

Lawsuits for mental pain on the upswing

More and more people are turning to the courts for payback for anguish

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It's a rare thing that filing a statement of claim in Ontario Superior Court renders one an international pariah. But that's what happened recently to Sharlene Simon, a resident of Innisfil, Ont., after it became public that she and her family launched a \$1.35-million lawsuit seeking damages for the "psychological suffering" she experienced after a horrific car accident. Seeking redress for emotional pain isn't unusual in such circumstances. What stoked outrage was the fact the suit named the three teenaged cyclists Simon hit with her SUV in October 2012 at 1:30 a.m. on an Innisfil beach road. One of the boys, 17-year-old Brandon Majewski, died following the crash; another, Richard McLean, was badly injured.

International media feasted on the grotesque ironies ("Driver sues boy she struck and killed," the *New York Post* crowed). Canadian media clucked that the country is veering into the climate of rapacious litigation seen in the U.S. The *National Post* called the Simons' suit "astonishing evidence of the raw appeal of the robes of victimhood." But the public nerve struck by the suit also reveals concern, and confusion, about the rising spate of psychological trauma cases, which can range from the heartbreaking to the jaw-droppingly shocking. That was seen recently with the news that Tatyana Granada, a Calgary resident banned from a grocery co-op for shoplifting in 2010, is suing it for \$8 million. Granada was found guilty of mischief after she returned to hide needles and pins in the co-op's food, and served jail time.

(She claims the co-op's defamation led to shame, loss of family honour and her husband's suicide.) We're seeing suits that once would never have made it before the courts taken seriously, as seen when five inmates in the Prince Albert, Sask., penitentiary sued the federal government in 2012, seeking more than \$50,000 in damages for "uncomfortable" detention. They claimed lack of sunlight, lack of access to a barber, inadequate library services and sleep deprivation resulted in "nervous shock" and "constantly being overwhelmed with hopelessness and erosion of self-worth."

While the suit by the inmates—who were variously convicted of murder, sexual assault and home invasion—was met with mockery and outrage, it remains before the courts. The Simons suit has been similarly pilloried, although it is more complex than headlines suggest. No criminal charges were filed against Sharlene Simon, making civil courts the arena of restitution and blame. The Majewski and McLean families both launched lawsuits early in 2013, naming Simon and her husband, Jules Simon, a police officer who was driving in a car behind her. Both allege Sharlene Simon, who was driving 10 km/h over the limit, was either texting or under the influence of alcohol. The Simons' suit, filed in December 2013, claims the cyclists were negligent—they didn't have lights, weren't wearing helmets, and didn't operate their bikes in "a prudent way," among other failings. As a result, it alleges, Sharlene Simon suffered "catastrophic impairment" and "depression, anxiety, irritability and post-traumatic stress" that affects her entire family.

Personal injury lawyers are unfazed by the Simons suit. "It's a very gutsy thing to do, but I'm not surprised," said one. Another sees insurance-company machinations driving the litigation. Michael Ellis, a lawyer with Toronto firm Levinter and Levinter who represents the Simons, says the public fury came as a surprise. There's nothing unusual about the case from a legal perspective, he says: "An accident occurred and two parties have differing views; both parties are suing one another and it will be up to the courts to decide which view is the correct one or most believable, and damages will flow from that."

Canadian law compensates an innocent party harmed psychologically by another's actions if two tests are met, Ellis says: "One, the psychological injury suffered by the plaintiff was a foreseeable consequence of the defendant's negligent conduct; two, that the psychological injury was so serious it resulted in a recognizable psychiatric

illness." His client has been **diagnosed with PTSD** and is suicidal, he says, and is unable to return to work as a security guard. "All of this is real."

Equally real is the loss of one young life, the injuries sustained by another boy, and the devastating impacts on their families—though the likelihood of court-awarded damages mitigating any of that is nil. The Simons' case won't be heard in court for years, but already it has put a spotlight on the evolution and complexity of psychological trauma litigation in this country, a trajectory that traces the growth of psychiatric metrics, the increased value assigned to "quality of life" and emotional well-being in a happiness-centric culture. More, it reflects the ways the courts can and cannot mete out redemptive justice amid growing expectations that if our psyche has been hurt or severely damaged, someone should pay.

Suing for emotional damages, or "pain and suffering," has long been a routine tag-on in personal-injury cases. Now it's the main event, with the number of stand-alone psychological damage cases on the rise. Susan Vella, a lawyer with Toronto firm Rochon Genova, chalks it up to a broader cultural change: "When I started practising 25 years ago, these harms—depression, PTSD, anxiety—were undervalued not just by courts but society. Now we know they can be more damaging than physical harms."

Awards for "nervous shock," or acute stress, date to the 1897 case *Wilkinson v. Downton*, in which defendant Wilkinson told Downton's wife that her husband was badly injured in a car accident (he wasn't) which led to her suffering incapacity; a British court awarded her £100. Research into psychiatric and psychological disorders over the following century, enshrined in the *Diagnostic and Statistical Manual of Mental Disorders*, bolstered the credibility of mental illness—and also created the metrics by which courts can quantify losses and costs. **Statistics correlate how the ability to earn income can be impaired by psychiatric disorders, and there is growing clinical literature around day-to-day impact of trauma, says Vella.**

Social awareness trickled into court judgment, specifically study of PTSD in soldiers after the first Gulf War, twinned with growing awareness of sexual abuse trauma, says Windsor, Ont.-based lawyer John C. Holland, of Stutts, Strossberg LLP. **Financial offerings and public apologies to victims of grievous abuse in residential**

schools and Japanese internment camps have also heightened sensitivities to the need to redress historical wrongs. That was seen in a landmark 2008 Ontario Superior Court judgment that ordered the Toronto Police Services Board to pay Marian Evans, Vella's client, damages of \$215,000—plus legal costs—as restitution for an “outrageous and despicable sexual assault” committed by a former police officer nearly 30 years previously.

Lawyers point out that institutional safeguards in Canada have forestalled over-the-top U.S.-style litigation and multi-million-dollar judgments. South of the border, lawyers routinely work on contingency, paid by a percentage of the damages. Here, it's the losing party that often pays most of the winner's costs, making embarking on litigation riskier. Lawyers point out that waging a personal-injury suit is expensive and protracted; most don't make it to court. Litigation is like surgery, says Holland: “You only undertake it if you can't solve the problem any other way.”

Caps on pain-and-suffering awards in Canada result in awards being far lower than in the U.S.—even if the conduct of the losing party was egregious. Sexual abuse damages are particularly low, says Vella, rising over 30 years from \$25,000 to \$50,000 to just over \$200,000, though additional pecuniary losses can drive awards over \$500,000.

Toronto lawyer Wendy Moore Mandel of the firm Thomson, Rogers, sees the more conservative awards in Canada as a conscious effort not to follow the U.S.: “There, if you spill hot coffee you get a million-dollar settlement. Here, if you spill hot coffee, you get a napkin.” Holland, however, sees Canada moving more toward the U.S. model. Vella agrees. British Columbia has done away with the damages cap in sexual abuse cases altogether, she says, and cites the 2006 Supreme Court ruling *Young v. Bella* in which the court stated in orbiter that it is time to reconsider the applicability of the personal injury cap to sexual abuse cases: “The fact we are seeing increasing amounts for damages arising from psychological and emotional disturbances is testament to the courts compensating more comprehensively [for] what can be lifelong suffering.”

Assessing psychological trauma can be shrouded in shades of grey, says Toronto psychiatrist Philip Klassen, an expert witness in emotional-damages suits. A 1988 B.C. Supreme Court judgment may have determined there is no “logical difference

between a scar on the flesh and a scar on the mind," but invisible scars can be difficult to measure. "It's 'harder' to absolutely know whether the person is telling the truth with respect to stress and the damages," Klassen says. Damages also can be awarded in the absence of a psychiatric diagnosis, though, contrary to criticism that people now sue for "hurt feelings" or feeling "sad" doesn't qualify, Vella says: "It has to be a credible harm." There's no blueprint, Klassen says: "People are very, very different in the way they cope and adapt to traumatic events."

Courts too recognize that psychological harm comes in degrees. The 1996 Ontario Supreme Court ruling *Mason v. Westside Cemeteries Ltd.*, in which a man sued after his parents' cremated remains went missing, awarded him a modest \$1,000 for "lost peace of mind"; it compared his suffering to "physical scratches and bruises of a minor nature." Yet the case of *Mustapha v. Culligan of Canada Ltd.*, in which a man claimed the sight of dead flies in an unopened water container led to a major depressive disorder, phobia and anxiety, was awarded a record \$341,000 in general and special damages. In what is seen as a move to close the floodgate to similar cases, the ruling was overturned by the Supreme Court of Canada in 2008 on the grounds that Mustapha's injury was not reasonably foreseeable and therefore did not give rise to a cause of action. (That ruling left Mustapha on the hook for more than \$500,000 in legal costs.)

A spate of ongoing cases are destined to test tolerances further. In one, a woman is suing a tanning-bed operator for psychological damages after the bed collapsed on her: "She had been sexually traumatized in a claustrophobic way and likened the event to previous events," Klassen says.

He points to "quality of life" being viewed as a key determinant of well-being, a fact made in Sharlene Simon's damages claim, which notes that "her enjoyment of life has been and will be lessened." Diminishment of quality of life also underlies the suit launched by the five inmates. In his ruling, federal judge Roger T. Hughes extended compassion in his decision to stay the proceedings: "Here we see expressions of anger, hopelessness, diminished capacity and losing control. One is reminded of a quotation ascribed to Gautama Buddha: 'Holding on to anger is like grasping a hot coal with the intent of throwing it at someone else; you are the one who gets burned.'" Those familiar with the Buddha's teachings will know that he advised letting go of anger completely, not embarking on acrimonious litigation. But the

latter option looms ever larger, witnessed in the rising number of Canadian parents suing school boards for not protecting their children from bullying.

Increased direct-to-consumer legal advertising is another driving force. Moore Mandel reports a boom in personal-injury advertising over the past five years, particularly in southern Ontario, which she attributes to the rise of legal clearing houses based on the U.S. model: firms that spend a bundle to advertise, then sell the files to other lawyers. This month, a Vancouver law firm launched a new “This would be a great time to lawyer up!” campaign on transit shelters, buses and newspapers depicting young couples buying a house, having a baby, and nursing a broken leg.

People can have unrealistic expectations of what courts can achieve in psychological damages cases, says Vella, who notes they can't force an apology or fix psychic wounds. “Taking back power is part of the healing process and can close a chapter. But it doesn't heal in itself.” Protracted litigation, paradoxically, can exacerbate the very trauma that instigated it. Ellis reports the frenzy surrounding Sharlene Simon's case has “been devastating for her.” But everyone touched by the events on that dark country road has been devastated. Now it will be up to the courts to decide if any redemptive catharsis can be delivered.

Editor's Note, June 3: This feature has been updated from the print edition to clarify that Susan Vella was speaking only about cases of sexual abuse.