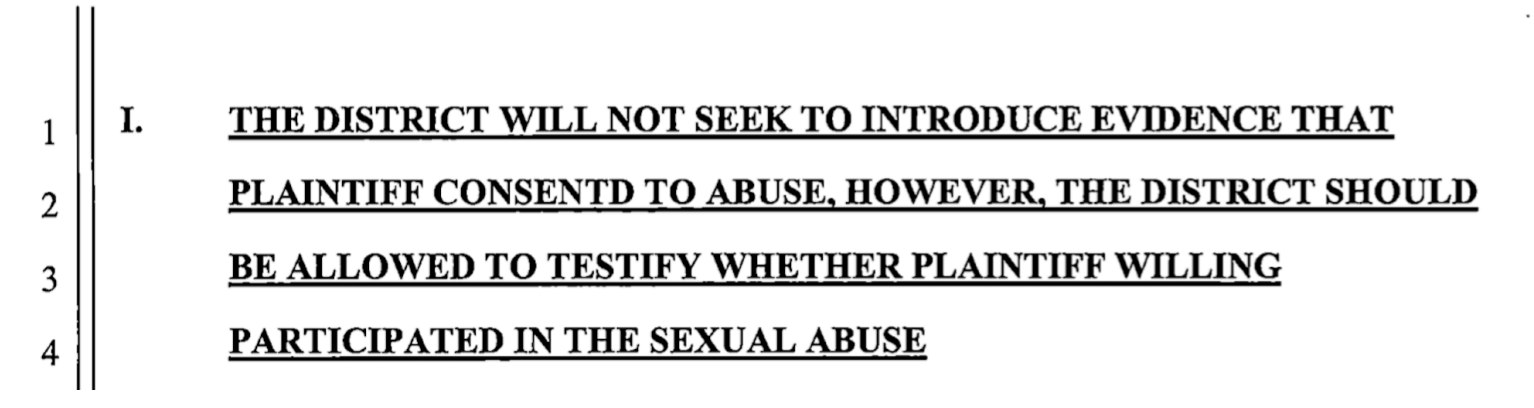
In School Molestation Lawsuits, Defense Lawyers are Still Implying Kids Consented

Larry Altman | May 3, 2018



I. **THE DISTRICT WILL NOT SEEK TO INTRODUCE EVIDENCE THAT PLAINTIFF CONSENTD TO ABUSE, HOWEVER, THE DISTRICT SHOULD BE ALLOWED TO TESTIFY WHETHER PLAINTIFF WILLING PARTICIPATED IN THE SEXUAL ABUSE**

In at least four recent cases in Southern California, attorneys defending school districts have asked judges to let them argue that young molestation victims willingly participated in sexual relationships with adults.

California lawmakers acted four years ago to ban the issue of consent as an argument in such lawsuits. State laws prevented attorneys from arguing consent as an issue in criminal cases involving minors molested by adults, but not in civil cases. Lawmakers closed that loophole after being outraged that an attorney defending a lawsuit against the Los Angeles Unified School District tried to pin blame on a 14-year-old middle school student, saying she was old enough to consent to having sex with a 28-year-old teacher.

Now attorneys are apparently trying to find ways around the new law, to decrease the millions of dollars school districts might be responsible for paying out in settlements and judgments.

"The district does not seek to argue plaintiff consented to the alleged abuse as a defense," attorneys for the Corona-Norco Unified School District wrote

in a March 22 document in Riverside County court.

"However, testimony regarding whether plaintiff willingly participated in the sexual abuse is relevant to damages. Clearly, the level of damages would be different if plaintiff was, for example, physically forced into a sexual act versus openly volunteering without any coercion.

"Thus, how the act itself was carried out and plaintiff's willingness to participate in the act is relevant and admissible as it relates to damages."

The plaintiff in that case was a teenage girl repeatedly molested in the sixth, seventh and eighth grades by a teacher's aide in his 20s. Steven Michael Martinez, now 27, was sentenced to 25 years in prison in 2014.

The judge handling the case listened to the arguments, but ultimately was not going to allow trial testimony about willing participation. The case was settled last week as the trial was set to begin. The school district agreed to pay a $3 million settlement, said Stephen Estey, a San Diego-based attorney who represented the girl's family.

The law firm that defended the Corona-Norco school district, McCune & Harber in Los Angeles, used the same argument in a court document filed last month to defend the Torrance Unified School District in a massive civil case stemming from a criminal child molestation case that resulted in former Torrance High School wrestling coach Thomas Snider being sentenced to prison for 69 years to life.

Twenty-four former wrestlers who were 13 to 15 years old when they were unwittingly molested during the coach's required but illegal nude "skin checks" are suing the district, Superintendent George Mannon, Principal Karim Girgis and Snider, alleging infliction of emotional distress, breach of fiduciary duty, sexual harassment, negligence in hiring and supervision, fraud, and public entity liability for failure to perform its mandatory reporting responsibility. The boys' parents and stepparents also are seeking damages for emotional distress.

The civil case is expected to begin later this month.

During Snider's three-week trial in fall 2016 at the Torrance courthouse, the teenage victims took the witness stand one by one, telling jurors about Snider's "skin checks" in a darkened storage room next to the gym, and

massages that required them to lie naked on a bench, wearing only a hand towel over their private parts.

Thomas Snider | Photo courtesy of California Department of Corrections

The coach's practice went unreported from the time he was appointed to the job in 2013 until Jan. 26, 2015, when he was abruptly suspended. Wrestlers on his team had told opponents at West High about the naked checks. They told their coach, who contacted district officials. Four months later, the District Attorney's Office charged Snider with more than 40 counts of child molestation and lewd acts with children.

At trial, boys testified that Snider directed them to remove their clothes so he could examine their skin for impetigo, ringworm and rashes prevalent in the sport. Boys said Snider put his fingers into their underwear to move their penises from side-to-side or kneeled in front of them, his face close to their genitalia, shining a flashlight into their private areas.

Although the examinations made them uncomfortable, the teens said they never told anyone because they did not believe anything was wrong. The boys said they believed the examinations were an aspect of wrestling and did what their coach told them to do. Experts, however, testified that California Interscholastic Federation rules prohibited coaches from requiring their wrestlers to disrobe. Skin checks are conducted before matches, but only on skin not covered by their singlets.

So far, Torrance Unified has settled one student's lawsuit for $1.75 million. At that rate, the coming case could result in a judgment of more than $40 million.

In court documents, McCune & Harber attorney Nazli Alimi argued the potential payout should be lessened because the boys willingly participated in the coach's skin checks. The language used is virtually the same as the attorneys used in the Corona-Norco case.

"The District Defendants do not intend to argue plaintiffs 'consented' to the alleged abuse as a defense of their alleged liability. However, evidence regarding whether plaintiffs willingly participated in the subject skin checks is relevant to damages," attorney Nazli Alimi wrote.

"For instance," the attorney continued. "the level of damages would be different if plaintiffs were, for example, physically forced into a sexual act versus openly volunteering without any duress. In other words, a diagnosis of post-traumatic stress disorder requires exposure to a traumatic incident."

"If one does not realize or believe what is being done to him at the time is wrong, then an expert can conclude the incident was not contemporaneously traumatic. From there, an assessment may be made as to the incidents' actual effect on the plaintiffs' emotional and mental condition. Therefore, such information is relevant as to plaintiffs' mental states during and after the incidents."

Ronald Labriola, one of the lawyers representing the 24 teenage boys -- now

young men -- called the pleading a “horrible argument to make.” He said the defense is trying to find another method of bringing in consent.

"I think it is a slap in the face to all the victims to have the school district -- which allowed Snider to abuse them in the first place -- now contend that they consented," Labriola said. "The school district knew since 1991 and since 2004 that Snider was a sexual predator and they allowed him to be alone with these boys in a secluded locker room for years. So it's not an issue of consent, it's an issue of what the school district allowed."

Jennifer Drobac, a law professor with Robert H. McKinney School of Law at Indiana University who has studied consent laws nationwide, called the defense’s filing “borderline unethical” and a “frivolous argument."

"It’s not that they suffered less damage, they have in fact suffered more damage," the professor said. "This coach perpetrated a fraud on them suggesting it was OK to subject themselves to this examination."

Drobac said judges should be "angry to see this argument made."

"The claim itself, I would argue, is exploitative of children,” the professor said. “I think these lawyers are further abusing these children by claiming they weren’t damaged by the fraud and abuse that went on."

Dana McCune, the lead attorney for the Torrance district, discounted the filed document, saying the district had no intention of arguing that the boys played any role in their victimization. He called the document “a procedural technicality” in response to a motion filed by the wrestlers’ attorneys seeking to prevent the defense from using consent as an issue at trial. McCune said, "I have never pursued and this district would never pursue a defense that these boys were negligent or at fault."

Still, the document and the issue of consent was part of pretrial motions that Judge Elihu Berle considered Thursday. Attorneys for the wrestlers argued that the district was trying to use consent as an issue. McCune appeared to back off from his court filing.

Steven Martinez | Photo courtesy of California Department of Corrections

Berle ultimately ruled that the defense was prohibited from arguing consent or making any insinuation that the students consented or voluntarily submitted to the molestation. They can, however, discuss the circumstances of what happened, just as the wrestlers' attorneys intend to do.

In a brief interview outside court, McCune reiterated that it was never his position to to point the blame at the wrestlers, and said he had submitted special documentation with the court to affirm that.

State law should appear to end any need for attorneys for victimized children to continue to file motions to keep their opposing counsel from attempting to use consent defenses.

Sen. Ricardo Lara authored the bill following a 2014 KPCC radio investigation that discovered a loophole in the law regarding consent and minors in civil cases. The problem came to light when an attorney representing the Los Angeles Unified School District in a civil case said during an interview that a 14-year-old girl was mature enough to consent to sex with a 28-year-old teacher. In criminal cases, a person must be 18 to give legal consent, but civil law was missing similar language. The new law removed consent as a defense in civil cases involving sexual battery, assault and other sexual cases involving minors.

"This (law) would prohibit consent from being a defense in any sexual battery civil action if the person committing the sexual battery is a specified adult who is in a position of authority and is able to exercise undue influence, as defined, over the minor," Drobac said.

Drobac, who studied the language in the law, said it does not create a distinction between the phases of the trial that determine liability and damages.

"A defense is a defense," said Drobac, author of the book, "Sexual Exploitation of Teenagers: Adolescent Development, Discrimination & Consent Law." She said, "The reasoning behind this law is that minors do not understand cultural rules the way adults do and make decisions differently than adults."

Estey recently won a San Gabriel Valley case against the Hacienda La Puente Unified School District. His client was engaged in a sexual relationship with a now-40-year-old teacher at Los Altos High School while she was in the ninth and 10th grades in 2014. Although the jury placed most of the responsibility on teacher David Park -- who was sentenced to three years in prison in 2015 -- and ordered him to pay the girl $5.2 million, the district was responsible for a $2.8 million judgment.

During that case, Estey said defense attorneys again brought up consent as an issue, and would occasionally ask questions that tried to slip in the word during trial. The attorney suggested that, for the future, lawmakers might tweak the language in the consent law -- Section 1708.5.5 of the Civil Code -

- to make it extremely clear that consent cannot be discussed. And judges, he said, need to make sure they understand it.

"(The law) is not strong enough in the actual code section," Estey said. "It's got to be enforced by the judge. The judges have to pay attention and they have to enforce it."

Karen Foshay and Marie Targonski O'Brien contributed to this story

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Larry Altman is a veteran Southern California reporter who has been covering crime and court cases for three decades. He was named the Society of Professional Journalists' Distinguished Journalist in 2006.

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