Cap on Non-Pecuniary Damages Does Not Apply for Intentional Torts

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On August 14, 2019, the Ontario Superior Court of Justice released its reasons for decision in *D.S. v. Quesnelle*[1], holding that the cap on general damages of $100,000 (since adjusted for inflation) set by the "trilogy" Supreme Court of Canada cases[2] did not apply to intentional torts – in this case, assault, sexual assault and other misconduct of a sexual nature[3].

The Decision

In this tragic case, the plaintiff sought damages for physical and sexual abuse suffered at the hands of his stepfather between the ages of five and ten. The conduct of the defendant towards the plaintiff was described by the court as "intentional, self-serving, violent, despicable, abusive and constituted a breach of trust of the very worst kind"[4]. As of the date of the motion, the defendant had already been convicted of assault, sexual assault and sexual interference, which the court relied on to establish liability for the intentional torts alleged by the plaintiff[5]. The defendant's actions were further found to have caused psychological injury, substance abuse problems and other interpersonal and personal challenges[6].

After determining that the defendant was liable for the intentional torts alleged by the plaintiff, and that the defendant's actions had caused damage, the court turned to the quantum of damages and the applicability of the Supreme Court of Canada's cap on non-pecuniary damages. Beginning with the British Columbia Court of Appeal's 1996 decision in *SY v. FGC*[7], the court noted that this decision suggested that in cases of sexual abuse, the policy reasons for a cap on non-pecuniary damages as established by the trilogy may not apply[8]. In *SY*, the BC Court of Appeal noted that, in contrast to non-intentional torts arising out of circumstances such as accidents or medical malpractice, sexual abuse claims do not typically result in monetary awards that guarantee lifetime economic certainty. Noting that the tort of sexual abuse may cause an unpredictable impact on a plaintiff's life, the Court of Appeal further suggested that sexual abuse victims may require and deserve more in non-pecuniary damages than the "cap" allows. The BC Court of Appeal reasoned that judges, juries and appellate courts would be in a position to decide "what is fair and reasonable" to both parties[9].

The court then turned to the Court of Appeal for Ontario's 2003 decision *Padfield et al v. Martin et al*[10], which stated that "it is in theory open to this court to create an exception to the cap and to decide that it does not apply in certain circumstances on policy grounds", noting the exception for defamation cases created by the Supreme Court in *Hill*[11]. It was further noted that the Court of Appeal in *Padfield* had recognized that the British Columbia Court of Appeal in *SY* had already concluded that the cap did not apply for intentional torts involving criminal behaviour, such as sexual assault.

Ultimately the court decided that the cap on non-pecuniary damages should not apply in the circumstances of this case and awarded damages in the amount of $400,000 in addition to damages for economic loss. Given that the defendant had already been sentenced to prison in relation to his criminal charges, the court declined to award punitive damages.

Takeaway

This case is significant in that it determines that the $100,000 (now approximately $350,000 to $370,000) cap on non-pecuniary damages does not apply to intentional torts such as sexual abuse. In cases of alleged sexual abuse, factors such as the age/vulnerability of the plaintiff, the frequency and severity of the assaults, the power wielded by the defendant (*i.e.* whether they were in a position of trust) and the severity of the consequences for the victim will be considered in assessing damages. While the court saw fit to award $400,000 (approximately $50,000 above what the court viewed as the cap), it should be noted that the court's decision was made in the context of an unopposed motion for default judgment and factual circumstances the court thought "[weighed] heavier…than those canvassed in the recent appellate decisions upholding the availability of general damages in the upper range of $290,000 to $300,000[12]"[13]. That said, this case continues the trend over the last several years of rising damages in sexual assault claims.

[1] 2019 ONSC 3230 [*Quesnelle*].

[2] *Andrews v. Grand and Toy Alberta Limited*, [1978] 2 SCR 229; *Thorton v. District No. 57,* [1978] 2 SCR 267; *Arnold v. Teno*, [1978] 2 SCR 287.

[3] *Quesnelle*, *supra* at para 2.

[4] *Quesnelle, supra* at para 21.

[5] Quesnelle, *supra* at paras 5-7.

[6] *Quesnelle*, *supra* at para 24.

[7] 1996 CanLII 6597 (BC CA) [*SY*].

[8] *Quesnelle*, *supra* at para 29.

[9] *SY*, *supra* at para 30.

[10] *Padfield et al v. Martin et al*, [2003] OJ No 2003.

[11] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130.

[12] Which, adjusted for inflation, reflect the cap established by the Supreme Court trilogy.

[13] *Quesnelle*, *supra* at para 36.

By

Wendy Whelan, John Hunter, Rebecca Bush

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

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200 Burrard Street
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V7X 1T2

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F 604.687.1415

Montréal
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Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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