Featured Article

Defusing Sexual Abuse Claims:

Eliminate the National Defendant From the Equation

By: Gary K. Moore
Moore, Strickland & Whitson-Owen
Chicago

Child sexual abuse claims are some of the most difficult types of cases to defend. Attendant to these emotionally-charged cases are notoriety, sympathetic plaintiffs and the danger of runaway verdicts. For youth mentoring organizations, these claims strike at the very heart of their mission - to have a positive impact on the lives of children. Sexual abuse lawsuits being filed across the nation further pose a threat to the viability of these organizations, which have limited resources, by making insurance coverage unaffordable. The irony is thus that the perpetrators' net of victims is widened to include the benevolent organizations that they infiltrate and the innumerable children and families that so badly need their help.

Compounding the complications in these types of cases is that the plaintiffs commonly sue the national organization, as well as the local agency. Usually, the national organization will have had no contact with either the plaintiff or the assailant. Nonetheless, a thorough understanding of the organizational structure, procedures and relationships at the national and local levels is essential to an effective defense. Developing evidence in these key areas can prevent liability from attaching at the national level and provide the basis for dismissal. Eliminating the national organization both deflates the plaintiff's case and fortifies the local defendant's ability to defend its case.

The First District of the Illinois Court of Appeals recently weighed in on this issue in a case alleging the sexual abuse of a child enrolled in the mentoring program run by a local affiliate of Big Brothers Big Sisters of America. ("America"). *Doe v. Big Brothers Big Sisters of America*, No. 1-04-1985, 2005 Ill. App. 3d LEXIS 803 (1st Dist. August 16, 2005). The court upheld summary judgment in favor of the national organization, holding that America owed no duty to protect the minor plaintiff from the alleged abuse by a local volunteer. In so doing, the First District addressed familiar theories under Section 314 of the Restatement (Second) of Torts, clarifying the definition of the phrase "to take custody." It also reviewed Illinois law regarding the "voluntary undertaking" doctrine under Restatement Section 324A. Most interestingly, however, the court provided an in-depth analysis of the "retained control" doctrine conceptualized by Restatement Section 414.

The *Doe* Facts

The minor plaintiff was a Little Brother in the Big Brothers Big Sisters of Metropolitan Chicago program. The plaintiff claimed that he had been sexually abused by his volunteer Big Brother, who was also an employee of the local agency. The complaint alleged four acts of negligence on the part of America: (1) that it provided inadequate methods to interview prospective employees; (2) that it provided inadequate methods to screen potential employees; (3) that it provided procedures for announced, rather than unannounced visits to the homes of prospective volunteer mentors; and (4) that it provided insufficient methods for case managers to supervise the match.

The relationship between America and its local affiliates was governed by a Membership Affiliation Agreement. Under the Agreement, America controlled the local affiliate's service area. It's obligations included: promulgating guidelines to the local affiliates in the form of "Standards of Practice for One-To-One Service," reviewing the local affiliate's policies and procedures once every five years, and providing the opportunity for materials, programs and training. The local affiliate was to use a variation of the Big Brothers/Big Sisters name and logo; provide "One-To-One Mentoring Service"; and comply with America's Standards of Practice.

As to the relationship between the parties, the Agreement explicitly contemplated the local agency's autonomy as an independent contractor with independent directors and officers. Only the local agency had rights with respect to its employees, volunteers, and daily operations.

While America's Standards of Practice echoed the autonomous nature of local agencies, they did require those agencies to develop systems, procedures and policies in certain areas. A policy on child sex abuse prevention orientation, education and training, and an intake process for volunteers were specifically addressed.

These Standards of Practice did not, however, mandate the manner in which the local agency went about enacting these policies and procedures; despite being required to meet the Standards of Practice, the membership agreement defined local agencies as autonomous. Local agencies were free to use whatever methods they deemed optimal for the creation of a local policy. The agreement expressly prohibited America from intruding into the day-to-day operations of the local agency. America's oversight of the local agency's operations was limited to an on-site review taking place every five years.

In light of these relationships, America moved for summary judgment, arguing that there was no evidence that it had ever performed the acts alleged by the plaintiff and thus it had no duty to protect the minor. America argued in the alternative that if there was an undertaking, it was limited in scope and insufficient to create a duty toward the minor plaintiff. Summary judgment was granted to America by the trial court and the plaintiff subsequently appealed.

On appeal, the plaintiff argued that America owed him a duty of protection under three theories. Interestingly, the plaintiff first argued that America retained control over the local agency's work and was therefore liable under the retained control concept articulated in the Restatement (Second) of Torts Section 414. Second, the plaintiff argued that America took custody of the plaintiff, creating a "special relationship" under Section 314(A)(4). Third, the plaintiff argued that America voluntarily undertook to protect the plaintiff under Section 324A of the Restatement by providing training materials and dictating the methodology under which the mentoring relationship took place.

Analysis Under the Retained Control Concept

The plaintiff's first argument was that America owed a duty to the plaintiff because it retained control over the local agency. Although the plaintiff did not cite Section 414 of the Restatement (Second) of Torts explicitly in his brief, the section provided the basis for the plaintiff's argument. Section 414 reads as follows:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise control with reasonable care. Restatement (Second) of Torts, Section 414, at 387 (1965).

Section 414 provides an exception to the general rule that "an employer of an independent contractor is not liable for the acts or omissions of the latter." *Pasko v. Commonwealth Edison Co.*, 14 Ill. App. 3d 481, 487, 302 N.E.2d 642, 647 (1st Dist. 1973).

Historically, Section 414 has been used as a theoretical underpinning to the Structural Work Act for determining liability in construction negligence cases. The Structural Work Act was repealed in 1995 by P.A. 89-2, and post-repeal Section 414 rose from its secondary role in construction negligence cases to the sole analytical framework. The implementation of Section 414 has not been smooth, as Illinois' appellate districts have applied it differently.

Consider the Fourth District's application in *Moss v. Rowe Construction Co.*, 344 Ill. App. 3d 772, 801 N.E.2d 612, 279 Ill. Dec. 938 (4th Dist. 2003), which, despite relying on Section 414's comment c, looked primarily to the contract between the general contractor and subcontractor to determine "control," and therefore duty. "The issue is not control of the 'means and methods' of performing the task, but rather who contractually and/or physically has the duty to control safety of the project. First, the contractual language must be reviewed to determine what terms address the duty to control for safety. The facts must then be reviewed to determine whether the duty was physically fulfilled under the contract." *Moss*, at 777.

The First District, in a construction negligence case three months later, also relied upon Section 414's comment c. *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303,

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About the Author

Gary Moore is a partner in the law firm of *Moore, Strickland & Whitson-Owen*. He received his B.A. and M.A. at the University of Illinois. He received his J.D. from Loyola University School of Law in 1974, and was admitted to the bar the same year. Mr. Moore presently serves as National Counsel for Sexual Abuse Claims for Big Brothers Big Sisters of America. He also represents numerous public and private entities in the areas of premises liability, third-party assault, general liability, products liability, civil rights and toxic torts. Mr. Moore is a member of the IDC, DRI, the American and Chicago Bar Associations. He can be contacted at gmoore@moore-strickland.com.

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807 N.E.2d 480, 282 Ill. Dec. 856 (1st Dist. 2004). The *Martens* court divided its analysis of "control," or duty, into three components: control by contract, supervisory control and operational control. While the Fourth District, at least in *Moss*, concentrated heavily on the contract, the First District's control analysis is three-pronged. This approach was identical to the one the First District used in analyzing *Doe*.

While the plaintiff relied upon Section 414, he did not employ construction negligence cases. Rather, he used two non-construction negligence cases. *See, Coty v. United States Slicing Machine Co., Inc.*, 58 Ill. App. 3d 237, 373 N.E.2d 1371, 15 Ill. Dec. 687 (2d Dist.1978); and *Foster v. Englewood Hospital Ass'n*, 19 Ill. App. 3d 1055, 313 N.E.2d 255 (1st Dist. 1974). The *Doe* court commented:

> *Coty* and *Foster* are the only two occasions when Illinois courts have extended section 414 to cover nonconstruction work case scenarios. Neither case, however, analyzed section 414, nor stated any specific analysis or rationale for extending section 414 to the circumstances before the courts. Rather, *Coty* and *Foster* simply found the principle analogous. Moreover, these cases are over 25 years old. No recent case has applied section 414 to any situation other than a construction work case. *Doe*, No. 1-04-1985, 2005 Ill. App. 3d LEXIS 803 (1st Dist. August 16, 2005).

The *Doe* court declined ruling on the applicability of Section 414 outside of the construction context, stating that "[E]ven assuming we found section 414 applicable, we find that its requirements cannot be satisfied under the facts present here." *Id.* The court thus left for another day the issue of whether Section 414's analytical framework will see broader application.

The *Doe* court took the opportunity, however, to engage in an extensive duty analysis under the Section 414 framework. The court began by once again emphasizing the importance of comment c to the duty analysis, contrasting this approach with that used by the Fourth District, and relied on by the plaintiff:

> This narrow analysis [of the *Moss* court] has subsequently been rejected, specifically by *Martens*[.] . . . [I]f courts found language in a contract with respect to the right to control safety alone sufficient to subject a general contractor to liability under section 414, "then the distinction in Comment c . . . between retained control versus a general right of control would be rendered meaningless." . . . [A]ccording to the *Martens* court, "the central issue is retained control of the independent contractor's work, whether contractual, supervisory, operational, or some mix thereof." *Doe*, No. 1-04-1985, 2005 Ill. App. 3d LEXIS 803 at 21 - 22 (citing *Martens*, 347 Ill. App. 3d at 318).

Having dismissed the *Moss* analysis and laying the framework of comment c's retained control analysis via the model set up by the *Martens* court, the *Doe* court began the first component of its three-pronged analysis. First, it looked to contractual control. Specifically, it analyzed the Agreement between America and its local agency, the One-To-One mentoring model, the Standards of Practice, and the local organization's use of America's name and logo.

"The* Doe *court declined ruling on the applicability of Section 414 outside of the construction context, stating that '[E]ven assuming we found section 414 applicable, we find that its requirements cannot be satisfied under the facts present here.'"

The court found that nothing in the agreement spoke contractually to the protection of children from sexual abuse, in that "a review of the Agreement does not disclose that the terms of the 'sexual abuse, molestation, assault' or anything akin were used at all." *Doe* at 26. Regarding the One-To-One mentoring model, "contrary to plaintiff's argument, it is not the sole model that an affiliate could utilize." *Id.* at 27. The court found local flexibility in the Standards of Practice in that local agencies could petition America "for approval of a different type of model of mentoring." *Id.*

Despite the fact that America required its local agency to use its name and logo, the *Doe* court found this "insufficient in itself to demonstrate America contractually retained [control over the local agency]" *Id.* In closing out its contractual control analysis, the *Doe* court looked to the Standards of Practice on sexual abuse. Again, there were no top-down mandates: "The only reference in the Standards to sexual abuse requires [the local agency's] board of directors to adopt policies that address child sexual abuse protection in its casework manual. However, the Standards do not provide suggestions, recommendations, or even a skeletal framework of what those policies should or could entail." *Id.* at 27 - 28. The bottom line was that even though there was a contract and standards, a lack of mandates and a great deal of local affiliate flexibility tipped the balance to a lack of contractual control.

On the issue of supervisory control the *Doe* court stated:

> [C]learly there is no evidence that America retained any supervision over [the local agency] or its volunteers. There is no evidence that any member of America's staff was present at [the local agency's] office except for one time every five years. Moreover, there is no evidence that any of America's staff ever supervised the volunteers and children or that it had any control over how the volunteers and children interacted, including what they did, where they went, etc. *Doe*, No. 1-04-1985, 2005 Ill. App. 3d LEXIS 803 at 28.

In the final part of its analysis, operational control, the *Doe* court focused on how much autonomy the local agency had in conducting its operations and who was in control of its operation. "[T]he evidence clearly demonstrates that America retained no control over [the local agency's] operations or volunteers. . . . Specifically, [the local agency] has an executive who possesses overall, responsibility for the employment, supervision, evaluation, and termination of all staff and volunteers. . . . Moreover, [the local agency's] board is required to adopt policies and procedures, which it must incorporate into its casework manual in connection with all aspects of its internal functioning." *Id.* at 28-29.

In sustaining summary judgment, the court summarized: "There is simply no evidence in the record to demonstrate America retained direct supervisory control over the method and manner in which [the local agency] or its mentors accomplished their tasks, either by contract, supervision, or operation." *Id.* at 29-30. The court concluded, even "assuming section 414 was applicable," America did not owe the plaintiff a duty under Section 414's retained control exception. *Id.* at 32.

Custody of Another Under Section 314

The plaintiff next argued, under Section 314(A)(4), that there was a special relationship between he and America. Illinois law generally does not impart liability for failing to protect another from a third party's criminal attack. *See, Platson v. NSM, America, Inc.*, 322 Ill. App. 3d 138, 748 N.E.2d 1278, 255 Ill. Dec. 208 (1st Dist. 2001). However, an exception is provided by Restatement (Second) of Torts Section 314(A)(4), when "[O]ne voluntarily takes custody of another so as to deprive the other of his normal opportunities for protection." *Platson*, 322 Ill. App. 3d at 146.

The plaintiff argued that despite being enrolled through the local agency, it was actually America's One-To-One program. Accordingly, he argued that America owed him a duty of protection from a criminal attack. America countered that there was no custody and no special relationship. America maintained that they had no control over the plaintiff, as their offices were half a continent away. Further, this distance prevented America from having any authority over the plaintiff.

The only case in Illinois to address a similar organization and issue involved a boy scout who was molested while at a Boy Scouts of America summer camp. *Doe v. Goff*, 306 Ill. App. 3d 1131, 716 N.E.2d 323, 240 Ill. Dec. 190 (3d Dist. 1999). The plaintiff in *Goff* subsequently sued his abuser, the local chapter of the Boy Scouts, and Boy Scouts of America. However, the Third District left a vacuum for future cases when it failed to analyze or define "custody." The full extent of the *Goff* court's analysis being the simple statement that "As the plaintiff's voluntary custodian, the appellees had a duty to protect him from foreseeable harm." *Goff*, 306 Ill. App. 3d at 1134. As a result, *Goff* offered no aid to the *Doe* court in its analysis.

Of more help to the court was the analysis of the voluntary custodian issue in *Platson v. NSM, America, Inc.* The court in *Platson* noted that "to take custody of another" or to "deprive another of his normal opportunities for protection" is not defined by the Restatement. In an attempt to rectify this situation, the court in *Platson* looked to persuasive authority outside of Illinois, relying on a case holding "that to assume custody of a child is to stand '*in loco parentis* to the child, accepting all rights and responsibilities that go with that status." *Platson*, 322 Ill. App. 3d at 147, *citing Slagle v. White Castle Systems, Inc.*, 79 Ohio App. 3d 210, 217 (1992). The Platson court ultimately found that "to establish a custodial relationship . . . there must be proof that an employer

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voluntarily assumed the additional responsibilities of a custodian towards the child." *Id.*

Ultimately, the *Doe* court chose dictionary definitions to aid them in their analysis, defining "custody" as "control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it," and "custodian" as "one that guards and protects and maintains." *Doe*, 2005 Ill. App. 3d LEXIS at 36-37 (citing Webster's Third New International Dictionary at 559). After surveying these definitions for the various forms of "custody," the First District held that America "did not have actual or constructive possession of [the plaintiff.]" *Doe*, 2005 Ill. App. LEXIS 803 at 37. America was "half way across the country" from the plaintiff and did not assume any of the responsibilities attendant in acting as a custodian. *Id.* Because the court found there was no custody, step two of the special relationship analysis, whether the attack was foreseeable, was not addressed.

Doe clarifies 314(A)(4)'s "special relationship" analysis by providing a definition where there had previously been none. This definition signals that there is not an implicit custodial relationship, but rather a defendant must have exerted control over the guardianship or safety of a plaintiff.

Voluntary Undertaking

The plaintiff's final theory on appeal was the "voluntary undertaking" exception provided by Restatement (Second) of Torts Section 324A. The plaintiff argued that America voluntarily assumed a duty to protect him by virtue of engaging "in a range of activities designed to prevent sexual abuse." *Doe* at *38*. Specifically, the plaintiff pointed to the single mention of child abuse contained in the Standards of Practice and the five-year review.

In its analysis, the court reiterated the basic tenets of the voluntary undertaking doctrine. Namely, that duty, in any voluntary undertaking scenario, must be limited to scope of the undertaking. *Doe* at *39, citing Chelkova v. Southland Corp.*, 331 Ill. App. 3d 716, 722 (1st Dist. 2002). The court further noted that Illinois public policy supports a "narrow construction of voluntary undertakings." *Id., citing Jakubowski v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d 627, 641 (1st Dist. 2002). The court also discussed the importance of the distinction between misfeasance and nonfeasance. Allegations of nonfeasance "cannot be a basis for tort liability to a third party under a voluntary undertaking theory." *Jakubowski*, 347 Ill. App. 3d at 640. The *Doe* court found that the plaintiff's allegations were ones of nonfeasance. As a result, summary judgment would have been proper "on this basis alone." *Doe*, 2005 Ill. App. 3d LEXIS 803 at 41.

The plaintiff relied extensively on the analysis provided by *Platson*, 322 Ill. App. 3d at 140. *Platson* involved a claim of voluntary undertaking made by a high school student. The student was sexually abused by a fellow employee while employed in a work-study program. However, in *Platson*, the employer had entered into an explicit agreement with the school district whereby it agreed to supervise students at all times. This was the crucial distinction for the *Doe* court, as there was no agreement between America and their local affiliate whereby America undertook to supervise or protect the plaintiff.

"Ultimately, the* Doe *court chose dictionary definitions to aid them in their analysis, defining 'custody' as 'control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it,' and 'custodian' as 'one that guards and protects and maintains.'"

The court also analyzed a number of franchisee/franchisor cases as "illustrative on when a voluntary undertaking will be found and when it will not." *Doe*, 2005 Ill. App. 3d LEXIS 803 at 42. Again, the level of control exerted by the franchisor, or national organization, was the linchpin of the court's analysis. In those cases where Illinois courts found no voluntary undertaking, the national had no mandatory safety policies or procedures in place. Not only were there no mandates regarding safety programs, but the local franchisee was ultimately free to fashion its own safety procedures and decide upon their implementation as it saw fit. *See, Chelkova*, 331 Ill. App. 3d at 725 and *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542, 732 N.E.2d 37, 247 Ill. Dec. 321 (1st Dist. 2000).

In cases where a voluntary undertaking of duty was found, the control asserted by the franchisor was much greater. The creation of a dedicated corporate branch or committee responsible for safety or security was universally present. Training and subsequent safety inspections designed to check security standards could also create a voluntary duty, as could creating a "Bible" of required procedures. *See, Decker v. Domino's Pizza, Inc.*, 268 Ill. App. 3d 521, 644 N.E.2d 515, 205 Ill. Dec. 959(5th Dist. 1994) and *Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487, 572 N.E.2d 1073, 157 Ill. Dec. 609 (1st Dist. 1991).

The *Doe* court found no voluntary undertaking, finding the facts "more akin to *Chelkova* and *Castro*." *Doe*, 2005 Ill. App. 3d LEXIS 803 at 45. America did not implement any mandatory programs and did not create a "Bible" containing required procedures. Of the utmost importance was the fact that the local affiliate "was responsible for running its day-to-day operations and to adopt child protection or sexual abuse prevention policies as it deemed necessary." *Id.*

Conclusion

The *Doe* case provides a valuable road map for liability defenses. By understanding and aggressively pursuing the evidence necessary to support these defenses, counsel can position the national organization for dismissal. Without the national defendant, the case decreases in value and the local agency's defense position is optimized. A carefully considered and coordinated defense strategy along such lines can, therefore, defuse the common dangers presented by sex abuse claims.