

CANADA / JUDGMENT

T.M. v. G.M.

2016 BCSC 149

COURT

Supreme Court of British Columbia

DECIDED

1 February 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 149 T.M. v. G.M. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: T.M. v. G.M., 2016 BCSC 149 Date: 20160201 Docket: S62485 Registry: Nanaimo Between: T.M. by her litigation guardian A.M. Plaintiff And G.M. Defendant Before: The Honourable Mr. Justice Josephson Reasons for Judgment Counsel for Plaintiff: G. Phillips Counsel for Defendant: D.A. MacLeod Place and Date of Trial: Nanaimo, B.C. November 24 and 25, 2015 Place and Date of Judgment: Nanaimo, B.C. February 1, 2016

- [1] The infant plaintiff was sexually assaulted by the adult defendant while the plaintiff was in and near the residence of the defendant and his wife playing with his son. He pled guilty to criminal charges of sexual assault and was sentenced. The issue in these proceedings is the assessment of damages flowing from eight incidents of sexual assault.
- [2] The only witness at trial was A.M., the mother and litigation guardian of the infant plaintiff. As well, a written report of psychiatrist, Dr. Elisabeth Zoffmann is in evidence.
- [3] The bulk of the evidence is contained in an agreed statement of facts in which the defendant admits the details of the eight incidents as follows:
1. The Plaintiff, T.M., was born on March 7, 2003.
 2. The Defendant, G.M., resided in [Nanaimo, British Columbia].
 3. T.M.'s grandparents lived across the street from the Defendant.
 4. In the summer of 2008, T.M. became friends with the Defendant's son, and by late 2008 or early 2009, T.M. would go to the Defendant's house to play with the Defendant's son.
 5. During several of these visits, the Defendant committed several acts of a sexual nature upon T.M.
 6. The Defendant has admitted to sexual contact on eight occasions: The First Incident
 - a. The first incident was in the Fall of 2009.
 - b. T.M. was at the Defendant's house, playing with the Defendant's son.

- c. The Defendant sent his son downstairs, picked up T.M.,- and brought her into the main upstairs bathroom.
- d. While inside the bathroom, the Defendant asked T.M. if he could see her vagina in exchange for candy.
- e. T.M. declined, but the Defendant persisted and T.M. allowed him to pull her pants and underwear down.
- f. The Defendant looked at T.M.'s vagina and touched her bum. The Second Incident
- a. The second incident took place in the Defendant's kitchen.
- b. T.M. asked if she could have some candy.
- c. The Defendant said that T.M. could have some candy if she showed him her vagina.
- d. The Defendant asked his son to go outside, then pulled down T.M.'s pants and underwear and looked at her vagina for approximately 20 or 30 seconds. The Third Incident
- a. The third incident occurred in the master bedroom of the Defendant's house.
- b. The Defendant asked T.M. to show him her vagina and bum in exchange for candy.
- c. T.M. resisted, but eventually agreed to do so.
- d. The Defendant asked T.M. to bend over, and then the Defendant pulled down her pants and underwear.
- e. The Defendant had a video camera hidden in the room, which he produced after T.M. was bent over.
- f. The Defendant video-recorded images of T.M.'s exposed vagina from behind while T.M. remained bent over. The Fourth Incident
- a. The fourth incident occurred in Summer 2010, when the Defendant lifted T.M. into a fruit tree to pick fruit.
- b. The Defendant lifted T.M. with one hand holding her body, and the other placed on her clothed vagina and rear. The Fifth Incident
- a. The fifth incident occurred when the Defendant told T.M. and his son that if they needed to use the washroom, they were to use the en suite master bedroom bathroom.
- b. T.M. used that washroom.
- c. The Defendant hid a video camera in a wicker basket in the washroom, and video recorded T.M. sitting on the toilet, pulling her pants up, and walking out.
- d. The video recording captured images of T.M.'s face. The Sixth Incident

- a. The sixth incident occurred when T.M., T.M.'s sister, and the Defendant's son were having a water balloon or water gun fight in the Defendant's back yard.
- b. The Defendant saw T.M. sitting on a fort-style playset by herself.
- c. T.M. started to come down from the playset, but the Defendant picked T.M. up.
- d. The Defendant held T.M.'s shoulders and ribcage with his left hand, and with his right hand he slipped his hand under T.M.'s bathing suit and grabbed her behind.
- e. T.M. said "Please don't, the other kids might see" and the Defendant removed his hand, and placed T.M. back on the ground. The Seventh Incident
 - a. The seventh incident occurred in a spare bedroom in the Defendant's house.
 - b. The Defendant placed a video camera under the bed.
 - c. The Defendant asked T.M. to show him her vagina in exchange for candy.
 - d. T.M. first declined, but then agreed to do so after a brief discussion.
 - e. The Defendant placed T.M. on the floor in front of him and positioned his body so that the bedroom door could not be opened.
 - f. The Defendant then pulled down T.M.'s pants and underwear, exposing her vagina.
 - g. The Defendant produced the video camera from under the bed and video-recorded her vagina up close.
 - h. While video recording, the Defendant placed his fingers on the outside of T.M.'s outer labia and spread her labia for the video recording.
 - i. The video recording captured partial images of T.M.'s face.
 - j. The incident occurred over approximately 45-60 seconds. The Eight Incident
 - a. The eighth incident occurred in the upstairs of the Defendant's home.
 - b. The Defendant's son and T.M. were playing in the Defendant's son's bedroom.
 - c. The Defendant asked his son to go downstairs.
 - d. The Defendant then stimulated his penis to an erection under his shorts while in the presence of T.M.
 - e. The Defendant asked T.M. to come to the master bedroom.
 - f. T.M. did so and positioned herself on the bed.
 - g. The Defendant then kneeled down at the end of the bed, exposing his erect penis to T.M.
 - h. The Defendant then masturbated in front of T.M. for approximately one or two minutes before ejaculating.

- i. The Defendant asked T.M. to get Kleenex for him, which the Defendant used to clean himself.
- j. The Defendant then sent T.M. downstairs to play with his son. Police Investigation
7. In September 2010, the Defendant was arrested and released as part of an RCMP investigation into inappropriate sexual contact.
8. On December 22, 2010, T.M. disclosed to her mother that there had been sexual contact by the Defendant.
9. T.M.'s mother reported to RCMP that her daughter had been sexually assaulted by the Defendant.
10. The RCMP interviewed T.M. and T.M.'s parents on more than one occasion following the report.
11. On approximately January 7, 2011, the RCMP arrested and charged the Defendant with various charges of a sexual nature. The Video Tapes
12. The Defendant stated that he viewed the video tape referenced in the third, fifth and seventh incidents approximately four or five times.
13. The Defendant stated that the videotapes were destroyed. The Criminal Proceedings
14. On January 18, 2012, the Defendant pled guilty to sexually assaulting T.M. between January 1, 2009 to June 30, 2010 in Nanaimo.
15. The Defendant was sentenced to 6 months of incarceration, less a day, to be served under a Conditional Sentence Order in his home, to be following by a period of probation of three years, which probation order continues. A.M.
- [4] The infant plaintiff, born March 7, 2003, was 6 years of age when the incidents began and 7 years of age when they ended. The grandparents of the infant plaintiff resided near her school and she was cared for by them after school. The defendant and his family resided across the street. The infant plaintiff frequently went to the residence of the defendant to play with his similarly aged son.
- [5] She described her daughter as exceptionally smart. She had behavioral concerns as the infant plaintiff was "very distracted and impulsive". As an example, she testified that if the infant plaintiff saw a butterfly, she would follow it onto a road. She would also go up to and talk to strangers. This caused her and the school to wonder if the infant plaintiff was suffering from attention-deficit hyperactivity disorder, but a pediatrician eliminated that possibility. However, distraction problems continued at school and at home.

- [6] The witness testified that she observed changes in the behavior of the infant plaintiff beginning in grade one. She had been a happy child, but "turned inward" and had constant "melt downs" at school. She played by herself and was "no longer the happy kid I knew". There were meltdowns prior to that in kindergarten, but they were "nothing significant" and usually related to "kids stealing toys".
- [7] The infant plaintiff also started "keeping things inside". Meltdowns at home were less frequent as she felt comfortable there. Similar problems continued in grade two with stress and anxiety leading to meltdowns. Until grade 5, the infant plaintiff isolated herself and was not able to make friends.
- [8] After the disclosure of the sexual assaults by the defendant, the infant plaintiff "became a very angry child" and would lash out at kids at school. At home as well, the infant plaintiff exhibited much anger.
- [9] When these incidents were disclosed, the whole family reacted with shock and emotional distress, understandably so. The infant plaintiff was emotionally upset that she had been "lying" to her parents about the incidents for so long.
- [10] Wisely, the family took the infant plaintiff to a sexual abuse counsellor once or twice a week for some six months. The mother also took part in the counselling to learn how to deal with her daughter after the sexual abuse. In September of 2014, similar counselling continued for four sessions only, interrupted by the mother's need for medical treatment. The mother plans to continue this counseling when possible. The focus of those sessions was to assist the mother in communicating with her daughter as she enters puberty.
- [11] The mother testified that the infant plaintiff's anger lessened a year after the disclosure, but she remains isolated and is "still not a happy bubbly child". This has improved at the present time, but remains a problem.
- [12] After disclosure, the mother observed that the infant plaintiff acting out in school in a sexually inappropriate manner, resulting in increased isolation. The mother also described that the plaintiff developed an obsession with candy during grade one, which continues unabated.
- [13] The infant plaintiff also exhibited guilt and embarrassment, feeling that she had done something wrong. Counselling has assisted in that regard. Anger issues have lessened.
- [14] The mother agreed in cross-examination that the infant plaintiff's kindergarten teacher noted that she had anger and defiance issues, but that they were lesser concerns than what she observed in grade one. The meltdowns and isolation worsened in grade one.
- [15] The mother was and remains angry with the sentence imposed on the defendant because "he's still living at home while we are trying to deal with the aftermath". Dr. Elisabeth Zoffmann

- [16] Dr. Zoffmann's report of October 29, 2014 is in evidence. Dr. Zoffmann was not called as a witness. She was retained by the plaintiff to offer opinions regarding any psychiatric or psychological conditions caused by the sexual assaults, as well as a prognosis and treatment recommendations for any such condition.
- [17] At page 6 of the report, in describing her interview of the infant plaintiff, Dr. Zoffmann stated: She states that she feels that the offender did not hurt her but that his behaviour was quite weird. She denies having any intrusive unwanted recollections of the behaviour. She does not have nightmares about the behaviour and states quite frankly that she finds discussing the incidents quite boring. At page 8: [T.M.] presented as an articulate youngster who was able to express herself fully. Her emotional expression in the interview seemed happy and unanxious. There is no evidence of anxiety or fear or disgust at discussing the issue of the sexual assaults. At page 9: It would probably be helpful for [T.M.] as well as her family for her to receive some simple cognitive behavioural education on normal sexual development and expectations between men and women or consenting partners of any kind. In spite of the legal process and ensuring counseling, [T.M.] remains quite naïve about this area of her development and this will become an issue as she grows older.
1. I do not believe that there is a specific diagnosis at the present time. One might be tempted to characterize her detachment as alexithymia or an exceedingly mild presentation of Asperger's syndrome but I am of the opinion that her current level of functioning places her within the normal range and should not be pathologized unless she experiences functional problems in the future related to this apparent detachment.
 2. The prognosis with respect to the sexual interference incidents is an open question. With the advent of sexual maturation and physical development [T.M.] may find that the experiences will affect her ability to relate to others in a sexual manner but this cannot be predicted based on the current interview where she feels that the incidents really have not affect her.
 3. [Mrs. M.] gives a history of increased anger and acting out behaviour in the year or so after the disclosure of the sexual assaults. The present recreational endeavors and enjoyment of life are restricted as [T.M] prefers not to engage in child-centered activities and prefers to spend a great deal of time with computer games. Future limitations on recreational endeavors cannot be predicted unless there are restrictions on activities predicated by her parents' concern about her safety.
 4. I have no future treatment recommendations but would advise that [T.M.] be exposed to common sense teaching about normal physiological development and sexual interactions between consenting individuals. This would certainly help to arm her against insidious seductive behaviour in the future. General/Aggravated Damages
- [18] To the credit of the infant plaintiff, she appears to be a very resilient young child.

- [19] In all the cases cited by plaintiff's counsel, the general and aggravated damage awards of around \$100,000 fitted scenarios where the plaintiffs suffered pronounced psychological injury lasting into adulthood and where the sexual assaults were more intrusive.
- [20] In suggesting a range of \$20,000 to \$25,000 under this heading, the defendant submitted the following authorities:
- a) R.D. v. G.S., 2011 BCSC 1118 - the step father of the plaintiff began sexually touching her since age 8, took nude photos of her, which were subsequently discovered by her; the plaintiff suffered psychological injury and she received \$35,000 for general and aggravated damages.
 - b) T.O. v. J.H.O., 2006 BCSC 560 - the plaintiff was sexually assaulted by his brother who was four years older than him, so the defendant was between the ages of eight and sixteen when the assaults occurred; it was not fully clear to what extent the plaintiff's current troubles were caused by this childhood abuse, the Court awarded \$40,000 as compensation.
 - c) A.B. v. C.D., 2011 BCSC 775 - the teenage plaintiff's high school teacher sexually assaulted by sexual touching; the plaintiff suffered psychological injury, court ordered \$50,000.
- [21] T.O. v. J.H.O., is not of much assistance given the highly unusual nature of its facts. The other two cases are from British Columbia and serve as a more reasonable guide to begin the assessment of damages. Adjustments must then be made to account for the injuries experienced by the infant plaintiff caused by the sexual assault in this case.
- [22] The plaintiff's apparent relative ambivalence to the sexual assaults, as reported by Dr. Zoffmann, does not lead to a conclusion that she was not significantly and adversely affected. In cases cited by the plaintiff's counsel, the full extent of the damage was not revealed until adulthood. Here, the mother's evidence is that the infant plaintiff experienced behavioural deterioration in grade one, which coincided with the sexual assaults. She experienced guilt, embarrassment and anger.
- [23] The full extent of how these assaults have affected her and her future sexual relationships remains unknown. Her current preference to be alone and detached from others is difficult to attribute to the sexual assaults alone.
- [24] Nonetheless, she is still entitled to compensation as there has been a violation to her right to personal autonomy. For sexual battery, she is entitled to damages whether or not she suffered any provable injury as a result. Ad Hoc Fiduciary Relationship
- [25] I accept the plaintiff's submission that there was an ad hoc fiduciary relationship between the infant plaintiff and the defendant and that it was breached. Applying the test from *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24: there was an implied undertaking to act in her best interests; she is part of a class of people vulnerable to his control; and he could through his exercise of discretion or control adversely affect her substantial practical interests, namely her health and safety in this instance.

- [26] The defendant points out that the plaintiff (a 7 year old girl) came to his home on "her own volition"; that he had nothing to do with setting up the playdates; and that he never undertook to look after her. The defendant submits that the defendant was merely the "parent of a playmate" of the plaintiff who opportunistically took advantage of her in his home. This submission ignores his position as the adult in his home and the infancy of the children.
- [27] I accept the plaintiff's submission that, in allowing the infant plaintiff into his home to play with his child, there was an implied undertaking of reasonable care and supervision, consistent with her best interests. It is reasonably foreseeable that, at the vulnerable age of 7 years, she may require some supervision and/or care.
- [28] I will fix quantum of damages under this head after discussing the claim for punitive damages. Punitive Damages
- [29] There is no issue that a criminal penalty is not a bar to awarding punitive damages, especially where the criminal charge did not encompass all the allegations in the civil case.
- [30] However, the purpose of any punitive damage award is not to remedy any perception, as the mother acknowledged, that the criminal sentence imposed on the defendant was not sufficiently punitive.
- [31] The plaintiff's strongest submission under this head of damage is that "the defendant has admitted to various acts that were not specifically punished by the criminal system". Most notable is that he was not punished for the creation of what was essentially child pornography as defined in s. 163.1 of the Criminal Code.
- [32] The creation of child pornography occurred in three of the eight incidents of sexual assault, which the defendant admits to accessing and viewing. Fortunately, there is no suggestion of the pornographic images of the infant plaintiff having been distributed to others.
- [33] I find myself unable to distinguish a case advanced by the defendant, a decision of L. Smith J. in *R.D. v. G.S.*, 2011 BCSC 1118 [R.D. v. G.S.]. This case also involved a relatively milder form of child sexual assault and the creation and use of child pornography by the defendant. In that case, the defendant only pleaded guilty to one incident where there were in fact multiple incidents, and he received no criminal penalty for use of the plaintiff's image or for creating the child pornography. The defendant in that case denied all but one incident, an incident he attempted unsuccessfully to minimize. The Court rejected his evidence and accepted that of the plaintiff.
- [34] The Court concluded at para. 224 and 225 as follows: There is no absolute rule that punitive damages cannot be awarded if there has been a criminal penalty: *E.D.G. v. Drozdik* at para. 30. However, if the defendant has been punished criminally, or has suffered punishment in other ways, the purpose of punitive damages has been fulfilled and such an award will be unfair and inappropriate. The defendant pleaded guilty and was sentenced to a 12-month conditional sentence order followed by a one-year term of probation for the possession of

child pornography and touching for a sexual purpose charges. He has lost his marriage and his family, and gave evidence as to his reduced financial circumstances. I have concluded that an award for punitive damages is not appropriate in this case.

- [35] The circumstances are markedly similar to those before me. The defendant in this case was sentenced to a conditional 6 month sentence together with probation. Whether or not a defendant experiences loss of job or marriage should not, in and of itself, be sufficient to either award or refuse punitive damages. Nevertheless, the court may simply be cognizant of such losses. In this case, counsel represented that the defendant lost both similar to the defendant in *R.D. v. G.S.*
- [36] While the sexual touching of a child is firmly denounced by society and the courts, the actions of a defendant thereafter must also be considered. Here the defendant endeavoured to minimize any additional harm caused to the infant plaintiff by pleading guilty to the criminal charges, waiving her examination for discovery in these proceedings and making extensive and detailed admissions, thus obviating the need for her to testify in this trial.
- [37] There is no valid basis to depart from the reasoning in *R.D. v. G.S.* pursuant to *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590. I decline to award punitive damages. Future Care
- [38] While further counselling and sex education is recommended by Dr. Zoffmann, there is no clear evidence as its anticipated frequency, length or cost. While the defendant's submission that \$2,000 would be sufficient is not unreasonable, considering the significant contingencies that exist, I will award \$5,000 under this head of damages. Conclusion Regarding Non-Pecuniary/Aggravated Damages Quantum
- [39] *R.D. v. G.S.* is also of guidance in this regard. The Court awarded damages of \$35,000 under this heading. The breach of trust was greater in that case as the defendant was the step father of the plaintiff. The resulting harm to the victim appears greater. The defendant in that case, except for the one incident which he minimized, denied the allegations at trial.
- [40] I must also consider that that amount was fixed almost five years ago.
- [41] I will award the plaintiff \$33,000 under this heading. Summary
- [42] The plaintiff is awarded the following:
1. Non-Pecuniary/Aggravated Damages: \$33,000
 2. Cost of Future Care: \$5,000
- [43] The plaintiff is entitled to her costs, with leave to apply. "Josephson J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/01/2016BCSC0149.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/t-m-v-g-m-2016>

Prepared on 25 October 2026 · Esheria