

Children Who Witness Violence: Tortious Aspects

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Clinical aspects of children who experience some type of trauma or abuse have been receiving increased attention. There is undoubtedly a long way to go to catch up with the work done in the field of adult psychiatry. Apart from the interest in the impact on children of physical and sexual abuse, there is increasing involvement of children in the legal process and trials. One area has been trials when they are put through the experience of being involved directly in an adversary system. Another area has been the claims of children who are plaintiffs in suits where they have been exposed to traumatic incidents. The interest encompasses diverse intermediary variables such as the vulnerability of an individual child, the social support systems available, the role of therapeutic intervention, etc. A specific area is the focus of this article: the legal issues which arise when a child is exposed as a third-party victim-observer to an act of violence and the clinical application of our knowledge as psychiatrists to that issue. A separate article focuses on the clinical aspects seen in these children.¹

The legal categories used to encompass the acts in question are "infliction of mental distress and suffering" or "interference with peace of mind." The issues revolve around the negligent or intentional infliction of harm. The harm we are concerned with is emotional in nature and is seen as being distressful to the children involved. From a *psychiatric* perspective, emotional distress is seen as a common thread running through the psychologic lives of these children as victims of the acts which have occurred. From a *legal* perspective an interest of the children has been violated. Violation of such an interest has penetrated the protected interests of the child. The paradigm of the types of cases in question are children who have witnessed the murder of a parent or have been subjected to a vicious assault. The question is: since these children have been passive witnesses to acts primarily directed toward another, are they entitled to some type of monetary compensation in the form of damages?

For example, a person is usually not committing a homicidal act on a parent with the specific intent of inflicting emotional harm on a child who happens to witness it. Yet, the behavior gave rise to such a consequence due to its negligent components or the degree of its outrageousness. Hence, to begin at the simplest level, a social policy position would be that the

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emotional distress inflicted on third-party children is behavior that should be ameliorated or discouraged. How would that be accomplished? The clinical approach to discourage it would be through some form of treatment intervention; the legal way would be to provide compensation to the victims who have been exposed to such violent acts. The purpose would be not only deterrence but justice. As noted, the individual child need not have been an intended victim but in these cases is an innocent bystander who sustains emotional damage. Of course, in some cases children can be caught up in the scene of violence as well as the primary victim, such as in shooting episodes or violent rages in the perpetrator. These distinctions may change the legal issues as noted below.

Background

Only in recent years has there been any legal acceptance of the position that mental distress, standing alone, could serve as the basis for a tort action. Many reasons exist for a reluctance to impose such liability. As always, when there is an effort to extend tort liability, certain traditional objections are raised. With mental distress there is always the argument that judicial intervention should be restricted. The restrictionist argument is that the judicial system is intervening in too many things already. The objection takes the form that, although it is unfortunate to have been buffeted badly by fate, such as from witnessing the murder of a parent, for example, legal redress should not be the answer. The emotional suffering would be classified as "beyond the pale" of legal protection.

Another major objection has been the difficulty in establishing proof of injury. In part the objection has been a general one, partially involving the validity of psychiatric diagnoses. If the diagnostic validity was questionable, how could the legal system have confidence that a genuine emotional disturbance could be accepted as distinguished from fictitious or malingered claims? However, even if credibility was given to the clinical diagnosis, should every degree of emotional suffering be considered compensable? How serious would a disturbance have to be to warrant some type of recovery?² Initial resistance took the form of believing that such damages could not be measured. In a famous English case in 1861, the judge commented, "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act causes that alone."³ Beyond compensation for physical injuries, the injection of damages for the mental anguish accompanying a physical injury evolved as a new claim. Yet, this in itself was as difficult to measure as mental anguish alone, even if the anguish was rooted in something like a negligently inflicted broken leg. More recently, we have become aware of the impossibility of separating

neurophysiologic sequelae, such as neuroendocrine changes that accompany either physical injuries or psychologically traumatic states such as fright, grief, rage, and helplessness.

What remained beyond fears about valid measurement were objections to mental distress based on concerns that courts would be overwhelmed with claims, that defendants would be burdened with unforeseeable liabilities which could lead to financial ruin, and that no rule could be devised to allow a limited recovery without seeming either arbitrary or difficult to apply. Yet, despite the difficulties in setting limits, in cases of intentional acts of a flagrant type, a classic article by Magruder in 1936 advocated that there should be little question that mental disturbance may well be legitimate. He argued for the principle that "one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue" (p. 1035).⁴

Yet, what about acts directed at a person totally different than the one claiming the emotional injury and suffering? Here the acts were not directed at the third party who was making claim for a compensable injury. In cases of the type discussed here, the violent acts are often directed at a parent. Originally these cases were covered by the doctrine of "transferred intent"—a legal fiction which allowed physical injuries resulting to a third party to be covered under intentional acts. If this was so with physical acts, it could supposedly be raised for psychologic harm as well. Such a fiction allowed a person who was accidentally shot by a bullet aimed at another to have a course of action. However, if the bullet missed a third party, but subsequently recurrent anxiety attacks emerged, there was no cause of action. By the turn of the century, courts were beginning to allow recovery for fright induced by a negligent act in the absence of physical contact but only if the person had been personally endangered.⁵ The shock resulting from the sight of the mutilated body of a murdered sister, for example, was held in the *Koontz* case not to give rise to liability.⁶ Nor would the emotional distress of a pregnant lady, suffered from watching her dog get shot, be compensable.⁷

Options Considered

One approach was to avoid resorting to the fiction. The consequences of mental distress would then have to be viewed as part of the intended result, yet a bystander child to violence was not in fact the intended victim. Some

jurisdictions began to use a foreseeability test, such that the mental effect upon the third party would have to have a high degree of probability. If so, the behavior of the perpetrator would be seen as willful or reckless. A crucial distinction which began to be used was whether the third party was physically present at the scene and whether the defendant was aware of this so he should have anticipated the consequences. Although the idea of someone in a murderous rage contemplating whether a nonintended victim was around seems farfetched, it became one of the guiding principles in assessing liability. Hence, the distinction turned on whether the child saw the parent shot or instead was told about it sometime after the event. A literal presence on scene was required in those cases in contrast to being nearby which would not suffice.

In some cases in courts or before victim reparations boards, the rule applied has been that the child had to be physically present and in fear for his own safety or perhaps his life. To run into an adjacent room after hearing a shot and see the wounded body of a parent would not suffice. Such a rule, in its literalness, would seem contrary to what contemporary psychiatry has learned about the impact of emotional trauma on people. The "zone of danger" was interpreted in terms of the third party having a fear for his own safety and not that of another. While that would be a valid point, little justification would exist in believing that a child coming on a scene of bloodshed might not be fearful for his own safety, especially when the deceased victim was a parent. In terms of the cognitive appraisal of the child coming on such a scene, the time distinction does not seem meaningful. Must a child be physically present, come in shortly in response to the sound of a disturbance, or would simply discovering a bloody body of a parent in the house on returning from a friend's house suffice to establish fear for his safety or his own life?

Perhaps the key question should not be whether the act was directly witnessed by being physically present, but whether the context of the act would be likely to induce fear of injury in a child and would it be likely to leave emotional sequelae. A practical problem in these cases is the need to set limits. Hence, the cases have customarily restricted recovery to situations where there is a close family relationship between the bystander and victim. This may be a practical rule, although even here we might argue clinically that both a child and his best friend who discover the mother's body might both have emotional distress induced. Whether all such "witnesses" should be able to recover damages can be viewed narrowly as nothing but a legal question. However, aspects of social policy involving such children would seem to merit consideration as well.

What becomes clearer in reviewing cases where the issue has been the negligent infliction of emotional harm in a victim is that the courts have

been groping between extreme solutions. A pattern can be traced from the original position that no recovery for emotional trauma was permitted. Then a shift occurred to the physical impact requirement. While the idea that a direct physical impact had to occur to an injured party (presumably, a child witness to a parental murder would have had to have been touched), in time the principle was bent out of recognition by inventing diverse types of "impacts." Early cases tended to involve situations such as horses, buggies, and cars almost hitting a person (usually a female and often pregnant) but stopping just short. The result in the victim was great fright and often a spontaneous abortion. While the early cases went against such a claim, eventually impacts were construed as "slight jolts," or even dust in the face. These evolvments were yet a long way for a bystander to recover for emotional trauma.

Nor has the zone of danger rule come through unscathed when we shift to a bystander. The requirements were that harm had to be caused to the person complaining, that the person was in a zone of potential personal danger from the defendant, and that any emotional distress was from fear for their own safety and not that of someone else. How valid is the distinction of whether someone is in a zone of danger so that he is in fear of danger to himself? People who witness someone being murdered might be in great fright and emotional turmoil, yet not believe they are about to be murdered. Children witnessing a parental murder are even more likely to have their defenses overwhelmed and suffer an acute panic with a subsequent posttraumatic stress disorder as a diagnosis. To argue that a given child had to be present on the scene pushes matters into the metaphysical. It leads to arguments turning on whether sitting in the next room was or was not being in a zone of danger. Such issues often involve not only physical distance from the act, but they may involve the time period that has elapsed and thereby the impact of what is experienced if presented at a time subsequent to the event. The requirement that a bystander have a sensory and contemporaneous perception of the event has initially been thought to mean that the bystander had to have viewed the scene as it happened. From there it went to cases when a bystander could have heard or sensed it happening at the moment of its occurrence, although not witnessing it. It leaves the problem of coming on a scene of carnage subsequently unresolved.

Current Key Cases

A leading case involved a Good Samaritan couple who invited a neighbor to spend the night at their house. The next day they discovered that the neighbor had committed suicide in their kitchen by cutting his throat when

they were out. They claimed that leaving his blood strewn about in their house caused them emotional distress.⁸ The issue turned on whether the defendant (*though his estate*) "willfully" set in motion acts which led to the emotional disturbance of the *neighbor's wife* who found the body. If the jury found the act willful, the claim would be satisfied against the estate. This case was remanded for a new trial.

Yet, in the *Koontz* case recovery was denied, although the victim was a sister who brought suit along with her husband. The murder was in a building located on their premises, and the couple was jointly seeking compensation from the "physical harm resulting from shock" and the husband from "loss of services." In this case, the couple did not recover even though the act was perpetrated by a trespasser on their property, and the disfigured body of the victim was left to be seen by the wife. The foreseeability of emotional upset would appear to be fulfilled in these cases and, hence, the zone of danger requirement would seem to be a superfluous distortion. British courts extended the rule to recovery for a widow whose husband developed neurotic symptoms while serving as a rescuer at a gruesome train wreck, although his own personal safety was never involved.⁹ In another case, witnessing the collapse of a department store wall leading to emotional distress and physical disability was seen as within a zone of danger giving rise to a fear for one's safety.¹⁰ The conclusion would be that the location of a person, in or out of a particular geographical zone, is not of great help in determining the legitimacy of a claim of induced emotional harm. The presence or absence of emotional sequelae has minimal connection with whether a person who claims emotional harm from witnessing an injury perpetrated on another was within a certain number of feet or around the corner rather than directly visualizing the initial act.

The California Supreme Court and the New York Court of Appeals have gone in opposite directions and set the pattern for different jurisdictions to follow. Reversing a five-year-old precedent, a California court case, *Dillon v. Legg* (1968), accepted the proposition that tort liability could be predicated on fright of nervous shock induced by a person's apprehension of negligently caused damage or injury to a third person.¹¹ In the *Dillon* case, a mother was "in close proximity" to her daughter who was killed by the defendant's negligent operation of an automobile. The mother alleged she "sustained great emotional shock and injuries to her nervous system." The court reasoned it would be incongruous and revolting to sanction recovery for the shock and fear a mother had for her own safety, yet to deny it for witnessing the death of her daughter.

The California court, in awarding the mother recovery, in effect drastically altered the zone of danger rule. It set out guidelines for juries to follow in deciding liability in future cases. These included: (1) whether the third party

was located "near the scene" of the accident in contrast to a distance away from it; (2) whether the shock resulted from a direct emotional impact upon the third party from the sensory and contemporaneous observance of the accident in contrast to learning of it from others; and (3) whether the victim and third party were closely related in contrast with the absence of a relationship or a distant one.

The New York case, *Tobin v. Grossman* (1969), involved a mother who was not a direct eyewitness. She heard the screeching of brakes and immediately went to the scene of the accident which was only a few feet away, and then saw her injured two-year-old child lying on the ground.¹² The mother sought to recover for her own mental and physical injuries caused by shock and fear over her child. Her claim was dismissed and the dismissal upheld on appeal. The classic position was adhered to of no cause of action lying for unintended harm sustained by one, solely as a result of *injuries* inflicted directly upon another. It was not an unreasoned opinion. The court made it clear that the need to establish physical impact was no longer needed to sustain a course of action from a negligently induced mental trauma. The question was rather the duty to one who was not the direct victim of an accident. Since the psychologic impact on mothers when a young child is seriously hurt has always loomed, the court reasoned that to include such a duty of liability would require a radical change in policy. The court was bothered by the difficulty in divising a circumspect rule, since it felt that any requirement to be a direct eyewitness would not be justified in that parents often receive traumatic news by telephone, word of mouth, etc. Nor did it know how to logically exclude other relatives, such as grandparents or a sensitive caretaker who has cared for a child over a period of years.

Interestingly, the situations of a child witnessing or responding to the negligently inflicted death of a parent is rarely mentioned. Rather than opting for a consideration of diverse factors in each case, as in California, the New York court and those jurisdictions which follow it feel there is no rational way to restrict liability if it is extended to third parties. Hence, the conclusion is that liability should be restricted to those directly or intentionally harmed. Though acknowledging that diverse factors were relevant, the court declined to assess them from their great numbers.

Developments

Interesting transitions are in progress in this area of interface between psychiatry and law. The Texas Court of Civil Appeals affirmed a judgment in favor of a minor girl who, while not being the recipient of a physical blow nor within the zone of danger, witnessed the death of her sister.¹³ The

court stated that the foreseeability of injury to the plaintiff was determined in part by whether they were closely related and held that the sibling relationship satisfied the requirement. In an Illinois case a minor boy witnessed his brother's clothing become entangled in an escalator with the sibling choking and deprived of oxygen. The direct observation was viewed as a "direct emotional impact" and sufficient for a cause of action for negligent infliction of emotional distress.¹⁴ *Dillon* was thereby extended to allow bystander recover for mental disturbance based on the foreseeability of the shock or anguish suffered by a plaintiff. Similarly, a Hawaiian case allowed recovery for a 10-year-old boy who was alighting from a bus with his step-grandmother and saw her struck and killed by an automobile.¹⁵ The claim for damages was based on the nervous shock and other psychic damage suffered by the boy even though he had not been touched. The key again was the reasonable foreseeability by the negligent party irrespective of a physical impact. The presence of the boy near the scene was held to be foreseeable in view of the neighborhood, the tortfeasor's familiarity with the neighborhood, and the time of day which would put him on notice regarding the presence of the third party.

Another area of expansion appears to be toward the liability of physicians, hospitals, and pharmaceutical enterprises. These have tended to be cases in which a mother claims emotional distress for some negligent act perpetrated on the fetus or related to its death. The result may be a blurring of distinctions between who is a bystander and who is a victim. Hence, a mother is prescribed a drug to prevent a miscarriage but later gives birth to a deformed child. The mother is viewed as a bystander who is a living witness in her suit against the drug manufacturer for its negligence.¹⁶ Yet, did not the mother ingest the drug? Will a deformed child bring suit on the basis of the healthy part of it having emotional distress for having to observe the deformed part of itself throughout its life? Clinically, this would be analagous to a splitting phenomenon where denial breaks down so that one part of the self is constant witness to observing the deformity. There have been attempts to extend liability to physicians and hospitals for the negligent death of a fetus which induced severe emotional distress in the mother.¹⁷ However, when the negligence is based on malpractice, it is felt there is a need to encompass the third-party suffering beyond the malpractice action itself.

Particular attention needs to be paid to an extension of the rule in *Dillon* in California by way of the *Tarasoff* case.¹⁸ Jurisdictions such as California, and those which follow it in the requirement of a therapist having a duty to warn potential third-party victims, open up the possibility for a malpractice action by a third-party bystander. In essence, if the potential victim was not warned of danger by the therapist and a violent act is perpetrated, the

penumbra from *Dillon* come into play in determining whether a bystander has a basis for a suit. The therapist is held to the standard of predicting dangerousness in a patient and then foreseeing that potential victims are protected so that in turn the potential victims can take steps to protect closely related bystanders.

The *Hedlund* case involved an action against two psychologists in California who were conducting psychotherapy and counseling with the mother of a five-year-old and a male friend of hers.¹⁹ When the man fired a shotgun at the mother, her son was sitting next to her. The mother threw herself over the boy, preventing serious physical injury to him but leaving the boy with serious emotional injuries and emotional trauma. The failure to warn the mother by the therapist was held to constitute professional negligence under *Tarasoff*. The reasoning was that a foreseeability factor was present in that if the threatened acts were carried out, there was a risk of emotional harm to a bystander, particularly someone in a close relationship such as a five-year-old with his mother. Expanding the tortious liability in this manner to those professionals held to a duty to warn potential victims can have endless repercussions. It not only expands the ambit of liability to a possible victim but to a class of those related. What if the boy did not show adverse psychiatric effects for some time? How far will the old zone of danger be required? Following *Dillon*, when a mother hears screeching brakes and shortly afterward sees her runover child, presumably the reverse would hold as sufficient for a bystander recovery as well. The question becomes how far a distance removed, or how short a period of time, suffice (given a degree of relationship). From a psychiatric perspective, once the penumbra of emotional sequelae in a third party has developed, does it have any relevance at all to ask how the message was received? The key issue is whether it is likely that an emotional disturbance will result. Nor is it crucial that it will be an immediate reaction or a delayed reaction, such as a depression which could ensue for months or years later. What this leads to is a need for greater diagnostic preciseness with the need to demonstrate causal connections and not simply possibilities.

Conclusions

Court cases make clear the following: (1) The rules will vary in different jurisdictions when a third party claims posttraumatic stress based on the negligent infliction of emotional distress on another who is a relative. (2) The old rule requiring a physical injury to the party has been superceded. Nor is there a need for a physical impact, though a requirement may exist that a third party has been in a "zone of danger." Yet the zone requirement is so ambiguous as not to be very useful, even though it is still maintained

in some jurisdictions. (3) All jurisdictions use the same language in terms of a need to establish negligence, proximate cause, and foreseeability. Yet, they may come to different conclusions while relying on the same language. (4) States which follow the California approach will proceed on a case by case basis to assess the psychiatric trauma sustained according to some of the guidelines proposed. The result has been a string of decisions criticized for apparent inconsistency.²⁰ (5) States which follow the New York approach do not see a liability responsibility to third parties who do not sustain either an impact themselves or at least fear for their own personal safety. (6) The issue is not primarily a matter of psychiatric testimony to establish that a posttraumatic stress disorder is present, but the need to create a new legal duty and cause of action. (7) Very few appellate decisions have dealt with the situation of children who themselves have witnessed trauma inflicted on a parent and claim a posttraumatic stress disorder. So far a large majority of third-party victims alleging mental distress have been mothers, and the distinctions have hinged on the following type of criteria: whether they witnessed the accident or not; whether they were in fear of injury to themselves; whether there was a foreseeability component in the defendant that others might have emotional reactions to the event besides the primary injured party; and the need to establish a causal link between defendant's conduct and the alleged emotional harm to third parties.

We can anticipate that new claims will arise in the future involving the emotional impact on children who witness accidents occurring to parents and siblings and possibly close relatives. The sequelae may be periodic acute episodes or a chronic level of emotional disability. Witnessing a parent being murdered or violently assaulted and being in the general proximity would seem to be a paradigmatic situation which psychiatrists and attorneys will use as a test situation to clarify the rules. Given the current emphasis on child abuse and wife abuse, the results will be tested and applied to those traumatic events which children witness more than homicide.

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