Economic Losses In Civil Sexual Assault Cases



Scientific studies have shown that individuals first exposed to criminal victimization as children or in adolescence have significantly lower life-course income as compared to those not exposed to such victimization until later in life, probably because their educational and occupational attainment is reduced.[1] Plaintiffs who have suffered sexual abuse, especially where the incident of abuse occurred at a young age, will likely experience diminished ability to work steadily. Their working life will likely be disrupted by persistent psychological difficulties caused or exacerbated by the abuse, such as post-traumatic stress disorder (PTSD), trust issues, anxiety, panic attacks, social isolation, relationship difficulties and educational difficulties.

Income Loss

Economic damages are awarded in civil sexual abuse cases as compensation for lower life-course incomes. Generally, there are two different approaches used to arrive at an amount of compensation for economic loss. The first, and traditional, method is often referred to as the income loss approach. The income loss approach involves a determination of the amount of income lost as a result of the abuse suffered. In other words, damages are calculated based on the income the individual would have earned, but for the abuse, as compared to the actual income earned. In sexual assault cases, income loss generally arises in one of two ways which are set out below.

Missed Time From Work

Sometimes the calculation is fairly straightforward. For example, when the plaintiff's job and income are known and the plaintiff misses work due to the abuse. The amount of damages will simply be the amount of income the plaintiff would have earned, had they not been forced to miss work.

For example, an individual who was abused as a child later goes on to become a teacher and while working as a teacher, experiences exacerbated PTSD symptoms. As a result, the individual must take leave from work for two years. Damages would be calculated as the individual's yearly salary multiplied by the two years of missed work.

Failure to Reach Potential

Sometimes, the abuse impacts the individual immediately at the time of the abuse, such that the individual would have achieved a higher level of education, and obtained higher-paying employment, if not for the abuse. In other words, the sexual abuse irreparably harms the individual's ability to earn income, such that they are unable to achieve at their full potential. Damages are assessed by comparing the plaintiff's potential income to the actual amount of income earned.

A vocational rehabilitation expert can be hired to provide an opinion on potential vocational path. The expert will examine a number of factors, such as: the abused individual's academic performance before the abuse (e.g. grades, aptitude test scores); the level of education and employment achieved by the individual's siblings and parents, and; any other evidence that would tend to demonstrate the potential vocational path that the abused individual would have achieved.

In some instances, the expert will be able to use the above factors to determine a specific job the individual would have obtained if not for the abuse. For example, if before the abuse occurred the individual had expressed interest in becoming a doctor, was earning high grades at school, and had siblings who are professionals, then the expert may be able to conclude that the abused individual would have attended medical school and found employment as a doctor. The vocational expert can then determine the expected level of income the individual would be earning, if not for the abuse. This level of income is then compared to the individual's actual earnings, and damages are assessed as the difference between these two amounts.

In other instances, the vocational expert may not be able to determine the specific job the individual would have obtained. However, they may be able to determine the likely level of education the individual would have attained and the resulting life-path and approximate earning potential the individual would have experienced, if not for the abuse. In these cases, Statistics Canada data that provides the average annual earnings based on educational achievement can be compared to actual earnings to determine damages.

Take for example an average student who dropped out of high school following, and as a result of, events of sexual abuse. Before the abuse occurred, the student, while only achieving mediocre grades, would have been on track to graduate high school but as a result of the abuse failed to graduate. While the specific job the individual would have attained is too difficult to determine, the individual's actual earnings can be compared to Statistics Canada data that shows the average annual salary of high-school graduates. Here, damages would be the difference between the statistical amount and actual income.

The Burden of Proof

Civil cases based on sexual abuse in childhood create a unique situation when it comes to economic loss. Although the economic loss may begin as soon as the child reaches age 18 or so, often the lawsuit is not pursued until decades later. Past income loss is defined as loss which is incurred prior to trial: Future income loss is incurred after trial. Normally the plaintiff must prove past income loss on a balance of probability (because it is usually based on events which have occurred) whereas a plaintiff need only prove that there is a "real and substantial possibility" that a hypothetical future income loss will occur. However in the unique circumstances where trials are held decades after children are abused and income losses start occurring, it is more appropriate to apply the "real and substantial possibility" burden of proof when determining the hypothetical loss of income (i.e. what would have happened had the plaintiff not been abused). In *MacLeod v. Marshall* [2] the Ontario Court of Appeal endorsed this approach and instructed that once it is determined that there is a real and substantial possibility of a loss

occurring the trier of fact must award damages commensurate with the percentage changed that the opportunity would have materialized.

Loss of Earning Capacity

The loss of earning capacity approach is separate and distinct from the traditional income loss approach. This distinction was discussed in *L.M.M. v. Nova Scotia (Attorney General)*: [3] "Loss of earning capacity was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income".[4] The loss of earning capacity approach treats the capacity to earn as a capital asset that has been devalued due to sexual abuse. The amount of damages under this approach is more arbitrary. It does not appear to be the result of any mathematical formula or logical estimation.

In some cases, when unable to precisely account for past and future income losses, the courts will award damages for a loss of competitive advantage. This occurred in a recent vicarious liability case, *C.O. v Williamson and Trillium Lakes District School Board* [5]. In *Williamson*, the Court stated: "The plaintiff's past and future income loss cannot be calculated with certainty or mathematical precision".[6] Nonetheless, the Court concluded that, "as a result of the abuse, the plaintiff has been and will continue indefinitely to be at a very substantial competitive disadvantage in obtaining and maintaining employment or getting promotions when she does have a job".[7] The Court awarded $200,000 for this loss of competitive advantage.[8] The $200,000 awarded in *Williamson* seems to be high water mark for damages awarded under the loss of earning capacity approach.

Income Loss or Loss of Earning Capacity: Which method do Canadian courts prefer?

A review of the 286 sexual assault cases decided since 1957 indicates damages for some economic loss (i.e. damages awarded from either the traditional income loss or by the loss of earning capacity approach) were awarded in 112 cases (less than 40 percent).[9] Of the cases in which economic damages were awarded, approximately 42 cases (38 percent of the cases in which damages for income loss were awarded, or 15 percent of all cases) were determined on a traditional basis, i.e. the calculation of lost past and future income. Approximately 51 cases (46 percent of the cases in which damages for income loss were awarded, or 18 percent of all cases) of the income loss awards were determined on the basis of loss earning capacity or competitive advantage.

Income Loss Cases: Recent Examples

Courts have awarded significant income losses in recent sexual abuse cases as follows:

(a) *Langstaff v. Marson*:[10] In a childhood sexual abuse case involving a teacher and student, the jury awarded $450,000 for past income loss and $925,000 for future income loss (appeal allowed by the Ontario Court of Appeal on other issues).

(b) *B.M.G. v. Nova Scotia (Attorney General)*:[11] In a childhood sexual abuse case, the trial judge awarded the Plaintiff a global figure of $500,000 for past and future income losses. In that case, it was not possible to determine what occupation the Plaintiff would have pursued, but for the sexual abuse.

(c) *Rosenthal v. Rosenthal*:[12] $450,000 was awarded for past loss of income and

$45,000 for future loss of income.

(d) *K.M. v. Marson*:[13] In a childhood sexual abuse case involving assaults over a two (2) year period, $1,192,550 was awarded for damages of past loss of income and $762,450 for future loss of income.

(e) *Macleod v. Marshall*:[14] In a childhood sexual abuse case involving sexual assaults by a priest, a jury awarded $1,588,781 for past and future loss of income, as a lump sum economic loss.

(f) *D.S. v. Quesnelle*:[15] In a childhood sexual abuse case involving assaults over the course of five (5) years the court found that "the plaintiff has experiences and will continue to experience very real and substantial economic loss as a result of the actions of the defendant".[16] An amount of $1,533,416.00 was awarded for past and future lost income.

(g) *S.L. v. Prince*:[17] This was a childhood sexual abuse case where the abuse was carried out by a priest. The priest assaulted twelve boys, including the plaintiff. The abuse occurred over a three-year period and there were over fourteen occasions of abuse. The plaintiff was awarded $581,637 for past income loss and an additional $526,657 for future income loss. The court held that the plaintiff "would have successfully obtained a College education had he not been abused by the defendant" and that the plaintiff's lack of success in college was most likely "due to the damage caused by the abuse rather than a lack of interest or ability".[18]

(h) *D.K.B. v. British Columbia*:[19] The Plaintiff was a talented thirteen-year-old hockey player when he was sexually abused by his coach. The probation officer had failed to warn the minor hockey association of danger posed by coach. Court awarded damages for loss of earnings in the amount of $467,000, the value of an entry-level NHL contract.

(i) *K.M.M. v. RCEC of the Diocese of London in Ontario*:[20] In a childhood sexual abuse case involving sexual assaults by a priest over a three-year period, the plaintiff was awarded $400,000 for past and future loss of income.

Overcoming the Challenges of "Loss Earning"

Calculating economic losses in historic sexual abuse cases involves a fair amount of speculation. Sexual abuse cases also present unique causation challenges. For this reason, even where there is a traditional income loss award, in sexual abuse cases courts tend to adjust the award so it almost approaches a loss of earning capacity assessment. The Court in *L.M.M.*, for example, concluded that there was "an insufficient basis upon which to make a precise forecast of lost future earning capacity" in light of the numerous uncertainties and contingencies present, and instead awarded a "global award" for past and future loss of income.[21]

The Modified Earning Capacity Approach

Dr. Ross MacMillan, an Assistant Professor in the Department of Sociology at the University of Minnesota studied empirical evidence related to lifetime incomes of individuals who suffered criminal victimization, including sexual assault. He describes the following in his findings:

Victimization undermines academic performance, educational attainment, labour force participation, occupational attainment and earnings in early adulthood…Adolescent

victimization has further effects on later socioeconomic fortunes, operating both directly and through education attainment. Such effects suggest significant income losses over the life span.[22]

MacMillan reviewed data from the from the Canadian General Social Survey, 1993 in order to develop a methodology to estimate the monetary costs of criminal violence to victims. Estimates of the long-term costs of criminal violence are derived from the regression effects of violent victimization on annual personal income.

Based on Professor MacMillan's research, a sexually abused male experiences a reduction in annual earnings of $6,000 based on 1993 dollars. In 2021, this is an annual reduction in earnings of $9,955 and a total past and future loss of income of approximately $400,000.

The Ontario Superior Court of Justice in *J.R.S. v. Glendinning*[23] used Professor MacMillan's research to determine economic loss. In adopting this approach, the Court noted the advantage it provided of "dispensing with the need to consider the various contingencies…, the necessity of assessing the actual but undeclared earning of each Plaintiff, and whether they could have mitigated their losses".[24]

MacMillan's approach, as adopted in *Glendinning*, could be called a modified loss of earning capacity approach. Rather than the usual, somewhat arbitrary approach to quantifying loss of earning capacity, in *Glendinning* the Court relied on statistical evidence to assess the loss of earning capacity. The reliance on MacMillan's approach in *Glendinning* has been criticized, in part because MacMillan was not called as witness at trial and therefore his report was hearsay.

Use of 1999 Statistics Canada Data

In the 1999 General Social Survey Cycle 13 – Victimization it was documented that men who were sexually assaulted experienced a 22.69% loss in income.[25] While there is no comparable statistic for women, presumably, the statistics for women who are abused as children would be close to the loss experienced by men abused who were also abused as children. Therefore a 22.69% loss can be applied to the plaintiff's actual earnings in order to arrive at an appropriate loss of earning capacity figure.

Loss of Future Interdependent Relationship

In *K.M. v. Marson*[26], the trial judge awarded damages for Loss of Future Interdependent Relationship (LOIR). These damages are based on the premise that two people can live more cheaply than one, a plaintiff may enjoy the benefit of having a partner with a higher income and share homemaking. In order to assess this head of damage expert evidence (likely psychological and economic) is needed to establish the likelihood the plaintiff would have married but for the abuse, the likely age of marriage, the likely earnings of the partner, the likelihood of divorce and children. In Marson, $135,587.00 was awarded for LOIR.

Family Law Act Claims

Under s. 61 of the *Family Law Act* family members can make claims for economic losses as well as compensation for loss of care companionship and guidance. In *Swales v. Glendenning*[27] four brothers were severely sexually abused by the parish priest. The mother was awarded $15,000 and the father got $5,000 for loss of care, companionship and guidance. However s. 61 also provides that family members can recover actual expenses reasonably incurred for the benefit of the person injured, a reasonable allowance for travel expenses actually incurred in visiting the person during his or

her treatment or recovery, where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services.

Conclusion

It is somewhat of a mystery why income loss awards in sexual assault cases are so different than in traditional personal injury cases. Some of the reasons may be that in earlier decisions, income claims were not often perused. The long-term effects of abuse were less understood and the evidence to support such claims was simply not before the court.

Certainly, causation issues are more troublesome in sexual abuse cases than they are in car accident cases, for example. This is especially true when the victim of sexual abuse is a child. Pedophiles often choose their victims specifically because they are exceptionally vulnerable and susceptible to grooming. As a result, more sexual abuse survivors have pre-existing problems than do slip-and-fall plaintiffs. Depending on the extent of the prior difficulties, it may be difficult for plaintiffs to establish that, absent the abuse, they would have enjoyed a successful career. It seems unfair that a defendant, who specifically chooses a vulnerable child as his victim, should then reap the benefit of that child's pre-existing vulnerability. However, it is well established that they plaintiff should not be in a better position than he would have been, but for the defendant's acts.

Another reason for the difference in economic loss awards may be that psychological injuries and their effects, as opposed to physical injuries, are less obvious. Finally, with psychological injuries there is always hope for recovery, especially where awards are given for future care and counselling. This can be compared to permanent physical injuries, where cost of future care awards are often intended to make the plaintiff more comfortable, rather than to "cure" the plaintiff. In any event, as more is known about the long-term effects of sexual abuse, and better evidence is before the courts, we should continue to see more and higher income loss awards. Encouragingly, recent trends in economic loss awards seem to indicate that this is in fact the case.

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Footnotes

1 Ross Macmillan & John Hagan. 2004. "Violence in the transition to adulthood: The socio-economic consequences of adolescent victimization." Journal of Research on Adolescence 14: 127-158; David S Zielinski, "Child maltreatment and adult socioeconomic well-being" *Child Abuse & Neglect*, Volume 33, Issue 10, Pages 666-678

2 2019 ONCA 842

3 2010 NSSC 44 *L.M.M.*.

4 *Ibid*. at para 147.

5 2020 O.J. No. 3204 *Williamson*.

6 *Supra*, *Williamson* at para 195.

7 *Supra*, *Williamson* at para 197.

8 *Supra*, *Williamson* at para 199.

9 The balance of the cases where income loss was not awarded include cases where damages for income

loss were not pursued.

10 2013 ONSC 1448.

11 2007 NSCA 120.

12 2014 ONSC 317.

13 2018 ONSC 3493.

14 2018 ONSC 5100.

15 2019 O.J. No. 4773 *Quesnelle*.

16 *Supra*, *Quesnelle* at para 48.

17 2015 O.J. No. 6842 *S.L.*.

18 *Supra, S.L.* at para 47.

19 2011 B.C.J. No. 617.

20 2011 ONSC 2143.

21 *Supra*, *L.M.M.* at paras. 255-256.

22 Ross Macmillan. 2000. “Adolescent victimization and income deficits in early adulthood: Rethinking the costs of criminal violence from a life course perspective.” Criminology 31(1): 553-587.

23 2004 O.J. No. 285 *Glendinning*.

24 *Supra*, Glendinning at para 297.

25 Statistics Canada, 1999 General Social Survey Cycle 13 – Victimization Public Use Microdata File Documentation and Users’ Guide (Ottawa: Statistics Canada, 2000)

26 *Supra*, Glendenning

27 2000 O.T.C. 743 (SC)