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Civil action against lecherous physician still a possibility

Time's Up for Dr. Larry Nassar. The devious and despicable actions of the former USA Gymnastics National Team physician and national medical coordinator are painfully detailed in the victim impact statements of more than 140 women accusing Nassar of sexual abuse over the course of his career.

In November, Nassar pleaded guilty to seven counts of criminal sexual conduct. Per the terms of his plea deal, he admitted that he used his position of trust in the medical field to sexually abuse young girls. The abuse extends as far back as 1998.

Ingham County (Michigan) Circuit Judge Rosemarie Aquilina is presiding over the proceedings to determine an appropriate sentence for the disgraced doctor. It is expected that Nassar will spend the rest of his life in prison — he could end up with prison sentences totaling 150 to 200 years.

In addition to his roles with USA Gymnastics, Nassar was also the team physician at Michigan State University for the women's gymnastics and women's crew teams. While there, he worked as the associate professor in the radiology department, division of sports medicine.

He also taught sports medicine and physical exam skills to the first and second year medical students in the College of Osteopathic Medicine.

Olympic gymnast Aly Raisman is one of many survivors who testified at Nassar's sentencing hearing last week. Raisman stated, "this monster [Nassar] was also the architect of policies and procedures that are supposed to protect athletes from sexual abuse for both USA Gymnastics and the USOC [U.S.

Olympic Committee]." She also believes that the USOC and USA Gymnastics "empowered and enabled" Larry Nassar. "When the brave women started speaking out back then [2012 London Olympic Games], more than a year after the USOC says they knew about Nassar, they were dismissed. At the 2016 Olympic Games, the president of the USOC said that the USOC would not conduct an investigation. It even defended USA Gymnastics as one of the leaders in developing policies to protect athletes," Raisman said.

The testimony emerging from the sentencing hearing is also potentially damning for Michigan State University. Last week, the 89th victim to testify, Larissa Boyce, said "I told Michigan State University back in 1997." According to lawsuits, Michigan State was placed on notice on at least three subsequent occasions, before Nassar was relieved of clinical and patient duties by the university in August 2016. "The disturbing truth is you could have been stopped back in 1997," Boyce told Nassar.

The first civil lawsuit was filed in 2016 in U.S. District Court for the Western District of Michigan by former gymnast Rachael Denhollander and other women. Denhollander was 15 years old when Nassar allegedly assaulted her.

She alleges that Nassar violated her during her appointments at Nassar's Michigan State office back in 2000. The account provided by Denhollander is tragically similar to other descriptions of various forms of sexual assault at the hands of a doctor whose position of trust and authority enabled him to perpetrate grotesque crimes.

One unnamed plaintiff says she complained to Michigan State in 2014 that Nassar had "cupped her buttocks, massaged

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her breast and vaginal area and became sexually aroused" as a supposed "treatment" for hip pain.

The university, the lawsuit alleges, told the plaintiff "she didn't understand the 'nuanced difference' between sexual assault and appropriate medical procedure" and it dismissed her complaints.

The lawsuits paint a picture of institutions that were willfully blind and/or indifferent to the young women making claims of mistreatment. The plaintiffs charge that USA Gymnastics, the USOC and Michigan State were grossly negligent in connection to Nassar's crimes. According to the plaintiffs, USA Gymnastics and Michigan State displayed a "willful disregard for necessary precautions to reasonably protect" the plaintiffs.

Discovery has yet to proceed into whether these institutions knew or should have known that Nassar was sexually abusing women and girls and failed to protect them. Michigan State and USA Gymnastics have moved to dismiss the cases.

In its motion, USA Gymnastics said the plaintiffs fail to "allege facts that would create a duty by

USAG to protect any plaintiff from the criminal acts of Nassar," and that most of the civil claims are barred from proceeding due to the statute of limitations.

According to USA Gymnastics attorney Andrew Portinga, there was no notice of Nassar's abuse until 2016 when Nassar's employment was terminated and he was reported to the FBI. "Nassar's conduct is disgusting, and USAG deplores Nassar's crimes. But Nassar, not USAG, is liable for Nassar's criminal actions," Portinga wrote in court documents.

Likewise, MSU denies any involvement regarding Nassar's conduct. Jason Cody, MSU spokesperson, stated, "any suggestions that the university covered up Nassar's horrific conduct is simply false."

If plaintiffs' claims survive the pleadings stage, discovery into who knew what, and when, will begin in earnest. But, the legal defenses raised by the defendants are difficult hurdles.

First, according to Michigan law, "a government is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCLS Section 691.1407. Furthermore, the operation of a state university is considered a governmental function, thus immune from tort liability. *Holzer v. Oakland University Academy of Dramatic Arts*, 110 Mich. App. 355, 360 (1981). The gymnasts' lawyers will have to prove that an exception exists in the Nassar case in order to proceed with the case outside of the traditional sovereign immunity defense.

Michigan State also seeks dismissal of Denhollander's claims sounding in Title IX, a federal law that mandates reporting of on-campus sexual crimes. Title IX, a portion of the

U.S. Education Amendments of 1972, states that: “No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance.” 20 U.S.C. Section 1681.

Michigan State argues that Title IX doesn’t apply since neither Denhollander nor the other women in the lawsuit were Michigan State students at the time of their assaults and therefore lack standing to sue Michigan State under Title IX.

To rebut, Denhollander’s attorneys might argue that even though the plaintiffs weren’t Michigan State students, the fact that a Michigan State professor treated the plaintiffs in an official university capacity while on the university campus ought to be a sufficient nexus for them to have gained Title IX protection.

Certainly, there is precedent to support claims by those who have suffered sexual abuse under Title IX actions against schools or universities. The U.S. Supreme Court held that sexual harassment that is deemed so

severe and objectively offensive is a form of sexual discrimination if it deprives the individual of opportunities or benefits provided by the school. *Davis Next Friend LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999).

Regarding the current Title IX claims, the question of “notice” is one that controls liability. According to the U.S. Supreme Court, damages may not be recovered for sexual harassment in an implied private action under Title IX unless there was (1) actual notice to the school (through a school official, who, at a minimum, has authority to institute corrective measures) and (2) deliberate indifference toward the allegation. *Gebser v. Lago Vista Independent School System*, 524 U.S. 274, 277 (1998). The testimony on notice in the sentencing hearing will be beneficial to the plaintiffs’ cases.

Finally, the issue of statute of limitations has been raised by the defendants. Here in Illinois, there is a special statute of limitations for survivors of childhood sexual abuse. Pursuant to 735 ILCS 5/13-202.2, actions for personal injury based on childhood

sexual abuse must be brought within 20 years from the date the individual discovers that the childhood sexual abuse occurred. Additionally, knowledge of the abuse does not equate to the discovery of the injury.

Michigan law, however, does not provide such an exception for childhood sexual abuse. Nonetheless, Michigan does apply the “discovery rule,” in which the statute of limitations begins to run when the plaintiff discovered the injury, or through reasonable diligence, should have discovered the injury. *Moll v. Abbott Laboratories*, 444 Mich. 1, 16 (1993).

Many of the girls and young women did not know that they were being abused by Nassar at the time the abuse occurred. Nassar, in a position of power, convinced them (and, apparently, MSU and USAG) that his actions were medical in nature. These factors may permit a liberal interpretation of the Michigan discovery rule.

Will protracted litigation be necessary to gauge the value of these claims? Unfortunately, this is not the first time a major public university has faced civil liability

for ignoring years of alleged sexual abuse.

In 2012, Penn State football coach Jerry Sandusky was convicted of 45 counts of child sexual abuse and is now serving a 60-year sentence.

Penn State took a noble approach and ultimately accepted responsibility for the role they had in the Sandusky child sex abuse scandal. Then-President, Rodney Erickson, relayed that Penn State’s goal was to settle any civil cases, rather than put the victims through the arduous legal process, yet again.

MSU spokesman Kent Cassella recently released a statement on the university’s motion to dismiss — “MSU is required by our insurers to mount an appropriate defense of these cases,” he said. “The defenses raised on MSU’s behalf are in no way a reflection of our view of the victims, for whom we have the utmost respect and sympathy. Our hope has been and continues to be for a fair and just resolution for all parties to the litigation.”

Will MSU, the USOC and USAG expeditiously pursue “fair and just resolution” to these claimants? “Time’s up.”