Time's up

We need to overturn the antiquated decision shielding employers from vicarious liability for employees' sexual misconduct

By Michael Levinson

Nearly 30 years ago in *Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12 Cal.4th 291, the California Supreme Court (all Supreme Court references are to the California Supreme Court) was faced with deciding whether an employee's on-the-job sexual misconduct falls within the scope of employment. After considering the policy implications underlying vicarious liability and their applicability to a hospital worker who sexually molested a pregnant woman during an ultrasound, the Court decided the issue with a resounding "no" in a 5-2 decision.

The effects have been chilling; not only has *Lisa M.* often prevented victim recourse against sexual abusers, but it has had the unintended effect of making employers, such as health care facilities, less likely to enact policies designed to protect women in vulnerable positions. Given the evolving nature of societal norms, growth in the women's movement, and current makeup of the state's highest court, *Lisa M.* is passé and plaintiff's attorneys should not shy away from challenging it with the right set of facts.

Vicarious liability: An overview

Respondeat superior, which in Latin means "let the master answer," has been around for centuries. The doctrine is codified under Civil Code section 2338 and simply means that an employer is vicariously liable for the conduct of its employee when acting within the scope of employment.

The main rationale is that it would be "unjust" for an employer to avoid responsibility when an employee causes injury to another arising from the "characteristic activities" of the employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) The Supreme Court has further specified that the policy reasons include: "(1) to prevent recurrence of the conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."(*Id.* at 209.)

Claims under FEHA

Complaints for sexual harassment can be brought against an employer for acts of employees under the Fair Employment and Housing Act (FEHA). This is a different claim than the issue of vicarious liability as discussed here.

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A plaintiff carries the burden of proof to show the employee's conduct was within the scope of employment. This determination is generally a matter of fact but becomes a matter of law when the facts are undisputed and there are no conflicting inferences. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 (citations omitted).) In some instances, a court can decide that no reasonable jury could conclude that an employee's tortious acts were related to the employment.(See, e.g., *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 452 [holding a teacher's sexual assault of a student was "simply too attenuated to deem [it] as falling within the range of risks allocable to a teacher's employer"].)

It has long been established that employee acts for which an employer may be liable include intentional torts. Notably, in *Carr v. Wm. C. Crowell Co.*, the court held that a plaintiff does not need to show that an underlying intentional tort by an employee was done to further the interests of the employer because "such an injury is one of the risks inherent in the enterprise." (*Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d. 652, 654-56.)

California courts have further shaped what constitutes an act within the scope of employment. In 1975, *Rodgers v. Kemper Constr. Co.* adopted a foreseeability test, which requires analysis as to whether an employee's conduct is so "unusual or startling" that it would be unfair to attribute the resulting damages to the employer. (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 614-616, 619.) Over a decade later, the Supreme Court adopted the foreseeability test in *Perez v. Van Groningen & Sons, Inc.* (*Perez, supra*, 41 Cal.3d at 965-66, 970.)

Five years after *Perez*, the Supreme Court had to determine in *Mary M. v. City of Los Angeles* whether the City of Los Angeles was vicariously liable for one of its officers, who raped a woman while on duty. (*Mary M., supra*, 54 Cal.3d at 209.) The Court analyzed the three main policy reasons and ruled in favor of the victim, but it declined to extend its ruling to other professions. (*Id.* at 221.) Instead, it emphasized the importance of police while pointing out that "[i]nherent in this formidable power is the potential for abuse." (*Id.* at 216-17; *Cf. John R., supra.*) This left open whether *Mary M.*'s holding could be extended to hospital workers.

Four years after *Mary M.*, and just three weeks before *Lisa M.* was decided, the Supreme Court foreshadowed the eventual outcome in *Farmers Ins. Grp. v. Cnty. of Santa Clara*, holding the county was not vicariously liable as a matter of law on behalf of a sheriff who sexually harassed multiple female deputies training under him. (*Farmers Ins. Grp. v. Cnty. of Santa Clara* (1995) 11 Cal.4th 992, 997, 1007-09.)

Lisa M. and progeny

Lisa M. involved a male sonographer who molested a pregnant woman during an ultrasound at a hospital under the guise of it being necessary to determine the sex of the baby. (*Lisa M., supra*, 12 Cal.4th at 295.) The plaintiff sued the hospital, but the trial court granted the hospital's motion for summary judgment, deeming the sonographer's conduct outside the scope of employment as a matter of law. The appellate court reversed, ruling it a factual issue to be decided by the jury. (*Id.* at 296.) The Supreme Court, however, refused to hold the hospital vicariously liable.

In rendering its decision, the Court analyzed the history of vicarious liability law with a focus on the foreseeability test. (*Id.* at 299.) Ultimately, however, it determined the conduct was more a result of "propinquity and lust." (*Id.* at 302.) Although the majority did note that a sexual tort can arise from an employment in some circumstances if the "motivating emotions [are] fairly attributable to work-related events or conditions," it declined to go into further detail. (*Id.* at 301, 303.) Instead, the Court minimized the significance of the situation and even appeared to subtly blame the victim, characterizing it as "a technician [who] simply took advantage of solitude with a naïve patient to commit an assault for reasons unrelated to work." (*Ibid.*)

The dissent questioned why the case was decided as a matter of law, arguing that whether the conduct fell within the scope of employment was itself a disputed fact. (*Id.* at 311 (Kennard J., dissenting).) Justice Kennard further posited that a reasonable jury could have found that the sonographer's sexual misconduct arose from the intimate nature of the procedure and would not have happened if the perpetrator had been working in a different role. (*Id.* at 313.)

Since *Lisa M.*, no court has ventured to take it on directly, and the few decisions that came close chose to carefully distinguish it. For example, the recent case, *Samantha B. v. Aurora Vista Del Mar, LLC*, which arose from patients at a psychiatric hospital who were sexually abused by a hospital employee, is illustrative. (*Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85.) In remanding the case for trial, the appellate court distinguished *Lisa M.* by pointing out that the hospital employee was a mental health worker who was more personally involved with his patients than a sonographer and was often left alone with patients for 20 minutes. It further observed that the victims were in a vulnerable state and may have had reduced cognitive capacity. (*Id.* at 91, 108.) As such, the court left it for the jury to determine if vicarious liability applied, while steering clear of a collision with *Lisa M.*

California Supreme Court: Then vs. now

When *Lisa M.* was decided in 1995, the Court was comprised of mostly conservative justices: Justices Ronald George and Kathryn Werdegar were appointed by Republican Governor Pete Wilson; Justices Marvin Baxter, Armand Arabian, Malcom Lucas, and Joyce Kennard by Republican Governor George Deukmejian; and Justice Stanley Mosk by Democratic Governor Pat Brown. More significantly, only two of the justices were women. During this period, Chief Justice Lucas pushed the Court sharply to the right. Unsurprisingly, only Justices Mosk and Kennard dissented in *Lisa M.*

In stark contrast, the makeup of today's Court has undergone an ideological shift left. Justices Martin Jenkins, Patricia Guerrero, and Kelli Evans were appointed by Democratic Governor Gavin Newsom; Justices Joshua Groban, Goodwin Lieu, and Leondra Kruger by Democratic Governor Jerry Brown; and Justice Carrol Corrigan, the longest tenured justice, by Republican Governor Arnold Schwarzenegger. With Governor Newsom's recent elevation of Justice Guerrero to Chief Justice and appointment of Justice Evans, the Court not only has a strong liberal majority but also a female majority.

What about stare decisis?

Stare decisis in Latin means "to stand by things decided." Under California law, the doctrine "is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system, i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.)

Though rare, there is recent precedent where the Supreme Court has overturned itself. For example, in *In re Jaime P.*, the Court reversed one of its decisions from years prior regarding probationary search conditions of a minor and explained that "reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration." (*In re Jaime P.* (2006) 40 Cal.4th 128, 133; see also *People v. Lopez* (2019) 8 Cal.5th 353, 381.)

Thus, stare decisis is not an ironclad rule, but rather a flexible policy capable of adapting to meet the changing views of society. Accordingly, stare decisis is not an insurmountable impediment to overturning *Lisa M.*

Winds of change

So, what "subsequent developments" have occurred since *Lisa M.* was decided in 1995?

With regard to the growing empowerment of women, perhaps the main catalyst is the rise of the #MeToo movement. The term was first coined in 2006 and later popularized by celebrities in 2017 who came forward with stories of sexual abuse. (Abby Ohlheiser, *The Woman Behind 'Me Too' Knew the Power of the Phrase When She Created It – 10 Years Ago*, Wash. Post, October 19, 2017, https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/.) Since its rise, the movement has helped encourage women everywhere to share their stories

and bring not only awareness to sexual misconduct but also accountability.

While still a work in progress, the movement has made headway in the past five years. (Jodi Kantor & Megan Twohey, *How to Measure the Impact of #MeToo?*, N.Y. Times, Oct. 3, 2022, https://www.nytimes.com/interactive/2022/10/03/us/me-too-five-years.html.) California, for instance, enacted Code of Civil Procedure section 340.16 in 2019, extending the time a sexual assault victim may bring a civil claim from two years to ten years. (Code Civ. Proc., § 340.16.) The law was amended on January 1, 2023, to apply retroactively to certain previously time-barred claims.

Other similar movements have also been created, including Time's Up, which focuses on promoting "fairness, safety, [and] equity in the workplace." (Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike*, Time Mag., March 8, 2018, https://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/.) All of this points to increased visibility regarding awareness and prevention of sexual abuse compared to three decades ago.

Courts are also beginning to recognize the need for change. In one recent case, a pregnant woman alleged she was sexually molested during an ultrasound at a hospital, reminiscent of *Lisa M.* A Humboldt County Superior Court judge overruled the hospital defendant's demurrer regarding vicarious liability, finding the plaintiff alleged "ultimate facts that show a sufficient nexus between the conduct and the employee's work." (*Jane Roe v. American Hospital Management Corporation dba Mad River Community Hospital, et al.* (Case No. CV2000068, Dec. 14, 2020) (J. Canning, Timothy A.). In this matter, plaintiff Jane Roe was represented by the author and his law firm Phillips, Erlewine, Given & Carlin LLP.)

In another case, a Los Angeles Superior Court judge opined:

> These cases are mostly 20-30 years old. As we have learned from the #MeToo movement, times have changed. What might have been excusable behavior – or behavior for which the employer was not previously liable – is no longer so easily excused. Men in power are no longer being given a free pass to sexually exploit vulnerable victims.

(*Alicia C. v. Los Angeles County Sheriff's Department* (Case No. BC694991, June 8, 2018) (J. Linfield, Michael).)

Appellate courts have yet to be as forceful, but dicta in *Samantha B.* suggests the potential for a more liberal interpretation of vicarious liability. The court expressly acknowledged that "[s]exual exploitation of the patients by employees is a foreseeable hazard arising from the circumstances of the job." (*Samantha B., supra*, 77 Cal.App.5th at 108.) This demonstrates progression toward change.

Foreseeability reimagined

In 2016, the Atlanta Journal-Constitution published an investigative series on doctors and sexual abuse. One part attempted to determine the pervasiveness of sexual misconduct by doctors nationwide by reviewing public records from each state dating back to 1999. (See Lois Norder, Jeff Ernsthausen, & Danny Robbins, *Why Sexual Misconduct is Difficult to Uncover*, Atlanta-Journal Constitution, July 6, 2016, https://doctors.ajc.com/table_of_contents/.) The results found over 2,400 cases where a doctor was accused of sexual misconduct involving a patient, but noted that number is likely significantly understated because many transgressions go unreported and state records lack specificity. (*Ibid.*)

Although the study focused only on physicians, its data and conclusions logically apply to other professions in the medical community who regularly see patients. While difficult, if not impossible, to quantify the frequency of patient sexual abuse in medical facilities, it is undoubtedly still prevalent today.

When comparing the Court's analysis of foreseeability in *Lisa M.* to today's standard, it is clear that the Republican-appointed Court adopted a false choice between whether an act is done out of "propinquity and lust" or within the scope of employment. But these are not mutually exclusive; why can't it be *both*?

Courts should not have to scrutinize the length of time a hospital worker spends with a patient or a patient's comprehension of medical procedures. Sexual misconduct can occur in any number of situations and is entirely foreseeable in the workplace, particularly in the context underlying *Lisa M.* It is now to the point where the foreseeability test should be reversed to favor the victim; in other words, it would be "unjust" to *not* attribute resulting damages from an employee's sexual misconduct on the job to the employer because such behavior can no longer be considered "unusual or startling" and is part of the cost of doing business.

Further, reversing the standard fits the three core policy reasons behind vicarious liability in the following ways: 1) employers, such as hospitals, would be forced to assess and revise their policies, particularly with regard to supervision of employees and hiring practices; 2) victims would have a greater chance to recover damages by being able to hold an entity liable; 3) and hospitals and the community at large benefit from the authority that hospital workers have over patients and would be in a better position to equitably bear the victim's losses.

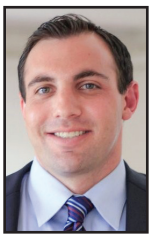
Regarding this last policy consideration, the Court in *Mary M.* proclaimed: "[t]he cost resulting from misuse of that power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power." (*Mary M., supra*, 54 Cal.3d at 217.) Similarly, health care workers maintain power, not in enforcement of laws, but over a patient's body. Patients place their trust in health care workers by revealing private information and following treatment recommendations. This is particularly true for women who undergo procedures alone and are in a vulnerable position with

no choice but to trust the clinician. Thus, the reasoning behind *Mary M.* can and should be extended to apply to hospitals at a minimum.

Conclusion

Lisa M. was wrongly decided and is out of step with today's norms. Instead of being forced to tiptoe around the holding, the default position should be that when there are no factual disputes, sexual misconduct in the workplace – particularly by a hospital employee towards a patient – is done in the course and scope of employment as a matter of law and attributable to the employer. Public policy supports this position, and courts are beginning to acknowledge as much in dicta. Now, a brave victim and bellwether case are needed so the Supreme Court can correct nearly 30 years of bad precedent.

Michael Levinson is a senior associate at Phillips, Erlewine, Given & Carlin LLP *in San Francisco, where he focuses on all aspects of plaintiff's personal injury matters, including sexual abuse cases.*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