
CANADA / JUDGMENT

Waters v. Bains

2008 BCSC 823

COURT

Supreme Court of British Columbia

DECIDED

25 June 2008

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

2008 BCSC 823 Waters v. Bains

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waters v. Bains,

2008 BCSC 823

Date: 20080625

Docket: S050256

Registry: Vancouver

Between:

Karamjeet Kour Singh

also known as

Karamjeet Kour Waters

Plaintiff

And:

Joginder Singh Bains

also known as Giani Joginder Singh Bains,

and Darshan Kaur Bains

Defendants

Before: The Honourable Madam Justice Morrison

Reasons for Judgment

Counsel for the Plaintiff

C. Frederick Easton

Faith E. Hayman

Counsel for the Defendants

G. Jack Harris, Q.C.

Bernie S. Buettner

Date and Place of Hearing:

January 21, April 11, May 15, 2008

Vancouver, B.C.

Authorities Considered:

Yeo v. Carver (1996), 26 B.C.L.R. (3d) 155 (C.A.)

Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

C.H. v. British Columbia (2003), 16 B.C.L.R. (4th) 113 (S.C.)

C.A. v. Critchley (1998), 60 B.C.L.R. (3d) 92 (C.A.)

L.T. v. R.W.T. (1997), 36 B.C.L.R. (3d) 165 (S.C.)

M.M v. R.F. (1997), 52 B.C.L.R. (3d) 127 (C.A.)

L.B. v. W.M., 2003 BCSC 261

ter Neuzen v. Korn, [1995] 3 S.C.R. 674

Young v. Bella, [2006] 1 S.C.R. 108

T.O. v. J.H.O. (2006), 266 D.L.R. (4th) 209 (B.C.S.C.)

Jacobi v. Griffiths, [1999] 2 S.C.R. 570

P.D. v. Allen, [2004] O.J. No. 3042 (QL) (Ont. Sup. Ct. J.)

Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595

Norberg v. Wynrib, [1992] 2 S.C.R. 226

Vorvis v. Insurance Corp. of British Columbia, [1989] 1 S.C.R. 1085

K.S. v. J.P.H., 2004 BCSC 769

Brooks v. British Columbia, 2000 BCSC 735

K.L.B. v. British Columbia (1998), 51 B.C.L.R. (3d) 1 (S.C.)

M.B. v. British Columbia, [2003] 2 S.C.R. 477

K.K. v. K.W.G. (2006), 40 C.C.L.T. (3d) 139 (Ont. Sup. Ct. J.)

D.H. v. L.J.H (17 November 1997), Victoria 93-0759 (B.C.S.C.)

Beaudry v. Hackett (28 June 1991), Vancouver C903202 (B.C.S.C.)

Mustaji v. Tjin (June 21, 1996), Vancouver CA019954 (B.C.C.A.)

Osborne v. Harper, 2005 BCSC 1202

Resurfce Corp. v. Hanke, [2007] 1 S.C.R. 333

P.B. v. R.V.E., 2007 BCSC 1568

M.R. v. British Columbia, 2002 BCSC 1557, (2005), 41 B.C.L.R. (4th) 91 (C.A.)

Blackwater v. Plint (2001), 93 B.C.L.R. (3d) 228 (S.C.), (2003) 21 B.C.L.R. (4th) 1 (C.A.), [2005] 3 S.C.R. 3

K.L.B. v. British Columbia (2001), 87 B.C.L.R. (3d) 52 (C.A.)

B.M.G. v. Nova Scotia (Attorney General), 2007 NSCA 120

D.H. (Guardian ad litem of) v. British Columbia, 2008 BCCA 222

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 39 O.R. (3d) 487 (Ont. Ct. J. (Gen. Div.))

J.S. v. Clement (1995), 22 O.R. (3d) 495 (Ont. Ct. J. (Gen. Div.))

- [1] This is a case involving allegations of sexual assaults on the plaintiff, Karamjeet Kour Singh, now known as Vicki Waters, against the defendants, her aunt and uncle, Giani Joginder Singh Bains and Darshan Kaur Bains. In a judgment of October 5, 2007, following a nine day trial ending September 27, 2007, the defendants were found liable. (Waters v. Bains, 2007 BCSC 1500)
- [2] The plaintiff, now 50, alleged years of sexual assaults by Joginder Singh Bains, commencing in 1966, when the plaintiff was eight years of age, continuing until she was 18 years old. The judgment found that the actions of sexual and other abuse over a period of ten years by Joginder Singh Bains caused grievous harm to the plaintiff; he is liable for damages.
- [3] There was also a finding of liability against the plaintiff's aunt, Darshan Kaur Bains, as she took no reasonable steps to prevent or stop the sexual abuse. The plaintiff had told her at an early stage on two occasions of her husband's abuse. Further, the female defendant collaborated with the plaintiff's grandmother to have an IUD inserted into the plaintiff as a 12 or 13 year old child at the onset of her puberty. The inference was drawn that the female defendant knew of the sexual abuse, and she wanted to ensure there would be no pregnancy or discovery of ongoing abuse. Both defendants breached their duty of care to the infant

plaintiff, their niece.

- [4] At the end of the trial, counsel for the plaintiff asked to make submissions on damages following any finding on liability. Those submissions have now been made by counsel. An application by counsel for the plaintiff to introduce further evidence with regard to damages was refused.

Position of the Plaintiff

- [5] Against Joginder Singh Bains, the plaintiff seeks general damages for sexual assault, including an aggregated portion in aggravated damages with a component for breach of fiduciary duty. In addition, punitive damages are sought. Against Darshan Kaur Bains, the plaintiff seeks equitable compensation for breach of fiduciary duty, general and aggravated damages as well as punitive damages. By way of special damages, the plaintiff also seeks compensation for loss of income, cost of future care and special costs.
- [6] Relying on the B.C. Court of Appeal decision in *Yeo v. Carver*, *supra*, counsel for the plaintiff suggests that non-pecuniary damages of \$250,000 awarded in 1996 would be the equivalent in today's dollar of an award closer to \$350,000. Placed in evidence from the Bank of Canada website was the calculation of what a "basket" of goods of \$250,000 in 1996 would amount to in 2008. That figure was \$318,079.10. The percent change was 27.23.
- [7] In *Yeo*, a young girl had been sexually assaulted by her stepfather when she was between the ages of 7 and 14. There had been no sexual intercourse, but there had been digital penetration, and continuous other humiliating sexual abuses. The psychological effects of the sexual abuse were part of the claim. In the trial judge's charge to the jury, he suggested that the defendant had "stripped the plaintiff of her sexual innocence."
- [8] In that 1996 case, the jury awarded \$350,000 non-pecuniary general and aggravated damages and \$250,000 in punitive damages. The Court of Appeal reduced the non-pecuniary damages to \$250,000 and the punitive damages to \$50,000.
- [9] The Court of Appeal in *Yeo* stated that the policy reasons which gave rise to the cap in the trilogy cases involving motor vehicle accident claims would not be applicable in this case of sexual assault. Sexual assault cases are intentional towards an individual, involving criminal behaviour; the public purse is not involved, as it is in catastrophic motor vehicle injury cases, where large insurance premiums and serious social burdens are implicated.
- [10] At paragraph 31 of the *Yeo* decision, the court stated, "Judges, juries and appellate courts are in a position to decide what is fair and reasonable to both parties according to the circumstances of the case."
- [11] The court found that the defendant had deprived the plaintiff of her childhood, and had inflicted pain and fear "in a most callous, disgusting and reprehensible way." (Paragraph 34(c))

[12] At paragraph 35 of the decision, the court ruled that general damages should take into account any aggravating features. That aggravated damages would not be a separate head of damages, but rather, part of general, non-pecuniary damages. The court found in that case there were significant aggravating circumstances, including breach of duty, the number of assaults, the age of the young plaintiff, the duration of the assaults, the coercion and threats, and the lack of remorse by the defendant.

[13] The court had this to say in Yeo at paragraph 55:

What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.

[Emphasis added]

[14] In support of the claim for punitive damages, the plaintiff suggests the reduced award of \$50,000 in the Yeo case would be approximately \$80,000 today. Counsel for the plaintiff suggests \$100,000 as an appropriate amount for punitive damages.

[15] Counsel further argues that the fact situation in this case details more egregious behaviour by both defendants than in the Yeo case. This plaintiff was an eight or nine year old child living in a new and hostile home, that of her paternal grandmother, after the plaintiff's mother died suddenly in a motor vehicle accident. Joginder Singh Bains instilled fear in Vicki Waters from the beginning of her contact with him. Fondling, physical assaults and domination quickly progressed to sexual assaults, including vaginal and anal rape, beginning when she was still a prepubescent child.

[16] These assaults, physical and sexual, continued until the plaintiff was 18. She was also forced into oral sex repeatedly, at different locations on her grandmother's farm or the defendants' farm, four miles away. She was threatened by each defendant separately not to say anything; that she could lose contact with her father and younger brother if she did not maintain her silence.

[17] When she tried to tell her aunt, the female defendant, that she needed protection from her uncle, and did not want to be left alone with him, her aunt not only refused to help, but cautioned her not to speak of it. Later, the aunt and the grandmother took Vicki to their doctor to have an IUD inserted in the plaintiff when she was 12 or 13 years of age. The young plaintiff had no idea what was being done to her in the family physician's office. She found out only after her marriage that she had an IUD, when the dated and defective IUD was discovered and had to be surgically removed.

- [18] Since the Yeo case in 1996, damages for sexual assault cases such as this have remained low, according to the plaintiff. There seems to have been a range of \$100,000 to \$175,000 for combined general and aggravated damages. A number of cases were cited by counsel, including *C.H. v. British Columbia*, supra, a 2003 decision of Mr. Justice Owen-Flood. In *C.H.*, the plaintiff was sexually and physically assaulted by her father when she was 15 and 16 years of age. General damages were assessed at \$135,000, which included aggravated damages.
- [19] Other cases cited included *C.A. v. Critchley*, supra, a 1997 case where our Court of Appeal in 1998 confirmed general damages in the range of \$50,000 to \$75,000. The plaintiff's physical and sexual abuse was by a defendant who ran a group home for troubled youths for the Ministry of Human Resources.
- [20] In *L.T. v. R.W.T.*, supra, a 1997 case, the defendant father sexually fondled a prepubescent daughter, and the court found "devastating emotional effects", awarding \$85,000 in general damages and \$10,000 in punitive damages.
- [21] In *M.M. v. R.F.*, supra, decided by our Court of Appeal, the sexual abuse of a foster child by a foster brother began when the little girl was four years old, until the age of 13. The defendant was 21 to 29 years old during that period. The trial judge had found that the plaintiff's life "was in total disarray". She suffered not only depression, but dropped out of school, began illicit drug use, alcohol abuse, self-mutilation and other devastating behaviour. Non-pecuniary and aggravated damages were assessed at \$100,000, the trial judge having determined that the appropriate range was between \$85,000 and \$150,000. This was before the Yeo decision.
- [22] Mr. Justice Donald, writing a minority decision, would have increased general damages to \$200,000. However, in the majority award, *Esson J.A.* at paragraph 154 found that the award of \$100,000 for general damages "was well within the range for similar cases." He stated it could be regarded as at the lower end, "but not as outside the range." He stated that the Yeo case involved significant aggravating features which were not present in their case.
- [23] Having regard for the Yeo decision, in arguing that an award closer to \$350,000 for general damages would be appropriate today, counsel for the plaintiff cites the *ter Neuzen v. Korn*, supra, case. That case recognized that it was appropriate to take into account the effect of inflation.
- [24] Of interest is counsel's reliance upon the *Hill v. Church of Scientology of Toronto*, supra, decision in 1995 by the Supreme Court of Canada. That case dealt with defamation, not sexual assault. However, the issue of damages, general, aggravated and punitive, dominated. *Hill* was a Crown attorney who brought an action for damages for libel. The case drew much attention, and the interveners included the Attorney General for Ontario, the Canadian Civil Liberties Association, the Writers' Union of Canada, the Canadian Association of Journalists, the Canadian Daily Newspaper Association, the Canadian Association of Broadcasters, the Canadian Book Publishers' Council, and a number of others.

[25] General damages were awarded in the amount of \$300,000, for aggravated, \$500,000 and punitive, \$800,000, for a total of \$1,600,000. The Ontario Court of Appeal ruled that the awards for damages to Mr. Hill's reputation were justified. The Supreme Court of Canada did not interfere with the jury findings, even though the plaintiff had received several promotions and an appointment to the bench by the time of the final trial.

[26] In Hill, the court first found that no cap should be placed on general damages for defamation.

[27] On punitive damages, the court had this to say:

196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[Emphasis added]

[28] The point made on behalf of the plaintiff in the present case is that the conduct of the defendants is egregious. The harmful and long term effects on the plaintiff have been devastating, and continue to be. The argument is that significant general damages should be awarded in a case of this type of sexual assault, as they were in a case of defamation.

[29] Counsel for the plaintiff also referred to the Young v. Bella, supra, case, where a student in the School of Social Work in Newfoundland was labelled as a suspected child sex abuser. The damage to her reputation was in issue. The Supreme Court of Canada, citing the medical and psychological evidence heard by the jury, agreed that in cases such as that, the court should begin to substantially increase the combined awards for general and punitive damages. The jury awarded \$430,000 for general non-pecuniary damages, plus \$314,000 for future loss of income, and other damages for a total of \$839,400. The Supreme Court of Canada upheld the damages awarded by the jury.

[30] Citing other authorities, counsel for the plaintiff argues that some of the factors that must be taken into consideration in assessing damages include the number and frequency of assaults, the nature of the sexual assaults, the age of the complainant, the age of the defendant, the vulnerability of the complainant, the relationship between the parties, whether force or violence were involved, the effect and consequences on the victim, the duration of the abuse, whether actual sexual penetration occurred, whether aggression, force and threats were used during the assaults, before or after, and whether the abuser was in a position of power, or had a fiduciary duty.

- [31] The plaintiff argues that Joginder Singh Bains deserves a substantial penalty in the form of punitive damages. At the beginning of the sexual assaults on the plaintiff, he was 35 years old, married, with two small male children. He portrayed himself, and has been portrayed as an educated man, esteemed by his community and within his religion. He has the status of a "Giani", a position of privilege within the Sikh faith. He has never been held to account publicly for his actions. He has denied the assaults and shown no remorse.

Dr. Brownstein's Report

- [32] In addition to the evidence of herself and other witnesses, as to proof of injury, the plaintiff points to the evidence of Dr. Brownstein, who gave his professional opinion on psychological damage. Dr. Brownstein's evidence went in by way of a five page report. His evidence was not contested.
- [33] Dr. Brownstein is a psychiatrist who has been practising since 1984. He has a private practice and is also a consultant at the Mental Centre in Nelson, where the plaintiff resides. He received his training in psychoanalytic psychotherapy in 1983 from Toronto, and further specialty training in psychoanalytic psychotherapy in Seattle from 1984 until 1992.
- [34] His report states: "I have had extensive experience counselling women who have been victims of sexual abuse and also considerable experience counselling men who have been victims of sexual abuse."
- [35] Dr. Brownstein had a series of interviews with the plaintiff beginning May 4, 2007, May 30, June 4 and June 11, 2007. He also reviewed documents with regard to the litigation.
- [36] The plaintiff related to Dr. Brownstein her problems with anxiety, that she feels anxious and tense much of the time. That she is fidgety, jumpy and hyper vigilant. That she is depressed, her mood is low, and she has low self-esteem. In addition, she feels ashamed and humiliated. She has difficulty trusting people, and this includes any authority figures, including her husband and even friends. She has trouble sleeping, and is plagued by nightmares of sexual abuse. She related impaired sexual functioning, stated that she does not enjoy sex, that she is afraid of it, it hurts, and she has never had an orgasm. She has had flashbacks of her uncle raping her when she had intercourse with her husband. That made her cry, and lash out at her husband.
- [37] There have been no sexual relations in the plaintiff's marriage for the past 12 years or more. The plaintiff told Dr. Brownstein of marital difficulties, and difficulties with rearing her children. She is overprotective and fears her daughter will get into trouble. She also feels that the abuse she was subjected to impaired her ability to do well at school and prevented her from obtaining further education and consequently getting a better job.
- [38] Many of these problems were supported by evidence at trial, evidence from the plaintiff herself, her husband and from her friend Marilyn Dwornik.

[39] In his interviews, Dr. Brownstein noted that the plaintiff cried frequently and apologized for crying. That she was restless, seemed sad, and said she felt ashamed and humiliated. He considered her intelligence at least average, possibly considerably above average.

[40] His opinion was stated in the original judgment, but I will repeat it here, as it bears considerably on the issue of damages:

In my opinion, the symptoms that Ms. Waters reports are entirely consistent with a history of sexual abuse such as she claims. Sexual abuse survivors regularly have difficulties with self-esteem, mood, and anxiety. They frequently go through periods of, particularly in their adolescence, drug abuse, alcohol abuse, sexual promiscuity, and poor judgement in choosing sexual partners. Frequently their sexual functioning later on as adults is impaired. They have difficulty enjoying sex, find it painful, have difficulty having orgasms. Another feature that is consistent with a history of sexual abuse is the phenomena known as flashbacks in which the individual re-experiences an original event when triggered by things that remind them of this. An example from Ms. Waters story would be the flashbacks of her uncle's sexual abuse when she is having sexual intercourse with her husband. Understandably, this would pose some difficulties in their sexual and marital relationship. Other features of Ms. Waters' story that are certainly consistent with a history of sexual abuse are her feelings of shame, humiliation, self-blame, and doubt. These features often keep the victim from speaking about the abuse that they have suffered or from standing up for themselves in the hopes of gaining some sort of justice. Prolonged and repeated sexual abuse impairs the individual's sense of identity, sense of being a powerful agent in the world and being able to trust things to run their natural course. This frequently impairs the individual's academic and occupational functioning and these claims are consistent with those of Ms. Waters. Ms. Waters' quality of life has been severely affected and her day to day functioning is impaired by anxiety, depression, hypervigilance, nightmares, marital difficulties, relationship difficulties, and academic and occupational achievements that could be less than would be expected had these events not occurred. Ms. Waters has been able to raise two children and is very proud of them. She has maintained her marriage, though with great conflict and a lot of unhappiness. Occupationally, she has not achieved very much and I understand is currently on a disability. She has certainly had some pleasure in her life, specifically raising her children, but other pleasures have largely escaped her and she lives with a daily level of distress that I would rate as moderate to severe.

[Emphasis added]

[41] The defence chose not to cross-examine Dr. Brownstein on his report, and I accept his report without qualification.

Evidence with Regard to Injuries Suffered

[42] In her own evidence at trial, the plaintiff stated that her suffering from depression was as a result "of all this stuff." In talking about her distress, she testified that after telling someone that something was going on, "and no one believing me or helping me, I took everything that

somebody said as a threat reality." She further stated that she felt betrayed, and that people had let her down. She does not trust easily. She feels used, and ashamed. She also felt she did not have a family unit that embraced her, so that she always feels alone, without an extended family. The plaintiff suffers from some physical ailments including irritable bowel syndrome, chronic fatigue, and a sense of achiness and tiredness all over. She said "that's stress, and it's traumatizing."

- [43] Counsel for the plaintiff points out that the school records indicate the plaintiff missed many days in most school years, that she did fail some courses, and in one report was classified as being capable of being a "domestic".

Further Authorities Cited by the Plaintiff

- [44] In support of the argument for damages for breach of fiduciary duty, the plaintiff cited *K.L.B. v British Columbia*, *supra*, and *Norberg v. Wynrib*, *supra*. *Norberg* was a Supreme Court of Canada case in 1992. A doctor had propositioned sex for drug treatment, knowing that the plaintiff was addicted to prescription drugs. There were several instances of fondling and simulated intercourse over a period of one year. Confirming this was a tort of battery, the Supreme Court of Canada found that a fiduciary duty had been breached. There was inequality between the two persons, and the plaintiff was vulnerable, addicted as she was.
- [45] In *Norberg*, finding that battery is actionable without proof of damage, the court stated liability should not be confined to foreseeable consequences. Aggravated damages could be awarded if the battery occurred in humiliating or undignified circumstances. General and aggravated damages would be awarded as one, with general damages being assessed after taking into account any aggravating features of the case. In which event, general damages would be increased.
- [46] On the issue of damages for loss of income and loss of opportunity, the plaintiff concedes there was no direct evidence led at trial with regard to loss of earning capacity. However, counsel cited the case of *K.K. v. K.W.G.*, *supra*, where the court concluded that the claim for lost income "defies calculation" (paragraph 83). In that case, from age 10 to 17, the father abused his daughter. The abuse consisted of everything except actual sexual intercourse, and occurred nightly. The daughter was suing her mother, who it was contended must have known. There was evidence with regard to economic loss, and also evidence with regard to what future earning capacity might be, both with and without a high school diploma.
- [47] In spite of concerns about the sufficiency of evidence relating to the economic loss of the plaintiff, the court in *K.K.* found that the abuse diminished the plaintiff's effectiveness at school and in the workplace, and "impeded her ability to achieve her full potential" (paragraph 84). In stating that the claim defied precision in quantification, the court said the loss was significant and awarded \$100,000 for loss of income.

- [48] In *D.H. v. L.J.H.*, supra, a decision of Mr. Justice Leggatt in 1997, the court awarded general damages in the amount of \$150,000 and damages for past and future economic loss at \$100,000. The plaintiff, between the ages of 4 and 10, was subjected to beatings by her mother, brothers and stepfather that amounted to torture. There was also sexual abuse by the stepfather. There was no medical evidence, and no viva voce evidence. Punitive damages were not awarded because the defendants had been convicted and jailed for the crimes.
- [49] However, at paragraph 20, Mr. Justice Leggatt found, "...it is not difficult to find that this abuse has had a dramatic and damaging effect on the plaintiff and will likely continue to have an effect on the plaintiff for the rest of her life." He continued at paragraph 25, "I also find the plaintiff has suffered, and likely will in the future suffer, some interference with her ability (to) earn an income."
- [50] Counsel for this plaintiff argues there is sufficient evidence here to make an award for income loss in the circumstances of this case. That even in those cases where expert evidence has been tendered, the finding of such loss can only be made approximately.
- [51] As to the cost of future care, future counselling should be provided for, according to the plaintiff. The plaintiff requests an award of \$10,000 for costs of future care, for counselling.
- [52] The plaintiff submits there should be a separate award of damages for the female defendant, Darshan Kaur Bains, for breach of fiduciary duty, negligence, and assault. The breach of duty occurred when Darshan Kaur Bains did nothing when the abuse was reported to her by the young plaintiff. She was a party to the continuing assaults then by her husband; and a separate assault was made by her on the person of the child when the IUD was inserted. Damages for both aggravated and punitive should be awarded as well, according to the plaintiff's submission.
- [53] Citing the cases of *Mustaji v. Tjin*, supra, and *Osborne v. Harper*, supra, counsel for the plaintiff points to punitive damages in the amount of \$175,000 awarded in *Mustaji*. In the 1996 *Mustaji* case, an immigrant nanny was held isolated by her employers, and subjected to working conditions close to slave labour. The jury awarded \$175,000 in punitive damages. The Court of Appeal was not persuaded that the jury made perverse findings of fact in awarding punitive damages.
- [54] The *Osborne v. Harper* case dealt with the issue of prejudgment interest on punitive damages. Interest was awarded.
- [55] Finally, the plaintiff seeks special costs; in the alternative, costs on a higher scale as set out in the Rules of Court. Because the allegations were over 40 years old, the plaintiff argues that witnesses were difficult to contact, the search for medical records caused problems, and extensive travel was required by the plaintiff and counsel.

The Position of the Defence

- [56] The defence concedes that an award for general damages should include an award for aggravated damages in the circumstances of the case. But an award of \$50,000 is appropriate for the plaintiff's non-pecuniary damages, and a further award of \$20,000 in aggravated damages. There should be no punitive damages.
- [57] There is insufficient proof that the plaintiff has suffered any chronic psychological or physical injuries which can be causally related to the abuse committed by the male defendant, according to the defence. It is contended that Dr. Brownstein's report does not diagnose the plaintiff as suffering from any psychological condition, nor does he causally relate the plaintiff's subjective complainants of psychological problems to the abuse committed by the defendant. The plaintiff has had other traumatic events and illnesses in her life, and unless there is expert opinion evidence on the issue of causation, counsel for the defence contends the plaintiff has not proven that her subjective complaints of psychological problems are causally related to the abuse by the defendant.
- [58] Counsel for the defence points to the evidence that the plaintiff did well at school, was steadily employed, had normal relationships, and has had a stable family life while raising two "excellent" children. Any damages should compensate her for the acute trauma of the actual assaults, but not for any subsequent chronic problems.
- [59] The defence contends at no time did Dr. Brownstein diagnose the plaintiff as suffering from any chronic psychological condition. His report does not give an expert opinion that the plaintiff could properly be diagnosed with psychological problems as claimed, including depression. His report recites hearsay evidence given to him by the plaintiff.
- [60] Does the plaintiff suffer from alcohol abuse? Dr. Brownstein's report states that the plaintiff had blackouts and missed work, due to her use of alcohol. The plaintiff denied blackouts at the trial, and did not testify that her use of alcohol ever caused her to miss work.
- [61] The defence denies that there was evidence at trial that the plaintiff suffered from anxiety, depression, sleep difficulties, impaired sexual functioning, marital difficulties, difficulty with childrearing, or impairment in academic and occupational functioning. While there may have been some evidence, the defence contends that the evidence falls short of demonstrating problems in any of these areas. The defence points to the fact that immediately after leaving high school the plaintiff was able to secure employment. She moved to another job to obtain better pay, with no period of unemployment. She has been off work and in receipt of disability benefits since 1989 as a result of her chronic fibromyalgia. She has other physical and chronic problems. But the evidence does not support a causal connection between psychological and physical injuries or conditions and the abuse by the defendants.

- [62] While Dr. Brownstein does state that the plaintiff's symptoms are consistent with a history of sexual abuse, the defence says that it cannot be said that such a correlation implies causation. There is no such opinion by Dr. Brownstein.
- [63] The defence also notes that there was abuse of the plaintiff by three other men, two common law relationships which were emotionally and physically abusive, and beginning at the age of 14, sexual abuse by the plaintiff's young uncle. The plaintiff recently sued that uncle for sexual abuse, and reached a settlement in a separate action.
- [64] The recent Supreme Court of Canada case of *Resurface Corp. v. Hanke*, *supra*, was cited. The defence contends that the basic test for causation remains the "but for" test, even in cases where there are multiple potential causes for the alleged harm. The plaintiff has failed to discharge the onus on her to establish that "but for" the abuse of the defendants, and more particularly the male defendant, she would not have suffered the psychological disorders or injuries of which she complains.
- [65] Further, the defence argues many of the plaintiff's symptoms could reasonably be related to the other problems and experiences that she has had in her life after the sexual abuse by the defendant, or could be related to her physical ailments, which have not been caused by the defendant. The plaintiff's chronic fatigue or fibromyalgia could well factor into these, rather than the sexual abuse.
- [66] In short, the plaintiff has failed to prove that she has any chronic psychological injuries. Alternatively, if the court finds that there are these psychological problems, the evidence falls short of demonstrating that the conduct of the defendants caused such problems. Thus the plaintiff's non-pecuniary general damages would be limited to reflect only the trauma of the assaults that occurred prior to her leaving the farm at the age of 18.
- [67] In the case of *M.R. v. British Columbia*, *supra*, a foster child was sexually assaulted by her foster father when she was between the ages of 9 and 16. The abuse included fondling, oral sex and intercourse. She was also raped on several occasions by another foster child. Mr. Justice Lander awarded \$50,000 in non-pecuniary damages and denied a claim for aggravated damages. He also said there was insufficient evidence that she would require counselling, so there were no future care costs awarded.
- [68] The defendants' point is that unlike the plaintiff in the *M.R.* case, this plaintiff has not been able to offer proof that there is personality dysfunction of the kind referred to by the psychiatrist in *M.R.* In that case, the court found that the plaintiff had dealt with her past extremely well. The defence claims that the plaintiff in this case has also done well, considering what she went through.
- [69] Addressing aggravated and punitive damages, the defence argues that there was a relative remoteness to the relationship between Joginder Singh Bains and the plaintiff. It was not a parent/child relationship, and according to the defence, this would mitigate against a larger award for aggravated damages.

- [70] Counsel cites the decision in *Blackwater v. Plint*, supra, a B.C. case in 2001 that was affirmed by the Supreme Court of Canada in 2005. This was a residential school case where sexual abuse had occurred. The plaintiffs were terrified of the defendant Plint. Coming from a dysfunctional home, the plaintiff in question arrived at the residential school shortly before he was seven years of age. Beginning the following year, the plaintiff was physically and sexually abused repeatedly by the defendant. A lifetime pattern of violence followed for the plaintiff.
- [71] The court found it was questionable as to whether that lifetime pattern of violence was directly connected to the experience of being sexually assaulted. This young boy was anally raped by the defendant over a period of three years, two or three times a week. At paragraph 505 of the judgment, the court stated:
- I accept Dr. O'Shaughnessy's opinion that the frequency and severity of sexual abuse are relevant to the degree of psychological damage that would be expected to develop therefrom: the more frequent and severe the assaults, and the longer the duration of the assaults, the greater the psychiatric damage that would be indicated. Conversely the less frequent and less severe the assaults, the lesser the extent of psychological damage one would expect to see.
- [72] However, the court found there were inconsistencies between what Dr. O'Shaughnessy understood to be the facts and what was given in evidence at the trial.
- [73] The plaintiff was awarded \$125,000 in non-pecuniary damages plus \$20,000 in aggravated damages. Punitive damages in the amount of \$40,000 were awarded as well, plus \$5,000 for future counselling. The defence contends that the plaintiff in this case was not in a true child/parent relationship with the defendants, similar to the situation in *Blackwater*.
- [74] Finally, in arguing against an award of punitive damages, the defence submits that the effect of a general damages award in the range of \$70,000 against "individuals of modest means", such as the defendants, together with the condemnation of the community, is sufficient to achieve the goal of punishment and deterrence. No additional award of punitive damages should be granted in these circumstances.

Analysis

- [75] Other cases have been read and considered. A number of cases within the past several years have seen the courts comment on the devastating effects on a plaintiff who has been sexually assaulted. Regardless of whether the complainant is a child or an adult, male or female.
- [76] *B.M.G. v. Nova Scotia (Attorney General)*, supra, is a decision of the Nova Scotia Court of Appeal in 2007. A 13 year old boy was sexually assaulted four times by his probation officer. The assaults involved touching, anal and oral sex. General damages of \$125,000 were awarded. The court found there was no basis for awarding punitive damages because the claims of negligence and breach of fiduciary duty had not been established.

[77] In considering the amount of general and aggravated damages of \$125,000, the court said the range would be \$125,000 to \$250,000. At paragraph 139 of that case, the court stated:

First, the court must identify the important characteristics of the case in order to define the types of cases that should be considered in establishing the range. The judge here looked to cases of severe and continuing abuse, often of a child by an adult in a position of trust and which caused or contributed to extended, ongoing negative effects on the victim. That, in my view, was the appropriate sort of case with which to compare this one. The abuse here extended over a period of weeks, included anal rape, was committed by a probation officer on a child under his supervision and was found to have resulted in and to continue to contribute to a marked disturbance in B.M.G.'s life.

[Emphasis added]

[78] In B.M.G., dealing with non-pecuniary damages, the trial judge stated:

The impact of the ... assaults on BMG is impossible to measure with precision. In particular, the impact on a 14 year old child of being anally raped by a fully grown man defies assessment.

...

A further aggravating factor would be the age difference, that is, a mature adult male versus a 14 year old child victim. The assaults in question were of relatively short duration but the nature of the assaults (especially the anal rape) is an obvious aggravating factor.

[79] At paragraph 120 of the judgment, the court was of the view that they should take a functional approach to the assessment of non-pecuniary damages in cases of sexual battery. That would take into account the capacity of the award to provide solace to the victim, to vindicate the victim's physical autonomy and dignity, and to take account of the humiliating and degrading nature of the defendant's conduct. At paragraph 122 of the judgment, the court said that non-pecuniary damages were meant to provide some substitute for what has been lost, even though what has been lost "cannot be valued meaningfully in financial terms." Further, "In this lies the inherent difficulty of assessing non-pecuniary damages. Money is no meaningful substitute for the loss of such things as dignity, personal autonomy, self-esteem and self-confidence."

[80] The court stated that one function of non-pecuniary damages "is to demonstrate that those rights are deeply valued and have been vindicated." (paragraph 126).

[81] The four assaults in B.M.G., serious as they were, took place over a period of weeks; the young male plaintiff was 13; the defendant was his probation officer. The facts of this present case are obviously different. Here the plaintiff began suffering the abuse at a much younger age, for a period of ten years. Plus all the other relevant factors.

[82] There has also been a recent case from our Court of Appeal, decided after the Nova Scotia case was heard. D.H. (Guardian ad litem of) v. British Columbia, supra, is a decision by Madam Justice Saunders. Here, sexual assault was ongoing for eight or nine months. The

plaintiff was a young boy who was touched about ten times. At trial, general damages had been awarded in the amount of \$100,000, plus cost of future care, \$240,000 and loss of future income, \$175,000. The court found no basis upon which to interfere with the award for non-pecuniary damages.

[83] Another case dealing with general damages in sexual assault circumstances is *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, supra, a decision of the Ontario Court, General Division, by Mr. Justice MacFarland in 1998. Jane Doe was raped by the notorious balcony rapist in Toronto. She subsequently sued the police for failure to warn women of the risk of a likely serial rapist in the area. She was awarded general damages of \$175,000.

[84] At pages 532 and 533, the court had this to say:

Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is, in the words of Dr. Peter Jaffe, "an overwhelming life event". It is a form of violence intended to create terror, to dominate, to control and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading.

...

In my view, damage awards in the \$40,000-50,000 range are reflective of neither the horrific nature of the violation nor of the overwhelming and all-encompassing consequences of it.

In my view, an appropriate general damage award for Ms. Doe in all the circumstances of this case is \$175,000.

[85] Prior to that, in 1995, Madam Justice Lang of the Ontario Court, General Division had this to say in a sexual assault case: *J.S. v. Clement*, supra, at page 520:

... The deliberate, hateful imposition of power and force by one human being against another in violation of one's being is something that cannot be rationalized by the victim, nor by society. A sexual assault, then, is no mere accident with physical and psychological consequences. By definition, a sexual assault deprives the victim of her dignity, her self-respect, her sense of self-confidence and leaves her fearful of places where she had previously found safety and solace. When that sexual assault is aggravated by acts of degradation, such as those inflicted upon Mrs. S., and where they are accompanied by a brutal beating inflicted in the sanctuary of one's home, the effect is devastating.

[86] In that case, an escaped prisoner had broken into the plaintiff's home, and brutally beaten and sexually assaulted her. General damages of \$90,000 were awarded.

Conclusion

- [87] My view of the evidence differs from that of the defence. Dr. Brownstein's opinion is that the plaintiff's symptoms are "entirely consistent with a history of sexual abuse such as she claims." Also, her feelings of shame, humiliation, self-blame and doubt, plus her quality of life - all are consistent with her history of sexual abuse. That does imply causation. The decision on causation is for the court to make, not Dr. Brownstein. Causation is determined by considering all the evidence.
- [88] It was suggested by the defence that Vicki Waters has been able to be a good mother, raising two children successfully. However, in testifying, Rodney Waters, the husband, stated, "but that's probably 90% thanks to me." He was a quiet witness who understated, not given to hyperbole or bragging. I found his evidence compelling and truthful.
- [89] Rodney Waters testified that his wife has many mood swings. She would not pay attention to what the kids have to say and had irrational fears about leaving their daughter with him. She seemed preoccupied, she was drinking, there were crying bouts; she would not want to go outside. He related a fairly recent occasion when she became "unglued". They were driving into Vancouver with the children and she saw her uncle, the male defendant, in a car. It took some time to get her calmed down. He said he just wanted his wife to get better.
- [90] I accept the evidence of the plaintiff, her husband, Dr. Brownstein and Marilyn Dwornik on the continuing problems the plaintiff has had. They are chronic and serious. They fit the pattern of a victim of sexual abuse.
- [91] In my view, the plaintiff has suffered serious losses, and these are as a direct result of the ten years of sexual abuse that she suffered at the hands of the defendants. There have been no significant intervening factors such as rapes by other persons, or serious motor vehicle accidents, as we have seen in some of the other cases cited. But for the sexual assaults of the male defendant and the complicity and actions of the female defendant, this plaintiff would not be in the position where she now finds herself.
- [92] The plaintiff's problems are many. First and foremost, she has suffered a loss of innocence and the loss of a normal childhood and adolescence. She suffers from low self-esteem, is unusually tearful and apologetic, suffers serious mood swings, and feelings of anxiety and depression. She has a distrust of people, difficulties with sexual relations, and suffers from flashbacks to the male defendant's abuse when she has had sexual relations with her husband in the past. She has had problems with her marriage and childrearing, and has suffered the shame and humiliation that victims of sexual abuse are known to suffer. She feels the loss of an extended family. And, as Dr. Brownstein stated, "she lives with a daily level of distress that I would rate as moderate to severe."
- [93] It can also be inferred from all the evidence that she became, as a result of those sexual assaults, vulnerable to further victimization, with sexual assaults occurring with another uncle when she was age 14, an uncle who was aware of the abuse by Joginder Singh Bains.

- [94] Both defendants played a significant part in her losses. Both contributed to her injuries, and both are liable for damages. The young plaintiff was present in their home, slept in their bedroom and at times, in their bed with them, when sexual assaults took place. The insertion of the IUD into an unknowing 12 or 13 year old is, as I have stated before, appalling. She was denied aid by her aunt, her father's younger sister, to whom she turned for help on two occasions. This child was vulnerable as she had recently lost her mother in a tragic accident. Their breach of their fiduciary duty to her is an aggravating factor.
- [95] In my view, the plaintiff's injuries are not divisible between the defendants. Her injuries and losses can be traced to acts and/or omissions by both defendants. There is no need, nor is it appropriate to apportion damages between the defendants. Once bad conduct has been found, as it has here, moral blameworthiness, then aggravated damages are naturally part of the compensatory damages.
- [96] The plaintiff's inability to control her emotions, her loss of enjoyment of life, the interference in her development of interpersonal and sexual relationships and her ongoing mood swings and depression are amply proven by the evidence.
- [97] General damages are those that the law presumes follow from the tort for the wrong complained of. In this case, the sexual assaults and complicity with those assaults. Such damages do not need to be specifically claimed or proved to have been sustained. As stated in *Yeo v. Carver* in 1996, "We are just beginning to understand the horrendous impact of sexual abuse." The learning process continues.
- [98] Aggravated damages are awarded when there is a need to compensate the plaintiff for outrageous behaviour by the defendants, as in this case. They are damages awarded for reprehensible conduct by the defendants. They are designed to try and make the plaintiff whole, not to punish the defendants. They are compensatory, as are non-pecuniary general damages. Aggravated damages take into account the intangible injuries, including distress, humiliation, anxiety, lack of trust, lack of self-respect, distrust of others, all of which have been suffered by the plaintiff, and all of which were caused by the defendants' behaviour. The mental and emotional stress as a result of the defendants' behaviour and denial of help are compensated under the heading of aggravated damages.
- [99] In my view, general damages, including aggravated damages are appropriate in the amount of \$325,000. I have taken into consideration the value of recent awards, as well as those that were given in 1995 to 1998, and taken into consideration the calculation of what those awards might be in today's dollar.
- [100] Punitive damages are those damages that are awarded when the defendants have acted with recklessness, malice, or deceit. They are intended to punish and to deter blameworthy conduct. Factors to be considered in whether to award punitive damages would include the reprehensibility of the conduct being punished. Also, the reasonableness of the relationship between the harm and the award of damages, and the difference between the award and the civil penalties authorized in comparable cases. Another important factor is

the absence of remorse, and the fact that both these defendants threatened the plaintiff as a child if she were to report the abuse to others. In my view, that is conduct deserving of punitive damages.

- [101] Further, the defendant, Joginder Singh Bains, continued what can only be regarded as arrogant and callous conduct toward the plaintiff. Over the years, as stated in the Norberg case, he "offended the ordinary standards of morality and decency in a cold and calculating way." There, the court found that that conduct needed deterrence. That case referred to the predominance of sexual assaults, primarily by adults upon females in our society as real and unabating. It is equally appalling when the victim is a young male, as some of the cases cited have demonstrated. In the Norberg decision, the court was of the opinion that an award of punitive damages was important "to make it clear that this trend of underestimation cannot continue." The reference was to underestimating the harm and risk of sexual abuse.
- [102] It is not a sufficient argument with regard to punitive damages to suggest that either defendant has, in effect, lost face or had to deal with condemnation within their community now, as a result of this civil action. Nor do I accept the submission that the defendants are "of modest means". There is little evidence to that effect. There is evidence the defendants have operated a dairy farm for many years. There is property jointly owned by the defendants that is assessed in excess of \$1,000,000.
- [103] There will be punitive damages awarded against the defendants in the amount of \$80,000. The defendants are jointly and severally liable for both general and punitive damages.
- [104] On the claim for costs of future care, \$10,000 is awarded. As Mr. Justice Leggatt stated in *D.H. v. L.J.H.*, "It is not difficult to find that this abuse has had a dramatic and damaging effect on the plaintiff and will likely continue to have an effect on the plaintiff for the rest of her life." (paragraph 20). Here, the plaintiff's friend, Marilyn Dwornik, a registered psychiatric nurse, has encouraged the plaintiff to get counselling, and she has done so from time to time. Dr. Brownstein's report notes that the plaintiff has frequently tried to get help for her difficulties, but has had trouble trusting counsellors, and will usually only go a few times at most, and then quit. He writes that currently, "she feels emboldened to continue with therapy with me, and I have also recommended that she inquire about a group of women who are survivors of sexual abuse." It almost goes without saying that counselling will be required for the plaintiff.
- [105] On the issue of the claim for loss of income and future earning capacity, I am in agreement with the defence, that there has been insufficient evidence to establish such claims.
- [106] This case has been heard in two stages. Liability was determined previously, and now argument on damages. I want to thank counsel throughout for their courteous and skilful advocacy, their thoughtful and thorough arguments.

[107] On the issue of costs, costs are awarded to the plaintiff, Scale B. Special costs are not warranted in these circumstances.

[108] The costs of the appearance of April 11, 2008 are awarded to the defendants. However, all other costs to the plaintiff.

Summary

[109] In summary, the following damages and costs are awarded:

- (1) General damages, including
aggravated damages \$325,000
- (2) Punitive damages \$80,000
- (3) Cost of future care \$10,000
- (4) Costs to the plaintiff, Scale B.

"Morrison J."

Madam Justice Morrison

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/08/08/2008BCSC0823.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/waters-v-bains-2008>

Prepared on 29 October 2026 · Esheria