Beyond #MeToo

# The Multi-Million Dollar Problem of Civil Sexual Misconduct Claims

By Kathryn S. Whitlock

**Defending these "bet the company" cases requires establishing a strong, working partnership among the claims handler, defense counsel, and the insured.**

The #MeToo Movement ushered sexual misconduct discussions into the public lexicon and firmly ensconced them in our civil litigation system. Claims run the gamut from sexual torts (e.g., rape), to hazing, to harassment, to abuse, to molestation, to sex trafficking, and even to some bullying. Verdicts in such cases can be astronomical: $21,749,041.10 against a schowol and its chief administrator to a man who contended that the administrator abused him when he was a high school student more than ten years earlier (*Mirlis v. Greer*, 2nd Cir. (Conn.) 2018 17-4023-cv (L) March 3, 2020); $58,250,000 to a woman production assistant who alleged that one of her superiors regularly subjected her to egregious sexual harassment and sexual battery (*Kahn v Hologram USA, Inc, et al*; Los Angeles Superior Court; #BC654017; December 02, 2019)); $1,000,000,000 (yes, billion) to a woman who claimed she was raped by an apartment complex security guard when she was a teenager (*Cheston v. Prevention Agency, Inc.*, Clayton County, Georgia, State Court #2014CV01498D; May 24, 2018). Sexual misconduct, harassment, abuse, molestation, and hazing cases involve some of the highest exposure claims for defendants.

In addition to the eye-popping verdicts, the adverse publicity that can surround the claims is serious and troubling. Consider Penn State and Gerald (Jerry) Sandusky, Miramax Films and Harvey Weinstein, and the 100,000 claims filed in the Boy Scouts of America bankruptcy proceeding. Such claims, which can arise in almost any context and are often seen against religious organizations, schools, overnight and day camps, youth groups, and athletic organizations, can be a death knell for an organization.

To say the stakes are high in these cases is a gross understatement. As with any liability case, the specific facts and law will be the determinative factors for handling of each case. However, there are some general matters that arise in sexual miscon-

■ Kathryn S. (Kate) Whitlock is a senior partner in the Atlanta office of Hawkins Parnell & Young LLP. She has spent her entire professional liability, product liability, and premises liability career defending people who are accused of not doing their jobs right. Ms. Whitlock defends lawyers, claims handlers, engineers, property managers, schools, and more.


duct cases that should be considered when adjusting them.

## Coverage Issues

The first step, of course, is to assess the policy language, the claims made, and the applicable state's law to determine the extent to which there may be coverage obligations under applicable policies. The coverage issues will vary, depending on the type of policy under which the insured seeks coverage. Coverage may be found in commercial general liability (CGL), directors and officers (D&O), errors and omissions (E&O), professional liability, sexual abuse or molestation, homeowners, and umbrella policies. In general, claims against the alleged perpetrator are excluded under an "expected or intended injury," intentional act, or criminal act exclusions. However, the organization (e.g., premises owner, employer) may still be entitled to coverage under the policy or an endorsement. Careful and early consideration of this issue is crucial.

## Theories of Liability

Since this is a developing area of law, we are seeing new and different claims all the time. Plaintiffs are looking to both federal and state law for sources of duties and available remedies.

### Federal Law Claims

Title IX provides, in part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.…" 20 U.S.C. §1681(a). Sexual harassment is a form of discrimination under Title IX. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). As a result, an

educational institution that receives federal funding can be liable under Title IX for sexual abuse of a student by a teacher, school employee, or another student. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). To prevail on a Title IX sexual misconduct claim against a teacher or school employee, a plaintiff must prove: 1) an official who had authority to address the alleged discrimination and to institute corrective measures had "actual knowledge of the discrimination"; and 2) deliberate indifference by the school to the discrimination. *Gebster v. Lago Vista Independent School District*, 524 U.S. 274 (1998). In student-on-student cases, a plaintiff must also prove the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650.

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Educational institutions and police departments are also subject to liability based on the federal statute creating a cause of action for violations of federal or statutory rights. 42 U.S.C. §1983. To assert a claim under §1983, a plaintiff must identify the rights abridged, such as due process and equal protection. *Doe v. Taylor Independent School District*, 15 F. 3d 443, 450 (5th Cir. 1994).

**State Law Claims**

Under state law, there are a number of different theories under which a plaintiff might travel. First, there is a civil cause of action for assault and battery, including sexual assault. *See Timothy Mc. v. Beacon City Sch. Dist.,* 127 A.D.3d 826, 7 N.Y.S.3d 348 (2015); *Davis v. Standifer*, 275 Ga. App. 769 (2005). This generally is available only against the alleged bad actor.

Second, many states recognize intentional infliction of emotional distress as a cause of action. *Pelitire v. Rinker*, 270 So. 3d 817 (La. 2019); *Doe v. Harris*, 2001 Va. Cir. LEXIS 529 (2001); *Johnson v. Cox*, 1997 Ohio App. LEXIS 1346 (Ohio Ct. App. 1997). To prove such a claim, a plaintiff usually must show that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was extreme and outrageous; (3) a causal connection existed between the wrongful conduct and the emotional distress; and (4) the emotional harm was severe. *Abdul-Malik v. AirTran Airways, Inc.*, 297 Ga. App. 852 (2009).

Another alternative is simple negligence law (such as negligent failure to provide adequate security). With such a claim, the defendant is judged on a reasonableness standard. *See generally Barsamian v. City of Kingsburg,* 597 F. Supp. 2d 1054 (E.D. Cal. 2009); *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861 (2004). That standard necessarily includes an element of duty from the defendant to the plaintiff to take the action (or refrain from taking the action) about which the plaintiff complains. *Wells Fargo Bank, N.A. v. Jenkins*, 293 Ga. 162 (2013); *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001). It means that, regardless of how negligent the defendant's conduct or how innocent the plaintiff's, if there is no duty flowing from the defendant to the plaintiff, there is no cause of action. *Glover v. Ga. Power Co.*, 347 Ga. App. 372, 819 S.E.2d 660 (2018); *Chastain v. Fuqua Indus.*, 156 Ga. App. 719 (1980). This element is important when one is considering, for example, a Scout's claim against a church, or a guest's claim against a hotel, or a patient's claim against a dental practice. *Goldstein, Garber & Salama, LLC v. J. B.*, 300 Ga. 840 (2017).

Assuming the duty exists, a plaintiff must prove the duty was breached to be successful. *Johnson v. American Nat. Red Cross*, 276 Ga. 270 (2003). This requires a showing that there is a standard of conduct applicable to the defendant to which the defendant failed to adhere. *Roussaw v. Mastery Charter High Sch.*, 2020 U.S. Dist. LEXIS 90192 (E.D. Pa. 2020); *Vargas v. City & Cty. of Honolulu*, 2020 U.S. Dist. LEXIS 114315 (D. Hi. 2020); *Gracy Woods I Nursing Home v. Mahan,* 520 S.W.3d 171 (Tx Ct. App. 2017); *Brown v. All-Tech Inv. Group, Inc.*, 265 Ga. App. 889 (2004).

Finally, the injuries of which the plaintiff complains must proximately result from the breach. The criminal act of a third party is, as a general rule, an intervening and independent wrongful act of a third person producing the injury, which constitutes the proximate cause of damages and insulates the defendant from liability. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005); *Miller v. Lord*, 262 Mich. App. 640 (2004); *Ontario Sewing Machine Co., Ltd. v. Smith*, 275 Ga. 683 (2002). However, this rule does not insulate the defendant "if the defendant had reasonable grounds for apprehending that such wrongful act would be committed." *Ontario Sewing Machine*; *K.G.R. v. Union City Sch. Dist.*, 2016 Tenn. App. LEXIS 960 (2016); *Doe v. Messina*, 349 S.W.3d 797 (Tx. Ct. App. 2011); *see also Atlanta Obstetrics and Gynecology Group v. Coleman*, 260 Ga. 569 (1990) (the requirement of proximate cause is a policy decision that, for a variety of reasons such as intervening act, the defendant's conduct and the plaintiff's injury are too remote for the law to countenance recovery).

One way a plaintiff can prove "reasonable grounds for apprehending" that the offender may assault another is by showing that the defendant knew, or in the exercise of reasonable care should have known, of the offender's propensity to engage in sexual misconduct. *Doe v. E. Irondequoit Cent. Sch. Dist.*, 2018 U.S. Dist. LEXIS 76798 (W.D. N. Y. 2018); *Doe v. St. Francis Hosp. & Med. Ctr.*, 309 Conn. 146 (2013). Such knowledge can give rise to a duty for the defendant to take reasonable steps to protect the plaintiff.

In civil cases, plaintiffs most often want to attribute liability to a third party. They may sue churches, hotels, schools, employers, other institutions at which an incident occurred, rideshares (Uber and Lyft), homeshares (Airbnb), and spouses and parents of alleged perpetrators. The accused (notable cases like Bill Cosby aside) tend not to have the assets that plaintiffs are targeting, so they looks elsewhere. Several theories can be advanced to get to those assets.

Plaintiffs may claim that the defendant committed an independent tort such as fraudulent concealment. *Doe v. St. Joseph's Catholic Church*, 357 Ga. App. 710 (2020); *Picher v. Roman Catholic Bishop of Portland*, 974 A.2d 286 (Me. 2009). This requires proof of actual knowledge of the misconduct and can be difficult for the plaintiff to prove, but also difficult for the defendant to disprove. In the wake of the Catholic Church scandals and the claims about the Boy Scout "perversion files," however, juries are willing to believe these claims.

Other independent torts that may be asserted are negligent selection, retention, training, and supervision. O.C.G.A. §34-7-20; *Avis Rent a Car System, LLC v. Smith*, 353 Ga. App. 24 (2019); (generally) *Doe v. George Wash. Univ.*, 369 F. Supp. 3d 49 (D. D.C. 2019); *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088 (10th Cir. 2005). Under these theories, "a principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." *Restatement (Third) of Agency*, §7.05(1)(2006). A defendant "may be held liable…where there is sufficient evidence to establish that the [defendant] reasonably knew or should have known of [the perpetrator's] 'tendencies' to engage in certain behavior relevant to the injuries allegedly incurred by the plaintiff." *Steagald v. Eason*, 300 Ga. 717 (2017); *Munroe v. Universal Health Svcs.*, 277 Ga. 861 (2004); *Poole v. North Ga. Conf. of the Methodist Church, Inc.*, 273 Ga. App. 536 (2005). But, as noted above, absent a causal connection between the alleged perpetrator's particular incompetency for the job and the injury sustained by the plaintiff, the defendant is not liable to the plaintiff. *Kelly v. Baker Protective Servs.*, 198 Ga. App. 378 (1991).

Plaintiffs also assert, in these sexual assault cases, claims seeking to attach vicarious liability to the defendant for the alleged perpetrator's conduct. *Villar v Howard*, 126 A.D.3d 1297 (N.Y. S. Ct. 2015). The first hurdle for the plaintiff in such cases is proving that the act was within the scope of the agency. *Restatement (Third) of Agency*, §7.07(1). An agent acts within the scope of the agency when performing work assigned by the principal or engaging in a course of conduct subject to a principal's control. An agent's act is not within the scope of the agency when it is part of an independent course of conduct not intended by the agent to serve any purpose of the principal. *Restatement (Third) of Agency*, §7.07(2). Most often, courts have found that sexual misconduct falls outside the scope of agency. *Z.V. v. County of Riverside*, 238 Cal. App. 4th 889 (2015); *Smyre v. Amaral*, 2013 U.S. Dist. LEXIS 90850 (D. De. 2013). Such a finding, however, is not a foregone conclusion, and the defense must be vigorously pursued. *Myers v. Trendwest Resorts, Inc.*, 148 Cal. App. 4th 1403 (2007); *Doe v. Hartz*, 52 F. Supp. 2d 1027 (N.D. Ia. 1999); *Ashman v. Amsden Grp., L.L.C.*, 106 Va. Cir. 451 (2020).

## Potential Defenses

Although, as noted, this body of law is developing, the basics are rooted in common law and many familiar defenses, as well as some not so familiar ones, are available to defendants.

### Liability

The most obvious defense is that there was no sexual misconduct. The facts alleged by the plaintiff and any claim of non-consent must be explored. There is no national consensus regarding the age of consent or the capacity to consent to sex. Moreover, the relationship of the plaintiff to the alleged perpetrator (e.g., patient-doctor, attorney-client, parishioner-clergy, teacher-student) may affect this analysis. Discovery of sound recordings, emails, texts, private messages, and social media can be revealing to both sides of the lawsuit. Make sure you get your insured's electronic information before the plaintiff does.

Even if the defendant has been found guilty in a criminal prosecution, the question of liability should be explored. Evidence that was not admitted in the criminal case could come in and be considered in the civil case.

Discovering this information may be challenging if there are criminal charges against the defendant when the civil case is being pursued. While there is a Fifth Amendment right not to speak out, if that right is invoked in a civil case, it often results in an adverse inference. *See McGillis Inv. Co., LLP v. First Interstate Fin. Utah LLC,* 370 P.3d 295 (Col. 2015); *Samson Contour Energy E & P, L.L.C. v. Smith*, 175 So. 3d 967 (La. 2014).

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If the accuser is a child, consider retaining an expert psychologist or forensic interviewer to review the forensic interview. The expert is to assess whether, given the child's age and the conduct of the interview, the interviewer influenced, aided, or coached the child into an allegation. As with all statements, the forensic interview should be reviewed for inconsistencies that indicate possible untruth.

The defense as to the alleged bad act should not come at the expense of fully developing other defenses. Even if the alleged perpetrator is a named defendant, the targets in civil litigation are, in the main, third parties. Care should be taken to develop other defenses for them such as lack of notice and reasonable steps to protect the plaintiff. This could include

retaining premises or security or child-care experts, collecting testamentary and documentary evidence of other crimes or events at or near the business, and/or obtaining evidence of prior incidents (or the lack thereof) by the alleged perpetrator. The goal is to prove that the defendant had no way of knowing that the act of which the plaintiff complains might occur.

**It should also be noted** that many states apply a "discovery rule" to abuse cases, which can toll the applicable limitations period. In a repressed memory case, that can make determining beginning of the statute of limitations challenging.

Of course, there are time limits for filing lawsuits. Most of these statutes are tolled during the claimed victim's minority. And many states have recently enacted special statutes of limitations for childhood sexual abuse claims. Ohio §2305.111; 735 ILCS 5/13-202.2; Rev. Code Wash. §4.16.340; K.S.A. §60-523. A few states have even enacted so-called "lookback windows" that designate a special time period in which victims are allowed to file civil lawsuits over decades-old abuse. Because the statutes are, in the main, new, their interpretation is subject to court decision and the language and details should be considered carefully to get as much protection as possible. It should also be noted that many states apply a "discovery rule" to abuse cases, which can toll the applicable limitations period. In a repressed memory case, that can make determining beginning of the statute of limitations challenging.

In some instances, for example those involving school officials or police departments, there may be state law immunities that apply. The defense team should identify and assert all potential immunities as affirmative defenses at the time the civil complaint is answered. Discovery should be developed around these immunities for summary judgment to be a viable option.

### Damages

Damages are ephemeral in sexual misconduct cases. Usually, the damages standard is something undefined and essentially open-ended. For example, whatever amount is determined appropriate by "the enlightened conscience of a fair and impartial jury." *Dalton v. Van Heath, LLP*, 2013 U.S. Dist. LEXIS 181324 (M.D. Ga. 2013). The issue is one that must be addressed.

Often, the plaintiff has grown into an adult who has not done well in life. The plaintiff may have suffered drug addiction, chronic unemployment, and/or a series of short, unhappy, intimate relationships. And the plaintiff wants to attribute this failure to thrive on the abuse.

To respond to the allegations, a deep dive into the plaintiff's background and history also is warranted. Siblings' lives should be explored to see the similarities and differences in experience and outcome. The plaintiff's school, employment, psychotherapy, and other healthcare records should be carefully reviewed for evidence of other problems or causes of the problems attributed by the plaintiff to the alleged abuse. Experts in trauma and memory also might be helpful in this regard.

Inquiry into other events and traumas in the plaintiff's life are critical. While most discovery procedures are available as a matter of right, a court order may be required in sexual abuse or assault cases to conduct discovery into the plaintiff's sexual conduct with individuals other than the alleged perpetrator of the abuse. *See* California CPC §2017.220. The use of evidence of a plaintiff's sexual behavior is sometimes seen as more harassing and intimidating than genuinely probative, by both a judge and a jury, so care must be taken when collecting and using this evidence.

Also critical is inquiry and investigation into the plaintiff's credibility. Very often, these cases have at least an element of "he said/she said," so whose word is more believable is a crucial issue. Finding ways to bolster the alleged perpetrator's credibility or reduce the plaintiff's credibility will increase the odds of success in the cases.

The plaintiff's background, credibility, experiences, etc. are a delicate subject. While full exploration is warranted, the subject matter and examination of the plaintiff and other witnesses about it must be handled with care.

### Conclusion

Because sexual misconduct cases have their own special brand of risk, they often are "bet the company" cases. Developing a partnership and team among claims handler, defense counsel, and the insured is imperative. It not only permits better and more effective handling of the claim, it also opens doors to proactive steps to increase training and reduce risk that sexual misconduct will occur in the first place and/or that future claims will be made.