



Child Sexual Abuse

A plaintiff's perspective

Charitable immunity. The Child Sexual Abuse Act. The *Hardwicke* case, repressed memory, expert testimony and statutes of limitations.

By Lawrence Z. Kotler and Scott A. Heiart

Incidents of child sexual abuse involving clergy, educators, coaches and other adult offenders are prevalent and frequently reported in the media. On July 15, 2007, more than 500 victims of clergy sexual abuse settled cases with the Archdiocese of Los Angeles for an amount in excess of \$600 million — approximately \$1.3 million to each plaintiff. Sexual abuse is of grave concern to the public and law enforcement. Statistics from the U.S. Department of Justice report, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, show that nationwide, crimes against juvenile victims comprise 67 percent of all sexual assaults.

Most sexual offenders are not family members but are acquaintances of the victim. According to the 2004 U.S. Department of Education report, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, nearly 9.6 percent of students are targets of educator sexual misconduct sometime during their school career. In most states, victims of sexual abuse occurring outside the home are allowed to sue an institution where the abuse took place. However, until recently, New Jersey was one of a handful of states in which charitable immunity laws barred those suits.

The arsenal of legal weapons available to sexual abuse plaintiffs in New Jersey was improved in 2006 by the state legislature's passage of an amendment to the New Jersey Charitable Immunity Act, N.J.S.A. 2A:53A-7 et seq., and the Supreme Court's decision in *Hardwicke v. American Boychoir School*, 188 N.J. 69. As a result of the legislative amendment, victims of sexual abuse now can maintain a cause of action against charitable institutions for negligent hiring, supervision and/or retention. As a result of *Hardwicke*, schools, churches and other charitable organizations no longer can shield themselves from liability by asserting a rogue employee was acting outside the scope of his or her employment.

This year, in *Phillips v. Gelpke*, 190 N.J. 580, the Supreme Court held that a sexual abuse victim's case did not require expert testimony to explain the recollection of the abuse. The court decided that the plaintiff's ability to recall the abuse and when she actually recalled the abuse went to the weight of her testimony.

These legislative and judicial developments, together with the New Jersey Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, provide child sexual abuse victims with relief not previously available in this state.

Charitable immunity

Before 1958, New Jersey courts adhered to the common law doctrine of charitable immunity, limiting suits against charitable institutions. In a

series of decisions that year, the New Jersey Supreme Court abrogated the doctrine: *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29; *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22; and *Benton v. YMCA*, 27 N.J. 67. In 1959, the New Jersey legislature responded to those Supreme Court decisions by enacting the Charitable Immunity Act (CIA). Since that time, the CIA stood as a virtual bar to sexual abuse suits against charitable organizations.

For example, in 1984 the Supreme Court held in *Schultz v. Roman Catholic Archdiocese of Newark*, 95 N.J. 530 (1984), that the CIA applied in cases of negligent hiring and supervision of an employee that resulted in the sexual abuse of a child.

In January 2006, however, an amendment to the CIA significantly altered the judicial landscape. The amendment ("Application of charitable immunity protection for certain sexual offenses committed by agent or employee," N.J.S.A. 2A:53A-7.4), created a new cause of action against charitable institutions for negligent conduct resulting in the commission of a sexual offense against a minor. It provides:

The immunity from civil liability granted to a nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes pursuant to the provisions of P.L. 1959, c. 90 (C.2A-53A-7 to 2A:53A-11) shall not apply to a claim in any civil action that the negligent hiring, supervision or retention of any employee, agent or servant resulted in a sexual offense being committed against a person under the age of 18 who was a beneficiary of the nonprofit organization.

Sexual offenses as defined by the amendment mean "any actions that would constitute any crime set forth in Chapter 14 of Title 2C ... or set forth in Paragraph (3) or (4) of subsection b. of N.J.S. 2C:24-4." These include crimes of sexual assault and endangering the welfare of children.

While the CIA once shielded potentially offending institutions from accountability in a court of law, it now explicitly strips such organizations of their immunity in child sexual abuse cases. The amendment is not only prospective in application: it applies retroactively to actions for which the statute of limitations had not expired as of the effective date of the amendment and to pending civil actions not yet dismissed or finally adjudicated as of the amendment effective date.

Child Sexual Abuse Act

The CSAA was enacted in 1992 in order to create a civil cause of action for child sexual abuse where none previously existed. The CSAA permits a civil action against abusers where the plaintiff was under age 18 at the time of abuse. It also creates secondary liability, subject to certain exceptions, against a parent or "other person standing in loco parentis within the household who knowingly permits or acquiesces in sexual abuse by any other person." N.J.S.A. 2A:61B-1a. (1). This provision, as construed by the Supreme Court, is key to the CSAA's utility in suits against institutions that employ and sometimes, as in the case of clergy sexual abuse, shelter the abusers.

The sponsors of the CSAA recognize the unique nature of sexual abuse, including that it may only be discovered by an adult victim after years of repression. As such, two of the more notable aspects of the CSAA are its accrual and tolling provisions. In this regard, a cause of action does not accrue under the CSAA until the "time of reasonable discovery of the injury and its causal relationship to the act of sexual abuse." Moreover, the CSAA's two-year limitations period may be tolled "because of the Plaintiff's mental state, duress by the Defendant or any other equitable grounds."

A plaintiff who prevails in a civil suit under the CSAA is entitled to \$10,000 in damages and reasonable attorney fees, or actual damages (compensatory and punitive), whichever is greater. Compensatory damages include "pain and suffering, medical expenses, emotional trauma, diminished childhood, diminished enjoyment of life, costs of counseling, and lost wages."

Other parts of the law lend protection to CSAA plaintiffs in the form of "rape shield" and *in camera* hearing provisions.

Hardwicke holdings

While the legislation that would ultimately lead to the CIA amendment was making its way through the legislature, the 2006 case of *Hardwicke v. American Boychoir School*, 188 N.J. 69, was making its way through the courts. *Hardwicke* would profoundly affect the rights of sexual abuse victims, beyond the new rights conferred by the CIA Amendment.

Beginning at age 12, John Hardwicke was sexually abused by school faculty and staff members while attending the New Jersey boarding school, the American Boychoir School. From October 1970 to April 1971, Hardwicke was sexually abused daily by the school's music director, Donald Hanson, and other school

staff. Hardwicke did not report the abuse to the school until 1999. During the interim, between 1981 and 1999, the school was notified by other students they had been sexually abused.

As a result of one such notice in 1981, Hanson was ultimately given a medical leave of absence and resigned as of June 20, 1982. Hanson admitted to the school to acting "inappropriately" with at least one student. The school kept all the sexual abuse complaints confidential and did not notify students about the abuse until April 2000, when it sent a letter to alumni who had attended during Hanson's tenure.

In 2001, Hardwicke filed suit against Hanson and the school. His complaint asserted a number of causes of action, including violation of the CSAA, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of a duty to disclose, and negligent hiring and supervision. The trial court ultimately dismissed Hardwicke's CSAA cause of action, finding the school did not qualify as a "person" under the CSAA; that in the absence of a CSAA cause of action, the accrual provisions of the CSAA did not apply to Hardwicke's common law claims; and that the CIA barred plaintiff's common law claims against the school, even those alleging school employees had acted "willfully, wantonly, recklessly, indifferently [or] criminally."

On appeal, the Appellate Division held that under the CSAA, the term "person" included non-natural persons and that

The state has lowered the bar for recovery against charitable organizations by imposing principles of vicarious liability, establishing a cause of action for negligent hiring, supervision and retention and by legislatively and judicially applying the "reasonable discovery" rule.

Hardwicke could therefore maintain a CSAA cause of action against the school. The court also found the CSAA's more generous statute of limitations applied to Hardwicke's CSAA and common law claims. The Appellate Division determined the CIA only provided immunity for claims based on negligence. Accordingly, it held the CIA did not bar the plaintiff's statutory CSAA cause of action for knowing conduct, nor did it bar Hardwicke's common law claims for intentional misconduct.

Implicit in the Appellate Court's ruling was the Supreme Court decision *Frugis v. Bracigliano*, 177 N.J. 250 (2003), recognizing the "heightened duty" of care a school board owes to protect the children in its care. *Frugis* was a sexual abuse case in which the abuser was a public school principal. The court observed that teachers and administrators stand as "surrogate parents" and the "first imperative [of the school board] must be to do no harm to the children in its care." These principles guided the Appellate Court in its reversal of the trial court. *Hardwicke v. American Boychoir School*, 368 N.J. Super 71 (App. Div. 2004).

The Supreme Court granted the American Boychoir School's motion for leave to appeal. The high court determined four principal issues:

- The school was a "person" under the passive abuser provision of the CSAA, standing *in loco parentis* within a "household";
- The CIA only immunizes charitable organizations from simple negligence; adopting the reasoning of Justice Handler's dissent in *Shultz*, it does not bar statutory or common law claims for grossly negligent or intentional conduct;
- The accrual and tolling provisions of the CSAA apply as well to common law causes of action for sexual abuse; and
- An employer can be liable for the acts of child sexual abuse committed by its employees, even when acting outside the scope of their employment, pursuant to the principles of vicarious liability in §219 of the Restatement (Second) of Agency (1958) and as an extension to the logic of the court's holdings in *Lehmann v. Toys 'R' Us, Inc.* 132 N.J. 587 (1993) and *Abbamont v. Piscataway Township Board of Education* 138 N.J. 405 (1994).

Repressed memory, expert testimony

The New Jersey Supreme Court provided child sex abuse victims with another positive ruling in a case involving repressed memories, a condition not uncommon among young child sex abuse victims.

In *Phillips v. Gelpke*, 190 N.J. 580 (2007), a plaintiff was sexually abused by her uncle beginning at age five and continuing until age eight. She testified she first began to recall the acts of sexual abuse at age 11 in a dream and, thereafter, through flashbacks occurring from time to time. She did not mention the abuse to her mother until she was 14. The plaintiff filed suit against her uncle when she was 19.

The defense moved by way of summary judgment and again at trial by way of a motion for a directed verdict to dismiss the plaintiff's case on the basis her claims were unsupported by expert testimony explaining how she was able to recall the repressed memories. The trial court denied the defendant's

applications, explaining it viewed the issue as one of witness credibility. The plaintiff obtained a verdict against her uncle and the defendants appealed.

In a reported decision, the Appellate Division in 2006 reversed the plaintiff's verdict, determining that "repressed memory ... should not be considered by a jury without expert testimony." *Phillips v. Gelpke*, 382 N.J. Super 505, 512. The Supreme Court granted certification and held that expert testimony was not necessary, agreeing with the trial court that the "plaintiff's ability to recall the events that she related, and when she recalled them, went to the weight to be accorded to her testimony."

Statutes of limitations

Legislators in other states have tackled the child abuse issue by enacting legislation opening a "window" within which, regardless of when the abuse occurred, a victim is able to file suit. California was the first to act, passing a one-year window in 2002. On July 10, 2007, Delaware Gov. Ruth Ann Minner signed the Child Victim's Act, eliminating the civil statute of limitations and opening a two-year window allowing victims — previously barred by a statute of limitations — to file suit. However, under Delaware's new law, in order to recover, a plaintiff must demonstrate gross negligence on the part of the charitable institution. Although New Jersey lacks a similar window extending the statute of limitations, the state has lowered the bar for recovery against charitable organizations by imposing principles of vicarious liability, establishing a cause of action for negligent hiring, supervision and retention and by legislatively and judicially applying the "reasonable discovery" rule to both statutory and common law claims of child sexual abuse.

Hardwicke and New Jersey's legislative initiatives have improved the odds of successfully litigating against sexual abusers and the organizations employing them. As a result, sexual abuse victims are now in a better position than ever to obtain redress for their injuries. Eliminating the statute of limitations prospectively would truly unlock the doors to the courthouse. ©



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