

Personal Injury

#MeToo: The importance of increased non-pecuniary damages for sexual abuse | Sandra Kovacs

By **Sandra Kovacs**

Sandra Kovacs

(January 11, 2018, 8:19 AM EST) -- Most personal injury lawyers' practices consist of actions seeking damages for injury arising from a fortuitous event, such as a motor vehicle accident. Fewer personal injury lawyers, myself included, are advocates for injury victims of an even more vulnerable kind: those who have suffered harm from an intentional act of sexual violence or exploitation. This area of practice is an important one, particularly since society at large is (finally) acknowledging the harm that sexual violence, harassment and exploitation causes to vulnerable persons, especially women, evidenced by the recent trend of the "#MeToo" movement following the Harvey Weinstein scandal in Hollywood.

Civil sexual assault cases are challenging not only because the subject matter is emotionally taxing, but also because the client's confidence in the justice system is already eroded — he or she approaches the litigation from a position of extreme reluctance, with an expectation of not being believed.

This expectation is not without grounds. A February 2017 *Globe and Mail* investigative series, *Unfounded*, reviewed national policing data and found that one out of every five sexual assault allegations in Canada is dismissed by police, resulting in a national unfounded rate of 19.39 per cent — "dramatically higher than that of other types of crime." Factoring in this data, only 34 per cent of sexual complaints lead to charges, and fewer still result in convictions.

I experienced this myself. I am a survivor of abuse, perpetrated by a member of my extended family during my youth. When I found the courage to go to police more than a decade following the assaults, the prolonged investigation resulted in no charges being laid. Frustrated, but not completely defeated, I turned to the civil system and filed a lawsuit. This alternative gave me access to justice and control over the process — and the accompanying sense of empowerment is exactly what I needed to continue with my healing journey.

In circumstances where there are assets or insurance available to the defendant, the civil forum may be the more suitable arena for survivors of sexual abuse or exploitation to pursue justice, first because the burden of proof is on a balance of probabilities as opposed to beyond a reasonable doubt (see *F.H. v. McDougall* 2008 SCC 53 at para. 49), but also because a civil action permits financial restitution. Moreover, pleadings are no longer confined to the traditional torts of assault or battery: other new or emerging torts may apply to a given situation including, for example, a statutory breach of privacy, or a breach of fiduciary duty where there exists a relationship of trust between the perpetrator and survivor — such as priest and parishioner, parent and child, or doctor and patient.

This is not to say, however, that a civil action achieves perfect justice. How the court quantifies damages needs improvement, particularly for adult victims.

British Columbian courts recognized long ago that the Supreme Court of Canada's trilogy cap on non-pecuniary damages does not apply to sexual abuse: see *S.Y. v. F.G.C.* [1996] B.C.J. No. 1596. The challenge of quantifying damages for sexual assault was also expressly acknowledged (at para. 55): "We are just beginning to understand the horrendous impact of sexual abuse. 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 are not capable of critical measurement."

Despite this acknowledgement, the B.C. Court of Appeal suggested that the general range for non-pecuniary damages for sexual abuse was between \$100,000 and \$175,000 at that time (about \$145,000 and \$250,000 in today's dollars). Some subsequent awards have exceeded this range, for example an award of \$325,000 in non-pecuniary damages was made in *Singh v. Bains* 2008 BCSC 823, a case involving anal and vaginal rape of a minor over several years. But this high award is in stark contrast to a more recent award of only \$35,000 to a young woman who was the victim of sexual touching by her stepfather during her adolescence: see *R.D. v. G.S.* 2011 BCSC 1118.

The amount awarded to adult victims of sexual assault, harassment, or exploitation are also usually assessed below the range proposed by the B.C. Court of Appeal in *S.Y. v. F.G.C.* For example, in *J.C. v. Shaw* 2011 BCSC 1529, only \$60,000 in non-pecuniary damages was awarded for multiple incidents of workplace harassment and assault between a worker and a supervisor. In *T.K.L. v. T.M.P.* 2016 BCSC 789, \$85,000 was awarded to a young adult female for multiple incidents of voyeurism by her stepfather, actions described by the court as "thoroughly undignified and humiliating."

Civil actions can be costly and risky to prosecute especially where liability is contested, and if an income loss cannot be established, and if the plaintiff will be compensated for only non-pecuniary damages with an expectation of an award of less than \$100,000, many lawyers may be unwilling to take a given case on a contingency. From a public policy perspective, this is a serious access to justice issue that must be remedied if we wish to motivate complainants empowered by the "Me Too" movement to have confidence in our civil courts, particularly if our criminal justice system cannot address their needs.

It is time that the courts recognize — just as the general community is now recognizing in the context of the "#MeToo" movement — the serious consequential harm that is caused by sexual assault, harassment and exploitation in our society.

The courts can do so by assessing non-pecuniary damages in a range that more accurately reflects the permanent psychological impact the violation has, in often insidious ways, on all aspects of a victim's life. A sexual violation transforms a victim in every way possible; life is never the same as it was before. I know this because I, too, have experienced this transformation. #MeToo.

Sandra Kovacs is a plaintiff's personal injury lawyer with KazLaw in Vancouver.