789 (Ala. 1995); *Robbins v. Hamburger Home for Girls*, 38 Cal. Rptr. 2d 534, 539-40 (Ct. App. 1995) (recognizing the tort, but holding that insufficient facts were pleaded to satisfy the elements in this case); *Zamstein v. Marvasti*, 692 A.2d 781, 790 (Conn. 1997) (recognizing the tort, but holding that insufficient facts were pleaded to satisfy the elements in this case); *Stone v. Wall*, 734 So. 2d 1038, 1049 (Fla. 1999); *Wolf*, 690 N.W.2d at 891; *Kessel*, 511 S.E.2d at 761-62; *Cosner*, 882 P.2d at 1247 (recognizing the tort, but holding that insufficient facts were pleaded to satisfy the elements in this case).

31. RESTATEMENT (SECOND) OF TORTS § 700 cmt. d (1977). But see *Larson*, 460 N.W.2d at 47 (reversing appellate court's recognition of a custodial parent's custodial interference tort action under section 700).

32. See discussion *supra* Part III.E. (regarding negligence based on violation of a legislative enactment).

33. See, e.g., *Bouchard v. Sundberg*, 834 A.2d 744, 756-57 (Conn. App. Ct. 2003); *Hyman v. Moldovan*, 305 S.E.2d 648, 649 (Ga. Ct. App. 1983).

34. See, e.g., *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978).

35. See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832, 833 (4th Cir. 1982) (applying Maryland law); *Armstrong v. McDonald*, 103 So. 2d 818, 819-20 (Ala. Ct. App. 1958).

36. See, e.g., *Lloyd v. Loeffler*, 539 F. Supp. 998, 1004 (E.D. Wis. 1982); *Wood v. Wood*, 338 N.W.2d 123, 124 (Iowa 1983); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983).

distress,³⁷ outrageous conduct,³⁸ abduction and concealment,³⁹ causing a minor child to leave or not to return,⁴⁰ and conspiracy.⁴¹ When the cause of action is recognized, tort liability may also 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.⁴²

H. Civil Rights Action

When the state has custody of a child, such as a child in foster care, and the state actor's negligence resulted in abuse, a civil rights action might lie under 42 U.S.C. § 1983 under the theory that the state has formed a "special relationship" with the child in its custody. In *DeShaney v. Winnebago County Department of Social Services*,⁴³ the United States Supreme Court ruled that when the child is no longer in state custody, there is no such "special relationship." No federal civil rights remedy will lie, therefore, even if child protective services investigated a complaint or returned the child to the parent negligently.⁴⁴

37. See, e.g., *Raftery v. Scott*, 756 F.2d 335, 339 (4th Cir. 1985) (stating that emotional distress tort will lie despite factual overtones of abolished tort of alienation of affection); *Wasserman*, 671 F.2d at 833; *Fenslage v. Dawkins*, 629 F.2d 1107, 1108 (5th Cir. 1980); *Kajtazi*, 488 F. Supp. at 20; *Sheltra v. Smith*, 392 A.2d 431, 431 (Vt. 1978).

38. See, e.g., *Pankratz v. Willis*, 744 P.2d 1182 (Ariz. Ct. App. 1987); *Cramlet v. Multimedia Program Prod., Inc.*, No. 80-C-1737, 1985 U.S. Dist. LEXIS 21704, *5 (D. Colo. Mar. 15, 1985).

39. See, e.g., *Gibson v. Gibson*, 93 Cal. Rptr. 617, 618 (Ct. App. 1971); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986).

40. See, e.g., *Lloyd*, 539 F. Supp. at 1004.

41. See, e.g., *Fenslage*, 629 F.2d at 1110; *Cramlet*, 1985 U.S. Dist. LEXIS 21704, at *1; *Lloyd*, 539 F. Supp. at 1003; *Gibson*, 93 Cal. Rptr. at 617.

42. See, e.g., *Marshak v. Marshak*, 628 A.2d 964, 970 (Conn. 1993); *Plante v. Engel*, 469 A.2d 1299, 1302 (N.H. 1983); *Zaharias v. Gammill*, 844 P.2d 137, 138 (Okla. 1992); *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992).

43. 489 U.S. 189, 193-94 (1989) (affirming lower court's determination that no § 1983 cause of action existed for a child once in foster care who was beaten to death by his father after being returned to his custody).

44. See, e.g., *Forrester v. Bass*, 397 F.3d 1047, 1056, 1059 (8th Cir. 2005). In *Forrester*, the court determined that social workers were entitled to qualified immunity and to summary judgment. *Id.* at 1059. In making this determination, the court discussed state-created procedures, which require investigations, law enforcement notification and intervention, direct observation of subject children, and the provision of social services but "do not mandate the particular substantive outcomes" and "do not create 'entitlements' subject to constitutional protections under the Fourteenth Amendment." *Id.* at 1056. In addition, the social worker's "failure to conduct an investigation, to contact law enforcement, and to verify the whereabouts of the boys, while erroneous, and maybe naive in retrospect, cannot be considered conscience-shocking." *Id.* at 1059; see also, e.g., *S.S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (holding that state social workers were not liable for returning child home to father knowing that he associated with a pedophile because the social workers did not increase her danger but only returned her to the situation from which they had taken her); *Powell v. Ga. Dep't of Human Res.*, 114 F.3d 1074, 1083 (11th Cir. 1997) (holding that welfare agency and its employees were not liable for infant killed after being returned to mother's abusive home); *Doe v. District of Columbia*, 93 F.3d 861, 864-65 (D.C. Cir. 1996) (holding that a violation of Child Abuse Prevention and Treatment Act (CAPTA) requirement of promptly investigating reports of child abuse does not give rise to § 1983 private cause of action because CAPTA is a funding act creating only generalized duties similar to those in the Adoption Assistance and Child Welfare Act for which a private right of action was rejected by *Suter v. Artist M.*, 503 U.S. 347 (1992)); *Teresa T. v. Ragaglia*, 865 A.2d 428, 435, 438, 444 (Conn. 2005) (holding that no tort action lies for failure to remove children because "the commissioner is not statutorily required to remove a child in imminent risk of

The Court specifically stated that if the state had removed Joshua DeShaney from his home and placed him in a state foster home, “we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”⁴⁵ The Court noted that several circuit courts of appeals had found state liability for failure to protect children in state foster homes who were abused by their foster parents.⁴⁶ Following *DeShaney*, several courts have recognized that the state may have a duty to protect children who are in foster care.⁴⁷ Even after *DeShaney*, several states have recognized liability based, not on the fact of a special relationship, but rather on a state-created danger.⁴⁸

physical harm pursuant to [child protection statutes and agency regulations],” but rather, “a probable cause determination is discretionary”); *cf.* 31 *Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003) (holding that Adoption Assistance and Child Welfare Act does not create a private cause of action to allow foster children to sue to enforce its provisions).

45. *DeShaney*, 489 U.S. at 201 n.9.

46. *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 793 (11th Cir. 1987) (en banc) (citing *Doe v. New York City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981)).

47. *See, e.g., J.H. ex rel. Higgin v. Johnson*, 346 F.3d 788, 792 (7th Cir. 2003) (stating that a plaintiff must demonstrate that the individual child welfare agency employees “had specific ‘knowledge or suspicion’ of the risk of sexual abuse facing the children [in their foster home] in order to hold the defendants liable under § 1983” (quoting *Lewis v. Anderson*, 308 F.3d 768, 773 (7th Cir. 2002)); *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990) (holding that foster child in state foster care has a due process right to personal safety); *Norfleet v. Ark. Dep't of Human Servs.*, 796 F. Supp. 1194, 1201 (E.D. Ark. 1992); *Kara B. ex rel. Albert v. Dane County*, 555 N.W.2d 630, 631, 635, 638 (Wis. 1996) (construing *DeShaney* and several other cases, when read together, as recognizing a clearly established constitutional right to a reasonably safe and secure foster home placement; stating that county officials did not have qualified immunity under a 42 U.S.C. § 1983 action brought by children who were physically and sexually abused in their foster home; and applying the professional judgment standard); *cf. K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (holding that child in state custody has the right “not to be handed over by state officers to a foster parent or other custodian, private or public, whom the state knows or suspects to be a child abuser”).

48. *See, e.g., Currier v. Doran*, 23 F. Supp. 2d 1277, 1279, 1282 (D.N.M. 1998) (denying summary judgment when the state agency had taken custody of the child and then placed him in the custody of his father, where he later died after his father threw boiling water on him, and when the state had received several reports that the child was being abused but did not act to remove him); *Tazioly v. City of Philadelphia*, No. CIV.A.97-CV-1219, 1998 WL 633747, *5-6, *7 (E.D. Pa. Sept. 10, 1998) (denying summary judgment when state agency failed to respond to numerous reports that the child was being abused after child “was treated for burns and contusions, dehydration, a fractured . . . leg, and a fractured skull” and holding that “a state actor may be held liable under [42 U.S.C.] § 1983 in cases where the state terminates satisfactory foster care and places a child in the custody of a [parent] with known propensities for violent and bizarre behavior, thereby increasing the foreseeable risk of harm to the child”); *Ford v. Johnson*, 899 F. Supp. 227, 229-30, 233-34 (W.D. Pa. 1995) (denying summary judgment when county agency had returned custody of child, who had been placed with department, back to father, who later beat child to death and holding that state agents who unnecessarily exposed child to danger could be found liable based on violation of child's rights under due process clause). *But see, e.g., Terry B. v. Gilkey*, 229 F.3d 680, 682, 684 (8th Cir. 2000) (holding that child welfare agency no longer had an affirmative duty to protect the children once the probate court placed them in the guardianship of their aunt and uncle even though the court ordered the agency to maintain an open protective services case on the children and concluding that individual defendants were “not liable on a theory of state-created danger for returning the children” with the alleged knowledge that the aunt and uncle were abusive).

IV. BARRIERS TO CAUSES OF ACTION

A. *Collateral Estoppel*

When there has been a finding of abuse in a family law, child welfare, or criminal action, that finding will generally 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 or had the opportunity to litigate the abuse issue.⁴⁹ If the defendant was convicted of a felony charge of abuse or custodial interference, then 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 a criminal action and the result favored the defendant, then the plaintiff should be permitted to relitigate the abuse in an action requiring proof only by a preponderance of the evidence.

Collateral estoppel may also apply against a child plaintiff. If the child was not represented by counsel in the previous action, however, collateral estoppel may not apply to preclude the tort action. Finally, the tort action may be pleaded in a way that involves different legal issues. Given the different purposes and standards that apply in family, child welfare, and criminal actions, plaintiffs should be able to bring their tort actions under most circumstances.

B. *Potential Defendants*

Abusive or negligent parents are obvious potential defendants. There may also be third party or institutional defendants, however, even though the injury to the child was caused by a parent or other household member. For example, under state mandatory reporting laws, certain people are required to report suspected abuse or neglect. Doctors, nurses, psychologists, counselors, teachers, and daycare workers are among the groups most often included as mandated reporters. If any such person 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, then the breach of that duty may give rise to a child's cause of action.⁵⁰

Third parties, including parents, who facilitate the abuse may be held liable. Parents may have liability for failure to protect children in their care or to protect other children from foreseeable abuse by their child or spouse. Third parties who contribute to the circumstances surrounding the abuse may also be held liable under a negligence the-

49. See, e.g., *Doe v. Doe*, 551 S.E.2d 257, 258 (S.C. 2001) (holding that father's conviction for the sexual abuse collaterally estopped him from relitigating the facts of the abuse).

50. See *supra* Part III.E. (discussing liability for failure to report).

ory. If the child was in state custody, then the state agency may also be a defendant.

C. 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. However, such tolling may not apply to actions brought against governmental entities.⁵¹ There is a split of opinion as to whether they may be tolled after the child reaches majority based on delayed discovery, particularly as applied to child sexual abuse.⁵² 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 induced by it. Some states may permit tolling the statute only in the second situation.

Statutes of repose apply 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 which 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 whether any injury has resulted.⁵³

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.⁵⁴

51. *See, e.g.*, *Artukovich v. Astendorf*, 131 P.2d 831, 833-34 (Cal. 1942) (holding that, in the absence of a statutory exemption, the claim-filing requirements of the government tort claims act are applicable to minors and are not subject to tolling). *But see, e.g.*, *Rodriguez v. Superior Court*, 133 Cal. Rptr. 2d 294, 295, 298 (Ct. App. 2003) (noting that legislative establishment of Foster Family Home and Small Family Home Insurance Fund, which required foster parents to file a claim with the fund before the statute of limitation for the underlying claim expired, constituted a statutory exemption tolling the statute of limitations during the foster child's minority).

52. *Compare Doe v. Roe*, 955 P.2d 951 (Ariz. 1998) (permitting use of the discovery rule); *Farris v. Compton*, 652 A.2d 49 (D.C. 1994); *Osland v. Osland*, 442 N.W.2d 907 (N.D. 1989); *Ault v. Jasko*, 637 N.E.2d 870 (Ohio 1994); *Moriarty v. Garden Sanctuary Church of God*, 534 S.E.2d 672 (S.C. 2000); *Olsen v. Hooley*, 865 P.2d 1345 (Utah 1993), *with M.H.D. v. Westminster Sch.*, 172 F.3d 797 (11th Cir. 1999) (applying Georgia law and not permitting use of the discovery rule); *Schmidt v. Bishop*, 779 F. Supp. 321 (S.D.N.Y. 1991) (applying New York law); *Baily v. Lewis*, 763 F. Supp. 802 (E.D. Pa. 1991); *Lindabury v. Lindabury*, 552 So. 2d 1117 (Fla. Dist. Ct. App. 1989). For a discussion of delayed discovery see DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE, *supra* note 2, § 4.30; HARALAMBIE, HANDLING CHILD CUSTODY, *supra* note *, § 20.8; HARALAMBIE, *supra* note 2, at 87-90.

53. 54 C.J.S. *Limitations of Actions* § 5, at 22 (1987).

54. *See, e.g.*, FLA. STAT. ANN. § 95.11(7) (West 2002). The Florida statute provides that [a]n 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.

Id. Under Virginia law, a cause of action accrues in actions

D. Immunity

Parents and those legally responsible for the care of children, such as foster parents, have a privilege to reasonably discipline the children, including administration of reasonable corporal punishment.⁵⁵ If the punishment is unnecessarily degrading, or inflicts serious or permanent harm, the privilege does not apply.⁵⁶ Child abuse, by definition, exceeds the reasonably accepted boundaries of parental care and control and 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.⁵⁷ Further, if the force is imposed primarily for a purpose other than proper training, education, or discipline, then it is not privileged, even if it would have been privileged if applied for a proper purpose.⁵⁸

The parental immunity doctrine traditionally bars recovery for torts committed by a parent against a minor child. That immunity was conferred upon parents to further the public policy of “preserving domestic tranquility” and is broader than the privilege of reasonable discipline.⁵⁹ Child abuse itself may have already broken that domestic tranquility.⁶⁰ The *Restatement (Second) of Torts* rejects the doctrine

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.

V.A. CODE ANN. § 8.01-249(6) (2000).

55. See, e.g., *People v. Whitehurst*, 12 Cal. Rptr. 2d 33, 35 (Ct. App. 1992); *Commonwealth v. Rubbeck*, 833 N.E.2d 650, 653 (Mass. App. Ct. 2005); *In re Peter G.*, 774 N.Y.S.2d 686, 687 (App. Div. 2004) (Sullivan, J., concurring); *State v. Adaranijo*, 792 N.E.2d 1138, 1140 (Ohio Ct. App. 2003); RESTATEMENT (SECOND) OF TORTS § 147(1) (1965) (“A parent is privileged to apply such reasonable force or to impose reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.”).

56. See, e.g., *Nixon v. State*, 773 So. 2d 1213, 1215-16 (Fla. Dist. Ct. App. 2000); *State v. Kimberly B.*, 699 N.W.2d 641, 644, 649 (Wis. Ct. App. 2005); RESTATEMENT (SECOND) OF TORTS § 150 cmt. e (1965).

57. RESTATEMENT (SECOND) OF TORTS § 150 cmts. c-d (1965); see, e.g., *Gillett v. Gillett*, 335 P.2d 736, 737 (Cal. Ct. App. 1959) (“While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent’s wilful [sic] or malicious misconduct.”).

58. 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.” *Id.* § 151 cmt. a.

59. For a discussion of the parental immunity doctrine and its erosion see DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE, *supra* note 2, § 3.22; DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN §§ 9:7-9:9 (rev. 2d ed. 2005).

60. See, e.g., *Wilson v. Wilson*, 742 F.2d 1004, 1005 (6th Cir. 1984) (holding that adoptive father’s sexual molestation of child between the ages of eight and eleven was gross misconduct, which “would be so destructive of a family’s parental relations as to eliminate the . . . public policy behind the parental immunity rule”); *Hurst v. Capitell*, 539 So. 2d 264, 266 (Ala. 1989) (noting exception to parental immunity for cases of sexual abuse when proven by clear and convincing evidence); *Henderson v. Woolley*, 644 A.2d 1303, 1303 (Conn. 1994) (stating that parental immunity does not bar “an action by a minor child against his or her parent for personal injuries arising out of sexual abuse, sexual assault, or sexual exploitation”); *Herzfeld v. Herzfeld*, 781 So. 2d 1070, 1077-79 (Fla. 2001) (determining that parental immunity doctrine does not ap-

of parental immunity except with respect to reasonable force or confinement for control, training, and education.⁶¹ Most states have either abrogated the doctrine of parental immunity,⁶² particularly with respect to intentional torts, or held that it never existed.⁶³ Further, if the civil action is filed after the child has become an adult, parental immunity does not apply.⁶⁴ Some courts have declined to recognize parental immunity when the child is emancipated⁶⁵ or the parental rights have been terminated.

For children in state care, the state may have sovereign immunity. Further, in *DeShaney* the United States Supreme Court held that the state had no constitutional duty to protect a child who is not in state care after receiving reports of possible abuse by a parent, but left open the possibility of imposition of such a duty for children in the state's care.⁶⁶ Following *DeShaney*, several courts have recognized that the state may have a duty to protect children who are in foster care.⁶⁷

E. Insurance Coverage

Many tort defendants, especially family members, lack assets sufficient to justify the filing of an action. A major deterrent to the filing

ply to intentional sexual abuse); *Eagan v. Calhoun*, 698 A.2d 1097, 1098, 1104 (Md. 1997) (holding that father's intentional killing of mother "constitutes an abandonment of the parental relationship and of the broader family harmony, and, as a matter of judicial and legal policy, it should not bar a wrongful death action by the remaining family members otherwise entitled to bring such an action"); *Doe v. Holt*, 418 S.E.2d 511, 515 (N.C. 1992) ("[W]hen a parent steps beyond the bounds of reasonable parental discretion and commits a willful and malicious act which injures his or her child, [in this case the father's repeated rapes and sexual molestation of his children,] the parent negates the public policies [that] led to recognition of the parent-child immunity doctrine . . . , and the doctrine does not shield the parent.").

61. RESTATEMENT (SECOND) OF TORTS § 895G(1) (1979).

62. *See, e.g.*, *Hebel v. Hebel*, 435 P.2d 8, 13-14 (Alaska 1967); *Broadbent v. Broadbent*, 907 P.2d 43, 50 (Ariz. 1995) (en banc); *Gibson v. Gibson*, 479 P.2d 648, 648, 653 (Cal. 1971) (en banc) (replacing parental immunity with reasonable parent standard); *Rousey v. Rousey*, 528 A.2d 416, 416 (D.C. 1987); *Wagner v. Smith*, 340 N.W.2d 255, 255 (Iowa 1983); *Nocktonick v. Nocktonick*, 611 P.2d 135, 141 (Kan. 1980); *Rigdon v. Rigdon*, 465 S.W.2d 921, 921 (Ky. 1970); *Black v. Solnitz*, 409 A.2d 634, 635 (Me. 1979); *Stamboulis v. Stamboulis*, 519 N.E.2d 1299, 1301 (Mass. 1988); *Sweeney v. Sweeney*, 262 N.W.2d 625, 628 (Mich. 1978); *Anderson v. Stream*, 295 N.W.2d 595, 596 (Minn. 1980); *Hartman v. Hartman*, 821 S.W.2d 852, 852, 858 (Mo. 1991) (en banc) (replacing parental immunity with reasonable parent standard); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 824 (Mont. 1983); *Rupert v. Stienne*, 528 P.2d 1013, 1018 (Nev. 1974); *Vickers v. Vickers*, 242 A.2d 57, 58 (N.H. 1968); *Foldi v. Jeffries*, 461 A.2d 1145, 1152 (N.J. 1983); *Guess v. Gulf Ins. Co.*, 627 P.2d 869, 871 (N.M. 1981); *Nuelle v. Wells*, 154 N.W.2d 364, 367 (N.D. 1967); *Kirchner v. Crystal*, 474 N.E.2d 275, 276 (Ohio 1984); *Winn v. Gilroy*, 681 P.2d 776, 785-86 (Or. 1984); *Falco v. Pados*, 282 A.2d 351, 353 (Pa. 1971); *Silva v. Silva*, 446 A.2d 1013, 1017 (R.I. 1982); *Elam v. Elam*, 268 S.E.2d 109, 111-12 (S.C. 1980); *Wood v. Wood*, 370 A.2d 191, 193 (Vt. 1977); *Thomas v. Kells*, 191 N.W.2d 872, 874 (Wis. 1971); *cf. Sixkiller v. Summers*, 680 P.2d 360 (Okla. 1984) (failing to abrogate parental immunity in case involving negligent supervision short of willful misconduct).

63. *See, e.g.*, *Rousey*, 528 A.2d at 416; *Elkington v. Foust*, 618 P.2d 37, 40 (Utah 1980).

64. *See, e.g.*, W. PAGE KEETON ET. AL., PROSSER & KEETON ON TORTS 616 (5th ed. 1984).

65. *See, e.g.*, *Fitzgerald v. Valdez*, 427 P.2d 655, 659 (N.M. 1967); *Logan v. Reaves*, 354 S.W.2d 789, 791 (Tenn. 1962).

66. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989).

67. *See, e.g.*, *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *Norfleet ex rel. Norfleet v. State of Ark. Dep't. of Human Servs.*, 796 F. Supp. 1194 (E.D. Ark. 1992); *Kara B. ex rel. Albert v. Dane County*, 555 N.W.2d 630 (Wis. 1996).

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. When not precluded by parental immunity, it is generally a good idea to plead at least one negligence count, often negligent infliction of emotional distress, even when the conduct itself appears to be intentional to permit recovery against the tortfeasor's homeowner's insurance policy. Even when framed as a negligence claim, however, many policies specifically exclude coverage for child abuse generally or sexual abuse in particular, and courts may construe policy exclusions for intentional acts as excluding coverage when the underlying action was intentional, regardless of the theory pleaded.⁶⁸ Many liability policies for businesses and organizations also include exclusions, particularly for child sexual abuse.

68. See, e.g., EMCASCO Ins. Co. v. Diedrich, 394 F.3d 1091, 1096-97 (8th Cir. 2005) (stating that "the injury that gives rise to the state court lawsuit [for child molestation] was intended by [the perpetrator] and clearly constitutes an intentional act within the policy exclusion" and such exclusion also applies to the claim of the mother's negligent supervision of the perpetrator); Allstate Ins. Co. v. Gilbert, 852 F.2d 449, 452 (9th Cir. 1988) (stating that "the nature of the [child sexual molestation] is such that an intent to cause at least some harm can be inferred as a matter of law, and that as long as some harm is intended, it is immaterial that harm of a different magnitude from that contemplated actually resulted"); Harden v. State Farm Fire & Cas. Co., 605 S.E.2d 37, 39 (Ga. Ct. App. 2004) (stating that "exclusion from coverage for injury 'the result of' willful and malicious acts makes clear that the policy excludes not only the claim based on alleged acts of sexual abuse, but also any claim which has its genesis in or was 'the result of' those acts," including the negligence claim against the perpetrator's spouse "because it was 'the result of' the alleged sexual abuse"); Pekin Ins. Co. v. Dial, 823 N.E.2d 986, 990-91 (Ill. App. Ct. 2005) ("The factual allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend." In addition, "[a]n insurance company is under no duty to defend or indemnify an insured who sexually abuses a minor, because the nature of the conduct itself establishes as a matter of law that the insured expected or intended to injure the victim."); Doe v. Mires, 741 So. 2d 842, 845 (La. Ct. App. 1999) ("The sexual molestation of a child is . . . a deliberate, intentional act, and the emotional and physical damage is such a fundamental and natural consequence of the molestation that any predator must be held to realize that damage will result." (quoting Smith v. Perkins, 651 So. 2d 292 (La. Ct. App. 1994)); Montgomery County Bd. of Educ. v. Horace Mann Ins. Co., 840 A.2d 220, 229 (Md. Ct. Spec. App. 2003) ("[S]exual activity between an adult and a minor child [is] . . . *injurious per se*' and is a tort that is 'only committed intentionally' by the adult." (quoting Pettit v. Erie Ins. Exchange, 709 A.2d 1287, 1287 (Md. 1998)); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 370 (N.Y. 1992) (holding that injury is inherent in child sexual abuse, and since the abuse was intentional, the injuries were intentionally caused as a matter of law); State Farm Lloyds v. C.M.W., 53 S.W.3d 877, 888, 891 (Tex. Ct. App. 2001) (holding that "intent to injure will be inferred as a matter of law in cases involving sexual abuse of a minor," "regardless of the legal theories attached to them"); Allstate Ins. Co. v. Vose, 869 A.2d 97, 102 (Vt. 2004) (holding that an act of "child abuse 'is not the type of act that only occasionally results in harm—it is inherently harmful,'" and intent will be inferred as a matter of law (quoting Serecky v. Nat'l Grange Mut. Ins., 857 A.2d 775 (Vt. 2004)); St. Michelle v. Robinson, 759 P.2d 467, 470 (Wash. Ct. App. 1988) (holding that father's sexual abuse of his daughter was clearly intentional, therefore, the facts did not support the claim of negligent infliction of emotional distress); Tara N. *ex rel.* Kummer v. Economy Fire & Cas. Ins. Co., 540 N.W.2d 26, 28 (Wis. Ct. App. 1995) (barring recovery for psychological and bodily injuries to the child, mother's loss of consortium, child's medical expenses and loss of earning capacity in case filed against grandparents who negligently supervised visitation between the child and her father due to policy exclusion for bodily injury arising out of an expected, anticipated, or foreseeable sexual act).

F. *Preserving Children's Domestic Tort Claims*

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

Family law attorneys who are not experienced in handling tort cases may be professionally and financially ill-equipped to handle a tort action related to a family law or child welfare case. In such a situation, the attorney should refer the client to a competent tort attorney or recommend that she seek such counsel, emphasizing that a statute of limitations is involved. Associating tort counsel may be an excellent way to address these cases, with one attorney having the experience of tort litigation, and the finances to handle the litigation, while the other attorney has the expertise in the substantive child abuse or custodial inference issues.

Evidence developed during the family law or child welfare case may prove to be very 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 when appropriate. File destruction policies should take into consideration the possibility that such file materials may be necessary or useful in the event that the child wishes to pursue the tort claims as an adult.

V. CONCLUSION

While 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 tort claims, which should be identified 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.

