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"Consent" in civil cases involving sexual misconduct

THE "CONSENT" DEFENSE, BOTH IN CHILDHOOD AND ADULT CASES, IS WEAKENED BY BOTH RECENT CALIFORNIA LAW AND COURT RULINGS

There is no national consensus regarding the age of consent or the capacity to consent to sex. This article will discuss the concept of "consent" in civil cases involving sexual abuse and sexual assault. Specifically, it will discuss California's legislative history regarding consent in childhood sexual-abuse cases as well as the concept of consent in adult sexual- assault cases.

Consent in childhood sexual abuse cases

"*There can be no keener revelation of a society's soul than the way in which it treats its children*." — Nelson Mandela

On July 16, 2015, the California legislature enacted Senate Bill No. 14 ("SB-14"), prohibiting "consent" as a defense in any civil action when the person who commits the sexual abuse is an adult who is in a position of authority over a minor. While SB-14 was a significant step towards better protecting the rights of childhood sexual-abuse victims, this step was taken in response to years of the troubling inconsistencies and dangerous loopholes in California law concerning consent of minors in sexual abuse cases.

While the age of consent is firmly set at 18 under California criminal law, court rulings before SB-14 had found that it was possible to argue that a minor could consent to sex with an adult in civil cases. In other words, while a minor was the victim in a criminal case involving sexual misconduct, that same victim could have been assigned fault in the civil case.

In 2009, the defense in *Doe v. Starbucks, Inc.* argued that a minor can legally consent to sex, and the Court agreed. In ruling on Defendant's Motion for Summary Judgment, the *Starbucks* Court concluded that, "persons under 18 may, in some cases, have capacity to consent to sex with persons over 18.... [T]he Court cannot agree with Plaintiff that a minor cannot legally consent to sexual intercourse with an adult." (*Doe v. Starbucks, Inc.* (2009) WL 5183773 *7.)

In 2013, in the case of *S. M., a minor v. Los Angeles Unified School District*, which involved a 14-year-old middle school student who was sexually abused by her male teacher at a school within the Los Angeles Unified School District, the defense successfully employed a "consent" defense in the civil trial. Although the teacher was criminally convicted and

See Ring, Next Page

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

sentenced to three years in prison for manipulating a 14-year-old female student into a sexual relationship, the district mounted a defense that argued the 14-year-old victim consented to having sex with the teacher and was therefore at fault. As the Court of Appeal noted, the trial court had instructed the jury that "there is no age of consent and that a minor is capable of giving legal consent to sexual intercourse." (*S.M. v. Los Angeles Unified School District* (2015) Cal.Rptr.3d 769, 786.) After a three-week trial aimed at blaming the victim, the jury found in favor of the district, a verdict clearly influenced by the "consent" arguments.

In response to the Los Angeles School District successfully employing a "consent" defense against a 14-year-old victim, as well as the wide media attention and public outrage that followed, the California State Legislature took action and passed SB-14 into law. SB-14 is defined in Civil Code section 1708.5.5 and Evidence Code section 1106(c). The crucial language of Civil Code section 1708.5.5 states, "[c]onsent shall not be a defense in any civil action [for sexual battery] if the person who commits the sexual battery is an adult who is in a position of authority over the minor."

Civil Code section 1708.5.5(b) further states, "an adult is in a 'position of authority' if he or she, by reason of that position, is able to exercise undue influence over a minor. A 'position of authority' includes, but is not limited to, a natural parent, stepparent, foster parent, relative, partner of any such parent or relative, caretaker, youth leader, recreational director, athletic manager, coach, teacher, counselor, therapist, religious leader, doctor, employee of one of those aforementioned persons, or coworker." This addition to the California Civil Code eliminates the use of consent as a defense in cases that involve an adult in a position of authority who engaged in sexual activity with any person under the age of 18. This position was further solidified with the addition of subsection (c) to Evidence Code section 1106, which states "evidence of the plaintiff minor's sexual conduct with the defendant adult shall not be admissible to prove consent by the plaintiff or the absence of injury to the plaintiff."

The legislative intent was to firmly oppose the use of the "consent" defense in civil cases involving the sexual abuse of minors. However, while SB-14's intention was to finally close the loophole that allowed consent as a defense against minors, the problem persists. For example, defense lawyers will argue that the perpetrator's conduct towards the plaintiff was sexual harassment, as opposed to sexual abuse or sexual battery, and therefore does not fall under the protections of Civil Code section 1708.5.5 and Evidence Code section 1106(c).

Consent in adult sexual assault cases

"*They muddy the water, to make it seem deep*." — Friedrich Nietzsche

It is very simple: In the absence of mutual consent, there is sexual assault. Nevertheless, despite the seemingly simple concept of consent, defendants in civil cases involving sexual assault will routinely plead consent as an affirmative defense and attempt to complicate the facts and the law to succeed on that defense.

To establish a claim for sexual battery under California civil law, the plaintiff must prove the following:

1. (a) That the defendant intended to cause a harmful or offensive contact with plaintiff's sexual organ/anus/groin/buttocks/ [or] breast, and a sexually offensive contact with the plaintiff resulted, either directly or indirectly;

1. [OR]

(b) That the defendant intended to cause a harmful or offensive contact with plaintiff by use of defendant's sexual organ/anus/groin/buttocks/ [or] breast, and a sexually offensive contact with the plaintiff resulted, either directly or indirectly;

1. [OR]

(c) That the defendant caused an imminent fear of a harmful or offensive contact with plaintiff's sexual organ/anus/groin/buttocks/ [or] breast]/ [or] plaintiff by use of defendant's sexual organ/anus/groin/buttocks/[or] breast, and a sexually offensive contact with the plaintiff resulted, either directly or indirectly; AND

2. *That the plaintiff did not consent to the touching*; AND

3. That the plaintiff was harmed or offended by the defendant's conduct.

What is consent? In the context of sexual assaults, "consent" is defined as the "positive cooperation in act or attitude pursuant to an exercise of free will." (Pen. Code, § 261.6.)

To give consent, a "person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (CALJIC No. 1.23.1.) The definition of consent describes consent that is "actually and freely given without any misapprehension of material fact." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 460.)

In determining whether actual consent is freely given, the concept of resistance to sexual assault often comes into play. While resistance may be probative on the issue of force or lack of consent, the absence of resistance should not be. California courts have recognized the concept of "psychological infantilism" – when a victim demonstrates a "frozen fright" response in the face of sexual assault. (*People v. Barnes* (1986) 42 Cal.3d 284, 299.) The "frozen fright" response resembles cooperative behavior by the victim. (*Ibid*.) Subjectively, however, the victim may be in a state of terror. (*Ibid*.)

Ineffective consent

Consent is not effective in the following situations:

Consent is ineffective if given by a person lacking capacity to consent. (See Rest.2d Torts, § 892A.)

The existence of actual consent to sexual contact disproves sexual assault *only if* the victim had "sufficient capacity" to give that consent. (*Giardino* at 460.) Per CALJIC 10.02, "[a] person has the capacity to give 'legal consent' to an act of sexual intercourse when that person possesses sufficient intelligence to understand the act, its nature, and possible consequences. Conversely, a person lacks

See Ring, Next Page

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

the capacity to legally consent to an act of sexual intercourse if that person was insufficiently intelligent to understand the act, or its nature, or its possible consequences." Examples of ineffective consent due to lack of capacity are when the victim is prevented from resisting sexual contact due to *intoxication, cognitive disability, anesthetic substances, or any controlled substances*.

Consent is ineffective as to acts that exceed the limits of the consent given.

Consent to a sexual act, which would otherwise be a sexual assault, is a valid defense so long as the sexual act does not exceed the scope of consent given (e.g., the manner and timing of the sexual act). However, as the court in *Ashcraft v. King* explained, "it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609-10.)

Consent is ineffective where fraudulently obtained.

Consent is not effective if it was obtained through fraudulent representations. For example, the court in *Rains v. Superior Court* found that consent is not effective in a situation where a physician's intentional misrepresentation that a procedure, which was otherwise an offensive sexual touching, is medically necessary. (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933.) In reaching their conclusion that consent was ineffective, the *Rains* court reasoned that, "[i]f a physician, for the sole secret purpose of generating a fee, intentionally misrepresented to a patient that an unneeded operation was necessary, it is beyond question that the consent so obtained would be legally ineffective."

Unique situations related to consent

Clergy/parishioner relationship

The court in *Richelle L. v. Roman Catholic Archbishop* found that a member of the clergy and the church *may* be liable for breach of a fiduciary duty when the member of clergy engaged in sexual misconduct with a parishioner. (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257.) While the *Richelle* court did not specifically address the concept of consent, the court reasoned as follows: "[t]he essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." (*Id*. at 271.)

As to a parishioner's claim for sexual assault against a member of the clergy, the victim must still prove lack of consent. In *Jacqueline R. v. Household of Faith Family Church, Inc.,* (2002) 97 Cal.App.4th., where a parishioner brought an action against her pastor, there was insufficient evidence of a sexual assault because even though the victim resisted the pastor's advances or told the pastor to stop, the victim also expressed *being afraid they would be caught* (as opposed to finding the pastor's advances offensive or unwelcome). (*Jacqueline R. at* 198.) Under this evidence, the court determined that the relationship was consensual.

Psychotherapist/patient relationship

California Civil Code section 43.93(b) states, "[a] cause of action against a psychotherapist for sexual contact exists for a patient or former patient for injury caused by sexual contact with the psychotherapist, if the sexual contact occurred under any of the following conditions:

(1) During the period the patient was receiving psychotherapy from the psychotherapist;

(2) Within two years following termination of therapy; and

(3) By means of therapeutic deception.

Simply put, California law does not tolerate sexual contact of any kind between a psychotherapist and a patient.

Attorney/client relationship

Rule 1.8.10, which went into effect in November 2018, bars attorneys from engaging in sexual relations with a client (other than a spouse or registered domestic partner) unless a consensual sexual relationship existed when the attorney-client relationship began.

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