



# VERDICT

Volume 2022-2023 - Issue 2

This is the second of two *Verdict* issues devoted to sexual abuse cases. It is an area of the law notable not only for the enormity of the wrongs committed, but also for the vigor and moral clarity of the law's response. There are not many areas of the law where barriers to justice are being lowered and not raised, but as the articles in these two issues make clear, that is what is happening in these cases. The articles in this issue cover state and federal legislative developments, sound rulings from trial courts, and the tireless efforts of the trial bar in the face of often novel defenses. Even if you do not regularly handle these cases, please take a minute and see what your peers are up to. It's an empowering picture of what we can accomplish together for our clients when we have even a little bit of wind at our backs.

## Litigating Adoption and Foster Care Abuse Cases<sup>1</sup>



Adam J. Pantano, Esquire



Scott A. Fellmeth, Esquire

*Saltz Mongeluzzi & Bendesky, PC*

Grace Packer was brutally murdered and dismembered by her adoptive mother, Sara Packer, and Sara Packer's boyfriend, Jacob Sullivan. Before her death, Grace suffered systematic sexual abuse at the hands of her adoptive father, David Packer, who was later incarcerated for those crimes. Grace lived an unimaginably horrific life. Because the case involved a deceased minor who was in Pennsylvania's foster and adoption system, to arrive at this settlement, there were

numerous difficulties during discovery in obtaining documents critical to the case and keeping in essential allegations of abuse and neglect against the defendants.

Grace's murder was the subject of national news, specifically the failures of the entities responsible for her protection. Those entities included the three (3) private companies that provided foster, adoption, and behavioral health services to Grace. At the outset of the litigation, there were difficulties with obtaining Grace's foster and adoption records from not only the non-party CYS (Children & Youth Services) entities, but also the defendants in the case, who asserted that because a court-appointed administrator was named as the Plaintiff, we were not entitled to receive any records related to child abuse involving Grace. The defendants and non-party CYS entities relied on several Pennsylvania statutes for their argument.

First, the parties pointed to Pennsylvania's Adoption Act (the "Act"),<sup>2</sup> arguing that because we represented the court-appointed administrator of Grace's estate, we were not one of the enumerated classes of individuals permitted to access Grace's adoption records. However, the Act's stated purpose and intent is for greater post-adoption contact between the adoptee and biological parents, as well as easier access for individuals to obtain information through the Commonwealth's information registry, the Pennsylvania Adoption Information Registry.<sup>3</sup> Indeed, when then Governor Ed Rendell signed the Act into law, he released a statement that provided a description of the Act, stating it "establishes a procedure for voluntary open adoption."

We argued that the Act has no place in civil litigation and could not be used by CYS or defendants as a shield to prevent discovery

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## The Post-2019 Landscape For Bringing Claims Against Local Government On Behalf of Child Abuse Victims



**Michael D. Shaffer, Esquire**  
*Shaffer & Gaier*

In November 2019, following a decade-long campaign by child-victims of sexual abuse and their families, Pennsylvania enacted a series of reforms that are expected to increase access to justice for those victims in Pennsylvania civil courts.<sup>1</sup> Act 87 of 2019 is particularly notable for changes that open state courthouses to claims by child-victims of sexual abuse against local government, including schools and their employees. These changes relate to waiver of governmental immunity, the cap on liability, and the statute of limitations. What follows is an overview of the legal landscape in this area post-Act 87.

By way of brief background, local government in Pennsylvania is generally immune from suit under the Political Subdivision Tort Claims Act.<sup>2</sup> Immunity is waived, and a local governmental entity may be held liable for certain negligent acts of the entity and its employees that cause personal injury.<sup>5</sup> The types of negligent acts for which the local governmental entity may be held responsible are enumerated in 42 Pa. C.S. §8542(b). They traditionally included

negligent operation of a motor vehicle, negligent care of trees, traffic controls, or utility services, and negligent maintenance of streets and sidewalks.<sup>4</sup>

Act 87 has amended Section 8542(b) to waive governmental immunity and, for the first time, permit child-victims of sexual abuse to hold local government responsible for negligently causing that type of personal injury.<sup>5</sup> As amended, Section 8542(b) now allows claims for negligence against the local governmental entity that arise from “[c]onduct which constitutes an offense enumerated under [42 Pa.C.S. §] 5551(7).”<sup>6</sup> Section 5551(7) lists a number of criminal offenses against children, including rape, sexual assault, sexual trafficking and servitude, and incest.<sup>7</sup> Where this type of criminal offense occurs, the local governmental entity may be held liable under Section 8542(b)(9) if its negligence enabled or facilitated the criminal conduct.<sup>8</sup> Thus, the local governmental entity may be held liable for negligent conduct that together with intentional (and indeed criminal) conduct concurrently causes injury to the child-victim.<sup>9</sup> The child-victim may state direct and vicarious claims of negligence against the entity.<sup>10</sup>

In another welcome development, Act 87 has eliminated the limitation on “damages awarded under section 8542(b)(9).”<sup>11</sup> Under the Political Subdivision Tort Claims Act, in cases where governmental immunity is waived, any resulting damages are generally subject to a

cap in favor of local governments.<sup>12</sup> The amount recoverable in cases subject to the cap is \$500,000 in the aggregate.<sup>13</sup> The cap has not been adjusted since 1980 and has largely lagged behind actual costs of medical care and modern litigation.<sup>14</sup> Fortunately, Act 87 recognizes the necessity of fully compensating child-victims for injuries caused by sexual abuse and has eliminated the burden of a cap on damages, at least for that type of injured persons.

Lastly, Act 87 has addressed one of the most significant practical impediments to bringing claims on behalf of child-victims of sexual abuse: the statute of limitations. For reasons that are beyond the scope of this article, child-victims of sexual abuse are often reticent to disclose the abuse soon after it happens such that claims arising from the abuse are often in danger of becoming stale and not actionable, even under a two-year statute of limitations.<sup>15</sup> Act 87 has provided a nuanced policy response to this problem, liberalizing access to courts for child-victims of sexual abuse both prospectively and retroactively, as follows.

Going forward, a victim of sexual abuse who is under 18 years of age at the time the cause of action accrues has “a period of 37 years after attaining 18 years of age in which to commence an action for damages.”<sup>16</sup> If the victim of sexual abuse is “at least 18 and less than 24 years of age at the time the

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## The William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008



**Keith Thomas West, Esquire**  
*The Victims' Recovery Law Center*

William Wilberforce was the British politician most associated with the abolitionist movement that ultimately enacted the Slavery Abolition Act of 1833, which outlawed slavery in the British Empire. Throughout the 21st Century, Congress has passed a series of comprehensive laws bearing his name that address the forms of modern slavery known as forced labor and sex trafficking. Originally, the federal government focused almost exclusively on the arrest and prosecution of the monsters who commit these horrendous crimes. However, as the seminal torts hornbook notes, criminal law is designed to protect the interests of the state, not the interests of the victim: "So far as the criminal law is concerned, the victim will leave the courtroom empty-handed. The civil action for a tort, on the other hand, is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer."<sup>1</sup>

Thankfully, section 1595 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (hereinafter "Act") provides victims of sex trafficking

with a civil remedy for damages against their traffickers and "whoever" knowingly benefits from participation in a venture the person knew or should have known engaged in sex trafficking.<sup>2</sup> The statute of limitations under Section 1595 is "10 years after the cause of action arose; or 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense."<sup>3</sup> To state a claim under Section 1595, the plaintiff must allege that the entity (1) knowingly benefited financially or received something of value, (2) participated in the venture, and (3) knew or should have known about the nature of the venture.<sup>4</sup>

Until recently, only a few civil cases were filed on behalf of sex trafficking victims under Section 1595. But, a small explosion in now taking place in this area of the law as the scope of the problem becomes more public, with waves of criminal investigations uncovering large numbers of hotels and motels where forced prostitution was permitted to occur over a considerable period of time.<sup>5</sup> There has been a split among district courts whether the knowledge element of the tort requires actual knowledge or active participation (as is true under the criminal law), or whether constructive knowledge should be sufficient to hold a third party liable for profiting from the illegal sex trade.<sup>6</sup> However, an important opinion by Judge Mark A. Kearney of the Eastern District of Pennsylvania, in *A.B. v. Marriott Int'l, Inc.*,<sup>7</sup> appears to represent a growing consensus position that

the "knew or should have known" standard should apply in these cases. The *A.B.* court held a negligence standard should apply, so those who profit from accommodating the sex trafficking business in any manner (e.g., from room rentals) should be held liable if the plaintiff can show the defendant "should have known" what was happening – such as from being put on notice of sex trafficking by the conduct or habits of the business' guests.<sup>8</sup>

As a society, we are slowly waking up to the reality that many thousands of our fellow men and women have suffered incomprehensible and incalculable harm as the victims of sex trafficking. These include kidnapped and exploited minors, vulnerable youths who were suffering from addiction or mental illness, and foreigners who were illegally transported from their homelands and held hostage in inhumane conditions in obscure corners across America. The tort authorized under Section 1595 may provide a civil remedy for many of these victims. Law enforcement officers tell endless stories of fleabag motels and such locations that have been notorious for prostitution for generations -- but what we are now learning is that many of these infamous locations were often even far worse than they appeared, because the "sex workers" in these locations are often trapped in a form of modern slavery. Plaintiffs' attorneys serve an invaluable service to both their clients and to society as a whole by shutting these locations down.

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***K.W. v. School District of Philadelphia, et al.***

**Benjamin Present Esquire**  
*Kline & Specter, P.C.*

A one-page order from the Commonwealth Court appears to be the first appellate insight into the breadth of Act 87's waiver of governmental immunity for civil claims involving sexual misconduct against minors.

The Commonwealth Court's June 30, 2022 decision denying interlocutory review of *K.W. v. School District of Philadelphia, et al.* does not finally resolve the prevailing issue – whether a government agency can be liable under the Political Subdivision Tort Claims Act's sexual abuse exception to immunity if someone other than the agency's employee committed the alleged abuse.

Rather, the Commonwealth Court simply determined that the trial judge's decisions ruling the defendants were not immune and, further, to not certify that issue for immediate appellate review were “not so egregious as to justify prerogative appellate correction.”

The appeals court's decision is still notable, though, because it involves what is believed to be the first opinion from a Pennsylvania Common Pleas Court analyzing the sexual abuse exception. The defense had argued in preliminary objections that the sexual abuse

exception did not apply to plaintiff's allegations because the alleged assailant – a student – was not a government employee.

The Commonwealth Court's decision is also noteworthy because plaintiff did not oppose the petition for permission to appeal in either the trial or appeals court. As Tom Kline told *The Legal Intelligencer* after the trial court decision, he had “little doubt” the issue would be raised in the appellate courts at some point. Following the Commonwealth Court's denial of the appeal, however, that review will not take place on the substance until after a trial or adverse summary judgment decision.

*K.W.* involves a March of 2020 incident in which a thirteen-year-old special needs student alleges he was sexually assaulted by his classmate on the school bus ride home. During the incident, *K.W.* and his assailant were seated directly behind the school bus driver. The bus was also staffed with an attendant whose job included providing a “safe, structured and secure transportation experience for students.”

As shown on video footage of the bus ride, the bus attendant was having an apparent personal conversation on her cell phone during the assault and not adequately observe the students, Plaintiff alleges.

The involved bus was owned and operated by the School District of Philadelphia, which maintains a fleet of buses in addition to using private vendors that contract with the district to transport students.

The bus driver and attendant were also School District employees.

Before Act 87, the School District's ownership of the bus and employment of the driver and attendant posed a substantial hurdle to recovery. All defendants would have argued they were immune under the PSTCA's broad invocation of immunity and that Plaintiff's claims did not meet any of the then-eight exceptions to immunity. Even if one of those exceptions were to apply, damages would have been capped at \$500,000.

That the defendants still pursued an immunity defense notwithstanding Act 87's passage is a signal that government agencies will look to limit the sexual abuse exception's scope through judicial decisions, as lawsuits relying on the new law continue to get filed.

The PSTCA has two statutory preconditions before reaching specific exceptions to immunity. First, the damages sought must be otherwise recoverable at common law or by statute from someone who is not immune, *i.e.*, a private business or an individual.

Second, the law requires that “the injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties.” The statute defines “negligent acts” so as to “**not** include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.”

If the preconditions are satisfied, then the plaintiff must meet a specific exception to immunity.

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## We're All On The Same Page



**George J. Audi, ChSNC, CSSC**  
SAGE Settlement Consulting

The two most recent issues of the *Verdict* highlighted sexual abuse cases. Articles discussed the sensitive nature of sexual abuse claims, including their emotional and financial implications. Sadly, the number of claimants involved in these types of cases is growing both locally and nationally. Thankfully, allies and advocates of sexual abuse survivors have increased in tandem.

One national advocate is the American Association of Settlement Consultants (AASC), founded in 2021. Sage Settlement Consulting was instrumental in establishing this new national trade association, whose mission is to create and promote integrated, common-sense solutions that protect the needs of injured individuals and their families. AASC also works with congressional members to establish and strengthen public policies that protect your clients.

As you can see in AASC's press release below, one of the main legislative objectives is changing the taxation of sexual abuse and sexual assault cases. Under current tax law, most victims pay tax on non-observable (yet very real) injuries, including mental

distress, PTSD, and emotional disturbance. We believe your clients deserve the same income tax-free structured settlement treatment that other injured claimants receive.

The AASC is making tremendous progress, and we look forward to moving the needle and getting congressional members on both sides of the aisle to make this a priority. Changing the outdated, inconsistent tax treatment of sexual abuse and sexual assault survivors will have a positive and lasting impact on everyone in the personal injury space.

### Settlement Industry Unites Behind Effort to Advocate for Sexual Assault Victims

For Release August 24, 2022

Washington, D.C. – The settlement industry has come together to advocate for the rights of sexual assault victims. The fact that a person who has experienced a sexual assault, an act that is fundamentally invasive and physical, needs to prove that they have suffered “observable” harm or else suffer taxation of their settlement as “non-physical” is an inequity that needs to be addressed. A sexual assault is by its very nature physical and should be considered a physical injury in all circumstances where it occurs.

Last fall, the American Association of Settlement Consultants (AASC) decided that tax fairness for sexual assault victims was a top policy priority when the AASC Board of Directors voted to include the issue on its legislative agenda. At AASC's Advocacy Day in February, AASC members met with nearly a dozen Members of

Congress and their staff to raise awareness about this and other critical issues in the settlement planning industry.

As part of educating policymakers and the public, AASC's legal scholars have proactively begun to publish articles on the tax burden that sexual assault victims face. In the last year, Robert Wood has been featured multiple times in *Forbes* and *Tax Notes* discussing the issue. Most recently, AASC Legs & Regs member and tax attorney Jeremy Babener, co-authored an article in *Bloomberg* with the Presidents of AASC, the National Structured Settlements Trade Association (NSSTA), and the Society for Settlement Planners (SSP), Rebekah Reedy Miller, Tacker LeCarpentier, Paul Isaac, “Getting Back to Fairness in Taxing Invisibly Injured Victims.”<sup>1</sup>

These national awareness efforts are essential to AASC's work in Washington, D.C. educating policymakers about the inequity of the current rules. We applaud our industry counterparts for joining with AASC to advocate for sexual assault victims and look forward to working together to achieve fairness in the tax code.

<sup>1</sup> [https://news.bloombergtax.com/tax-insights-and-commentary/getting-back-to-fairness-in-taxing-invisibly-injured-victims?ct=t%28EMAIL\\_CAMPAIGN\\_6\\_21\\_2021\\_9\\_44\\_COPY\\_01%29](https://news.bloombergtax.com/tax-insights-and-commentary/getting-back-to-fairness-in-taxing-invisibly-injured-victims?ct=t%28EMAIL_CAMPAIGN_6_21_2021_9_44_COPY_01%29)

**Editor's Note:** *George Audi is a Settlement Consultant with SAGE Settlement Consulting, the National leader in comprehensive settlement planning and PTLA Gold Sponsor. You can reach George at: [gaudi@sagesettlements.com](mailto:gaudi@sagesettlements.com).*

## Litigating Adoption and Foster Care Abuse Cases

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efforts. In the alternative, we argued that should the Court determine the Act applied to civil litigation, we would still be entitled to Grace's adoption records as nothing in the Act purports to deny access to the estate of a murdered adoptee from gaining access to the adoptee's own records. That an adoptee is entitled to basic rights under the Act is beyond question and the fact an adoptee is murdered or dies makes him or her no less an adoptee entitled to the rights under the Act. Our client, the Administrator of Grace's Estate, stood in Grace's shoes and the release of Grace's records to the Administrator would be identical to releasing them to Grace, her legal guardian, and/or descendants. The act of appointing an administrator to an adoptee's estate does not diminish or erase the adoptee's rights even though the adoptee is now deceased. The Court agreed with our arguments.

The non-party CYS entities also relied on Pennsylvania's Child Protective Services Laws (the "CPSL"),<sup>4</sup> and alleged that reports concerning instances of child abuse in the possession of a county agency were confidential and were only to be made available to a court of competent jurisdiction pursuant to a court order or subpoena in a criminal matter involving a charge of child abuse. However, their argument overlooked the CPSL's clear exceptions for the release of information in confidential reports, which provides "[u]pon written request, a subject of a report may receive a copy of all information contained in the statewide database or in any report filed pursuant to Section 6313."<sup>5</sup> The CPSL defines "subject of the report" as "any

child, parent, guardian or other person responsible for the welfare of a child or any alleged or actual perpetrator in a report made to the department or a county agency under this chapter."<sup>6</sup> Furthermore, information contained in case records shall be released upon request to parents and legal guardians as well as to children's and parents' attorneys.<sup>7</sup> We successfully argued that Plaintiff, as the Administrator of Grace's Estate, was clearly entitled to Grace's records.

Another obstacle encountered was obtaining law enforcement's investigative file related to Grace's murder. The impediment was Pennsylvania's Criminal History Record Information Act,<sup>8</sup> ("CHRIA"), which generally prohibits disclosure of criminal intelligence, investigation, and treatment information to litigants in civil actions. The prohibition of obtaining these documents in litigation can have profound effects, including foreclosing plaintiffs from using evidence that law enforcement agencies are in a unique position to collect based on their power to obtain search warrants. In other words, CHRIA can effectively preclude a party's ability to prosecute its case. As a work around, to receive all of the investigative materials related to Grace's murder, we subpoenaed the files from the criminal defense attorneys who are not able to assert CHRIA in response to a subpoena. Because of this, we were able to obtain the complete investigative file of Grace's murder, which contained critical information to the case.

Finally, because of the egregious conduct by defendants, we sought

punitive damages at the outset of this litigation. After defendants' preliminary objections to punitive damages were overruled, one defendant attempted a second bite at the apple by filing a motion for judgment on the pleadings, hoping to have allegations of its recklessness and gross negligence stricken because allegations related to sexual abuse of Grace were time barred by the statute of limitations. Specifically, the defendant argued that the Minority Tolling Statute<sup>9</sup> did not apply to a deceased minor plaintiff. In response, we argued that the minority tolling statute addresses situations in which a minor has no parent or guardian to bring suit on their behalf, or whose parent or guardian may, for any number of perfectly valid reasons, be unwilling or unable to do so. In our case, the Minority Tolling Statute permitted us to move forward with our claims because Grace had no guardian to bring suit on her behalf during her life since the very people abusing her were the only ones with standing to sue on her behalf. The Court agreed and denied defendant's motion.

Because cases involving adoption and foster children entail many Pennsylvania statutes and regulations, it is imperative for attorneys to be aware of the difficulties that each presents. The issues described above were only a few, but critical, obstacles that we encountered in this case. Fortunately, we were able to overcome the arguments made by the defendants and deliver an outstanding result for our client.

<sup>1</sup> In April 2021, Saltz Mongeluzzi &

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**Litigating Adoption and Foster Care Abuse Cases**

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Bendesky PC attorneys Robert Mongeluzzi, Larry Bendesky, Adam Pantano and Scott Fellmeth secured an \$8,900,000 settlement on behalf of the Estate of Grace Packer against three (3) private entities that provided foster, adoption, and behavioral health services to Grace.

<sup>2</sup> 23 Pa. C.S.A. §2901 *et seq.*

<sup>3</sup> <https://www.pagov-pair.org>.

<sup>4</sup> 23 Pa. C.S.A. §6301 *et seq.*

<sup>5</sup> 23 Pa. C.S.A. §6340(b).

<sup>6</sup> 23 Pa. C.S.A. §6303.

<sup>7</sup> 55 Pa. C.S.A. §3130.44(d).

<sup>8</sup> 18 Pa. C.S.A. §9101 *et. seq.*

<sup>9</sup> 42 Pa. C.S.A. §5533.

**Editor’s Note:** Adam Pantano, a Partner at Saltz Mongeluzzi & Bendesky, P.C., handles a wide range of complex civil litigation involving motor vehicle and trucking accidents, construction accidents,

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**The William Wilberforce Trafficking Victims Protection Reauthorization Act Of 2008**

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Further, plaintiffs’ attorneys -- especially through the use of expert testimony -- are establishing the existence of a reasonable duty of care in the hospitality industry, so that these businesses will understand that they owe a duty to know their customers and to keep apprised of the activities on their property. These notorious businesses now face a serious risk of financial calamity for remaining willfully blind as to the reasons

why their properties have attained infamous reputations and steady streams of customers who should reasonably set off alarm bells.

<sup>1</sup> W. Page Keeton et al., *Prosser and Keeton on The Law of Torts 2*, at 7 (5th ed. 1984).

<sup>2</sup> 18 U.S.C.S §1595.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Tessa Zavislan, *Inhospitable: Third Party Liability for Sex*

*Trafficking in the Hospitality Sector*, 71 Am. U. L. Rev. F. 137, 149-150 (2022).

<sup>6</sup> *Id.* at 152.

<sup>7</sup> 455 F. Supp. 3d 171 (E.D. Pa. 2020).

<sup>8</sup> *Id.* at 181-194.

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**The Post-2019 Landscape**

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cause of action occurs, the individual shall have until attaining 30 years of age to commence an action for damages.”<sup>17</sup> These new limitations periods apply to claims against a local government tortfeasor, and also to any private tortfeasor. Act 87 has also exempted child-victims of sexual abuse from notice requirements prerequisite to any action against a local government.<sup>18</sup>

Act 87 expressly has made the extended statute of limitations applicable “retroactively to civil

actions where the limitations period has not expired” prior to the Act’s effective date of November 26, 2019.<sup>19</sup> It is important to note that Act 87 does not revive any action that has been barred by the existing statute of limitations as of November 26, 2019.<sup>20</sup>

Act 87 amendments that waive governmental immunity and eliminate the limitation on damages also apply prospectively and retroactively.<sup>21</sup> A child-victim of sexual abuse may bring a claim against local government for full

compensation, whether that claim arose before or after November 26, 2019.<sup>22</sup> As exceptions to the general rule of retroactive application, Act 87 does not revive any claim on which the statute of limitations expired or any claim that has been resolved either nonjudicially or by final judgment (and not subject to appeal) on the effective date of the statute.<sup>23</sup>

In all, these amendments bring salutary changes to a legal landscape where child-victims of

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## The Post-2019 Landscape

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sexual abuse had limited access to courts and civil compensation. They have the potential to put justified pressure on local government, especially schools, to ensure that the places where children spend much of their time — schools, are increasingly a safe place to be and learn.

<sup>1</sup> Act 87 of Nov. 26, 2019, P.L. 641.

<sup>2</sup> 42 Pa. C.S. §8541.

<sup>3</sup> 42 Pa. C.S. §8542(a).

<sup>4</sup> 42 Pa. C.S. §8542(b)(1)-(8).

<sup>5</sup> 42 Pa. C.S. §8542(b)(9).

<sup>6</sup> *Id.*

<sup>7</sup> 42 Pa. C.S. §5551(7).

<sup>8</sup> *N.N. v. The School District of Philadelphia*, November Term 2021, No. 1055 (Phila. Cnty.

March 14, 2021).

<sup>9</sup> *Glomb by Salopek v. Glomb*, 530 A.2d 1362 (Pa. Super 1987).

<sup>10</sup> 42 Pa. C.S. §8542(b)(9) (“acts by a local agency or any of its employees may result in the imposition of liability on a local agency”); *Scampono v. Highland Park Care Center, LLC*, 57 A.3d 582 (Pa. 2012).

<sup>11</sup> 42 Pa. C.S. §8553(e).

<sup>12</sup> 42 Pa. C.S. §8553(a).

<sup>13</sup> 42 Pa.C.S. § 8553(b).

<sup>14</sup> *Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096 (Pa. 2014).

<sup>15</sup> *Rice v. Diocese of Altoona-Johnstown*, 255 A.3d 237 (Pa. 2021).

<sup>16</sup> 42 Pa.C.S. § 5533(b)(2)(i).

<sup>17</sup> 42 Pa.C.S. § 5533(b)(2)(i.1).

<sup>18</sup> 42 Pa.C.S. § 5522(e).

<sup>19</sup> Act 87 of Nov. 26, 2019, P.L. 641, § 10(2).

<sup>20</sup> Act 87 of Nov. 26, 2019, P.L. 641, § 10(1).

<sup>21</sup> Act 87 of Nov. 26, 2019, P.L. 641, § 10(3).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

**Editor’s Note:** *Michael D. Shaffer, Partner at Shaffer & Gaier, has dedicated his practice to representing individuals who have suffered severe vehicle accidents; traumatic brain injuries; severe burns; paralysis; and other types of catastrophic and career-ending injuries. You may reach Mr. Shaffer at: mshaffer@shaffergaier.com.*

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Relevant here, the sexual abuse exception provides for liability in cases of “[c]onduct which constitutes an offense enumerated under section 5551(7) . . . if the injuries to the plaintiff were caused by actions or omissions of the local agency which constitute negligence.” Section 5551(7), in turn, lays out various criminal offenses encompassing sexual abuse of minors.

In *K.W.*, the defendants’ preliminary objections focused on the statute’s reference to the “acts of a local agency or its employees,” reasoning that, because the “act” of sexually assaulting *K.W.* was allegedly perpetrated by another student, they were immune.

Plaintiff responded that liability is occasioned by the agency’s “actions or omissions” that give rise to the sexual offenses, not the

sexual offenses themselves. Thus, if the agency’s employees were negligent and that negligence caused abuse to occur, then the exception applies and immunity is waived, regardless of the assailant’s relationship to the agency. Additionally, the statute specifically excepts an employee’s criminal conduct from its definition of “negligent acts.” (This does not mean an agency cannot be liable for an employee’s sexual misconduct; it is just not strictly liable and must have acted negligently.)

Plaintiff also pointed out that Act 87’s legislative history calls for “absolute parity” in the treatment of child sex abuse claims as between public and private defendants. Moreover, in *Doe v. Harrisburg Area School District*, a federal judge in the Middle District of Pennsylvania found the

sexual abuse exception to apply on very similar facts.

After the trial court overruled the preliminary objections, the defendants sought leave with the trial court to file an interlocutory appeal.

In denying the application for appeal, Philadelphia Common Pleas Judge Vincent L. Johnson wrote what is believed the first Pennsylvania judge’s opinion on the sexual abuse exception. In it, Judge Johnson called the defendants’ argument seeking to limit claims to those where agency’s employees committed the sexual abuse “extremely problematic.”

**Editor’s Note:** *Benjamin Present is an attorney at Kline & Specter, P.C. where he represents catastrophically injured individuals. You may contact Mr. Present at: benjamin.present@klinespecter.com.*



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