

Lawyers call for higher damages in civil sexual assault cases

Should Ontario follow British Columbia in removing personal injury cap?

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Ontario courts need a new approach to the ongoing psychological harms of sexual abuse and should start awarding damages to victims accordingly, say lawyers who handle civil litigation in that area.

In a recent ruling in *Vanderkooy v. Vanderkooy*, a Superior Court judge awarded \$125,000 for loss of reputation to a man accused of sexual abuse by his nieces without sufficient evidence. Finding the nieces' accounts "vague" and "embellished," the judge also found they made the accusations because they didn't like their uncle.

But in a part of his decision some lawyers find troubling, Justice Andrew Goodman noted that had the sisters' abuse claim been successful, he would have awarded each of them \$35,000 in damages.

"If I were required to award damages for sexual assault and battery including the intentional infliction of mental distress, I would assess general damages to both [sisters] in the amount of \$35,000 each," he wrote.

"I would not award punitive or aggravated damages."

He added: "I agree with the plaintiff's final submissions in that a good reputation is closely related to innate worthiness and

dignity of the individual. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former luster."

The ruling is only one example of the courts' questionable approach to damages for sexual abuse victims, according to lawyers who take on such cases. The damage awards suggest an injury to a person's reputation is greater than the harm suffered by victims of sexual abuse, lawyers say.

It's a situation personal injury lawyers who represent victims of sexual assault have questioned for a long time.

In a 2006 paper, Lerner LLP partner Elizabeth Grace noted punitive awards for victims of abuse are rarely more than \$50,000 even though "one can scarcely imagine an area better suited for large punitive damage awards than sexual abuse."

Of course, there are specific factors to consider that can justify the damage outcomes, wrote Grace. "But when one who practises in the area of sexual abuse, as I have in the past decade, sees over and over again the profound damage wrought by sexual abuse and is constantly reminded of the depravity and evil perpetrated against vulnerable individuals, one has to question why it is that awards in this ar-



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ears are not more consistently, or even sporadically, higher than they have been to date."

Part of the reason for the discrepancy is that the insidious harms of sexual abuse are largely invisible, says Susan Vella of Rochon Genova LLP.

"Judges don't have the same baseline to understand from the courts' experience the day-to-day harms of psychological harms whereas I think they are able to grasp the impact of harm to somebody's reputation," she says.

Victims often bring sexual abuse cases to the courtroom years after they happen, a situation that makes it difficult to assess

the impact they can have. When victims speak on the stand, their suffering isn't as clear as it would be in a traditional personal injury case involving someone badly injured in a car accident, Vella notes.

To add to the problem, the damage cap for traditional personal injury cases may apply to civil sexual abuse matters. The cap restricts judges from awarding anything higher than about \$330,000 for pain and suffering. While the general damage awards in sexual abuse cases have been increasing over the past 20 years, the Court of Appeal for Ontario and the Supreme Court of Canada haven't yet ruled on the cap issue and, as a result, there's uncertainty as to whether it applies. The cap doesn't apply to injury to reputation.

British Columbia has rid itself of the cap when it comes to civil sexual abuse and according to Vella, that's the first step towards a fairer damages award system in Ontario, too.

Loss of innate worthiness, the same term Goodman used to describe the loss of reputation, is something victims of sexual abuse also endure, according to Vella. As a result, she suggests the recourse should at least be parallel to loss of reputation.

As with a lost reputation, the impacts of sexual assault are lifelong, she notes.

According to Grace, the courts "readily acknowledge in a general way that sexual abuse causes such profound injury and loss." But that recognition hasn't translated into "specific and quantified damages to that injury and loss."

The courts' inexperience in dealing with victims of sexual assault in civil cases is also a factor in lower damage awards, says Vella.

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When it comes to punitive damages for defamation, the courts have relied on *Hill v. Church of Scientology of Toronto* — "a particularly extreme case," according to Vella — in which a jury ordered an award of \$800,000 in 1991. The Supreme Court of Canada later upheld the decision.

In civil sexual assault, there simply weren't many cases 20 years ago to provide jurisprudence for such a high damage award, says Vella.

But according to Philip Tunley, the lawyer who represented the sisters in *Vanderkooy*, the courts now have recent case law to reference for higher damage awards.

In his submissions to the court, he gave examples of such cases, including a 2012 sexual abuse matter that saw a \$225,000 award to the victim. **LT**