

Personal Injury

Missed opportunities when derivative claims for sexual abuse aren't considered

By **Anna Matas**



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(October 10, 2017, 3:35 PM EDT) -- Both physical and psychological injuries affect survivors of sexual abuse and sexual assault directly. But a survivor may not be the only person who suffers and is harmed as a result of sexual misconduct.

In many cases, the impact of sexual misconduct is felt not only by the survivor, but also by those close to him or her. At the outset of every case, personal injury lawyers must ensure that valid derivative claims of family members or others are not neglected or missed.

Over time, society has come to better recognize the many and varied harms suffered by survivors of sexual assault. In addition to the physical injuries that may — though do not always — arise from sexual abuse, survivors frequently suffer from “invisible” psychological injuries, such as depression, anxiety and post-traumatic stress disorder. In many cases, these injuries have a negative impact on a survivor’s relationships with those closest to them.

Across Canada, where one person has been injured through the fault of another, the common law permits family members to seek to recover the cost of care provided to an injured person. In civil lawsuits arising from personal injury, compensation is often sought by family members for costs incurred to provide, for example, the nursing care or physiotherapy required by an injured person.

This has not been widely applied in cases where the injuries arise from sexual assault or sexual abuse, likely because the most obvious costs arise from the care required for physical injuries. Not only are physical injuries not always present in cases of sexual abuse, these injuries — and any costs incurred as a result — may be particularly difficult to prove if the abuse happened a long time ago.

In Ontario, the common law ability to recover compensation in connection with an injury suffered by a close family member has been codified by the *Family Law Act*. Section 61 of the act permits close family members to recover for expenses incurred for the benefit of an injured party, including nursing, housekeeping and travel expenses for visiting an injured person during recovery. All of these forms of compensation are available to the family members of survivors of sexual assault.

Ontario expands, through the act, the ability of close family members to recover compensation for the harms they suffer as a result of the injuries (short of death) inflicted on a close family member. An injured person’s spouse, siblings, parents and grandparents,

children and grandchildren may claim for the "loss of guidance, care and companionship that the family member might reasonably have expected to receive in the absence of the injury."

"Guidance, care and companionship" encompasses both the emotional connections that family members share and the practical assistance that they provide to each other. It includes both functional help, such as cooking or cleaning for children or grandparents, where the cost of a replacement service can be calculated, and less visible and quantifiable aspects of relationships, such as emotional support.

A survivor of sexual misconduct may find that as a result of his or her psychological injuries arising from the assault or the abuse, he or she can no longer provide these forms of assistance and connection to those closest to them. For example, following a sexual assault, an adult woman might develop anxiety and depression, which could cause her to lose the ability to bond with (or provide discipline to) her teenage daughter. Similarly, she may lose the ability to continue in an intimate relationship with her spouse. In this scenario, both the spouse and the daughter would have valid *Family Law Act* claims for loss of guidance, care and companionship.

The loss of guidance, care and companionship suffered by close family members does not have to be permanent for an award to be made. The quantum of damages awarded to family members depends on the extent of the damage done to the relationship and the duration of the injury. For example, children in the same family are sometimes awarded different amounts based on their individual relationship to the injured parent and the impact of the damaged relationship relative to the child's stage of development.

Family Law Act claims rarely attract large awards, regardless of whether the underlying injury resulted from sexual misconduct or other forms of actionable harm. However, in the same way that society has gradually come to recognize (and courts to compensate for) psychological injuries to survivors of sexual abuse, it is important in appropriate cases for family members of those affected by sexual misconduct to make claims for the harms they have suffered as a result of the injuries inflicted on family members who have survived abuse.

While these awards cannot restore a damaged relationship, for many family members, recognition of the harm they have suffered due to the harm inflicted on a close family member is itself an important form of healing.

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