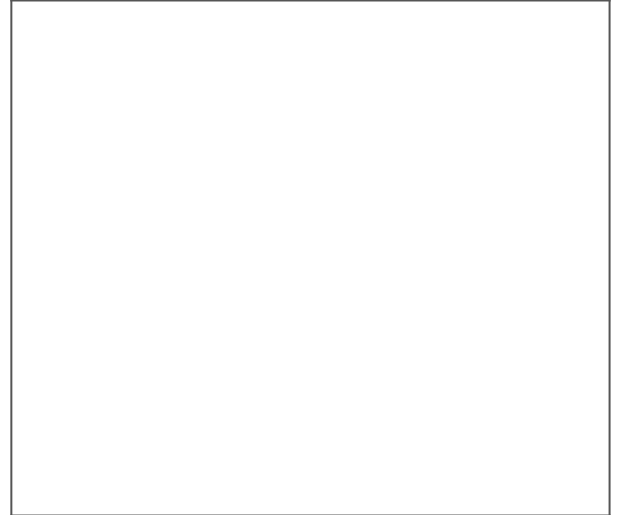


Civil Claims for Sexual Abuse

published 01/27/2014

The Advantages and Disadvantages of Civil Sexual Abuse Claims

In recent years, the Canadian civil legal system has acquired a greater understanding of the very serious nature of sexual abuse and its impact on victims. As a result, victims are now more frequently turning to the civil courts as a means of compensation. Civil litigation, while imperfect, may be an empowering and effective means by which victims of sexual abuse can have an opportunity to confront their abuser, be heard, and obtain some recognition of the harm they have suffered through financial compensation. While no amount of money will provide complete restitution, the primary purpose of a civil action for damages is to attempt as much as possible to place the victim in the state she or he would have been but for the sexual abuse. Furthermore, the civil justice system can serve as a tool to deter perpetrators. While there are advantages to pursuing a civil action for sexual abuse, the nature of these claims and the emotional harms suffered by the victims of abuse create some unique challenges. This article seeks to provide a general overview of what a victim can expect when pursuing a civil action for sexual abuse and to highlight some of the advantages and disadvantages of pursuing such a claim.



Basis of Liability in Sexual Abuse Claims

In a civil action, sexual abuse claims are typically based on the torts of battery and assault. In civil cases, there is an important distinction between battery and assault. Sexual battery is broadly defined as the intentional application of force which violates a person's sexual integrity, without that person's consent. Sexual battery thus includes a wide range of

misconduct from minor sexual touching to a violent act of rape. Sexual assault, on the other hand, does not require touching; it involves one person intentionally putting another person in fear of harm by threats, words, or gestures of a sexual nature without bodily contact. Sexual assault and battery may arise in various contexts such as in the family home, the workplace or an institution, and can include a repeated, persistent form of sexual abuse which occurs over a period of time, or a single isolated incident. In addition to the torts of battery and assault, civil claims for sexual abuse may include other grounds for liability such as: breach of fiduciary duty (e.g. where a teacher or parent has breached their position of trust or failed to protect the child); negligence (e.g. where an institution failed to monitor a staff member who abused a child); and vicarious liability (e.g. an institutional defendant who is held responsible for the misconduct of its employee). As well, a victim may commence their civil action against more than one defendant whom the courts may hold jointly and severally liable. Thus, for example, if a victim was sexually assaulted while living in an institution by an employee of that institution, they may file a lawsuit against both the employee and the institution. If both defendants are found liable, both are equally and wholly responsible for the damages awarded to the victims.

Criminal Law Proceedings

A victim may pursue a criminal prosecution for sexual assault in addition to a civil proceeding. Where both criminal and civil proceedings are initiated, the criminal matter will normally proceed first. Criminal and civil actions are completely separate proceedings; however, a criminal conviction against the alleged perpetrator may serve as strong evidence to help prove a civil case. Furthermore, the filing of a civil case prior to a criminal proceeding may compromise the success of an existing criminal case against the abuser. Although civil compensation is analogous to restitution in a criminal proceeding, defense counsel may use the existence of the civil suit to attempt to undermine the victim's credibility by portraying him/her as a person purely seeking financial gain.

In addition, within the criminal justice system, victims of sexual assault in Manitoba may be eligible through the Compensation for Victims Crime Program for compensation for physical and emotional injuries resulting from the assault. In order to be eligible for such compensation, victims must have both reported the sexual assault to police as soon as possible and applied for the compensation within one year of the crime.

The Limitation of Actions Act

Sexual abuse claims are commonly historical, having occurred in a victim's childhood. In Manitoba, *The Limitation of Actions Act* provides that sexual abuse claims are not governed by a limitation period and may be commenced at any time. As such, an adult victim is not barred from commencing a civil action for sexual abuse in Manitoba which may have

occurred several years ago.

Burden of Proof

In a civil case, the victim must prove their case on a balance of probabilities - is it more likely than not that the defendant sexually abused the victim? The civil standard of proof is therefore lower than the criminal standard of proof which is “beyond a reasonable doubt”. Until recently, the trend in civil cases was to hold sexual abuse victims to a higher standard of proof than other civil cases because sexual assaults were of ‘higher moral blameworthiness’ and required greater scrutiny. Under this higher burden of proof, cases of historical sexual abuse were particularly difficult to prove as there was normally little surviving objectively verifiable evidence, the sexual abuse usually occurring in private, and the outcome often turning on the contradictory sworn testimony of the opposing parties. Courts typically required independent corroborating evidence in order to prove a sexual abuse case. However, in *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held that requiring corroboration would elevate the evidentiary requirement in a civil case above that in a criminal case. Furthermore, the Court confirmed that all civil cases are governed by the same standard of proof regardless of the seriousness of the allegations. Thus, while corroborating evidence certainly strengthens a case, the victim is no longer required to produce corroborating evidence in order to prove their case. Moreover, it is important to note that establishing lack of consent is not a part of the victim’s burden of proof. Rather, the defendant may raise consent as a defence.

The Litigation Process

Initial Stage

Once a victim has retained legal counsel to commence a civil action, the process will likely begin with the victim’s counsel writing a demand letter to the alleged perpetrator with a view to attempting to settle the matter before court proceedings are commenced. Achieving settlement depends on many factors, including the strength of the evidence and the desire of the perpetrator to preserve their public reputation.

Court Proceedings

Where settlement is not achievable at the initial stage, counsel for the victim may commence a civil proceeding in court by filing a Statement of Claim and serving it upon the perpetrator. The next step involves the exchange of evidence between the victim and perpetrator and the process of Discovery, in which each party is questioned under oath. If settlement is still not achievable, then the parties may proceed to trial. During court proceedings, both parties will

likely testify and will be subject to both direct and cross-examination. Furthermore, physical evidence may be presented, and experts may be called to help support and quantify the victim's harms and losses. At the conclusion of a trial, the court will decide: 1. whether the sexual abuse is proven on a balance of probabilities; 2. if proven, the extent to which the abuse caused the harms (liability of the defendant); and 3. whether the harms caused have resulted in the victim suffering various losses (the extent of the liability).

Confidentiality Concerns

When a claim moves to court it becomes a matter of public record. Counsel may take steps to protect the privacy of the victim as confidentiality is often a priority for sexual abuse victims who struggle with feelings of shame and guilt over the abuse suffered. Measures to ensure the privacy of the victim may include filing a motion with the court to use pseudonyms in the pleadings or seeking a publication ban of the court proceedings.

Settlement out of Court

The vast majority of sexual assault claims are settled out of court. Generally, settlements are more advantageous to both parties than proceeding to court; the victim is not forced to re-live their abuse through a gruelling trial which will include extensive disclosure of their private lives and rigorous court examination, and the perpetrator can preserve their reputation. Furthermore, both parties can avoid the high cost and risk of a civil trial. Generally, settlements include confidentiality agreements. While these confidentiality agreements serve to protect the perpetrator's reputation, they may also be tailored to the specific needs of the victim. For example, a confidentiality agreement, while barring the victim from disclosing the details of their financial settlement other than to financial advisors, will probably permit the victim to disclose their abuse to professional health care providers or a trusted family member. Indeed, it is essential that the terms of the settlement agreement do not re-victimize or silence the victim.

Quantifying Compensation

As stated, the purpose of a civil judgment is to place the victim back into the position they would have been in had the wrong not been committed. Thus, once a victim has proven his/her case on a balance of probabilities, so long as he/she has established that but for the defendant's act he/she would not have suffered the harm claimed, including psychological injury, the defendant is liable for that harm. However, the defendant is not liable for psychological injury or other difficulties that the victim would have experienced in any event. Damages fall within two broad categories: non-pecuniary and pecuniary damages.

Non-Pecuniary Damages

The main function of non-pecuniary damages is to provide solace to a person who suffers intangible losses. Fixing an appropriate amount is essentially within the court's discretion. An award for non-pecuniary damages must reflect what seems fair and just in the circumstances of a particular case, having regard to the nature of the wrongful acts and the consequential harms. The courts also strive to award compensation that is consistent with awards in other similar cases.

(a) General and Aggravating Damages

The central question in an assessment of general damages is to what extent the sexual abuse or breach of fiduciary duty caused the victim to experience pain, suffering and loss of enjoyment of life, taking into account the aggravating factors. The Supreme Court of Canada and academic research have recognized that sexual abuse, by its very nature, results in a greater impact upon the victim than does a non-sexual assault. Sexual assault victims suffer inherent harms including loss of dignity, personal integrity, autonomy and personhood. In addition to these inherent harms, sexual abuse victims may also suffer a variety of other consequential harms such as feelings of shame and self-blame, depression, anxiety, suicidal thoughts, addictions, sleep disorders, sexual dysfunction and interpersonal relationship problems. The courts are thus faced with the challenge of quantifying these intangible psychological and emotional injuries which can vary greatly depending on both the facts of the case and the nature of the victim. The courts generally assess general damages by considering the particular aggravating features of a case such as: the relationship between the parties (particularly whether there was a relationship of trust), the number of assaults, the ages at which those assaults occurred, the frequency and duration of the abuse, the degree of violence and coercion, the nature of the abuse, and the degree of suffering incurred by that particular victim.

The challenge of quantifying intangible harms in sexual abuse cases often results in lower general damages awards relative to other personal injury cases. In Canada, while there is a cap on general damages in personal injury civil claims (presently just over \$350,000), this cap does not apply to sexual abuse claims. However, despite this 'no-cap policy', the majority of general damages awards (which normally include aggravating damages) in sexual abuse cases rarely exceed or even reach the 'cap' amount. As the B.C. Court of Appeal stated in *Y.(S.) v C.(F.G.)*, (1996) 26 BCLR (3d) 155 at 172, "To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement". While there have been some recent sizable awards in sexual abuse cases in Canada, there is no consistent upward trend in the courts and many victims continue to be awarded relatively low general damages.

(b) Punitive Damages

Punitive damages are awarded to punish the defendant, to express society's condemnation for his/her misconduct, and to deter future misconduct. As the main function of the civil legal system is compensatory, punitive damages are awarded only where the court finds the defendant's conduct to be particularly reprehensible, vindictive or malicious in nature. Where the defendant is an institution being held vicariously liable, the courts tend to award sizable punitive damages as a way of encouraging institutions to change policies and processes in order to prevent future abuses from occurring. Furthermore, while there is no absolute rule that punitive damages cannot be awarded if there has been a criminal penalty, if the defendant has been punished either criminally or in some other way, the purpose of punitive damages may be fulfilled and the court may be reluctant to make an award of punitive damages for the victim.

Pecuniary Damages

Unlike non-pecuniary damages, the main goal of pecuniary damages is to provide the victim with full compensation for actual losses (rather than fair compensation). While the defendant's liability is relevant in assessing non-pecuniary damages, the focus in assessing pecuniary damages is on the actual or future losses incurred by the victim. Until recently, the trend in Canadian courts was to award relatively low pecuniary damages as compared to other personal injury claims. This was again largely due to the fact that the courts have found it difficult to translate the harms suffered by sexual abuse victims into economic damages. However, progress has been made and some sizeable awards for pecuniary damages have been made in recent sexual abuse cases.

(a) Loss of Income Earning Capacity

In order to establish loss of earning capacity, the victim must establish on a balance of probabilities that they suffered a loss of opportunity in their education and employment and that this loss would not have occurred but for the sexual abuse. It is important for victims to understand that bringing such an action for damages requires cogent evidence rather than mere speculation. Cogent evidence may include: records of past earnings, statistical and expert reports and assessments. For adult victims, the loss of earning capacity is normally based on their work history and for minors with no work history, it will be calculated based on statistical tables. Once average earnings are set, the court will factor in various contingencies unrelated to the abuse which may increase or decrease the victim's earnings throughout their life.

(b) Future Care

Future care awards in sexual abuse claims generally serve to cover the cost of past and future expenses incurred by the victim in order to heal from the injuries caused by the defendant. Such treatment may include counselling, therapy, medication, and vocational and educational upgrading.

Collecting on a Judgment and Vicarious Liability

When deciding whether to launch a civil lawsuit, a sexual abuse victim must consider whether the very high emotional and financial costs of litigation are warranted. It may not make sense to file a lawsuit against a 'judgment proof' individual where there is little to no chance of collecting on the court's award for damages. It is also important to consider all possible defendants who may be included in a sexual abuse claim and in particular, whether there is a viable claim against an institutional defendant with 'deep pockets'. Indeed, there is a growing trend in Canadian courts in which institutions are increasingly being held vicariously liable for the misconduct of their employees.

Vicarious liability is a no-fault, indirect form of liability that makes employers responsible for the misconduct of their employee and thus jointly and severally liable for the cost of damages flowing from a successful sexual abuse claim. However, vicarious liability can be difficult to prove and is highly fact-specific. In order to establish vicarious liability against an institutional defendant, there must be a strong causal link between the job and the wrongful conduct in question. The courts apply an onerous test in order to establish vicarious liability and as such, not all sexual abuse occurring on the premises of an institution will justify a finding of vicarious liability. The victim must establish that there is a connection between the employer's business or "enterprise" and the wrong committed by its employee and that this connection is sufficiently strong to justify holding the employer vicariously responsible for the misconduct. In addition, the courts will consider whether societal goals of a fair and just remedy and deterrence of future harm will be advanced by imposing vicarious liability on an employer in a specific case.

Conclusion

An increasing number of victims are seeking compensation through the courts for sexual assault. While the civil justice system can provide compensation and perhaps some closure to victims of sexual abuse, it also poses many challenges. It is critical that victims of sexual abuse, who are often emotionally and psychologically vulnerable, fully understand and weigh the advantages and disadvantages of civil actions before proceeding with a sexual abuse claim. There may be many positive consequences of civil cases including: the chance of

receiving fair financial compensation; the victim having more control over the litigation process than in a criminal proceeding; the victim having the opportunity to face and challenge their abuser and finding some closure at the end of the process. However, civil cases also pose many challenges: there is uncertainty in the process; the outcome and therapeutic closure that victims expected may never come; the civil legal process is fraught with delays causing the victim to constantly re-live their abuse over a long period of time; and victims are subjected to intrusive disclosure of their personal lives and adversarial cross-examination which may compound their mental anguish.

This article was written by Cheryl Pearson.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.