

N.C. v. W.R.B.
Ontario Superior Court of Justice
[1999] O.J. No. 3633

BEAULIEU J.:--
INTRODUCTION

1 The plaintiff brought this action for damages for sexual assault and battery and assault and battery. The plaintiff claims that during her relationship with the defendant from 1987 until 1993 she was the victim of sexual, physical, verbal and emotional abuse. Although the plaintiff and the defendant were never legally married, they lived in a common law relationship from 1987 until 1990. The plaintiff asserts that the abuse started three to six months after the beginning of her relationship with the defendant and ended in May of 1993, one month before the defendant was arrested and charged with sexual assault, assault and uttering threats. The defendant was subsequently convicted on February 22, 1996 of sexual assault and sentenced to six months imprisonment to be served on weekends and three years probation. On July 10th, 1996, the plaintiff received an award of \$6,000 for pain and suffering from the Criminal Injuries Compensation Board.

FACTS

2 The plaintiff claims that the physical, sexual and emotional abuse were perpetrated by the defendant on a regular basis during a six and a half year time period. According to the plaintiff, the defendant grabbed her by the neck, pushed her around, slammed her against walls, dragged her by the hair and threw her down stairs. The plaintiff testified that the defendant hit her with his hands, fists and various objects, threw things at her and punched her. The plaintiff called the police in June 1993 when the defendant left a message on her answering machine threatening her life. It is the plaintiff's testimony that the defendant threatened her life on numerous occasions during their relationship.

3 In her statement of claim, the plaintiff submits that, as a result of the sexual, physical and emotional abuse, she sustained injuries including mental distress and anguish, loss of dignity and self esteem, humiliation and embarrassment, psychological and emotional trauma, fear and anxiety, depression, post traumatic stress disorder, eating and sleeping disorders, loss of enjoyment of life, headaches, bruising and muscular injuries, numbness in her arms, hands and legs and facial twitches.

4 After examining the evidence and assessing the plaintiff's credibility during viva voce testimony, I am compelled to conclude that the plaintiff did in fact suffer physical and verbal abuse on a daily basis and sexual assaults as frequent as four or five times a week during her six and a half year relationship with the defendant. After reading the numerous assessment reports submitted by the plaintiff, I am convinced that the plaintiff was powerless to leave the relationship due to her systematic erosion of self-esteem. I also find that as a result of the abuse, the plaintiff suffered from symptoms of post traumatic stress disorder such as depression, anxiety and anger as well as nightmares and disrupted sleeping patterns. The exhibit filed and the viva voce evidence bear out the plaintiff's contacts with the Family Services Association and Dr. Davies and substantiate the plaintiff's claim for special damages.

5 Having decided that the plaintiff is entitled to recover damages, I will now proceed to examine the relevant caselaw to determine the appropriate quantum of damages.

QUANTUM OF DAMAGES

6 The plaintiff provided a book of authorities dealing specifically with the quantum of damages to be awarded in this case. Although most of the cases cited deal with domestic relationships, very few deal with spousal or common law relationships.

7 In *Dhaliwal v. Dhaliwal*, [1997] O.J. No. 5964 (Gen. Div.) [hereinafter *Dhaliwal*], Metivier J. awarded the plaintiff general damages in the amount of \$5,000 and aggravated and punitive damages in the amount of \$5,000. In this case, the parties were married for 14 years. During the marriage, the husband was violent towards his wife and their eldest daughter. The wife brought an application for spousal support, child support and an equalization of the net family property. She also claimed damages for assault. The evidence at trial showed a history of violent outbursts on the part of the defendant directed at the plaintiff. The wife was also subjected to emotional abuse by way of verbal attacks and name calling. As a result of the physical and verbal abuse, the wife suffered from depression, insomnia and a loss of self-esteem.

8 In *M.C. v. F.M.* [1990] O.J. No. 1862 (Gen. Div.) [hereinafter *M.C. v. F.M.*], the plaintiff brought an action for sexual assault against her ex-common law partner. The parties had lived together for more than two years. The events in question took place after the parties stopped cohabiting. The defendant broke into the plaintiff's house, forcibly confined her and subjected her to an all-night series of brutal physical and sexual assaults. The defendant was acquitted of sexual assault at criminal trial, but convicted of assault, for which he served six months imprisonment. The court fixed damages at \$40,000. Keenan J. acknowledged that the defendant's criminal acquittal on the sexual assault charges did not preclude the court from finding him liable for the commission of those acts on the civil standard of proof. Although exemplary or punitive damages are not generally awarded when the defendant has been prosecuted in criminal court, his acquittal reopened the possibility of an award of punitive damages. Nonetheless, punitive damages were not awarded because compensatory damages could be fixed at a level that would include exemplary considerations. The court awarded aggravated damages to compensate the plaintiff for the intangible injuries suffered, including humiliation and continuing trauma, which result from the manner in which the tangible injuries were inflicted.

9 After reviewing the caselaw pertaining to sexual assaults perpetrated by a common law partner or a spouse, and recognizing judicial discretion as exercised in each case, I am inclined to follow Keenan J.'s approach in *M.C. v. F.M.* The *Dhaliwal* case involved both family law remedies and the assaults and is to that extent distinguishable.

10 In her statement of claim, the plaintiff asks this court to award exemplary and punitive damages against the defendant. The purpose of exemplary or punitive damages is to punish or deter the wrongdoer. It is a penalty imposed for outrageous conduct.

11 As a general rule stated by Keenan J. in *M.C. v. F.M.*, punitive or exemplary damages are not awarded when the defendant has already been prosecuted in the criminal courts and has been punished for the same conduct. In the present case, although the defendant has been convicted of assault, he has never been convicted of sexual assault or uttering threats. I recognize the allegation of the light sentence and the fact that not all criminal counts formed the basis of the sentence and recognize that the court has the possibility of awarding punitive damages in this civil actions as in the case *M.C. v. F.M.* However, Keenan J. refers to the House of Lords decision in *Cassell & Co. Ltd. v.*

Broome (1972) A.C. 1027 in which the House of Lords states that compensatory awards, such as general damages and aggravated damages, are to be considered before exemplary or punitive damages. Only if the compensatory awards are insufficient to mark the court's disapproval of the defendant's conduct should exemplary awards be considered. When considering whether to award exemplary or punitive damages, Keenan J. said in M.C. v. F.M.:

... no punitive damages are to be awarded in this case because the compensatory award or damages can be fixed at an amount which takes into account exemplary considerations.

12 I agree with Keenan J.'s reasons in M.C. v. F.M. By awarding aggravated damages, the court recognises the immeasurable impact of the injuries suffered by the victim which are exacerbated by the way these injuries were inflicted. The court can only hope that by awarding aggravated damages, the victim can take solace in the fact that the wrongdoer is required to compensate her for the personal suffering she endured. I am satisfied that the compensatory damages can be fixed at an amount which takes into account exemplary considerations. Consequently, no exemplary or punitive damages are to be awarded.

13 There is no question that sexual assault is an extreme violation of the intimate privacy and integrity of the victim and involves serious and long term injuries. I do not pretend that any compensatory award could fully compensate the plaintiff for her physical and psychological injuries. However, given the intimate domestic relationship between the plaintiff and the defendant, the frequency of the physical and sexual assaults, the nature of these brutal assaults and the impact they have had on the plaintiff, it is my opinion that an award of \$65,000 in general damages and \$25,000 in aggravated damages is appropriate in this case. Consequently, no exemplary or punitive damages are to be awarded.

RE-PAYMENT OF C.I.C.B. AWARD

14 According to section 26(1) of the Compensation for Victims of Crime Act, R.S.O. 1990, c. 24, a person who receives compensation from the Criminal Injuries Compensation Board is entitled to recover from an offender personally by way of a civil action for damages. However, the Board is subrogated to all rights of the recipient under the Act:

(1) Subject to subsections (2), (4) and (5), nothing in this Act affects the right of any person to recover from any other person by civil proceedings damages in respect of the injury or death.

Subrogation

The Board is subrogated to all the rights of the person to whom payment is made under this Act to recover damages by civil proceedings in respect of the injury or death and may maintain an action in the name of such person against any person against whom such action lies, and any amount recovered by the Board shall be applied,

first, to payment of the costs actually incurred in the action and in levying execution; and

second, to reimbursement of the Board for the value of the compensation awarded, and the balance, if any, shall be paid to the person whose rights were subrogated. R.S.O. 1980, c. 82, s. 26(1, 2).

15 The Ontario Court of Appeal has dealt with the issue of "double recovery" in the context of Criminal Injuries Compensation awards on two occasions. In *Criminal Injuries Compensation Board v. Ditroi* (1975), 8 O.R. (2d) 133 [hereinafter *Ditroi*], the court determined that the Board's subrogation rights are general. As a result, a victim who receives compensation is required to notify the Board of any compensation recovered from the offender in a civil action since the Board has the right to subrogate the amount it paid the victim in the form of compensation. The amount of the subrogation is limited to the amount paid by the Board.

16 Section 26(5) of the Compensation for Victims of Crime Act states that a person who receives compensation from the Board must notify the Board of any civil action brought against the offender:

26(5) An applicant for or a person awarded compensation shall forthwith notify the Board of any action brought against the offender who caused the injury or death of the victim.

17 This issue was also considered in *Berlingieri v. DeSantis* (1980), 31 O.R. (2d) 1 [hereinafter *Berlingieri*] by the Ontario Court of Appeal. According to *Berlingieri*, whether the person who received compensation from the Board notified the Board of the civil action for damages or not as required by section 26(5) of the Compensation for Victims of Crime Act, the court must assume that the Board would have maintained an action had it been notified since it is entitled to rely on section 25(2) (today section 26(2) of the Compensation for Victims of Crime Act) giving it priority of payment.

18 Assuming N.C. gave notice as required by s. 26(5) of the Compensation for Victims of Crime Act, the Board will likely not be entitled to recovery as they have chosen not to maintain the action. If, however, N.C. failed to comply with s. 26(2) of the Compensation for Victims of Crime Act, the Board might have a claim for recovery despite the fact it is not "maintaining the action" against W.R.B. Although I am unaware if the plaintiff has notified the Board of this civil action, I must assume that the Board would have maintained an action had it been notified. Consequently, I expect that the compensation the plaintiff received from the Criminal Injuries Compensation Board will be reimbursed out of the damages awarded in this civil proceeding. Thus, when calculating the quantum of damages, I have considered the \$6,000 compensation the plaintiff received from the Criminal Injuries Compensation.

COSTS

19 The plaintiff is awarded \$65,000 in general damages, \$25,000 in aggravated damages and \$1,017 in special damages. Pre-judgment and post-judgment interests are to be paid by the defendant. Costs for the plaintiff are fixed at \$2,000 payable forthwith.