

## **125K DAMAGES AWARD AGAINST ABUSE COMPLAINANTS**

**By Loretta Merritt  
Torkin Manes LLP**

In a decision that could create a chilling effect for victims of sexual abuse, an Ontario man has successfully sued his nieces for defamation after they sent out emails to family members accusing him of sexually abusing them when they were young girls. On August 15, 2013, Justice Goodman of the Ontario Superior Court of Justice awarded damages in the amount of \$125,000 in favour of the uncle. He said that he did not find that the uncle committed sexual battery or assault against either of the two women. The two women admitted making the statements however they defended the lawsuit saying the statements were true and therefore justified or protected by a legal privilege.

The two women made a counterclaim for the sexual abuse which they say they suffered in 1982 to 1986 when they were between 4 and 6 years old. The judge dismissed their claim for the abuse. He said the nieces' accounts of the abuse were "vague" and "embellished". The judge said that the sisters admitted that they did not like their uncle and he also found that they were "seeking answers to questions that gave rise to their various psychological and socialization issues". However, he also said had the counterclaims been successful, he would have awarded each sister \$35,000 in damages.

The two women confronted their uncle in 2006 and accused him of sexually abusing them. They also sent out an email to extended family members accusing the uncle of sexual abuse. The uncle denied the abuse and, after discussions with their parents, the sisters retracted their allegations and apologized. They said that they had been abused but the perpetrator was not their uncle. However, the allegations resurfaced again in another chain of emails after the women said they had a lingering feeling that their uncle was in fact the perpetrator.

A defense of qualified privilege is available when the person making the statement has an interest or a legal, social or moral duty to make the statement and the person to whom the statement is made has a corresponding interest or duty to receive it. In this case Justice Goodman found that the statements were not privileged even though the sisters said in their email that they didn't want "anyone else to be sexually abused". The case is currently under appeal.

There are a number of concerns which this case raises. Foremost is the concern that it may have a chilling effect for sexual abuse survivors coming forward. This decision could encourage defendants in sexual abuse cases to make a counterclaim for defamation. However, the case really applies only to its' own specific facts. In this case the judge said he did not believe that the allegations of abuse had been proven. One of the lessons to be learned from the case is that care must be taken when making allegations of sexual abuse to third parties. One would hope that on the appeal the Court will give some guidance and support the idea of affording legal protection for statements made as part of the healing journey either in therapy, or in discussions with family or close friends in attempt to get support.

Also of concern is the great discrepancy between damages for sexual abuse and damages for defamation of character. Defamation actions outside of the sexual abuse context have sometimes resulted in damages between \$400,000 and \$800,000. There is no cap or upper limit on such damages. On the other hand, in sexual assault cases, the cap for pain and suffering in personal injury cases established in the late 1970's by the Supreme Court of Canada applies. The current value of the cap is approaching \$350,000.00. However, there are very few sexual abuse cases where damages are awarded at or near the cap. There are a couple of decisions in British Columbia which indicate that the cap ought not to apply in sexual abuse cases the law is evolving in this area and ultimately this issue will have to be decided by the Supreme Court of Canada.

It is also important to keep in mind that most sexual abuse cases result in out of court settlements as opposed to trials. In my experience, for most people, lawsuits based on sexual abuse are not just about the money. Rather, plaintiffs are looking to be heard, to stand up for themselves, to hold people to account, and for healing, justice and closure. It is still my view that taking legal proceedings (criminal or civil) can be an important step in the healing journey.

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