HANDLING CIVIL CHILD SEXUAL ABUSE CASES

by
Darrell L. Heckman
Attorney at Law
107 North Main Street
Urbana, Ohio 43078
(937) 653-4478

I. TAKING THE CASE - OR NOT

One of the most difficult decisions in a civil child sexual abuse case is whether or not to accept the case. The lawyer who accepts such a case is looking at prolonged litigation with a low likelihood of settlement. A liability insurance policy does not cover intentional torts. Most states hold that sexual assault is an intentional act not covered by homeowners' insurance. Gearing v. Nationwide Ins. Co. (1996), 76 Ohio St. 3d 34, 665 NE2d 1115.

There may be coverage, however, for an individual or entity if the insured is guilty of negligence such as negligent supervision, negligent hiring, or even failure to warn in cases where the insured has not perpetrated the sexual assault himself. Doe v. Shaffer (2000), 90 Ohio St. 3d 388, 738 NE2d 1243.

Most sex offenders are indigent, especially if they are in prison. A lawyer should not file a lawsuit against such a person because either the lawyer will not be adequately paid or the client will pay out more than she collects. Wholly uncollectable judgments do not serve your client's interest. Furthermore, a defendant with nothing to lose may file a counterclaim and prevent you from dismissing the case at a later date.

Nonetheless, many sex offenders are not indigent. A significant percentage own their own homes or have other significant attachable assets such as 401(k) plans. Except in Florida, Texas, Kansas, and a few other states, homesteads are not wholly exempt and there may be an adequate corpus to collect from the house or other assets.

While a civil sexual assault case defendant may file bankruptcy, a debt for "willful and malicious injury by the debtor to another entity" is not dischargeable. 11 U.S.C. 523(a)(6). A complaint for sexual assault qualifies as a non-dischargeable debt.

However, the non-dischargeability of the debt is not self-executing. A complaint to determine dischargeability on the grounds of willful and malicious injury must be filed in the bankruptcy court within the time allowed by law, which, in a Chapter 7 bankruptcy, is 60 days after the first meeting of creditors. Bankruptcy Rule 4007.

Under the Uniform Fraudulent Transfer Act, a transfer of assets by the defendant with intent to defraud the creditor or for less than fair market value may be set aside by a creditor (e.g. O.R.C. Chap. 1336). There will be a statute of limitations to such an action and a complaint for declaratory relief should be filed to prevent a second transfer of assets to a real bona fide purchaser. A preliminary injunction prohibiting transfer of assets should also be ordered if the client can afford it. Typically, a bond is required for a preliminary injunction (e.g. Civ. R. 65, Fed. R. Cv P. 65).

The resolve of the client is very important to evaluate. She is going to have to testify and, in all likelihood, give one or more depositions. This is the type of case where clients can change their mind in mid-stream. If you are operating on a contingency fee, a voluntary dismissal is a very unsatisfactory result for you.

The liability should be very carefully evaluated. Many jurors still do not believe that incest occurs, except on the most overwhelming proof. If the defendant has been acquitted in the criminal case, the odds are even greater against you unless there was a problem in the criminal case that you can overcome in the civil case.

Children ages 6-12 are the best witnesses. A child under 4 cannot testify meaningfully. A child over 13 is usually not accorded the courtesy given to prepubescent children. Consider this factor in setting your trial date. If your child witness cannot confront the perpetrator in court, you are probably better off not taking the case than in

using your various procedural rules to allow such testimony.

II. CAUSES OF ACTION AND LIMITATIONS OF ACTIONS

Your cause of action should be pled as assault and battery and intentional infliction of emotional distress. Remember, your assault statute of limitations may be short (e.g. O.R.C. 2305.111, 1 year) although a tolling statute may exist for minors (e.g. Doe v. First United Methodist Church (1994), 68 Ohio St. 3d 531, 629 NE 2d 402, 1 year after majority). A case involving repressed memory, in addition to being rife with statute of limitation problems, is rife with proof problems and, absent a confession, should be declined.

III. THE CHILD WITNESS

The lawyer must build a rapport with the child witness. This may take considerable time. A true interest in the child and things appropriate for her age is important. "Baby talk" is to be avoided. Kneeling down to the child's level when speaking to her may be helpful. The minimum number of people necessary to be present for the interview is the number that should be present. The child does not want to relate her abuse over and over and over. As she becomes a teenager, it will be excruciatingly painful for her to repeat her story.

Children are very literal. Be tuned-in to deceptive questions asked by opposing counsel. If he uses vocabulary beyond the understanding of the witness, be sure the jury knows it.

Many children do best in the morning. If there must be a deposition, set it early, be sure there are ample breaks, and do not allow it to continue indefinitely. Setting a time limit may be appropriate.

Description of sexual organs by small children is a delicate subject. When 5-year-olds use words like "vagina", they sound coached. On the other hand, pet words like "pooter" may need to be explained somehow to the jury. Diagrams are useful since

the child can point to where she was inappropriately touched.

Children do very poorly when relating time and distance, but may be able to be startlingly accurate in their descriptions. ("He kept the dirty magazines in the drawer with his red socks" is great if he really has red socks.)

IV. EVIDENCE

Evidence of similar acts by the defendant can be extremely potent, but the potential for reversible error is great. Under Ev. R. 404 and FRE 404, such evidence may be admissible if its probative value outweighs its prejudicial effect under Ev. R. 403 and if the evidence relates to motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This kind of evidence will be particularly useful if the defendant claims an inadvertent touch, or that he thought the victim was his wife, or if he claims he was just showing the victim what she should not let other people do to her. (I have encountered all of these situations).

If there is concrete evidence, such as pornographic movies in the home, be sure to try to find a way to admit such evidence such as that he displayed the pornography to the child. Nothing takes away the defendant's halo quicker than revealing his personal stash of hard-core pornography.

Hearsay exceptions can provide a tremendous source of corroborating evidence. A statement to a physician or nurse for purposes of treatment or diagnosis is admissible. Ev. R. 803(4). This permits the physician to tell what the child told him happened to her, since knowledge of the cause of the abuse is necessary for treatment.

Excited utterances are also important evidence. A child's first report of abuse may qualify as an excited utterance for as long as the child is under the stress of the event, which may be several hours or even days. The victim is not the only one who may make an excited utterance. If the child's parent discovers the abuse, either in person or from the child's revelation, the parent will probably be making excited utterances.

This can be especially important if the parent is married to the abuser and starts to recant.

V. EVALUATING DAMAGES

Damages may be developed for pain, suffering, and emotional distress. Post-Traumatic Stress Disorder is common among victims and is usually diagnosed if the victim shows symptoms of hyperarousal, re-experiencing, and avoidance and numbness.

Punitive damages are available where the defendant acts with malice, which includes conduct that constitutes a conscious disregard for the rights of others along with a great probability of causing substantial harm. Preston v. Murty (1987), 32 Ohio St. 3d 334, 512 NE 2d 1174.

VI. CONCLUSION

Where all of the necessary elements do align, these cases can result in substantial judgments and a large measure of satisfaction for your client.