



Sexual torts and vicarious liability: Expanding *Mary M.* into the private sector

Asserting vicarious liability against private employers for the sexual misconduct of their employees with police-like authority

By Michael Hale

In 1991, the California Supreme Court decided *Mary M. v. City of Los Angeles*(1991) 54 Cal.3d 202, 209, a landmark decision in employment law which found the City of Los Angeles vicariously liable for the sexual misconduct of an LAPD officer who sexually assaulted a citizen while on-duty. The Court held that because police officers were afforded the unique authority to detain citizens and touch them without consent, an abuse of that authority was foreseeable and the municipality should be held vicariously liable for any subsequent damage caused by its employee.

This holding carved out a very narrow exception to the general rule that an employer cannot be held vicariously liable for the sexual misconduct of an employee against a non-employee because such conduct was, by definition, outside the scope of employment. (*Id.* at 202). An amusing and somewhat disingenuous oversimplification of this rule that one often hears is that "no one is ever hired to commit sexual torts against others." But *Mary M.* correctly found that absolute power vested in an employee over another non-employee is foreseeably corruptible, and the employer should be held liable for harm caused as a cost of doing business.

What this article intends to do is show how the logic which gave rise to *Mary M.* can be used to assert vicarious liability against a private employer whose employee abuses its police-like authority by committing acts of sexual misconduct against a non-employee.

For more than two decades, however, nearly every attempt at expanding upon *Mary M.* in the public employment arena has been met with opposition by the courts which have gone out of their way to keep its holding from being used beyond the specific facts upon which it was decided. In 1995, California Supreme Court Chief Justice Lucas joined a concurring opinion which went so far as to describe the *Mary M.* decision as "aberrant," "wrongly decided" and one which "should be overruled." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1020.) So expansion of *Mary M.* in any area of law will be an uphill battle,

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but one well worth fighting. Despite this negative treatment and misconceptions to the contrary, *Mary M.* is still good law and the analysis contained therein can be a valuable tool outside of the specific government law context in which it arose, particularly when used to hold private employers accountable for the sexual intentional torts of their employees who have police-like powers.

General background: *Mary M.*'s holding

In analyzing whether the City of Los Angeles was vicariously liable for the sexual misconduct of an employee, the California Supreme Court in *Mary M*. drew upon well-established law from the private sector and asked whether the employee's conduct was "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209.) It also asked whether the risk was one that may "fairly be regarded as typical of or broadly incidental to the enterprise." (emphasis added) (*Ibid.*) Likewise, other courts have looked to whether the tort was "engendered by" the employment and had a causal nexus to it. (*Lisa M. v. Henry Mayo Newhall Mem'l Hosp.* (1995) 12 Cal.4th 291, 300 *citing Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960 *and citing Rodgers v. Kemper Const. Co.* (1975) 50 Cal.App.3d 608, 615.)

Alternately phrased, the determination of vicarious liability in any context is two-fold: first, one must consider the foreseeability of the harm, and second, one needs to ask whether equity or fairness would dictate that liability should be passed to the employer. When considering the foreseeability of the harm to plaintiff, the California Supreme Court focused on the nature of the police officer's authority which permits them to detain citizens and touch them without consent. Based on the unique nature of this authority in our society, the court determined it was foreseeable police officers would abuse it for personal gain. (*Mary M., supra,* 218-220.)

The court also found that because the vested authority of police officers is wholly necessary for a functioning society it would not be unfair to impose upon the governing body costs of business losses from torts which arose from officer misconduct. (*Ibid.*) Moreover, equity, or public policy, favored a finding of vicarious liability in order to (1) prevent recurrence of the tortious conduct, (2) give greater assurance of compensation for the victim, and (3) ensure the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. (*Id.* at 209.)

Authority for expanding *Mary M.*

It is commonly argued *Mary M*. stands for the proposition that *only* police officers can be found to have the unique authority necessary to support a finding of vicarious liability for sexual torts. To be sure, in a footnote the Court states that its conclusion "flows from the unique authority vested in police officers" (*Id.* at 218, fn 11). But a careful reading of this comment underscores the crux of the holding, namely that the California Supreme Court finds the authority itself to be unique, not that police officers alone have this authority. In fact, the footnote continues to explain that the court envisioned that employees who are not police officers and who commit sexual assaults "*may* be acting outside the scope of their employment." (emphasis added) (*Id*. at 218, fn 11.) The court provided further guidance: "The proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (*Mary M.*, *supra*, 54 Cal.3d at 219, *citing Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 970.) That is to say, non-police officer employees with like authority may also be acting within the scope of employment. The court appears to leave open the possibility that non-police officer employees with police-like authority may expose their employer to vicarious liability for abuse of that authority.

Though this may seem tenuous at first glance, it is not a far leap from police officer abuse of authority as a basis for vicarious liability to abuse of other, similar types of authority. Granted, the applications are narrow considering the short list of employees in the private sector with the power to detain another or touch them without consent, but it is easy to imagine, for example, a private security guard having such authority. This would be particularly true if that security guard was licensed by the state or had a specific job description which mandated he physically detain suspects. Again, the question is not whether the employee's sexual misconduct was authorized by the employer – it is hard to imagine an employer that would – but whether those acts occurred in the course of a series of acts which themselves were authorized by the employer. Here, if an employee has as a part of his retention, the power to detain and touch other non-employees without their consent, the employer which stands to gain from that authority should be liable when it is abused.

Using the rationale behind the holding in *Mary M.* to find private employers liable for the sexual misconduct of its employees is not entirely new. Expansion of *Mary M*. into the private sector is the next logical step from the holding in *Flores v. Autozone* (2008) 74 Cal.Rptr.3d 178. This California Court of Appeal decision determined that private sector employers can be found vicariously liability for the non-sexual intentional torts of their employees. In that case, an employee of defendant Autozone struck plaintiff with a metal pipe as a result of an altercation that arose when defendant employee was berated by plaintiff customer while on the job. The Fourth District Court of Appeals used the same analysis as *Mary M.* and concluded that it was foreseeable that

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plaintiff's damages could arise from the employment and, furthermore, equity dictated vicarious liability be imposed on the employer as a result.

Stretching *Flores* to include sexual intentional torts, particularly when there is police-like authority, would not be much of a stretch at all. Although *Flores* does not specifically focus on authority and deals exclusively with non-sexual intentional torts, it provides a logical launching pad from which to argue that private employers should likewise be vicariously liable for the sexual intentional torts of their employees. When this is coupled with *Mary M.*'s authority rationale and an analogous fact pattern, it becomes clear that the argument for finding private employers vicariously liable for the sexual intentional torts of their employees is viable.

Common arguments against expansion

Given that *Mary M.* has narrow application in the public sector and therefore has a narrow application in the private sector, and because the expansion of vicarious liability creates a certain amount of trepidation for defendant employers, it should be expected that defendants will work hard to keep that cause of action out the complaint.

Whether facing a demurrer or summary judgment/adjudication motion, plaintiff should be clear about separating non-sexual intentional torts and sexual intentional torts. Defendants may deliberately or inadvertently combine the two which will confuse the issues and the court, resulting in the dismissal of causes of action that need not have been dismissed. In private employment law, *Flores* clearly permits vicarious liability for non-sexual intentional torts assuming the act was foreseeable and it is fair for the employer to bear the resultant cost. (*Ibid.*) If defendants try to throw out vicarious liability for sexual intentional torts as well as non-sexual intentional torts by arguing that *all* intentional torts are barred from vicarious liability, they would have succeeded in eliminating causes of action from plaintiff's complaint that are clearly permissible. The idea is to expand *Mary M.* into the private sector by analogizing its specific authority-based rationale, not provide ammunition for the defense that can be used to eradicate otherwise permissible causes of action.

At the heart of this discussion is a scope of employment issue. As such, defendants will undoubtedly couch it in terms that take away from the trier of fact's decision about whether the employee was within the scope of employment. This is a tantalizingly compelling argument that provides an easy-out for today's budget-strapped and case-logged courts. But according to the California Supreme Court, "(o)rdinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences are possible.'" (*Lisa M.*, *supra*, 12 Cal.4th, 291 at 299, *citing Mary M.*, *supra*, 54 Cal.3d at 214.) More precisely, "Where the facts of the case make it arguable whether the employee has acted within the scope of his employment, then the scope of employment issue is one properly decided by the trier of fact." (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 138, see also Rest.2d Agency, §228, com. d. p. 505.) The key thing to remember here is that the general rule favors plaintiff. In order for defendants to get out from under the presumption that a scope of employment issue is to be determined by the trier of fact, it must carry the burden of showing undisputed facts from which no conflicting inferences may be drawn.

The practical implications of this are fairly straight-forward, and if the complaint is properly drafted, it can force defendants into a catch-22 should they choose to file a demurrer. For example, let us revisit the earlier hypothetical in which a patron was detained by a private security guard with requisite authority and then falsely imprisoned and sexually assaulted by that guard. If defendant employer files a demurrer, it admits the pleaded facts, i.e. that defendant employee had the authority to detain and touch plaintiff without consent. Based on *Mary M.*, defendant cannot then argue that its employee was not in the scope of employment when it committed sexual tort because that misconduct was a direct result of the defendant employee's authority over plaintiff – just as was held in *Mary M.* If the sexual assault allegedly arose from that authority, the issue of scope of employment must be determined by the trier of fact and the demurrer should be overruled. In a motion for summary judgment/adjudication, the scope of employment issue can be similarly framed by plaintiff depending on how the undisputed material facts are drafted.

An obvious argument one can expect to be made is that applying a case decided against a public entity to a private employer is misplaced and based on the litany of subsequent appellate court cases which refused to do so in the 20 years since *Mary M.* was decided, expansion is not favored. As argued above, the California Supreme Court left the door open on this point. Even if they did not, the policy against expansion in those subsequent cases is limited to the public sector, which makes sense given the current economic state of most California municipalities. Furthermore, this policy argument should not necessarily apply to private employers, particularly when weighed against the obvious benefits that expansion would provide plaintiffs, such as prevention of recurrence and just compensation.

Likewise, as referenced earlier, one can also expect defendants to argue that *Mary M.* only pertains to police officers, and in support of their argument that it cannot be expanded to include private security guard companies, defendants will cite *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125. In that case a private security guard pulled over a motorist on a public roadway and detained her on suspicion of driving under the influence. His job description, however,

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explicitly stated that he was only to interact with clients, of which plaintiff was not one, and he was only permitted to "observe and report" unless there was a physical altercation that could escalate to a life threatening situation. (*Id.* at 328.) Moreover, the defendant employee was not permitted to pull motorists over or otherwise do anything that would lead others to believe he was a police officer, such as use a spotlight. (*Ibid.*) The Appellate Court held that based on the facts presented, as matter of law a private security guard company could not be held vicariously liable for sexual assault committed by the on-duty employee. (*Id.* at 327.) This makes sense – the security guard company had specifically stripped its employees of the authority that was present in *Mary M.*, therefore the court came to the correct conclusion in that case. In other words, *Mary M.*'s holding was inapplicable because the employee lacked the requisite authority for imposition of vicarious liability.

Strategic benefits

It may seem like more trouble than it's worth to embark upon this intellectual journey on behalf of an injured plaintiff, particularly because in addition to other more traditional allegations, alleging vicarious liability for sexual misconduct against a private employer is likely to produce a demurrer or motion for summary adjudication/judgment. But there are important strategic and procedural benefits to alleging vicarious liability for sexual misconduct.

First, and most importantly, it will allow the full extent of plaintiff's damages to be heard by the jury should the allegation survive demurrer and summary judgment. Imagine a situation where plaintiff is both falsely imprisoned and sexually assaulted by a private security guard. To the extent possible, defense counsel may try to parse the damages and delineate that which was caused by the sexual tort from that which was caused by the non-sexual tort or negligence. Keeping the sexual intentional tort as a cause of action will permit plaintiff's entire story to be told.

Second, if plaintiff has both negligent and intentional tort causes of action, the mere threat of vicarious liability for the intentional tort allegations could, if dismissed, prompt defendant to withdraw a demurrer or motion for summary adjudication. In other words, it could be used as bait for getting your case at issue or quickly moving into alternative dispute resolution.

Conclusion

Mary M. is despised by some judges and by the defense bar, but it can be a valuable tool in fighting for plaintiffs. As a body of law, it is ultimately well thought out and properly decided. Many point to *Mary M.*'s narrow holding as problematic and cite the refusal of subsequent courts to permit expansion of it in the public employment sector as evidence that it should not anywhere be expanded. Nevertheless, when carefully pled and applied to private employers in order to hold them vicariously liable for the sexual misconduct of employees' police-like authority, it can be used to benefit plaintiffs by holding employers accountable for abuses of authority from which they derive a direct benefit. Although it can be difficult and taxing to attempt to educate courts and defendants on what is right, the logic is simple and the results can be profound.


Hale

Michael E. Hale of Luizzi, Murphy & Solomon, LLP*, is a fifth generation San Franciscan, third generation San Francisco attorney, third generation alumni of the University of San Francisco School of Law and a graduate with Honors from the University of California in Santa Barbara. Hale was admitted to the California State Bar in 2006 and is licensed to practice in all California State Courts as well as the United States District Court of Northern California. He has successfully negotiated numerous settlements for his clients in both personal injury and predatory lending actions and he has successfully negotiated commercial leases for clients as well.*

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