

# **SEX ABUSE IN LOUISIANA**



**LAMOTHE LAW FIRM, L.L.C.**

**Presented by:**

**Frank E. Lamothe, III  
400 Poydras Street, Suite 1760  
New Orleans, Louisiana 70130  
(504) 704-1414**

**I. INTRODUCTION**

**II. TYPES OF CASES**

- A. First party cases
- B. Third party cases

**III. CLIENT SCREENING**

- A. Extent of abuse
- B. Institutional responsibility
- C. Prescription
- D. Solvency of Defendant
- E. Client Profile

**IV. LOUISIANA SUBSTANTIVE LAW**

- A. Asserting a claim
  - 1. Petition filing requirements
  - 2. Punitive damages
  - 3. Institutional responsibility/*Respondeat Superior*
- B. Defenses
  - 1. Prescription
  - 2. First Amendment
  - 3. Mitigation of damages
  - 4. Who else to blame

**V. DISCOVERY**

- A. Written discovery, Interrogatories, Requests for Production of Documents
- B. Depositions
- C. Expert discovery

**VI. TRIAL**

## **I. INTRODUCTION**

It is estimated by studies that one in six children will experience some form of sexual abuse prior to reaching the age of majority. This suggests that there is an epidemic involving predatory action towards children in our society. The purpose of this paper is to primarily discuss institutional sex abuse as opposed to sex abuse occurring in private settings such as in a family environment. Institutions can include religious organizations as well as secular organizations. Part of this paper will focus on issues that are unique to religious organizations in the prosecution of sexual abuse cases.

## **II. TYPES OF CASES**

### **A. FIRST PARTY CASES**

First Party Cases are cases where the individual perpetrator is sued directly. This could be a boy scout leader or some member of a religious order such as a priest or minister. In these types of cases there may be a collateral criminal investigation or prosecution if the abuse has come to the attention of the authorities.

### **B. THIRD PARTY CASES**

In Third Party Cases there is an organization or entity that is alleged to be responsible for the abuse engaged in by one of its employees or members. In religious cases this could involve an archdiocese, diocese or some religious order. In secular cases this could involve an organization such as the Boy Scouts or other organized groups or a school whereby a teacher or some employee is engaged in abusive behavior. In Third Party Cases there is a separate issue of culpability of the organization as opposed to culpability of the individual involved in the group. There are separate proof requirements involving organizations which will be discussed in this presentation.

## **III. CLIENT SCREENING**

### **A. EXTENT OF ABUSE**

In determining whether to accept a case a number of issues have to be considered. Obviously, one cannot know everything at the beginning of a case but it is important to make as much of an informed decision on whether or not to take a case where abuse has been alleged. A first consideration is the level of abuse. One must determine whether or not the abuse is of enough significance that it would warrant accepting the case and prosecuting it particularly when it is a stand alone case as opposed to a group of cases arising out of a common set of circumstances such as when one abuser is involved with numerous victims. Therefore, one must decide whether a kiss on the cheek, one act of groping or fondling is sufficient to pursue a claim as opposed to more egregious forms of sexual abuse such as anal/vaginal rape or oral/genital contact.

### **B. INSTITUTIONAL RESPONSIBILITY**

Some early determination should be made on what proof can be engendered which is termed "notice." Notice is the obligation to show that the institutional defendant knew or should have known of the abuse and failed to take appropriate action to deter the abuser. This is the level of proof necessary when one is dealing with an institutional or third party defendant. On

intake one must make some determination as to whether this type of proof can be gathered or is it reasonable that it can be gathered. Sexual abusers are usually serial and if they have done it one time they usually have done it numerous times. Often an institution has evidence that abuse has occurred or certainly enough evidence to be very suspicious of its occurrence. Also, an institution must have a sex abuse policy in place that would be designed to eliminate or minimize the potential for sexual abuse in its organization. A failure to have any form of a sexual abuse policy would suggest culpability.

### **C. PRESCRIPTION**

A determination must be made as to whether or not the case is arguably prescribed. This will be discussed in more detail later concerning defenses. However, if the case is clearly prescribed, the question is whether or not it should be accepted.

### **D. SOLVENCY OF DEFENDANT**

Obviously, individual First Party defendants in many cases will be insolvent or have limited funds to respond to judgment. Institutions may or may not such as, Boy Scouts or recreational groups or other groups that have limited assets or funding. You should make sure that bankruptcy or limited fund issues will not impair the ability to collect a judgment.

### **E. CLIENT PROFILE**

Many abuse victims have emotional problems. This is endemic to this type of litigation. Many abuse victims have not received adequate mental health care and have serious problems which can impair their ability to work with a lawyer. Many of them have criminal records or have drug/alcohol problems which have occurred as a result of experiencing sexual abuse. At some point, it is important, up front, to determine whether or not there can be a reasonable attorney/client relationship and the client can indeed cooperate and work with counsel.

## **IV. LOUISIANA SUBSTANTIVE LAW**

### **A. ASSERTING A CLAIM**

#### **1. PETITION FILING REQUIREMENTS**

To file a Petition alleging sex abuse in Louisiana there are particular requirements that do not apply to other types of cases. To file a Petition there must be compliance with LA. R.S. 9:2800.9 entitled "Action Against a Person for Abuse of a Minor." To pursue a claim this Statute in part states that if a Plaintiff is 21 years or older at the time the action is filed, Certificates of Merit must be executed by the attorney for the plaintiff and by a licensed Mental Health Practitioner selected by plaintiff declaring that there is good cause to conclude that there is a reasonable and meritorious case for the filing of the Petition. The Mental Health Practitioner must offer an opinion that, in his opinion there is a reasonable basis that plaintiff has been subject to criminal sexual abuse during his childhood. If a Petition is filed naming a defendant that does not include these certificates, the filing attorney is subject to disciplinary action.

## 2. PUNITIVE DAMAGES

LA. C.C. Art. 2315.7 allows for punitive damages to be awarded for criminal sexual activity occurring during childhood where there is wanton and reckless regard for the safety of the person involved. This is in addition to general and special damages which are recoverable in tort cases.

In *Krueger v. Catholic Diocese of Baton Rouge*, 973 So.2d 178 (La. App., 2007), the Court reversed the Judgment of the trial court and held that the Diocese was liable for negligent supervision where a special education boy was sexually molested by a female classmate at Redemptorist High School. The Court further held however, that the evidence was insufficient to justify an award of exemplary damages against the Diocese pursuant to LA. C.C. Art. 2315.7 since the conduct of its employees was negligent but did not rise to the level of wanton or reckless conduct. This case implies that the defendant, Diocese, even though not the actual perpetrator of the sexual molestation could have been held liable for punitive damages if the evidence showed that its employees acted in a wanton or reckless manner.

## 3. INSTITUTIONAL RESPONSIBILITY/RESPONDEAT SUPERIOR

To establish a negligence claim directly against an institution where the defendant employed or had an agency relationship with the individual perpetrator, it is the plaintiff's burden to show: 1.) defendants knew or should have known that the plaintiff could be sexually abused if the employees volunteering and serving the institution were not properly supervised; and 2.) defendants failed to take proper and reasonable steps to protect a victim from foreseeable harm. The organization must have adequate safeguards in place to prevent sex abuse when it is foreseeable.

Additionally, employers may be vicariously liable for the acts of their employees. La. C.C. Art. 2320 allows masters to be sued for acts of their employees. To recover against an organization for the acts of its employees, one can show that the employee was acting on behalf of the organization and engaged in activities which would fulfill the mission of the organization.

In Louisiana to hold an employer responsible for the sex abuse of one of its employees, it is necessary to look at a series of factors. These include: 1.) whether the tortious act was primarily employment rooted, 2.) whether the violence (sexual abuse) was reasonably incidental to the performance of the employee's duties, 3.) whether the act occurred on the employer's premises, and 4.) whether the act occurred during the hours of employment. See *LeBrane v. Lewis*, 292 So.2d 216 (La., 1974).

See also, *Samuels v. Southern Baptist Hosp.*, 594 So.2d 571 (La. App. 4 Cir., 1992), (hospital employer liable for nurse employee's sexual molestation of psychiatric unit patient during working hours, on employer's premises). *Williams v. Butler*, 577 So.2d 1113 (La. App. 1 Cir., 1991), (liable for gym supervisor employee's sexual molestation of children which occurred during working hours on premises). The Court noted in these cases that they are both distinguishable from other cases in the fact that they occurred, 1) on employer's

premises; and 2.) during employee's working hours. The Courts in these cases allowed liability on the basis of the last two *LeBrane* factors.

However, the Louisiana Supreme Court has not gone so far as to simply allow sexual assault claims to be vicariously imposed on employers where the act occurred on employer's premises and during the hours of employment. In the seminal case of *Baumeister v. Plunkett*, 673 So.2d 994 (La., 1996), the Court held that even with these two factors established, there must be some additional evidence that the intentional act was reasonably incidental to the performance of the employee's duties or the tortious act was primarily employment rooted. The Court did not outline what these factors or what types of circumstances would trigger these additional factors but here it did not hold the hospital vicariously liable for sexual assault by a supervisory in the nurse's lounge of a hospital. The Court referred to *LeBrane v. Lewis*, 292 So.2d 216 (La., 1974) for the controlling factors

See also, *Rambo v. Webster Parish School Bd.*, 745 So.2d 770 (La. App., 1999) (writ denied Feb. 8. 2000), (School Board not vicariously liable for sexual assault by janitor finding assault not sufficiently employment related), *Sanborn v. Methodist Behavioral Resources Partnership, Behavioral Services, Inc.* (La. App. 4 Cir., 2004), (Sexual assault of client by sex abuse counselor not sufficiently employment related).

There are special rules for certain relationships. In *Applewhite v. City of Baton Rouge*, 380 So.2d 119 (La. App. 1 Cir., 1979), the Court held that a law enforcement officer had abused his "apparent authority" which requires such person to act in the public's interest and his employer would have to respond in damage. Here there was a police officer and a corrections officer who forced individuals to engage in sex acts. The Court found that law enforcement officers hold a special place in our society and therefore, normal rules of *respondeat superior* are not applicable. However, in *Bates v. Caruso*, 881 So.2d 758 (LA, 2004), (Officer sexual abuse victim not sufficiently employment related to impose vicarious liability on the city. Sexual abuse occurred at officer's home outside of working hours. The Officer dated the victim's mother and had a regular relationship with family).

Additionally, where the State has custody of a child, the Court will hold the State responsible since the State has a "nondelegable duty of care and protection of the child," under special statutory provisions which give the State that status. *See Miller v. Martin*, 838 So.2d 761 (La., 2003).

## **B. DEFENSES**

### **1. PRESCRIPTION**

Prescription is controlled by LA. R.S. 9:2800.9. This is remedial legislation enacted in 1993. It allows for a ten year liberative prescription period running from the day the abused minor obtains majority. Therefore, the prescription effectively runs till age 28 on an individual who was abused as a child.

Louisiana Civil Code of Procedure Art. 3496.1 was enacted in 1988 which allowed a liberative prescription of 3 years from date of majority for abuse by a parent or care taker. It was amended in 1992 to apply to all persons.

Prior to this remedial legislation, prescription involving sex abuse of a minor was subject to the liberative prescription of one year, the same as any other tort claim. It was, however, subject to some exceptions.

Because of the particular nature of sex abuse and the tendency of victims of sex abuse to not report it, because of threats by the abuser, shame or other psychological reasons, the Louisiana Supreme Court has held that a claim involving sex abuse of a minor would not prescribe and was suspended until the minor told a parent. This would allow the parent to take action on behalf of the minor if appropriately informed. The one year period would run from the date the minor told the parent. *Wimberly v. Gatch*, 621 So.2d 633 and 635 So.2d 206 (La., 1994), *Wagoner v. Dyson*, 647 So.2d 493 (La. App. 1994).

*Contra non valentem* has also been used to suspend the running of prescription where the claimant alleged repressed memory as a result of the abuse and then had a recovered memory within a year of filing of the Petition. This would be a recovered memory syndrome which would relate to trauma which can result in a loss of memory of the abuse as a defense mechanism. The Court in *Doe v. Archdiocese of New Orleans*, 823 So.2d 360 (La. App., 2002), held that the action was not barred due to repressed memory and that the issue would be tried on the merits with the rest of the case. This allows the plaintiff to defeat an Exception of Prescription and have it referred to the merits for trial with the entire case where repressed memory is alleged. Obviously, in this type of case the plaintiff will need to have an expert on repressed memory who can be persuasive.

See also, *Doe v. The Roman Catholic Diocese of Lafayette, et al.*, (La. App. 1<sup>st</sup> Cir. 2008) (not designated for publication.) This case also acknowledges suspension of prescription under the doctrine of *contra non valentem* where repressed memory is established.

In other jurisdictions another doctrine has been utilized to argue suspension of prescription. This doctrine is the issue of fraudulent concealment. In Louisiana there are no sex abuse cases dealing with fraudulent concealment, however, there is a case which discusses this, *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.*, 502 So.2d 1034 (La., 1987). In this case, the Court found that the doctrine of *contra non valentem* applied and action was not barred by prescription. This involved title in mineral interests. It involved unrecorded and secret economic interests being established in parish minerals through the use of imposed parties, unrecorded documents and secret counter-letters.

## **2. FIRST AMENDMENT**

In any sex abuse case involving a religious organization the First Amendment is frequently used to limit discovery on certain issues. The First

Amendment obviously deals with the right to state intrusion into the right to practice a religion. Obviously, the religious defendants will take an expansive view of what is religious in nature. Courts, however, have held that child abuse is not a religious matter but a secular matter. Therefore, discovery directed to the issue of whether child abuse occurred and whether or not an institutional defendant knew or should have known of the abuse and failed to take steps to protect an individual victim would be secular in nature.

Courts have not been allowed to become involved in church internal procedures or practices which would involve religion. *See Glass v. First United Pentecostal Church of DeRidder*, 676 So.2d 724 (La. App. 3 Cir., 1996), which involved claims which allegedly impacted a church's internal grievance procedure. However, *See Gorman v. Swaggart*, 524 So.2d 915 (La. App. 4 Cir., 1988), which held that the First Amendment does not provide protection to statements and conduct made outside of the church or to statements or conduct made regarding a former church member who is no longer associated with the church.

Also, Courts have held that the trial court may uphold an "incidental burden" on the free exercise of religion to prevent grave and immediate danger to interests in which the State must lawfully protect and any incidental burden is vastly outweighed by Louisiana's interest in protecting children from the grave and immediate harm of sexual child abuse. *See Wimberly v. Gatch*, 621 So.2d 633 and 635 So.2d 206 (La., 1994), and also *see, Surinach v. Pesquera De Busquets*, 604 F.2d 73 (C.A.1 (Puerto Rico), 1979), *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), *McClure v. Salvation Army*, 460 F.2d 553 (C.A.5 (Ga.), 1972), and *Seattle Times Company v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).

### **3. MITIGATION OF DAMAGES**

In any sex abuse case the defendants will comb the victims life to look for any other instances of trauma or neglect to point to these as causative factors to suggest that the individual had other problems and other insults which would reflect their current condition. Obviously, a number of sex abuse victims do come from homes that are in crisis, unstable or dysfunctional in some way and therefore, defendants can usually find something that can support their contentions. It is important for the plaintiff to have good expert testimony to establish that the sex abuse was the dominant factor in causing the claimant difficulty which later in life may reflect itself in an inability to have relationships, sexual dysfunction, depressions, anxiety, suspicion of others or in many cases serious mental illness, criminal activity, drug/alcohol abuse or other difficulties.

### **4. WHO ELSE TO BLAME**

Defendants will look to blame other family members for plaintiff's condition in sex abuse cases, anyone who had a negative effect on plaintiff's life will be singled out as someone to blame.



## **V. DISCOVERY**

### **A. WRITTEN DISCOVERY, INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS**

In religious organization cases, written discovery can be very exhaustive and contentious. Very often there will be an effort to gather the files of an alleged abuser and then these will be subject to a number of objections including medical privilege, First Amendment protection and other relevancy objections. It is important to obviously get all documents relating to a given abuser including personnel records and any medical records which would relate to the individual. Very often the medical records are provided to the religious organization that employs the individual and therefore will be outside the scope of medical privilege. The privilege only runs to a medical care provider.

Quite often in these records, there will be evidence of treatment for abuse issues. Since the organization is being accused of cover-up or avoidance in dealing with sex abuse issues, it is important to get documents reflecting any other claims or inquiries made regarding sex abuse. If the individual abused was an altar boy, then it would be valuable to get a list of all the altar boys serving during a certain period of time. He could also have been subject to abuse or attempts of abuse. Systematically looking for witnesses in this regard can be beneficial. As far as discovery, the good part is that sex abuse does not occur just once and if explored a pattern can be uncovered.

### **B. DEPOSITIONS**

After full written document discovery has been exchanged depositions can obviously involve the accused individual who may take the Fifth Amendment if there is any possibility of criminal charges being asserted. Additionally, numerous fact depositions can be taken of any organization regarding safeguards to protect against abuse as well as possible notice or awareness of any untoward activity involving the alleged abuser. Depositions in these cases can be extensive.

### **C. EXPERT DISCOVERY**

Obviously, there will be psychological or sex trauma experts who will testify to how the nature of the abuse affected a particular individual. There can also be institutional experts involved when an institution has implemented inappropriate safeguards to protect children in their care. Additionally, if a repressed memory is alleged as a means for suspending prescription under the doctrine of *contra non valentem* then an expert on repressed memory would also be utilized.

## **VI. TRIAL**

Trial of a sex abuse case can be very challenging. Obviously, in sex abuse cases the emotions will be very high. It is very difficult to hear cases where there is evidence of egregious abuse. Obviously, the plaintiff will be at an advantage where the proof of abuse is well established. The issue of corporate responsibility will be more of a challenge since the institution can always agree that the abuse was egregious, but it knew nothing of it, however, when it ultimately found out it immediately took action to terminate the abuser. It is important to establish, in credible evidence, that the corporation knew or should have know of the abuse and simply did not take appropriate steps to protect the individual. In today's environment, most organizations have sex abuse policies which can be used as evidence as to what should have been

done and then an inquiry can be made as to whether or not the sex abuse policy was followed. If you look on any diocesan website you will see a detailed sex abuse policy. Smaller organizations where children are involved may not have detailed sex abuse policies.