

Why Are Damages in Civil Sexual Abuse Cases

Over 20 years ago, I became interested in civil sexual assault cases partly because the damages being awarded to abuse survivors by Courts were so low. Since that time, I have watched the trends in the cases decided in Courts both by judges and juries. Without doubt, I have seen a general upward trend in the amount of damages awarded to abuse survivors. However, compared to the damages given to other kinds of plaintiffs (e.g., car accident victims or plaintiffs in defamation cases) the awards are still relatively low. I have spent a lot of time thinking about this issue and came to the conclusion that the answer is multifaceted. For many reasons, civil sexual abuse cases are very different from other types of cases and present unique legal challenges, including challenges in assessing damages.

Some background context is helpful. In a trilogy of cases decided in 1978 (*Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 S.C. R. 229, *Arnold v Teno* [1978] 2 S.C. R. 287, *Thornton v School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267) the Supreme Court of Canada imposed a cap of \$100,000.00 (as of 1978) on general damages for pain and suffering. The decision was made on the basis that, as a matter of public policy, there should be a limit to the amount of compensation for pain and suffering. The Court said that:

"The sheer fact [is] that there is no objective yard stick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to wildly extravagant claims... It is in this area that awards in the United States have soared to dramatically high levels in recent years."

This means that regardless of the severity of the injury sustained, the most any Canadian plaintiff can get for pain and suffering is approximately \$350,000.00 (in 2014 dollars). This cap is considered the appropriate amount to award the most seriously injured. e.g., if a young healthy person becomes a paraplegic and has severe brain damage, they would only be entitled to the cap for pain and suffering.

In 1978, there were virtually no civil sexual assault cases being decided by the Courts. Sexual abuse survivors were not coming forward in large numbers and when they did, it was more often to press criminal charges rather than to sue civilly for compensation.

So Low?

Civil law suits for damages for sexual abuse became more common in the 1990's and beyond. Over the last 15 years or so, there have been approximately 250 civil sexual assault cases that have gone to trial in front of judges where damages were awarded. I have reviewed all of the reported decisions and formed some opinions about why the damages awarded to sexual abuse survivors are still relatively low. In my view there are 4 main causes as follows: 1) bias against psychological injuries, 2) unrealistic optimism 3) causation issues, and 4) precedent based common law system.

Bias Against Psychological Injuries

Although in law, there is no reason why psychological injuries should necessarily attract lower damages awards than physical injuries, my perception is that, particularly in sexual abuse cases, there is an inherent bias against psychological injuries. I think it is easier for judges and juries to understand the disabling nature of a physical injury that they can see, for example, a lost leg. Understanding how disabling a psychological injury can be is challenging. A plaintiff who "looks" fine may appear to "be" fine. Having spoken to hundreds of survivors over the last 20

...unrealistic optimism about the future and hope for recovery in [...] psychological injuries.

years, it is my view that a psychological injury can in fact be more disabling than a physical injury. Take for example a child who believes that there is something wrong him because he was sexually abused and who also carries the shame of believing that the abuse is his fault. That child may go on to a life of trying to numb himself with substance abuse resulting in criminal activity and have failed relationships, little or no employment and host of psychological problems. On the other hand, an otherwise healthy child who loses a leg may learn to adapt and go on to live a relatively normal life.

Unrealistic Optimism

Similarly, it seems to me that in the case of psychological injuries there is unrealistic optimism about the future and hope for recovery in the case of psychological injuries. Everyone knows that a leg

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cannot grow back. However, I think courts sometimes wrongly assume that giving money for therapy will "fix" the plaintiff and prevent future losses.

Causation

The law of causation is quite complicated. Suffice it to say that a defendant does not have to pay for what a defendant does not cause. Causation in civil sexual assault is often very complicated. because pedophiles often choose to prey on vulnerable children specifically because of their vulnerability. As well, linking later life events to the psychological injury sustained as a result of the abuse can be difficult. Defendants in civil sexual assault cases often point to a host of pre-existing and subsequent problems which they say are unrelated to the abuse. For example, an abuse survivor who goes on to become an alcoholic may face the argument that his alcoholism is attributed to genetic factors because he had an alcoholic parent. Cause and effect is much more difficult to establish in civil sexual assault cases than it is in regular personal injury cases.

Precedent Based Common Law System

Our common law system is based on a precedent system of judge-made law: judges look at previous decisions in order to decide current cases. As a result, the law of damages evolves slowly, and rarely in leaps and bounds.

The oldest case that I can find in which damages were awarded for a sexual assault was a decision in 1957 where a 5 year old girl was raped by an adult male and awarded \$2,000.00 in general damages. Even accounting for inflation, this damages award seems very low. However, the only evidence led with respect to the injuries sustained by the girl related to the physical injuries sustained in the assault. The courts started to deal with civil sexual assault cases in the 1970's and 1980's before there was any real understanding (in the legal or medical communities) about the nature of the impact of childhood sexual assault. Even the cases in the early 1980's dealing with serious ongoing sexual abuse of children have relatively low damages awards. Over time more and more abuse survivors have come forward, sought therapy and brought these cases to the civil courts. At the same time, the medical and therapeutic communities have also become more aware of the long-term and lasting effects of childhood sexual abuse. More studies have been done and continue to be done on the impact of abuse in childhood.

Over the last 25 years a substantial body of research has been done linking childhood sexual abuse to poor performance in school, negative employment impacts, substance abuse, criminal activity, and various psychological difficulties. In fact, recent research has shown that actual changes in the brain can occur.

What Can Be Done?

The trend in damages awards for sexual abuse survivors is definately upward. In order to continue this trend, lawyers taking these cases to trial must ensure that they present the necessary evidence to enable the courts to truly understand the nature of the effects of the abuse. In most cases, a psychological impact assessment done by a psychologist who is experienced in dealing with abuse survivors will be necessary. In addition, there will have to be records and/or reports from other treating mental health professionals and all other relevant records such as school and employment records, tax returns. As well, the plaintiff will want to call witnesses who can testify about their observations of how the abuse has affected the plaintiff. Such witnesses could include

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family members, friends and partners. Of course, each case is unique and the abuse survivor will work with his/her lawyer to determine what evidence is needed in the specific case. For example, in the case where the survivor has remembered more details over time, it may be necessary to call a witness who has expertise in the area of traumatic memory. In addition to leading proper evidence, lawyers practicing in this area need to push the envelope and conduct proper legal research to show the upward trend in damages. In some cases courts have even suggested that the cap on pain and suffering may not apply in sexual abuse cases. Finally, it is important to remember that the financial compensation or damages award is only one aspect of a civil sexual assault case. For many survivors, the civil law suit is as much about coming forward, being, heard, shifting blame, holding people to account, protecting future children, healing, justice and closure. ❖

Loretta P. Merritt

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ACHIEVEMENTS

CCAA is proud to help 200,000 people per year across Canada. In 2014, many of these people were helped by being recipients of almost 100,000 items that were distributed through the Newmarket, Ontario warehouse. We've also helped more victims that have been rescued from Human Trafficking than in previous years.

As a result of our Derringer's 13 Days of Christmas campaign alone, over 2,100 families, 4,825 children, and 8,109 individuals were assisted with more than 23,000 items distributed through the CCAA warehouse.

CCAA was also able to acquire access to approximately 100 computers with educational software from the Shape the Future program. These computers and software are for distribution to First Nations community centres across Canada.

CCAA is also proud to have been involved in the legislative process of several initiatives, including the Canadian Victims' Bill of Rights. CCAA's CEO and Founder, Ellen Campbell, spoke before the Senate and Justice Committee in Ottawa and also met with Prime Minister Stephen Harper and Justice Minister, Peter MacKay. We continue to be the voice for victims and survivors and hope to be even more involved in 2015.

AWARDS

Among the several awards of recognition received in 2014, we'd like to highlight three:

- In January, 2014, Ellen Campbell received the Order of Ontario at Queen's Park, Toronto. It was presented by then Lieutenant Governor of Ontario, David C. Onley.

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directed to Loretta P. Merritt at (416) 777-5404. The issues raised in this release by Torkin Manes LLP are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.

FOOTNOTES:



A new anti-bullying reporting tool developed for the Canadian Centre for Abuse Awareness by theHelpPoint

[**CLICK HERE**](#)

- In November 2014, Ellen Campbell received the first annual Brilliant Minded Women Award.
- In December 2014, Ellen Campbell received the first annual Green4Good "Hero" Award.

Ellen Campbell was on to something 22 years ago when she decided to start an agency that helps survivors of abuse. It actually is possible to break down the walls of shame and stigma that come with abuse - and believe me, that has to happen if people are going to be able to receive help and begin to heal and have successful lives. 2014 was a good year, but there is still so much more to do. So, 2015, here we come - 'we' being CCAA and ALL the people who help us along the way.❖

Helena Kameka

1 - Cases that are tried in front of juries are not generally reported and are not used as case precedents because juries do not give reasons for their judgments. It is my unscientific view that juries generally award significantly higher damages in sexual abuse cases, but statistical information is not available.

2 - S.Y. v. F.C.C. [1996] B.C.J. No 1596 (C.A.)

