Ontario Court Rejects Stereotypical Myths And Confirms Single Sexual Assault Against Adult Warrants High Damages



Because the majority of civil sexual assault cases are settled out of court, it is always helpful when a plaintiff has the courage and tenacity to pursue their claims right through to trial. The plaintiff who does so does a service to other litigants and potential litigants by adding to the body of precedent that informs not only future court decisions, but also settlement negotiations in other cases.

The recent addition of *BE v. OR*, 2024 ONSC 6193 to this body of precedent confirms that a single occasion of sexual assault against an adult victim can attract very significant non-pecuniary damages that, in Ontario at least, may also be supplemented by a large pre-judgement interest award.

THE FACTS

BE v. OR, 2024 ONSC 6193, decided by Justice C.J. Brown who sits in Toronto, was released on November 12, 2024. It involved an assault committed just over nine years prior, in September 2015.

The plaintiff was 29 years old when he was sexually assaulted by the defendant, who was both his older neighbour and a lawyer. Before the sexual assault, the parties' families were on friendly terms. The plaintiff was accustomed to assisting the defendant with small tasks on request.

One evening, the defendant asked if the plaintiff would give him a drive. The plaintiff agreed, but when he arrived at the defendant's house to pick him up, he found the defendant and another man there. The plaintiff was led to the basement, where he was sexually assaulted by the defendant and the other man. The sexual assault included repeat fellatio on the plaintiff.

The defendant denied the plaintiff's allegations and responded to the Statement of Claim with a Counterclaim against the plaintiff for sexual assault. While some say the best defence is a good offence, that was not the case here.

HE SAYS VS. HE SAYS: CREDIBILITY & RELIABILITY

The dispute between the parties was a classic one requiring the trial judge to

consider diametrically opposed versions of events and assess each party's and their witnesses' credibility and reliability.

The trial judge, in a textbook summary of the factors that enter into assessing credibility and reliability, favoured the plaintiff's over the defendant's evidence.

Regarding the plaintiff, the judge wrote:

"I found the evidence of BE to be straightforward and candid. His answers were intelligent and thoughtful. He was quiet and somewhat timid in testifying. He testified with respect to the events surrounding his adulthood and the sexual assault without attempting to avoid answering questions. He was not defensive or argumentative, but was forthright in his testimony. Where he did not know an answer, he candidly stated this. His evidence was not contradicted by the documentary evidence. His answers were consistent in examination in chief and in cross-examination.

I found his evidence to be reliable and find him to be credible."

In juxtaposition, the judge wrote about the defendant:

"OR's evidence was guarded, defensive and argumentative. He was evasive and attempted to avoid answering questions that did not fit his narrative or the theory of his case. He attempted to answer around or explain away certain facts and evidence. He obfuscated when faced with difficult questions. His answers were often not consistent with the documentary evidence. He would continue to deny facts despite the documentary evidence shown to him which contradicted his answers. In these cases, he would attempt to work around or explain away the contradictory documentary evidence.

OR refused to admit to reasonable facts and was impeached in cross-examination on prior inconsistent statements. He could not recall or would not admit to facts despite being shown contemporary text messages that he had sent. In some instances, he responded to material evidence declaring it to be fraudulent or made up.

His evidence throughout was defensive and argumentative. I find OR's evidence to be unreliable and I do not find him to be credible."

These statements are ones I intend to share going forward with clients and witnesses when I prepare them for examination because these words by a judge will, I hope, bring home the point I always make about how essential it is to be candid, responsive, modest and not defensive when being examined under oath.

CONSENT

The torts at issue in *BE v. OR* included assault and battery and the intentional infliction of mental suffering.

After explaining that in a civil case the defence of consent will defeat the tort of battery only where the defendant can prove they acted with the plaintiff's consent, the trial judge in *BE v. OR* cited Supreme Court of Canada authority for her concise and to the point statement that "silence, ambiguous conduct or a lack of objection does not establish consent."

These are words defence counsel in particular should be mindful of. I have previously written about the defence of consent in civil cases, and it is my experience that consent arguments are too often being advanced in circumstances where there is no credible basis for doing so if the law of consent were truly understood.

MYTHS & STEREOTYPES

The trial judge in *BE v. OR* rejected the defendant lawyer's arguments that the plaintiff, by freezing and not knowing what to do while being assaulted, did not act as he should have, or as the "common man" would have done.

Off the top of my head (and I have been working in the sexual abuse field for about 30 years now), I cannot think of another reported sexual assault decision involving an *adult* male victim. I have little doubt that the arguments leveled against the male plaintiff in *BE v. OR* were gendered ones because he is male and was viewed as not responding in the "manly" ways deemed appropriate in a male-dominated, patriarchal society and culture.

Brown J. strongly rejected these kinds of arguments, finding them to be based on stereotypical myths about a sexual assault victim's expected behaviour. She found the plaintiff was traumatized by the events in the defendant's basement, did not consent to being sexually touched, and she concluded the defendant had committed the torts of assault and battery, as well as the intentional infliction of mental suffering.

NON-PECUNIARY DAMAGES & PRE-JUDGMENT INTEREST

The judge in *BE v. OR* concluded on the evidence that, as a result of the defendant's sexual assault, the plaintiff had suffered psychological, physical and economic harm. She awarded the plaintiff general and aggravated damages totalling $300,000.

The general and aggravated damages award of $300,000 in *BE v. OR* is in keeping with *Zando v. Ali*, 2018 ONCA 680, where the plaintiff, an adult female victim, was awarded $175,000 (in 2017 dollars) as general and aggravated damages, which is the equivalent of about $217,000 in 2024 dollars once adjusted for inflation. In upholding this award, the Court of Appeal in *Zando v. Ali* referred with approval to the range the trial judge had identified as appropriate for adult, single incident sexual assault, being $144,000 to $290,000 in 2017 dollars, or $178,500 to $360,000 in 2024 dollars.

In *Zando v. Ali*, there was no evidence of long-term harm to the plaintiff. In *BE v. OR* there was. In other words, the higher amount awarded for general and aggravated damages in *BE v. OR* reflects the pronounced negative impacts, many of them lasting, that the sexual assaults had on the plaintiff.

Importantly, the trial judge in *BE v. OR* fixed pre-judgment interest on her non-pecuniary damages award of $300,000 at 5% per annum from the time the plaintiff reported the sexual assault to his doctor in 2015, amounting to roughly nine years, and by my calculation, approximately $135,000.

This is not the first time an Ontario court has made a large pre-judgment interest award in a sexual abuse case. In *CO v. Williamson*, 2020 ONSC 3874, an historical case I took to trial, a teenage victim of sexual assault was awarded $300,000 (in 2020 dollars) for general and aggravated damages, plus pre-judgment interest of just over $175,000 (in that case, calculated at the rate of 2.5% per annum for a period of roughly 23.5 years).

When *CO v. Williamson* was decided in 2020, there was an emerging belief that the courts should exercise their discretion to fix interest rates on non-pecuniary damages at less than the presumptive 5% rate prescribed by Rule 53.10 of Ontario's Rules of Civil Procedure. Those days are now gone after the Ontario Court of Appeal recently reaffirmed that the 5% interest rate applies unless evidence and special circumstances provide a basis for departing from this rule: see *Henry v. Zaitlen,*

2024 ONCA 614 and *Aubin v. Synagogue and Jewish Community Centre of Ottawa*, 2024 ONCA 615.

In my experience, defendants and their lawyers often recoil at the prospect of such large amounts for interest, arguing these amounts cannot possibly be justified since they approach or possibly even exceed the underlying damages award. The time for such denial is over.

HIGH-WATER MARK FOR PUNITIVE DAMAGES

The trial judge in *BE v. OR* expressed her condemnation of the defendant's conduct, both during his abusive interaction with the plaintiff and during the litigation, by making a punitive damages award of $250,000.

This represents if not the highest punitive damages award against an individual defendant perpetrator of sexual assault, certainly a high-water mark for such damages.

Indeed, in *CO v. Williamson*, 2020 ONSC 3874, mentioned above, the trial judge indicated he would have been inclined to award $150,000 as punitive damages had this amount been requested. Instead, he awarded $100,000, which is what the plaintiff had asked for based on then-existing precedent.

Where an individual defendant has not been otherwise punished, such as by the criminal courts, and the defendant takes the matter to trial, that defendant takes the risk of a large punitive damages award being made against them as an expression of the court's condemnation for their misconduct, and possibly also for the manner in which they conducted the litigation. Lawyers acting for such individuals need to be alert to this possibility and warn their clients about the risk they face.

CONCLUSION

Total damages awarded in *BE v. OR* amounted to $685,052. In addition to the general and aggravated damages of $300,000, amounts for pass loss of income and past and future psychological care were awarded. With pre-judgment interest added, the judgment for damages and interest is just over $800,000. With the substantial indemnity costs also awarded by the trial judge, the defendant is looking at a judgment against him totalling over $1 Million.

It bears remembering that the defendant will not be able to escape payment by declaring bankruptcy, because s. 178(1)(a.1)(i) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 does not allow a person to be discharged from a civil judgement debt based on sexual assault.

Without question, *BE v. OR* is a welcome and needed addition to the body of caselaw that deals with adult survivors of sexual assault and the compensatory and punitive damages to which they are entitled. It should also serve as a powerful deterrent to relying on the stereotypical myths that surround the "expected" behaviours of "real" victims of sexual assault that are so often used to try and discredit them, especially if they were teenagers or adults at the relevant time.

The significant amount of general and aggravated damages awarded based on a single sexual assault and the pre-judgment interest on those damages confirms that single incident cases involving adults should be taken seriously by defence counsel. This applies not only to those acting for the individuals alleged to have committed such sexual assaults, but also, where applicable, to those representing organizational defendants which may be jointly and severally liable with the individual perpetrator.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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