Preventing Institutional Liability For Children Who Molest Children

by Beatrice Yorker J.D., R.N., C.S., FAAN

Professionals and institutions that care for children are increasingly aware of the risks associated with children who victimize other children. Demographic information regarding the number of sex offenders who are themselves minors is rapidly developing. Although the transition from victim to abuser is still being studied (Hanson & Slater, 1988), researchers have shown that child molesters have a higher frequency of unwanted sexual activity as children. Research has also shown a connection between childhood victimization of the offender, the age and gender of their victims, and the type of offense (Groth & Burgess, 1977; Groth & Birnbaum, 1979; Burgess, Hartman & McCormack,1987). Abel, Becker, Cunningham-Rathner, & Mittelman (1988) conducted extensive studies with perpetrators and concluded that sexual offending behavior typically begins in adolescence or earlier. There is enough documentation in the literature to put professionals who work with children on notice that the risk of sexual abuse is present any time children who are victims of maltreatment are cared for in group settings.

This article will cover two general institution types that care for children, psychiatric/mental health treatment facilities and educational settings. Although a significantly higher number of children with a history of sexually abusive behavior are in residential treatment than in schools, the more specialized and treatment oriented the educational setting is, the more likely that there are increased numbers of children with clusters of behaviors such as aggressive and/or sexualized acting out. Although facilities that treat or detain juvenile offenders will not be specifically addressed in this article, professionals in those settings may also benefit from the recommended prevention and risk reduction measures that will be discussed.

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Liability

In order for a potential plaintiff to be able to file suit against an institution because a child has been molested by another child in their care, several criteria must be met. Civil liability for children being molested falls under the general area of torts, or the laws governing personal injury. Tort law includes negligence and malpractice, as well as intentional torts such as assault, battery, false imprisonment and invasion of privacy, or infliction of emotional distress. Care providers should be aware that each cause of action listed above contains several elements that must be present in order to have a valid claim. A cause of action for negligence requires the plaintiff to establish four elements: (a) that the defendant owed a duty to the plaintiff; (b) that the defendant breached that duty; (c) that the breach of duty was the proximate cause of any injury; and (d) that the plaintiff suffered damages. The same four elements apply to a cause of action for malpractice, which is negligence by a professional who must adhere to a specified standard of care.

Institutions that care for children clearly have a duty to protect children in their care from physical and emotional injury. The standard of care is established through a variety of mechanisms. One very important determiner of the standard of care is the profession. In fact, APSAC plays a critical role in determining standards of care for professionals in the field of child maltreatment. Another source of standards is the policies and procedures established by the institution. Regulatory bodies such as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) determine the applicable standard of care. An additional way that courts establish the appropriate standard of care is through the testimony of expert witnesses. The courts often apply common sense rules regarding questions of adequate protection by institutions for children in their care.

Although a lawsuit for an intentional tort such as assault and battery can be brought against the perpetrator of child molestation, negligence and malpractice are the most common types of suits brought against institutions. One reason for this is that it is very difficult to show that an institution intentionally caused harm to the child if another child was the perpetrator. Because institutions represent a deep pocket, some plaintiffs file a lawsuit for negligence against the institution and also file a suit for assault and battery against the perpetrator.

Negligence Lawsuits

Several recent lawsuits provide examples of institutional liability for children molesting other children. In Garcia v. City of New York, (1996) a public school teacher sent a five year old boy to the bathroom unescorted. The child was sodomized by an older boy who was identified but never charged. The City appealed a judgment of $535,000 in damages for the plaintiff and his family, on the grounds that the school had no prior notice that the alleged attacker posed a danger to young children (Goldstein, 1996). Attorneys for the public school argued that the court should apply a 1994 precedent requiring school officials to have "actual or constructive notice" of the potential problem in order for a school to be held li-

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able for the misdeeds of a student (Mirand v. City of New York, 1994). The Appeals Court judge reduced the award to $462,751, but denied the City's motion to set aside the verdict on the basis that "plain common sense" dictates that a kindergarten student should not have been allowed to go to the bathroom unattended. The court went on to say that "The potential danger to the child under the circumstances of this case can be reasonably foreseen and could have been prevented by adequate supervision of the school" (Garcia v. City of New York, 1996)

A similar case involved a female student who successfully sued her school after being sexually assaulted by two other female students in her class. (Adams, 1993) The victim testified that she had been pulled out of the classroom by the larger of the two assailants and once in the hallway bathroom was forced to disrobe. Her attackers also undressed and allegedly touched her body and forced her to lick one of the girls on the buttocks. A physician who examined the victim testified that she had been forced to perform cunnilingus on both attackers and they performed oral sex on her. The plaintiff claimed that she had asked the teacher for permission to use the bathroom and that the teacher had given her permission to go to a bathroom down the hall. There was a bathroom directly accessible to the classroom, however the teacher prohibited its use during class.

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A jury in the case returned a $350,000 verdict against the school. An Appellate judge dismissed the jury award on the basis that there was insufficient evidence that the school could have foreseen the danger. The plaintiff's mother appealed and testified that she had complained to the teacher that one of the two assailants, a larger girl who had been held back a year, had previous incidents of violence, such as making another student walk around school naked and forcing the plaintiff to eat a piece of cake that had fallen on the floor.

On appeal, the panel of judges reinstated the jury's award by a 3 to 1 vote. The court noted that the teacher's actions had violated school policies that prohibited more than one student being out of the class at a time and specified that classroom bathrooms were to be used where available. The first judge who reversed the jury award found the violations of the school's safety policy were not sufficient to find the school negligent since the policy was intended to protect students from outside intruders, not other students. The judge who wrote the majority opinion of the Appeals Panel countered that although the rules were created to prevent harm from intruders, "they were obviously intended to protect the students from danger, whatever the source." (Adams, 1993) The judge stressed the foreseeability of the assault, writing "It was enough that plaintiff show that [the student accused of the assault] had previously exhibited violent tendencies which should have placed the City on notice that she would, given the opportunity, assault plaintiff in the future." He noted that there was sufficient evidence to support the jury's finding that the defendant school had breached its duty to supervise students with the same degree of care "as would a reasonably prudent parent" The dissenting judge disagreed and argued that there was no unreasonable action on the part of the teacher nor was the history enough to prompt a reaction. (Adams, 1993)

Insurance Coverage for Intentional Acts

In general, insurance carriers exclude coverage for intentional acts that cause injury. Most insurance policies have language that specifically excludes bodily injury that is "either expected or intended from the standpoint of an insured" (Adams, 1993). In the area of sexual torts, the cause of action is relatively clear, e.g. all the elements of assault and battery are usually met. Because of this exclusion from coverage, victims will usually be unable to recover directly from a company that insures the assailant. Most sexual predators are of limited personal means, and so victims seeking to recover monetary damages in civil courts may target the liability insurance of the assailant (Walters, 1996). For example, one case involved a sixteen-year-old child who forced a eight-year-old to submit to a sex act at knife point. The parents of the victim sued the prepetrator's parents under their homeowner's policy, but the court concluded that the intentional injury exclusion from the insurance policy applied and although an assault occurred, there was no coverage under the defendants' policy (Menard v Zeno, 1990)

Preventing Sexual Misconduct by Minors in Care

Psychiatric/Mental Health Treatment Facilities

Health care providers who work in treatment facilities that serve children and adolescents are aware of the high proportion of children in treatment who have histories of abuse. With the growing number of institutional negligence lawsuits being filed, administrators and nurses have beefed up policies designed to specifically prevent sexual assault among patients or clients. The following recommendations are the result of increasing knowledge and experience in the area of child sexual offenders.

Assessments and psychosocial histories of

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children should include a risk appraisal for their potential for being abusive. Widom (1991a, 1991b) has broadened our understanding that children who have experienced physical abuse and neglect are at far greater risk for engaging in violence than children with a history of sexual abuse alone. Questions regarding previous episodes of aggression or hurtful acts toward siblings or animals can be incorporated into admission forms. Any projective testing that reveals themes of extreme violence toward others should be communicated in the chart, along with a plan for continued assessment and intervention.

One major child and adolescent residential treatment facility established a separate unit for known sexual offenders. Any residential or in-patient treatment facility that has more than ten sexual offenders at a time should consider the costs and benefits of opening a separate unit. Some cost-effective strategies can be accomplished by having such unit-wide safety measures as single bathroom facilities, single sleeping rooms, daily structure that deters unsupervised play, and routine checks on residents' whereabouts. A specialized unit also prevents exposure between predators and children who are significantly younger or less able to defend themselves.

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As a child psychiatric nurse who has worked closely with treatment facilities over the past twenty years, I can see the benefits of our collective experience with children who have issues of sexualized acting out. For example, we are all much more aware of the potential for exploitation when children of a wide variety of ages are in close proximity. We are also aware of the sometimes compulsive tendency for children to reenact aspects of trauma they have endured in the past. A simple behavioral modification program may not have the same efficacy in treating this type of behavior as with behaviors that are under conscious control.

Many in-patient units are consolidating care of diverse patient populations as a means of cost-containment. If separation of sexual predators is not possible, simple safety measures can be effectively implemented to prevent sexual acting out between children. Precautions used for self-injurious or aggressive patients can easily be extended to patients who pose a risk of inappropriate sexual activity. For example, once any incidents have occurred, the offending child should be kept in line of sight, then placed on fifteen or thirty minute checks for a reasonable period of time following the incident. Nurses can also structure bathroom activities to minimize contact between potential predators and vulnerable children. They should pay careful attention to sleeping room assignments and have the option of placing beds of children with histories of acting-out in view of the nurse's station during the night shift. Certainly there should be provisions for appropriate supervision during outings and outside activities if there is any indication that a particular child might be at risk for victimizing others. Many hospitals and other institutions place video monitors in strategic locations to enhance safety. One residential treatment unit is considering using motion detectors in areas that cannot be directly visualized by nursing staff.

Educational Facilities

Some educational facilities, particularly those that provide psycho-educational services, may be able to use some of the suggestions for psychiatric facilities listed above. An additional complication however, is the issue of student privacy or confidentiality. It is sometimes difficult to place heightened scrutiny and supervision on a child without revealing that they have a history of sexual abuse or acting-out. The two lawsuits described above provide guidance by placing the responsibility on the school to protect students if sexual misconduct is foreseeable. Once a student has engaged in threatening or aggressive behavior, teachers and administrators should provide reasonable safety measures for potential victims. The student's mental health history does not necessarily need to be revealed if the student has not given any behavioral clues that they pose a threat to their peers or to younger children. As the judge in the first case suggested, it is not common sense to allow kindergartners to go to a communal restroom with much older children without adequate supervision.

Both educational and treatment facilities should consider offering prevention programs for all students/residents. These programs could include general education regarding personal rights followed by specific skill building for reporting incidents. The preventive potential of such educational programs has been well documented, especially if the programs include role-playing or experiential exercises.

Conclusion

Although the media coverage of lawsuits against agencies that care for children is quite disconcerting, the field of child maltreatment has evolved to the point of providing much helpful guidance. Teachers, nurses, and administrators will generally only be held liable for sexual assaults committed by children in their care if the assaults are foreseeable. The standard of care imposed on child care institutions is not to prevent every possible adverse incident or assault, but to

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Assessment of Adult Survivors

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rapid, and inexpensive assessments of adult survivors of childhood abuse

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prevent those that are within a reasonable range of probability. It is also reassuring for professionals to know that they are only expected to act reasonably to protect children in their care. If a child with a documented history of sexually inappropriate behavior is closely supervised, if staff are aware of the potential danger, and if, in spite of precautions taken, the child succeeds in outwitting the safeguards and injures another child, the courts will simply hold the institution to the standard of care of a similarly situated institution or professional under the same or similar circumstances. The measures suggested in this article should provide guidance to professionals regarding current standards of care for the supervision of children who molest children.

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