ADULT LIABILITY FOR SEXUAL ABUSE BY A MINOR: A CASE STUDY
By Steven J. Watson, Esq.

In July of 1996, Thomas and Sandra Gritzner discovered that their four-year-old daughter, T.G., had been sexually abused by a ten-year-old boy who lived across the street. In the months leading up to the abuse, T.G. had gone to play with the boy at his house on several occasions. The boy, M.R., lived with his mother, Karen Rosetti, and her boyfriend, Roger Bubner, in a house Bubner's mother owned. Rosetti and Bubner consented to T.G.'s visits to their house. M.R. abused T.G. inside the house while Rosetti and Bubner were sleeping in another room. An investigator from the Department of Human Services subsequently confirmed that M.R. had sexually abused T.G. Unfortunately, M.R.'s young age barred prosecution under the juvenile code.

The Gritzners were frustrated by this lack of accountability, and they wanted to file a civil lawsuit. Prior to abusing T.G., M.R. had engaged in sexual acts with other girls, including his half-sister. Rosetti and Bubner knew of this history, but had said nothing about it to the Gritzners. The Gritzners believed that M.R. never would have had an opportunity to abuse T.G. if Rosetti and Bubner had warned the Gritzners about M.R.

In June of 1997, the Gritzners filed suit against M.R., Rosetti, Bubner, and the homeowners' insurance carrier. The complaint alleged two primary theories of liability: (1) negligent failure to warn the Gritzners of M.R.'s propensity to engage in sexual misconduct; and (2) negligent failure to supervise the children and to control M.R. Although there was a homeowners' insurance policy, only Bubner and M.R. were "insureds" under the terms of the policy.

Bubner filed a motion to dismiss the case for failure to state a claim. Bubner

was not M.R.'s natural father and had not adopted him. Therefore, the insurance company argued that Bubner owed no duty to T.G. or her parents, and that allowing them to make a recovery would violate public policy. The Gritzners argued, on the other hand, that their claim fell within the well-established duty of all owners or occupiers of land to exercise ordinary care toward any persons who come upon their property with consent.

The trial court granted Bubner's motion to dismiss. In doing so, the court relied on a Wisconsin Court of Appeals failure to warn case, *Kelli T-G. v. Charland*.[i] In that case, a woman failed to warn a child's parents about her ex-husband's pedophilic propensities. The court of appeals affirmed—on public policy grounds—a summary judgment for the woman. The *Kelli T-G.* court concluded that it would be too difficult to determine when one person should have a duty to warn of potential sexual abuse by another person. Allowing "recovery would enter a field not only with no definable, sensible stopping point, but no sensible starting point as well."[ii]

The Gritzners appealed the dismissal of their case. The court of appeals stated that while it was not enthusiastic about the *Kelli T-G.* holding, it felt bound to follow existing precedent.[iii] Therefore, the court of appeals affirmed the dismissal of the failure to warn claim. However, the court reversed the dismissal of the negligent failure to supervise and control claim. In doing so, the court reached several important conclusions. First, the court found that Bubner had voluntarily agreed to supervise T.G. during her visits with M.R., and therefore, that Bubner had a special relationship with T.G. such that he had a duty to protect her.[iv] The court further found that, in light

of Bubner's knowledge of M.R.'s prior sexual misconduct, he had a special relationship with M.R. such that Bubner had a duty to control M.R.'s behavior.[v] Finally, the court of appeals found that Bubner had this special relationship with M.R. even though he did not have a formal legal relationship with M.R.[vi] Both sides asked the Wisconsin Supreme Court to review the court of appeals's decision.

The supreme court completely reversed the dismissal of the case, sending it back to the trial court on both the failure to warn and failure to control claims.[vii] The supreme court found that the negligent failure to control claim could proceed under two distinct theories, each based on a separate section of the **Restatement (Second) of Torts**.

The first theory supporting the Gritzner's negligent failure to control claim was the doctrine of *in loco parentis*. The court observed that even though Bubner was not M.R.'s legal parent, the Gritzners had alleged that Bubner had a "parent-like relationship" with M.R.[viii] Therefore, the court offered a four-part test, based on Section 316 of the **Restatement (Second) of Torts**, to determine whether Bubner could be liable for failing to control M.R. He could be liable if:

> (1) he stood *in loco parentis* to [M.R.], (2) he knew or had reason to know that he had the ability to control [M.R.], (3) he knew or had reason to know of the necessity and opportunity for exercising his control over [M.R.], and (4) he nevertheless failed to exercise reasonable care to control [M.R.]'s conduct so as to prevent [M.R.] from intentionally harming [T.G.] or conducting himself so as to create an unreasonable risk of bodily harm to [T.G.].[ix]

Factors to evaluate in determining whether an adult stands *in loco parentis* to unrelated minors include: "the children's ages, their dependence upon the person claimed to be *in*

loco parentis, and whether such person in fact supports the children and exercises the duties and obligations of a natural parent."[x]

The second theory supporting the Gritzner's negligent failure to control claim was that Bubner had voluntarily undertaken to supervise and protect T.G. while she was in his house. Pursuant to Section 324A of the **Restatement**, Bubner could be liable if:

> (1) [he] undertook, gratuitously or for consideration, to render services to [T.G.]'s parents which he should have recognized as necessary for the protection of [T.G.], (2) he failed to exercise reasonable care to protect [T.G.], and (3) his failure to exercise reasonable care increased the risk of harm to [T.G.], or he undertook to perform a duty owed by [T.G.]'s parents to their child, or the harm was suffered because of [T.G.]'s or her parents' reliance upon Bubner's undertaking.[xi]

Thus, on remand the Gritzners will be able to use either or both of the above theories to prove that Bubner negligently failed to supervise and control M.R.

The supreme court analyzed the negligent failure to warn claim in the context of Wisconsin's common law definition of negligence:

> [T]he crucial question in evaluating the Gritzners' claims is not whether Bubner had any 'duty' to take affirmative actions but whether Bubner's alleged failure to take certain actions was consistent with his duty to exercise a reasonable degree of care.[xii]

Using this framework, the court concluded that the facts alleged in the complaint—which are the only facts that matter for the purposes of a motion to dismiss—could be sufficient to prove a failure to warn claim:

> Under the alleged facts, it was foreseeable that Bubner's failure to warn might cause harm to [T.G.]. A reasonable person would have recognized that Bubner's failure to warn [T.G.]'s parents created an unreasonable risk of injury to [T.G.]. This conclusion comports with our case law that recognizes that a failure to warn may constitute negligence under numerous, diverse circumstances.[xiii]

However, the supreme court was split on the question of whether the Gritzner's failure to warn claim should be dismissed on public policy grounds. A minority of the judges agreed with the trial court and the court of appeals that allowing recovery for the failure to warn claim "would impose liability . . . in situations in which the decision whether to warn is fraught with difficulty and in which no just and sensible legal guidelines are available to limit liability."[xiv] The majority of the court refused to say that, as a matter of law, the Gritzner's failure to warn claim violated this public policy concern. The majority concluded that a fair analysis of the public policy implications of the failure to warn claim should only be done by the trial court after a "full factual resolution" at trial.[xv]

While the supreme court has left this important issue unresolved, the court's opinion is still a significant victory for T.G. and other victims of child sexual abuse who will now be able to have their failure to warn claims heard by a jury, instead of having their case dismissed at the start as contrary to public policy.

Because the issue of whether the failure to warn claim violates public policy remains open, it is valuable to examine how other courts have treated similar issues. Many courts are reluctant to subject a person to liability for failing to warn "other individuals about the sexually abusive propensities of third parties."[xvi] Obviously, there are going to be cases where the sexual abuse could not have been reasonably foreseen, and where public policy will preclude recovery.

The *Gritzner* court provided some examples of the kinds of information that could affect a public policy analysis:

[W]e know very little of the circumstances and facts of this case. We do

> not know, for example, about [M.R.]'s prior 'inappropriate sexual acts' with female children, or how many victims were involved. We do not know whether [M.R.] was adjudged delinquent. We do not know whether [M.R.]'s previous inappropriate sexual act or acts were the subject of any juvenile court proceedings.[xvii]

Other courts that have allowed recovery in sexual abuse cases provide some further guidance. (*See, e.g., Pamela L. v. Farmer*, 169 Cal. Rptr. 282 (Cal. Ct. App. 1980) (finding potential liability against a wife who invited and encouraged children to visit her property even though she knew that her husband had molested women and children in the past and might do so again in the future); *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998) (holding that a wife could be held liable for negligent failure to prevent or warn about her husband's sexual abuse when the wife had actual knowledge or special reason to know that the husband was likely to abuse a particular person or persons); and *Doe v. Franklin*, 930 S.W.2d 921 (Tex. App. 1996) (holding that a grandmother could be held liable for failure to protect her granddaughter from a known risk of sexual abuse by the grandfather).)

In these cases, the courts allowed recovery against abusers' wives. The *Gritzner* court went beyond the marital relationship. In a broader approach that more courts will hopefully follow, it allowed the failure to warn claim to go forward against an adult who was not legally related to the abuser.

For jurisdictions in which this type of claim remains troublesome as a matter of public policy, a strong argument for allowing recovery was made by the Supreme Court of New Jersey:

> Considerations of fairness and public policy also govern whether the imposition of a duty is warranted. Public policy considerations based in

> large measure on the comparative interests of the parties support overwhelmingly the recognition of a duty of care in these circumstances. This Court has recognized that the sexual abuse of children not only traumatizes the victims, but also exacts a heavy toll on society . . . .
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> In defining the appropriate standard of care, we are enjoined again to consider the comprehensive legislative treatment of the issue of sexual abuse of children. While the efforts of the Legislature to combat sexual abuse of children are considerable, evidence and experience indicate that they may not be sufficient to stem the tide. This is because ninety-five to ninety-eight percent of child sexual abuse 'is hidden behind closed doors' and occurs 'in the home or within the circle of immediate friends and family.' . . . [C]ivil remedies [may] complement statutory protections and further the legislative efforts to enhance the protection of children.[xviii]

The Supreme Court of Wisconsin observed in *Gritzner* that "[h]olding adults to the well-defined, reasonable standards of conduct we recognize in this case will provide increased protection for children."[xix] The Gritzners, and parents everywhere, can only hope that the court's prediction is correct. For the Gritzners, four years have passed and the discovery phase of the case is just now beginning. There are still serious hurdles to be cleared. The insurance company likely will file summary judgment motions on coverage and the intentional acts exclusion. When the case finally does go before a jury, the Gritzners will still face motions to deny their claim on public policy grounds. Hopefully, T.G. will someday be compensated for what happened to her, and her parents will secure some of the accountability that has thus far been nonexistent. For now, the Gritzners are content to have made it past the courthouse door.

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i. *Kelli T-G. v. Charland*, 542 N.W.2d 175 (Wis. Ct. App. 1995).

ii. *Id.* at 178.

iii. *Gritzner v. Michael R.*, 598 N.W.2d 282 (Wis. Ct. App. 1999).

iv. *Id.* at 287-288.

v. *Id.* at 288.

vi. *Id.* at 287.

vii. *Gritzner v. Michael R.*, 611 N.W.2d 906 (Wis. 2000).

viii. *Id.* at 919.

ix. RESTATEMENT (SECOND) OF TORTS § 316.4

x. *Gritzner*, 611 N.W.2d at 920.

xi. RESTATEMENT (SECOND) OF TORTS §324A.

xii. *Gritzner*, 611 N.W.2d at 913.

xiii. *Id.* at 925.

xiv. *Id.* at 915.

xv. *Id.* at 926.

xvi. *Id.* at 917.

xvii. *Id.* at 925-926.

xviii. *J.S. v. R.T.H.*, 714 A.2d 924, 932-33 (N.J. 1998) (citations omitted).

xix. *Gritzner*, 611 N.W.2d at 924.