

## Could the USOC and USA Gymnastics Pay the Price in Sex Crimes Case?

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Mahatma Gandhi once said, “silence becomes cowardice when occasion demands speaking out the whole truth and acting accordingly.”<sup>1</sup> The cultural movement #MeToo, has decided that the occasion is now, and that the whole truth be spoken out by victims of sex crimes, and to act accordingly by raising awareness to the cause so that no one else must say, “me too.” The #MeToo movement all started with big names like Bill Cosby and Harvey Weinstein being accused of sex crimes.<sup>2</sup> Unfortunately, the jurisdiction of sex crimes isn’t limited to just Hollywood. In recent events, countless victims have emerged, including countless years of sexual abuse in sports; specifically, in the Olympics and gymnastics. There have been at least 140 female victims of sex crimes related to the USA Gymnastics program that have finally, publicly, spoken out. These women are now speaking out against USA Gymnastics doctor, Lawrence Nassar. Nassar has pleaded guilty to multiple counts of sex crimes, and will most likely never live another day as a free man. But where does that leave USA Gymnastics and the United States Olympic Committee? Are they civilly liable for the damage that their doctor did to women athletes?

With the extensive media coverage of Dr. Nassar’s criminal trial, the public became privy to the “treatments” Dr. Nassar administered to female athletes. According to various new reports, such as *The New York Times*, these crimes were being committed by Dr. Lawrence Nassar, the doctor for USA

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<sup>1</sup> Mahatma Gandhi, *The Official Mahatma Gandhi eArchive* Mahatma.org.in (2018), <http://www.mahatma.org.in/mahatma/books/showbook.jsp?id=108&link=bg&book=bg0031&lang=en&cat=books> (last visited Feb 14, 2018).

<sup>2</sup> Courtney Connley, *#MeToo founder Tarana Burke has big plans for the movement in 2018*, CNBC, Jan. 19, 2018, <https://www.cnbc.com/2018/01/19/metoo-founder-tarana-burke-has-big-plans-for-the-movement-in-2018.html>, (last visited Feb. 12, 2018).

Gymnastics for USA Gymnastics and the United States Olympic Committee.<sup>3</sup> The victim impact statements were particularly persuasive. Judge Rosemarie Aquilina permitted 156 women athletes to share the harmful impact these treatments had on their careers and their lives. Decorated Olympian, Aly Raisman's testimony shed light, not only on Dr. Nassar's abuse, but also on the total disregard the USOC and USA Gymnastics had when they were alerted to Nassar's "treatments." Raisman's statement included the following,

- "Your abuse started 30 years ago, but that's just the first reported incident we know of. If over these many years just one adult listened and had the courage and character to act, this tragedy could have been avoided. So many others and I would have never ever met you, Larry. You should have been locked up a long, long time ago...Over those thirty years when survivors came forward, adult after adult - many in positions of authority - protected you, telling each survivor it was okay that you weren't abusing them. In fact, many adults had you convince the survivors that they were being dramatic or had been mistaken."<sup>4</sup>

Another Olympian, Jordyn Wieber, went as far as to say, "Larry Nassar is accountable. USA Gymnastics is accountable. The US Olympic Committee is accountable."<sup>5</sup>

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<sup>3</sup> Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate*: The Judge, *Nytimes.com* (2018), <https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html> (last visited Feb 14, 2018).

<sup>4</sup> Mahita Ganjanan, *It's Your Turn to Listen to Me, Aly Raisman's Powerful Statement at Larry Nassar's Sentencing Time* (2018), <http://time.com/5110455/aly-raisman-larry-nassar-testimony-trial/> (last visited Jan 26, 2018).

<sup>5</sup> Bryan Graham, *How do you sleep at night? Olympic duo Wieber and Raisman confront Larry Nassar in court*, *The Guardian* (Jan. 19, 2018), <https://www.theguardian.com/sport/2018/jan/19/olympic-champions-jordyn-wieber-aly-raisman-larry-nassar-court> (last visited Jan 26, 2018).

Both, Raisman and Weiber may be right to hold USOC and USA Gymnastics liable for the injuries they, and so many others, have faced. Whether the negligent retention of an employee, such as Dr. Nassar indicates liability for the organization is the primary issue. Negligent retention falls under torts. Torts, generally speaking may be defined as, “an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers.<sup>6</sup>” There are three categories of torts; intentional torts, negligent torts, and strict liability torts.

It could be assumed that if Dr. Nassar were sued civilly, he would be found liable for an intentional tort because he “intentionally put another person in reasonable apprehension of an imminent harmful or offensive contact.<sup>7</sup>” Intent to cause physical injury is not required to be present and physical injury does not need to result. His employers, USOC and USA Gymnastics, might also be liable for the tort, but unlike Dr. Nassar, they would be liable for negligence.

Negligent torts are “a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions when there is some duty to act.<sup>8</sup>” Tort laws are defined by individual state statutes. In this circumstance, the negligent tort, if proven, would be the negligent retention of Dr. Nassar. In order to prove negligence, a prima facie case must be made. The criteria for a negligence prima facie case are: “the existence of a legal duty that the defendant owed to the plaintiff, defendant's breach of that

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<sup>6</sup> *Tort*, LII / Legal Information Institute (2018), <https://www.law.cornell.edu/wex/tort> (last visited Jan 26, 2018).

<sup>7</sup> *Id.*

<sup>8</sup> *Negligence*, LII / Legal Information Institute (2018), <https://www.law.cornell.edu/wex/negligence>, (last visited Jan 26, 2018).

duty, plaintiff's sufferance of an injury, proof that defendant's breach caused the injury (typically defined through proximate cause)."<sup>9</sup>

Going through these criteria, it would seem that USOC and USA Gymnastics are liable. There is a legal duty to act as stated in the Safe Sport Policy that the defendant (USCO and USA Gymnastics) owed to the plaintiff(s) (the gymnasts). The policy clearly states that all individuals that participate in programs USA Gymnastics, "shall refrain from engaging in or willfully tolerating any of the forms of Misconduct and Prohibited Conduct."<sup>10</sup> The participating individuals required to comply with the Safe Sport Policies are, but are not limited to, the athletes, instructors, medical staff, and coaches.<sup>11</sup>

The duty to act must also meet the following criteria, "the defendant engaged in the creation of the risk which resulted in the plaintiff's harm, the defendant volunteered to protect the plaintiff from harm (voluntary undertaking), the defendant knows/should know that his conduct will harm the plaintiff (knowledge), and the establishment of business/voluntary relationships"<sup>12</sup>." USOC and USA Gymnastics created risk by continuing to employ Nassar despite abuse allegations, which eventually caused harm to the gymnasts. As stated in the Safe Sport policy USOC and USA Gymnastics assumed the responsibility of protecting the gymnasts from any harm they may suffer from misconduct. It is reasonable to expect that allegations of sexual abuse should be taken very seriously. When USOC and USA Gymnastics decided to ignore these allegations for years, despite evidence of what was occurring at the training facilities and hotel rooms, it was only to be expected that great harm would come to the gymnasts. There is an established business relationship as

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<sup>9</sup> Id.

<sup>10</sup> USA Gymnastics Safe Sport Policy, (2018)

[https://usagym.org/PDFs/About%20USA%20Gymnastics/safesportpolicy\\_062617.pdf](https://usagym.org/PDFs/About%20USA%20Gymnastics/safesportpolicy_062617.pdf) (last visited Feb. 12, 2018).

<sup>11</sup> Id.

<sup>12</sup> Id.

well; USOC and USA Gymnastics are non-profit organizations and their clients are the gymnasts that train with coaches and use the facilities of USA Gymnastics.

The breach of that duty to protect the gymnasts may be found in the lack of corrective or protective actions that USOC and USA Gymnastics should have taken when alerted to Nassar's abuse and misconduct. In 2000, a gymnast reported her concerns of Nassar's practices and her concerns were dismissed<sup>13</sup>. An investigation of the allegations of sexual misconduct and abuse did not occur until 2014, and then again in 2016.<sup>14</sup>

The injuries are different for each individual. There is no doubt that injuries have occurred, as all of the victims have stated that they have suffered psychologically and emotionally. The injuries and harm inflicted upon the athletes, such as McKayla Maroney (the athlete has been described as being plunged into an emotional abyss), appear to include emotional distress.<sup>15</sup> Emotional distress is "some kind of conduct that is so terrible that it causes severe emotional trauma in the victim."<sup>16</sup> In sexual misconduct claims, emotional distress can be the major, or even only, harmful result.

The proof that USOC and USA Gymnastics lack of action and/or care in the matter, comes from Raisman's statement; "If over these many years just one

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<sup>13</sup> Michael Campbell, *Dr. Larry Nassar: A History of preying on people*, Lansing State Journal, <http://interactives.indystar.com/news/standing/OutOfBalance/NassarTimeline/LSJ.html>, (last visited Feb. 12, 2018).

<sup>14</sup> *Id.*

<sup>15</sup> Tracy Connor, *Abuse plunged McKayla Maroney into 'emotional abyss,' mom says*, NBC News (2018), <https://www.nbcnews.com/news/us-news/gymnast-mckayla-maroney-plunged-emotional-abyss-abuse-n827181>, (last visited Feb 14, 2018).

<sup>16</sup> *Intentional Infliction of Emotional Distress*, Findlaw (2018), <http://injury.findlaw.com/torts-and-personal-injuries/intentional-infliction-of-emotional-distress.html> (last visited Jan 26, 2018).

adult listened and had the courage and character to act this tragedy could have been avoided. I and so many others would have never ever met you Larry.”<sup>17</sup> Had the USOC and USA Gymnastics taken the sexual misconduct allegations seriously, and acted, Nassar would not have been able to “treat” any more athletes and cause them the trauma that they will experience for the rest of their lives.

Nassar’s criminal trial took place in Michigan. The training facilities for USA Gymnastics, where many of Nassar’s “treatments” took place, are in Michigan. If a civil action suit were to be filed, then it could be assumed that the civil action will be filed in the state of Michigan. Under Michigan law, Revised Judicature Act of 1961, Sec. 2956,

- “An action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.”<sup>18</sup>

USA Gymnastics, the employer, is vicariously liable for the actions of Dr. Nassar, the employee. Under Respondent Superior, “an employer or principal is legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency.”<sup>19</sup> USA Gymnastics hired Nassar as a doctor. The scope of employment for a physician comes directly from the Hippocratic Oath that every doctor takes. One of the first responsibilities outlined in the classical version of the oath is, “...I will do no

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<sup>17</sup> Mahita Ganjanan, *It's Your Turn to Listen to Me, Aly Raisman's Powerful Statement at Larry Nassar's Sentencing Time* (2018), <http://time.com/5110455/aly-raisman-larry-nassar-testimony-trial/> (last visited Jan 26, 2018).

<sup>18</sup> *Revised Judicature Act Of 1961*, 236 of 1961, 2956 (1996), [http://www.legislature.mi.gov/\(S\(ecsey5l1t1344k1v3jzni2x0\)\)/documents/mcl/pdf/mcl-Act-236-of-1961.pdf](http://www.legislature.mi.gov/(S(ecsey5l1t1344k1v3jzni2x0))/documents/mcl/pdf/mcl-Act-236-of-1961.pdf), (last visited Feb. 12, 2018).

<sup>19</sup> *Respondeat Superior Doctrine Law and Legal Definition*, US Legal, Inc. (2018), <https://definitions.uslegal.com/r/respondeat-superior-doctrine/> (last visited Jan 26, 2018).

harm or injustice to them.”<sup>20</sup> The oath further specifies, “into whatever homes I go, I will enter them for the benefit of the sick, avoiding any voluntary act of impropriety or corruption, including the seduction of women or men.”<sup>21</sup> There is no question that Nassar acted beyond the scope of his medical license when he engaged in sexual misconduct. Dr. Nassar also acted beyond the scope of his profession when he used his licensed medical title to cover up the misconduct and more importantly to continue it for years. However, the issue here is did Nassar performed these “treatments” purely out of self-interest, or was there intent to fulfill the requirements of certain duties, but Nassar took the procedures too far?

If a court finds that Nassar’s “treatments” occurred out of pure self-interest, USOC and USA Gymnastics may not be charged for vicarious liability. In *Sanchez by Rivera v. Montanez*<sup>22</sup>, “a child and his parents sued a community action agency, alleging that the agency was vicariously liable for an employee’s sexual molestation of the plaintiff child. The Commonwealth Court of Pennsylvania affirmed the trial court’s entry of summary judgment in the defendant agency’s favor, holding that the employee’s actions were clearly outrageous and motivated purely by personal reasons.”<sup>23</sup> However, liability may arise from keeping Nassar on the payroll, as part of negligent retention.

Then in *Gaines v. Monsanto Co.*,<sup>24</sup> “. . .the defendant harassed and made advances upon plaintiffs’ daughter and had a reputation for making advances upon female employees, all of which, plaintiffs plead defendant knew or should have known.”<sup>25</sup> The court found “an employer may be directly liable for negligent hiring or negligent retention of an employee where the employer knew or should have known of the employee’s dangerous proclivities and the

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<sup>20</sup> *Greek Medicine - The Hippocratic Oath*, Nlm.nih.gov (Sept. 16, 2002), [https://www.nlm.nih.gov/hmd/greek/greek\\_oath.html](https://www.nlm.nih.gov/hmd/greek/greek_oath.html) (last visited Jan 26, 2018).

<sup>21</sup> *Id.*

<sup>22</sup> *Sanchez by Rivera v. Montanez*, 165 Pa.Cmwlth. 381, 645 A.2d 383 (1994).

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

<sup>24</sup> *Gaines v. Monsanto Co.*, 655 S.W.2d 568, 570 (1983)

<sup>25</sup> *Id.*

employer's negligence was the proximate cause of the plaintiff's injury. Negligent hiring or retention liability is independent of Respondeat superior liability for negligent acts of an employee acting within the scope of his employment.<sup>26</sup>

Given the outcome of Nassar's criminal trial, the strength of the victim impact statement and the elimination of Larry Nassar's letter to the court, it would seem that if a civil suit is to be brought by the gymnasts against the USOC and USA Gymnastics, the presiding judge will find in favor of the gymnasts, on the tort of negligent hiring and retention. Unfortunately, the state of Michigan does not permit punitive damages, but allows for exemplary damages<sup>27</sup>. The possible award of exemplary damages does not send a message to others. The exemplary damages are designed to just compensate the plaintiffs, and not to punish the defendant. Punitive damages are used to not only compensate the plaintiff(s), but to punish the defendant and to send a message to others engaging in harmful misconduct.

The acts of Dr. Nassar were heinous in nature. The total disregard demonstrated by the USOC and USA Gymnastics was reprehensible. To prevent atrocities like this from happening again, and to protect other organizations from liability, organizations must be more proactive. Employers can mitigate liability by refraining from negligent hiring. They should always perform extensive background checks on prospective hires and identify whether or not the prospective hire will present imminent danger to other employees and consumers. Employers should put forth a policy protecting both consumers and employees and enforce it to the fullest extent. Employers, (this is where USOC and USA Gymnastics dropped the ball) should always listen to allegations of sexual misconduct and demonstrate care and concern for the safety of the alleged victims by thoroughly investigating the matter. Also, employers should act and terminate employees that have caused harm, to mitigate the risk of negligent retention.

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<sup>26</sup> Id.

<sup>27</sup> *Exemplary Damages in Michigan*, Michigan Litigation Law (2018), <https://www.michiganlitigationlaw.com/exemplary-damages-in-michigan/> (last visited Jan 26, 2018).



Congress should expand *The Clery Act* to organizations outside of academia. *The Clery Act* “requires colleges and universities participating in federal financial aid programs to maintain and disclose campus crime statistics and security information.”<sup>28</sup> If *The Clery Act* were expanded, perhaps this would sway consumers and employees away from organizations with bad Clery Reports, which are comprised of disclosed crime statistics, and provide an incentive to increase security measures to avoid losing prospective and current consumers and employees.

A lesson to all is to act responsibly and ethically when issues of any type of misconduct occur, in order to prevent harm to others and one’s self. Using a simple decision making model can alter the outcomes of a situation for the better. If one can identify relevant facts of a situation, any ethical issues that arise from the situation, who the stakeholders are, and what the alternatives are there to choose from, atrocities such as this can be avoided.<sup>29</sup> Had an adult, whether it be a parent or official, used this decision making model, they would have taken into account the testimonies of abuse, identified that there was an ethical issue at hand (in the form of sexual misconduct), identified the people affected by the misconduct (i.e. the gymnasts and their families, the organizations involved, etc.), and would be able to identify that Nassar’s termination was one, and probably the best alternative. The ethical decision made using this model would have resulted in the termination of Dr. Nassar, thus preventing years and years of sexual misconduct.

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<sup>28</sup> *Federal Student Aid* (2018), <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports> (last visited Feb 1, 2018).

<sup>29</sup> Laura P. Hartman, Joseph R. DesJardins & Chris MacDonald, *Business Ethics: Decision Making for Personal Integrity and Social Responsibility*, 4<sup>th</sup> Ed., 49 (2017), eTextbook.