

NEW AREAS IN LITIGATION FOR CHILDREN

- o Psychological Damage Following Wrongful Death of Parents
- o Use of Videotaped Child Psychiatric Interviews
- o Allegations of Sexual Abuse of Children

Gilbert Kliman, M.D.

The identity of a psychoanalytic clinician usually involves much discipline and containment, especially of aggressive energies. Many psychoanalysts, the author included, find a constructively restrained passivity the ideal mode for enhancing patient communication and evoking transference phenomena.

The opposite is true when a psychoanalyst functions in litigation for children. Seldom will an analytically oriented psychiatrist find more adventure available than at the legal frontier. Aggressive application of psychoanalytic and related developmental concepts to questions of children's rights and welfare continues to break new ground. It is the effectiveness of creative professional assertiveness in the good cause of a child's well-being, which makes the combat so intellectually and emotionally rewarding for the psychiatric expert.

Illustrative areas of activity, based on the author's experience in litigation, are touched upon below.

I. COMPENSATION FOR LOSS OF PARENTAL SERVICES

The Center for Preventive Psychiatry, located in White Plains, New York, is a non-profit community mental health agency serving over one thousand persons per year. It operates under a contract with the State of New York, which permits it to provide preventively-oriented psychotherapy to persons of all economic classes. As a result of its special mission and identity, The Center is able to focus on areas of experience not ordinarily the subject of psychiatric intervention. In particular, it specializes in the prevention of pathologic consequences of severe situational crises such as bereavement and divorce.

Of particular relevance to the current Chapter is the stress of violent or wrongful death of a parent during a patient's childhood. Over the past seventeen years, it was possible for the author to personally work with hundreds of father-

(1) Associate Clinical Professor, Division of Child Psychiatry and Director of The Foster Care Study Unit, Columbia University, Editor, The Journal of Preventive Psychiatry, Founder, The Center for Preventive Psychiatry, White Plains, New York.

**S-M-F**

**FORENSIC EXPERTS BUREAU**

1000 St. Charles Place, Suite 210, Hollywood, Florida 33026  
Phone: (305) 432-3520

CALIFORNIA - (415) 459-4448  
NEW YORK - (914) 831-4444  
FLORIDA - (305) 432-3520

or mother-bereaved children (Kliman, 1965, 1968, 1979, 1980, 1982, 1983). Many of the children and surviving spouses had suffered their grief as a result of a murder or other form of wrongful death. Yet, as analytically-oriented clinicians, it had escaped our attention that potential existed for a legal precedent on the children's behalf.

In 1981, however, an alert attorney, Robert Conason, raised the legal question, for which he asked the author's help as an expert: Should a court financially compensate children for the psychological, moral and educational damages due to loss of parental services?

To our knowledge, in 1981, loss of parental services with consequent psychological damage to a surviving child had seldom or never been a successful basis for a wrongful death action. Yet, enough was known about childhood bereavement to indicate that some forms of loss of parental services may lead to serious damage (Kliman, 1968 and 1980). Surviving children commonly exhibit learning inhibitions, antisocial behavior, chronic depressive reactions, and gender identity disturbances, as well as an increased incidence of neurotic and psychotic disorders. A prospective study of 10,000 Minnesota school children by Gregory (1965) showed that death of a parent was associated with marked increase of truancy, multiple arrests, failure of one or more grades, and school drop-out. Kohut's views that parents serve as ego-auxiliary or self-objects, are thus well substantiated. The loss of these auxiliary functions of parental service can be profoundly damaging to many children (Kliman, 1984).

Eth and Pynoos (1984) have reported on a series of 40 children who witnessed a parent's homicide. The additive demands of mastering such a pathogenic experience as well as doing the work of mourning have gripped these investigators' attention. They note the children experience "continued intrusion...of the central action when the lethal physical harm was inflicted..." The children undergo intense perceptual re-experiences, involving multiple sensory modalities, and autonomic arousal. There is frequently a "post-traumatic stress disorder (with)...intrusive memories, unconscious re-enactments, startle reactions, recurrent nightmares, fears of repeated trauma, and avoidant or other symptomatic behaviors...These expectable reactions to trauma are superimposed on the child's grief." It is apparent that the combination impairs the work of mourning and that prominent memories of the perceptions of the particulars of the death contaminate the pleasant recalls of parental interaction.

At present the legal status of compensation for psychiatric and psychological aspects of loss of parental services is still being debated and court responses are difficult to predict. A jury award of six million dollars mainly for psychiatric aspects was recently overturned on appeal. The appeal of the case -- in which the author had testified on behalf of two double orphaned children -- dealt solely with technical liability rather than damage aspects (Martens vs. City of New York, 1982).

However, the law has recently changed to the advantage of bereaved and even traumatized-by-witnessing persons, including children. Broadened attitudes

governing compensation for psychologically damaged witnesses to a death are inherent within recent decisions in New York and a new code in Ohio.

In New York (1984) the relevant cases of *Bovsun v Sanperi* and *Kugel v Mid-Westchester Industrial Park* were appealed. The appeal was decided in favor of the plaintiffs in both cases. It was the decision of the court that "a plaintiff may recover damages for injuries suffered in consequence of shock or fright resulting from the contemporaneous observation of the serious physical injury or death of a member of his or her immediate family, where the defendant's conduct negligently exposed the plaintiff to an unresonable risk of bodily injury or death and the same conduct by defendant was a substantial factor bringing about the injury or death of plaintiff's immediate family member."

As a direct result of the above decisions, the author is already reviewing two cases of children who witnessed the death of a close family member. In each case there are allegations of psychological damage.

During 1982, a bill was passed by the Ohio state legislature and recently signed into law by the Governor, allowing for compensation in cases where a wrongful death had produced psychological harm (Ohio Code Supplement Par.2125.02). The conditions under which a jury or court may award damages in such a case are of great relevance to the child psychoanalytic or child psychiatric expert, whose special knowledge may be more appropriate than any other discipline's. The range of compensable losses includes:

"...Loss of support from the reasonably expected earning capacity of the decedent;

...Loss of services of the decedent;

...Loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education, suffered by the surviving spouse, minor children, parents, or next of kin...

...The mental anguish incurred by the surviving spouse, minor children, parents, or next of kin."

The author is currently helping prepare a claim for damages in such an Ohio case as expert for a mother and child whose husband and father suffered an allegedly wrongful and fatal medical treatment. Such cases will open new avenues of compensation for family survivors of medical malpractice, who in the past have had a narrow scope of causes for awardable damages.

## II. USE OF VIDEOTAPED CHILD PSYCHIATRIC INTERVIEWS

The current, widespread tendency to keep children from testifying in the courtroom may often be based on false premises. It is naive to believe that children may by this simple means be protected from conflict, later-arising regrets, anxiety, and adversarial abuse. All of these problems frequently occur outside the courtroom.

Furthermore, in the courtroom there is better control over the etiologic agents than outside circumstances permit. Judges can protect children better than many other caregivers in the adversarial system. And from the point of view of justice, it might even be postulated that it is the very power of children to move the court, rather than their frailty, which keeps them out of certain litigations.

In the belief that many children may be accurate as well as powerful sources of information, the author has made it his custom to videotape forensic consultations, after obtaining consent from both the child and the adult who brings the child for consultation. This is essentially an extension of the practice of many psychiatrists to routinely videotape initial diagnostic interviews.

In one case, the videotape proved a valuable supplement to judicial interviews in chambers. And in several recent custody disputes the viewing of videotapes by the adversarial attorneys, as well as by the children's attorneys, led to prompt out-of-court settlements.

An example of such an out-of-court settlement occurred almost immediately following a videotaping in the author's office a few years ago. Two children, ages nine and fourteen, were involved in a custody dispute in which the father claimed the mother was abusing the children and threatening their lives. Several interviews of the parents had been fruitless, and the children had been kept away. The author insisted on seeing and videotaping the children's interviews, to which he got both parents' and their attorneys' agreements, as well as the children's. While on camera, the children separately and convincingly described not only their mother's homicidal behavior but her serious suicidal threats and major alcohol intake. One child pleaded that the mother not be allowed to see the tape, a request which was honored, but allowed the attorneys to see the tape. This viewing produced a meeting of minds, and a prompt transfer of the children to their father's care. To everyone's surprise, including my own, the mother asked to become my patient, and is now much improved by a combination of chemical and psychodynamic treatment. She is now glad for the videotaping, grateful to have been confronted by an unequivocal means and required to deal with her illness and behavior. Her children remain with the father in another city and are much more respectful and affectionate than ever with their mother, whom they visit regularly.

Precedent may have been set in one visitation case, in which the judge requested that a court-appointed child psychiatrist study videotapes as part of the author's medical records. After reviewing those videotapes, the reviewing psychiatrist agreed that two little girls believed they had been repeatedly sexually molested by their father. The judge decided against the father -- who had been demanding visitation rights -- according to the court-appointed psychiatrist's recommendations. I now strongly recommend that as part of medical records, videotapes be kept whenever a child's testimony is likely to be required.

In the same case as the one in which videotaped psychiatric interviews concerning sexual abuse were recorded, two other novel uses of psychiatric expertise occurred. The first was the use of hypnosis to challenge allegations. Since the daughters -- aged eight and ten -- were the only witnesses to the alleged sexual

activities, the author considered they might be fabricating or in collusion with a fabrication of an adult party to the dispute. Therefore, the children's and mother's consents were gained to use hypnosis for additional interviewing by the author. In a hypnotic state, the children's accounts remained unchanged despite challenges. These hypnotic inductions and interviews were also videorecorded and later viewed by the children's attorney, both parents' attorneys, and the court-appointed psychiatrist.

As a guard against tampering with the videotapes, the operator of the equipment was an independent attorney. Certification was made of the tapes in the same fashion as videotaped depositions. An electronic chronograph device was used within the video apparatus to further secure it against tampering. From the time of its recording to the time of its viewing under court direction, the tape remained in the possession of the independent attorney, who also testified in court concerning the security of the procedure.

Still another somewhat unusual use of an expert in this case was that of court-room assistant to the attorney. Together, White Plains, New York attorney Leslie Levine and the author observed an altercation between the allegedly abusive father and a witness, and noted the father's varying degrees of impulsivity and agitation. The author's testimony was utilized on both direct and rebuttal. During rebuttal, portions of the transcript were read and each relevant section presented as part of a hypothetical question for expert opinion.

#### IV. ALLEGATIONS OF SEXUAL ABUSE OF CHILDREN

Sexual abuse of children is increasingly known to occur. The purpose of this mention, however, is to introduce a cautionary note. Most of the cases in which the author has examined children have been convincing cases of sexual abuse. However, the very sensational and highly publicized qualities of recent cases, some of them on a mass scale, have created special burdens for child psychiatric experts. Certainly, childhood sexuality in general is an area which can benefit from psychoanalytic understanding of developmental processes. These include the multifarious roles of childhood fantasy and the ease with which childish behavior can be interpreted as complying with the fears and expectations of interviewers.

A psychoanalytically informed clinician has a special skill he or she can bring to bear with children who, it is suspected or alleged, have been sexually abused. The unanalyzed or inexperienced examiner may have his perceptions biased so that he unwittingly and unwarrantedly reads a history of abuse and incest into the child's play. The puppet and doll play of preschool children is often erotic if there is the slightest encouragement or permission for such expressions. Thus, some widely occurring themes can be mistakenly interpreted as evidence of sexual abuse, including incestuous experience.

I recently examined a mother, father, and pre-school boy in a case where the mother was accused of incestuous activities with her son. She had brought the

child to a clinic when her then three-year-old had complained of wanting to be a girl, and had told her he thought if he cut his penis off he could be like his sister. The clinic personnel were alarmed by his doll play. It included some frankly erotic scenes and the child expressed clear conflict about his own gender.

History revealed causes which were adequate, sufficient and strong from a psychoanalytic point of view, for his preoccupation with sexual identity and for his genital anxieties. He had a new sister whose genitals he had often observed when she was being changed. He himself had recently had a hernia repair, near his testicles, a common source of genital anxiety. His sister was then in the hospital and he envied the attention she was getting for wearing a large bandage. Adding to these stresses major surgery on two other family members, marital tensions and his mother's reactive depression, there was ample etiologic explanation of his presenting problems. There was no scientifically persuasive evidence I could find for incest, and the child never reported any. Indeed he denied any contacts with his mother's nude body, or she with his except while being cleaned.

Yet this child had been removed by a protective service organization from the family home, and it took over two months to return him to his distraught family. During that period he deteriorated in his psychological condition. This, I fear, is an example of clinical weaknesses within the legal system dealing with children's evidence. Such difficulties can best be prevented or resolved by careful psychoanalytic supervision or self-observation by the observers. Only the most powerful measures to support objectivity can reliably avoid the contagion of biases which epidemics of child sexual abuse reports produce.