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Political will and the power of the pen

THE SHIFTING PERSPECTIVE OF SEXUAL ABUSE RESULTS IN LONG-OVERDUE CHANGES TO CALIFORNIA'S STATUTES OF LIMITATIONS: AB 218 AND RELATED BILLS

Among the many remarkable bills aimed at protecting Californians signed by Gov. Newsom in the last month were three bills aimed at extending the statutes of limitations in sexual-abuse actions: AB 218 dramatically extends the time in which a victim of childhood sexual abuse may bring a cause of action and includes a three-year revival period for which previously expired claims may be pursued; AB 1510 addresses the decades-long abuse by Dr. George Tyndall of University of Southern California ("USC") by providing victims whose claims have expired a one-year revival period within which to bring an action; and AB 9 extends the statutes of limitations to file claims for discrimination, harassment and/or retaliation with the California Department of Fair Employment and Housing ("DFEH").

Whether the passage of these bills is credited to the powerful #MeToo movement or the decades' worth of national stories of widespread systemic abuse among churches, schools and organized youth sports, the momentum has brought us to a place where empathy and compassion are threaded into our jurisprudence.

The new laws reflect an analysis of accrual that takes into account the unique circumstances of sexual abuse and how victims often do not come forward right away, either because of shame or embarrassment, or the failure to even appreciate that what occurred was wrongful. As poignantly noted by one appellate court, "'[a] survivor of childhood sexual abuse often lacks

See Boyer, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

the means or ability to ascertain his or her injuries and their cause within the traditional limitations period. Many victims of childhood sexual abuse have repressed all memory of the abuse for many years or, if they do remember the abuse, they minimize or deny its effects to the extent that they do not connect the abuse with later injuries. Generally, it is only when an adult survivor of sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed.'" (*Sellery v. Cressey* (1996) 48 Cal.App.4th 538,546-548.)

While the decision in *Sellery* dates back more than twenty years, it seems that it is really just now that the Legislature has caught up to the research and recognized the contours of sexual abuse and the effect of the manipulation orchestrated by the abuser that may prevent a victim from coming forward sooner. Tragically, sexual abuse is a part of our world and victims of such abuse should not be shouldered with the long-lasting and debilitating effects without recourse simply because the arbitrary deadline within which to bring a civil action has expired.

AB 218 – Childhood sexual abuse statute of limitations

AB 218 significantly reshapes the law governing when a claim for childhood sexual abuse may be brought. Currently, survivors of childhood sexual abuse must file a lawsuit by age 26, or within three years of when the victim realizes, or should have reasonably realized, that their psychological injury was caused by the childhood sexual abuse – whichever occurs later.

Where the action is brought against anyone other than the abuser, and the victim is over the age of 26, current law requires that the victim *also* prove that the third-party defendant knew or had reason to know of prior "unlawful sexual conduct" by the abuser "and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person." (See Code Civ. Proc., § 340.1(b)(2).) In other words, the statute currently precludes victims of childhood sexual abuse who are over the age of 26 and relying on the delayed-discovery rule from bringing actions against third-party defendants such as churches, schools, etc., *unless* the victim can prove that the third party knew that the abuser had engaged in *prior* unlawful sexual conduct and failed to take reasonable steps to prevent future abuse.

The current version's age 26 cut-off, unless a heightened notice standard is met, unfairly penalizes victims of sexual abuse. The notion that children abused by an adult seeking redress against a third-party entity are saddled with the additional requirements of this heightened notice standard simply because they are over age 26 is outrageous given the vulnerable nature of such abuse and the reality that most victims do not even immediately recognize the touching as wrongful. Tragically, it is in the very context of sexual abuse torts against children, where children are often manipulated by those trusted adults in a position of power over the child, that the application of a delayed discovery rule is most appropriate. To bar such claims at age 26 unless they can meet a stringent notice requirement simply makes no sense.

Thankfully, this is no longer the law. Assemblywoman Lorena Gonzales, the author of AB 218, has moved mountains and codified a statute of limitations that appreciates and acknowledges the very nature of the tort it governs.

Extended statute of limitations against abusers and third-party entities

Under the new law, a victim of childhood sexual assault has until age 40 or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury was caused by the sexual assault, whichever period expires later, to bring a cause of action. As reflected in the legislative history for AB 218, the extension of time from age 26 to age 40 is in accord with approaches taken by other states and is justified by the trauma caused by abuse at such a young age. As confirmed by the significant development in the research of the effects of child sexual abuse, many child victims of sexual abuse suppress memories of the abuse, deny the abuse, and fail to appreciate that the conduct was even abuse, let alone harmful, well into adulthood.

The amended law also makes it easier for victims to pursue claims against third-party entities responsible for the sexual abuse. While a cut-off date still exists, it has been changed from age 26 to age 40. And while before a victim over the age of 26 could only pursue a claim against a third-party entity where the entity knew or had reason to know of the abuser's past unlawful sexual conduct with a minor (other than the victim) and failed to take reasonable preventive steps to avoid acts of future unlawful sexual conduct by the abuser, the law as amended is much less stringent.

As explained in Senate Judiciary Committee analysis of AB 218:

> This bill modifies the provisions of subdivision (b)(2) [now subdivision (c) in the bill]. First, it provides that the nonperpetrator defendant only needs to know, have reason to know, or otherwise be on notice, of *any misconduct* creating a risk of childhood sexual assault, whereas current law requires the relevant misconduct to be specifically "unlawful sexual conduct." *This drastically expands the actionable conduct pursuant to the statute.* In addition, the bill modifies the second factor to requiring proof that the defendant failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault.
>
> Most importantly, this bill replaces an "and" with an "or" and only requires one of the two factors to be proven to move forward with a claim after the relevant limitations period. *These changes lessen the burden on a victim to bring such a case after having passed the cutoff age.*

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 218, (2018-2019 Reg. Sess.), as amended March 25, 2019, p. 11 (emphasis in original and added).)

The amendments made to Section 340.1 understand the context of childhood sexual abuse and reflect California's strong interest in protecting children.

See Boyer, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

Revival and retroactive application

Just as the 2002 amendments to Section 340.1 included a revival period for actions previously barred under the earlier, more constrained statutes of limitations, AB 218 likewise includes a revival provision. The new law provides that the claims that would otherwise be barred as of January 1, 2020, because an applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is explicitly *revived*. The law creates a three-year window in which such claims can be brought, or, if later, within the statute of limitations period newly established by AB 218. The new law includes a provision stating:

> The changes made to the time period under subdivision (a) as amended by the act that amended this subdivision in 2019 apply to and revive any action commenced on or after the date of enactment of that act, and to any action filed before the date of enactment, and still pending on that date, including any action or causes of action that would have been barred by the laws in effect before the date of enactment.

(Code Civ. Proc., § 340.1(r), as amended and eff. 1/1/2020.)

The revival provision therefore applies to any action "that has not been litigated to finality" and that would otherwise be barred as of January 1, 2020 because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired. "Litigated to finality" generally means where the case has not been finally decided on appeal.

Thus, the newly extended statute of limitations applies to cases filed on or after January 1, 2020, as well as any pending action filed before January 1, 2020 that has not been finalized on appeal.

Of particular note is that the revival provision applies to actions that have been previously barred because of the failure to file a Government Tort claim. (Code Civ. Proc., § 340.1(q), as amended and eff. 1/1/2020.) AB 218 also amends Government Code section 905(m). Under current law, claims made pursuant to Section 340.1 that arise out of conduct occurring after January 1, 2009 are exempted from the Government Tort Claims Act. The new law deletes the time component of subdivision (m) and includes a provision making the change *retroactive*.

As revealed in the legislative history, while the Legislature was aware of the policy concerns against retroactive legislation, it was also aware that important state interests such as those involved here may justify such revival provisions.

> Childhood sexual abuse has been correlated with higher levels of depression, guilt, shame, self-blame, eating disorders, somatic concerns, anxiety, dissociative patterns, repression, denial, sexual problems, and relationship problems." [footnote omitted] Given the horrific damage and lifelong trauma that can be caused by childhood sexual assault, these claims are arguably worthy of such revival, despite the general disregard for doing so.

(Assem. Com. on Judiciary, Analysis of Assem. Bill No. 218, as amended March 25, 2019, p. 8.)

On this point, it is also worth noting that statutes of limitations are by definition arbitrary. As has been seen with a variety of different statutes, public policy may warrant a revival period to permit certain victims to simply assert their claims in a court of law. A revival provision provides a victim *the opportunity* to pursue his or her claims – it does not affect the merits of the claim. It is thus procedural in nature.

AB 218 reflects a change – a change reflecting empathy for those who have been sexually abused as a child. While many legislatures may have no experience with such abuse, the passage of AB 218 acknowledges the circumstances of sexual abuse and the reality that victims simply cannot come forward soon after the abuse. The research demonstrates that children are often mentally and emotionally incapable of recognizing the harm from such abuse until much later in adult life. (See U.S. Dep't of Justice: The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress 21 (Aug. 2010).) The very act of "grooming" usually involves normalizing sexualized behavior in the relationship between the child and the abuser so as to thwart the child from understanding that the relationship is indeed abuse.

While as adults, it is not hard to comprehend that at the time a child is being sexually abused, the child is being *harmed,* the very contours of childhood sexual abuse preclude a child from objectively recognizing such abuse and harm. The new law now reflects this reality.

AB 1510 – Dr. Tyndall's victims

Allowing victims of Dr. Tyndall an opportunity to bring a civil action that otherwise would be time barred

For nearly 30 years, Dr. George Tyndall, the only full-time gynecologist at USC's student health center, used his position of trust and authority to sexually abuse, molest and humiliate female students, many of whom were teenagers seeing a gynecologist for the first time. After the abuse and cover-up was finally made public in 2018, hundreds of female victims came forward and initiated state actions against USC. However, many of these victims faced an expired statute of limitations.

Prior to 2019, the statute of limitations for actions concerning the sexual abuse of a victim over the age of 18 was generally two years. Last year, the Legislature passed AB 1619 (effective 1/1/19) which expanded the statute of limitations in civil actions for recovery of damages suffered as a result of sexual assault where the assault occurred on or after the victim's 18th birthday, to either 10 years from the date of the last act, or three years from the date the plaintiff discovered or reasonably should have discovered that an injury or illness resulted from the sexual assault, whichever is later. (See Code Civ. Proc., § 340.16(a).)

Most of the students victimized by Dr. Tyndall could not take advantage of the extended statute of limitations in Section 340.16 as the abuse occurred long before the statute was enacted.

See Boyer, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2019 Issue

AB 1510, authored by Assemblywoman Eloise Gomez Reyes, provides a narrow one-year revival provision, beginning January 1, 2020, to give these victims on opportunity to have their day in court.

AB 9 – FEHA claims

Extending the time for filing harassment and discrimination claims under FEHA

In yet another bill recently signed into law by Gov. Newsom, the time period for filing a FEHA discrimination or harassment claim was extended so as to provide victims a longer period within which to come forward. AB 9, authored by Asm. Reyes, Friedman and Waldron, targeted the pre-filing requirement that victims must pursue when seeking relief under FEHA. Under current law, a victim of harassment or discrimination at work must file a pre-litigation claim with the Department of Fair Employment and Housing (DFEH) within one year of the unlawful act. The failure to comply with the pre-filing requirement precludes the victim from seeking redress under the statute in a civil action.

AB 9 amends Government Code section 12960 to the current one-year time limit for filing a claim with the DFEH to three years.

As poignantly noted in the legislative history of AB 9, victims of sexual harassment and discrimination often blame themselves and may not understand that what happened to them was unlawful. (Assem. Floor Analysis, Analysis of Assem. Bill No. 9 (2018-2019 Reg. Sess.), as amended July 11, 2019; Senate Judicial Com., Analysis of Assem. Bill No. 9 (2018-2019 Reg. Sess.) as amended March 21, 2019.) Low-wage earners may be particularly vulnerable in such situations as they may be unaware of their rights or too afraid of the risk of retaliation given financial constraints. (*Ibid*.) As noted in the Assembly Floor Analysis, "The #MeToo movement has brought attention to many of the dynamics related to sexual harassment. In particular, many victims have shared that they needed ample time to fully grasp what happened to them before they felt comfortable coming forward. In addition, the fear of retaliation often prevented victims from being able to report incidents of sexual harassment." (*Ibid*.)

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