

## QUANTUM/DAMAGES ISSUES

A damage assessment of \$175,000 plus \$25,000 for punitives for a single instance of sexual assault upon a colleague, involving intercourse, was upheld on appeal. The Court outlined the factors to be taken into account in quantifying sexual assault damages.

### ***Zando v Ali*, 2018 ONCA 680**

#### **FACTS AND ISSUES:**

The Plaintiff, Dr. Zando, alleged that in 1999 the Defendant, Dr. Ali, sexually assaulted her in her home. This was a single incident of sexual assault. Both the Plaintiff and the Defendant were colleagues at the Sarnia General Hospital.

Dr. Zando alleged that Dr. Ali came over to her house to complete an insurance form that he needed for the renewal of his office lease. She further alleged that he went to the washroom, came back naked and forced himself on her by thrusting his erect penis into her face, penetrated her vagina, and ejaculated onto her rug.

Dr. Ali had not been punished in criminal proceedings for the assault.

Dr. Zando sued Dr. Ali for physical and sexual assault in 2001. She also sued two other physicians and the hospital alleging that they had participated in a campaign of harassment and discrimination against her in relation to the sexual assault. Dr. Zando settled the claims against the hospital and the two other physicians in 2016. The terms of each of these settlements were confidential. Only the claim against Dr. Ali went to trial.

At trial, the trial judge held that, on a balance of probabilities, Dr. Zando was sexually assaulted by Dr. Ali. The fact that he had refused to provide a DNA sample allowed the Court to draw an adverse inference against him. Dr. Zando was awarded \$175,000 in non-pecuniary damages and \$25,000 in punitive damages.

Dr. Ali originally appealed both the finding of liability and damage assessment, however, at the hearing of the appeal, he abandoned his appeal on liability. Dr. Zando challenged the trial judge's assessment of non-pecuniary damages and her decision to award punitive damages.

**HELD:** For the Plaintiff; appeal dismissed and damages assessment upheld.

The Court held that there was no reversible error in the trial judge's assessment

of non-pecuniary damages.

- a. The Ontario Court of Appeal adopted the framework for determining damages in a civil sexual battery or assault case as described in ***Nova Scotia (Attorney General) v BMG***, 2007 NSCA 120 (CanLII), 260 NSR (2d) 257:

[12] First, there is the purpose of non-pecuniary damages in sexual assault and battery cases: "to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts" (***B.M.G.***, at para. 132).

[13] Second, the factors for assessing such damages include: (i) the circumstances of the victim at the time of the events, including the victim's age and vulnerability; (ii) the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were; (iii) the circumstances of the defendant, including age and whether he or she was in a position of trust; and (iv) the consequences for the victim of the wrongful behaviour including ongoing psychological injuries (***B.M.G.***, at para. 134, citing ***Blackwater v. Plint***, 2005 SCC 58 (CanLII), [2005] 3 S.C.R. 3, at para. 89).

[14] Third, in assessing non-pecuniary damages for sexual assault, the court must first consider the important characteristics of the case to define the types of cases that should be considered for comparison purposes in establishing an appropriate range, and then select an amount of damages within that range, based on the features of the particular case (***B.M.G.***, at paras. 136 to 140).

- b. The Court found that it was open to the trial judge to adopt the range of non-pecuniary damages that she did in assessing the severity of the sexual assault:

[17] In my view there was no error in principle in the trial judge's determination of the range of non-pecuniary damages. The trial judge adverted to the factors set out in ***Blackwater v. Plint*** for assessing non-pecuniary damages for sexual assault. She considered the particular features of the assault in the case before her in identifying a range and in assessing the respondent's non-pecuniary damages. It is only by reading para. 95 of her reasons in isolation and out of the context of the record that one might conclude that the trial judge was identifying a range applicable to all cases of sexual assault. In fact, the parties provided the trial judge with their written submissions as to the damages that would be appropriate in the present case. The appellant at trial, as on appeal, suggested a range that was applicable to less serious cases of sexual assault, while the respondent suggested a higher range and argued Evans as an appropriate comparator.

[18] In assessing the severity of this sexual assault, it was open to the trial judge to adopt the range that she did. This was a case of

sexual assault with penetration by a colleague and friend in the victim's own home. The trial judge identified the features specific to the sexual assault in this case (at paras. 89 to 91):

After Dr. Zando was sexually assaulted, she had feelings of shame, guilt, humiliation and degradation.

As a result of her cultural upbringing, she felt she had to bear this suffering on her own. Her Muslim faith and Eastern values and beliefs deterred her from speaking out immediately and making it public.

As Dr. Robinson testified, Dr. Zando's feelings of betrayal and mistrust regarding a colleague who she perceived was attempting to control or sabotage her career, are reasonable and legitimate feelings as a victim of sexual assault.

[19] The trial judge's determination of damages did not depend on a finding that the respondent suffered long-term psychological trauma from the one incident of sexual assault, nor in my view would it be an error in principle for a trial judge to assess damages at that level in the absence of evidence of such long-term injury. As noted earlier, damages for sexual battery or assault are not solely to compensate for physical or mental injuries. They fulfill a range of functions, including "the recognition of the humiliating and degrading nature of the wrongful acts" (B.M.G., at para. 132).

[20] In all the circumstances, I see no error in principle in the trial judge's selection of the appropriate range of non-pecuniary damages in this case or in her assessment of Dr. Zando's damages. Again, I note that the appellant's argument was not that the damages award was so high as to be disproportionate.

[emphasis added]

The Court rejected the Defendant's argument that the trial judge failed to take into consideration the settlement amount paid by the other doctors and the hospital for harassment in assessing damages against Dr. Ali:

[21] As for the argument that the trial judge did not take into consideration the other potential contributors to the respondent's mental state, I disagree. The trial judge was aware of the fact that the respondent had reached a settlement with the other defendants for her alleged harassment by them. She rejected the argument that Dr. Zando's psychological injuries were caused by the alleged harassment that was not before her. The trial judge determined that Dr. Ali had not harassed Dr. Zando, a factor that she indicated was relevant to her assessment of damages. The focus of the trial judge was to determine damages for the sexual assault. I am not persuaded that the damages assessed by the trial judge improperly included in her assessment of damages an amount that would be attributable to harassment of Dr. Zando by the other defendants.

The Court held that the fact that the Defendant had not been punished

criminally as a result of the sexual assault was held to be a relevant factor in assessing the imposition of punitive damages as a deterrent, however this was not the reason punitive damages had been awarded:

[22] Punitive damages are awarded when a defendant's misconduct is so outrageous that such damages are rationally required to act as a deterrent: **Hill v. Church of Scientology of Toronto et al.**, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 197.

[23] The appellant argues that punitive damages were unwarranted in this case. He says that the trial judge failed to undertake the required analysis, in particular to determine whether the non-pecuniary damages she had already awarded for the sexual assault were sufficient to accomplish the goals of denunciation, deterrence, and punishment. Instead, she assumed punitive damages were required simply because the appellant had not been charged criminally.

[24] I disagree. The trial judge's decision with respect to punitive damages was based on the fact that the appellant's conduct in sexually assaulting the respondent was morally reprehensible and should be punished and denounced, and that he had not been punished criminally. The fact that he had not been punished criminally was a relevant factor (to satisfy the court of the need for such damages as deterrence) but was not the reason punitive damages were awarded. As such, I see no reversible error in the trial judge's decision to award punitive damages in this case.

[emphasis added]

### COMMENTARY:

This case sets out how damages are to be quantified in a sexual assault case. It demonstrates that significant non-pecuniary and punitive damage awards can be imposed even in the case of a "single incident" sexual assault. The assessment of psychological damages in this case was further complicated by several settlements prior to trial whose terms remain unknown.

The Ontario Court of Appeal noted that the decision to award punitive damages was based on the fact that the Defendant was not charged criminally. It remains unclear as to whether or not punitive damages will be warranted if criminal proceedings are either incomplete or do not result in a conviction.

The Ontario Court of Appeal also based the imposition of punitive damages on the fact that the sexual assault was "morally reprehensible." It is unclear as to whether or not some sexual assaults would not be considered "morally reprehensible" and therefore would not attract punitive damages.

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