

Trend develops for higher sexual abuse non-pecuniary awards

Several recent trial decisions have awarded higher than usual non-pecuniary awards for sexual abuse, marking a possible trend toward increased compensation in this area.

In the spring of 2008, I analyzed the damages awarded in all reported sexual abuse decisions from Canada's common law jurisdictions. The decisions covered roughly 23 years of jurisprudence and involved 220 plaintiffs.

The data revealed that only 10 percent of these plaintiffs had received non-pecuniary awards of greater than \$150,000. Only two plaintiffs had been awarded non-pecuniary damages of more than \$200,000, or what amounted at the time their awards were made



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to roughly the inflation-adjusted personal injury “cap” on non-pecuniary damages.

These findings were troubling. First, our courts have repeatedly acknowledged the profound and devastating harms occasioned by sexual violence and abuse, and yet when considered globally, their awards did not seem commensurate. Second, as with defamation, the courts have clearly held that the “cap” on non-pecuniary damages does not apply to sexual

abuse claims. Yet it is only in defamation that one commonly sees general damages awards well in excess of the inflation-adjusted “cap” amount, often with aggravated damages awarded on top.

Third, the sexual abuse area is unique in routinely attracting additional aggravated damages, or an aggravated component to a non-pecuniary award, due to the inherently humiliating and degrading nature of the intentional abuse of power that invariably accompanies the misconduct.

Fourth, sexual abuse is, not surprisingly, a heavily female-dominated area. The data collected in 2008 revealed that females comprised 71 percent and males 29 percent of all

abuse plaintiffs who, based on reported decisions to that point, had received awards. Indeed, it was not until 1998 that males started to join the plaintiff ranks in appreciable numbers. Before that, there were many years in which women comprised 100 percent of plaintiffs.

Recently, however, there have been promising signs of a departure from the past trend of depressed awards. At least some of the impetus for this comes from the Nova Scotia Court of Appeal's decision in *Nova Scotia (Attorney General) v. B.M.G.*, [2007] N.S.J. No. 506. There, Justice Cromwell (as he then was) provides a cogent description of the three-fold functions to be served by non-pecuni-

ary awards in the sexual abuse area; to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's physical autonomy and dignity and to recognize through aggravated damages the humiliating and degrading nature of the wrongful acts. He also made the obvious, but often overlooked, point that when reliance is placed on prior awards, these awards must be adjusted to current dollars.

Three trial decisions highlight the emerging trend toward higher non-pecuniary awards.

In *Waters v. Bains*, [2008] B.C.J. No. 1196, Justice Morrison awarded general, including

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aggravated, damages of \$325,000. The plaintiff in this historical abuse case was found to have endured more than 10 years of horrendous abuse, starting at age eight, committed by her uncle and facilitated by her aunt, which Justice Morrison described as causing her “grievous harm.”

There were no significant intervening factors. Justice Morrison provided a well-reasoned justification, based on her findings and on precedent (adjusted to take inflation into account) for this award.

In *C.C.B. v. I.B.*, [2009] B.C.J. No. 2075, another historical abuse case, Justice Gray awarded the plaintiff \$250,000 for non-pecuniary damages. The abuse was committed against the plaintiff by her father when she was between the ages of five and nine.

Justice Gray relied on the aggravating factors that included the abuser’s relationship of trust with, and power and authority over, his victim, the threats and coercion that accompanied his abuse, the nature and frequency of the abuse and the plaintiff’s young age during the abuse.

Justice Gray was not dissuaded from awarding higher-end

non-pecuniary damages by the plaintiff’s “resiliency,” noting that harm in cases of this kind should be presumed and, in any event, is recognized as being particularly difficult to measure and predict.

While also an historical abuse claim, *Evans v. Sproule*, [2008] O.J. No. 4518 (ONSC) only involved a single occasion of sexual abuse committed by a police officer against an adult female. While the misconduct included physical restraint and a clear abuse of authority, it did not include any genital contact. Justice Chapnik nonetheless awarded non-pecuniary damages of \$150,000, with \$50,000 of this earmarked to reflect the aggravating elements of the assault.

After 25 years of jurisprudence, more victims of sexual abuse may now receive compensation at levels that reflect the particularly serious nature of the misconduct involved and the often long-term disabling injuries suffered. ■

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