

## Liability Admissions in Sexual Abuse Claims

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Punitive damage awards are commonplace in sexual abuse claims. However, the Ontario Court of Appeal has recently confirmed that a trier of fact cannot award punitive damages against a defendant based solely on that defendant's failure to admit liability in a timely fashion.

In *McCabe v. The Roman Catholic Episcopal Corporation for the Diocese of Toronto* (2019 ONCA 213), the majority of the Court of Appeal overturned a jury's award of \$15,000.00 for punitive damages against the Diocese of Toronto. The award was based solely on the failure to admit vicarious liability for historical sexual abuse, committed by one of its priest, until the first day of trial.

The Diocese of Toronto had employed Father Alphonse Robert as a Parish Priest. In 1963, Father Robert invited Robert McCabe, who at the time was 11 years old, on a trip to Montreal to visit the Basilica of Notre Dame. During that trip the two spent the night together in a hotel room and Father Robert sexually assaulted Mr. McCabe by fondling him sexually and performing oral sex on him.

Mr. McCabe brought an action for damages against the Diocese of Toronto in December of 2014. By then, Father Robert was deceased.

The Diocese denied vicarious liability for the abuse throughout the litigation, but then admitted liability on the first day of the trial. The trial therefore proceeded as an assessment of damages only. Following the evidence and after hearing the charge from the trial Judge, the jury awarded general and aggravated damages of \$250,000.00, loss of income of \$280,000.00, treatment expenses of \$5,000.00 and punitive damages of \$15,000.00. The Diocese appealed on various grounds.

The Court of Appeal was unanimous in rejecting three of the four grounds of appeal. Of significance, the Court confirmed that the award of \$250,000.00 in general damages was well within the reasonable range for serious sexual assault, noting the Court's recent statements from *Zando v. Ali* (2018 ONCA 680), where a range of up to \$290,000.00 can be appropriate in sexual assault cases.

The Court was split however on the issue of punitive damages. Benotto, J.A. would have dismissed this ground of appeal as well finding that the Diocese's strategic decision not to admit responsibility to a vulnerable victim of abuse, given the

circumstances, was uniquely egregious and was deserving of condemnation. For this finding, Benotto, J.A. relied on a number of decisions where punitive damages were awarded due to the conduct of the litigation, where that conduct was egregious enough to be considered an independent actionable wrong.

Benotto, J.A. relied on evidence from Mr. McCabe's expert psychologist, who had explained during the trial that the trauma suffered by Mr. McCabe was made worse by the fact that liability was denied and by the fact that he would have to prove that the events of the sexual assault occurred. In that doctor's opinion, this re-victimized Mr. McCabe and caused him to be fragile, stressed and anxious.

Roberts, J.A., for the majority, disagreed on the issue of punitive damages. The majority found that the trial Judge had erred in leaving the issue of punitive damages to the jury for determination, as neither the pleadings nor the facts in the case supported such an award. The majority found that in essence, the trial Judge had created "**a new and unprecedented category of punitive damages arising out of the timing of the appellant's admission of liability.**" There was no basis in law for such an award.

Roberts, J.A. noted that in all of the cases relied on by Benotto, J.A., there were findings that the misconduct in the litigation was a continuation of the misconduct which gave rise to, and was the subject of, the action in the first place.

Here however, the Diocese did not deliberately inflict pain on the respondent (nor did it abuse him). The delay in the admitting of liability, alone, could not be characterized as egregious misconduct justifying an award of punitive damages. The Diocese of Toronto was perfectly entitled to not admit liability until the opening of the trial:

***Punitive damages cannot be awarded solely for the failure or delay of a defendant to admit liability. To create such a category of punitive damages would completely undermine the foundation of the litigation process. A defendant is under no obligation to admit liability and, subject to attracting the elevated costs consequences I refer to below, may put the plaintiff to the strict proof of his or her allegations, no matter how painful the litigation process proves to be for the plaintiff, without fear of invoking a punitive damage award. Unfortunately, that is the nature of the litigation process.***

Further, it was also procedurally unfair to the Diocese of Toronto to allow the respondent to put forward a new basis for punitive damages that has not been pleaded. Mr. McCabe had alleged the Diocese was vicariously liable for the punitive damages claimed against Father Robert.

This allegation was rejected by the trial Judge, as there can be no foundation for punitive damages on the basis of vicarious liability for the misconduct of another. Mr.

McCabe should not have then been able to raise a new theory for punitive damages based on the appellant's delay in admitting liability.

The final issue was that of costs. The majority noted that while the Diocese's denial of liability, without more, does not attract an award of punitive damages, it may or may not give rise to a cost sanction. That is the issue the trial Judge rightly should have considered, rather than putting the issue of punitive damages to the jury.

This is an important decision, notably in the context of sexual abuse litigation, but also for all claims. The Ontario Court of Appeal has confirmed that the standard for an award of punitive damages is very high. There must be egregious conduct and an independent actionable wrong. Requiring a plaintiff to prove their case, in and of itself, does not rise to that standard.

Because the Court of Appeal's decision was not unanimous, there does remain the possibility that leave will be sought to the Supreme Court of Canada. Until then, however, the law in Ontario stands that a defendant should not fear an award of punitive damages for not admitting liability no matter how obvious a finding of liability may be.