CITATION: Evans v. The Catholic Children's Aid Society of Toronto et al., 2025 ONSC 5652
COURT FILE NO.: CV-19-00618450-0000
DATE: 20251009

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DIANE EVANS	
Plaintiff	*Ivanna Iwasykiw* and *Linda O'Brien* for the Plaintiff
– and –	
THE CATHOLIC CHILDREN'S AID SOCIETY OF TORONTO and KRYSTYNA SKIRWA, ESTATE TRUSTEE, THE ESTATE OF PETER KACZMARCZYK	
Defendants	*Barry Marta*, for the Defendants The Catholic Children's Aid Society of Toronto
	Phillip Millar, for the Defendant Krystyna Skwira, Estate Trustee, The Estate of Peter Kaczmarczyk
	HEARD: August 25, 2025 and in writing

REASONS FOR DECISION (POST VERDICT)

CALLAGHAN J.

[1] In June, a jury rendered a verdict in favour of the plaintiff, Diane Evans, in this historical sexual assault case. The verdict exceeded the claimed amount for general and punitive damages. The plaintiff seeks to amend her claim accordingly.

[2] The defendants bring post-verdict motions. Krystyna Skirwa, Estate Trustee for the estate of Peter Kaczmarczyk (the "Estate"), brings a motion asking this Court to either set aside or vary the punitive damage award. The Catholic Children's Aid Society of Toronto ("CCAST") brings a

motion asserting that it ought not to be jointly and severally liable for the damages incurred and that the heinous nature of Peter Kaczmarczyk's actions should excuse it from paying any damages.

[3] The parties each made arguments on the applicable pre-judgment interest rate for both general and special damages in this case.

Background

[4] The plaintiff was successful in this 20-day jury trial. In her claim, she alleged she was abused from 1956-62 by Peter Kaczmarczyk. The claim further alleged that the CCAST had failed in the duty of care it owed the plaintiff in that it did not remove her from the home or take steps to otherwise protect her.

[5] At the end of the trial, the jury found both defendants liable to the plaintiff. The jury awarded $400,000 in general and aggravated damages, past income loss of $940,000, and future counselling of $50,000. As against the Estate, the jury awarded $1,000,000 in punitive damages. At the request of CCAST and on agreement of the other parties, the jury was asked to consider how it would apportion the damages as between the parties. The jury responded by apportioning 75% against the Estate and 25% against the CCAST.

[6] The plaintiff alleged that she had been abused by Peter Kaczmarczyk from 1956-64. Peter Kaczmarczyk was her mother's live-in boyfriend. The plaintiff testified she was sexually assaulted three times a week when she lived at the home. Over these years, the plaintiff was periodically removed from the home to live elsewhere including with a local order of nuns. During this period, the CCAST was in and out of the home, although there was no evidence the CCAST was aware that Ms. Evans was being abused by Peter Kaczmarczyk. The plaintiff confronted Peter Kaczmarczyk when she was about 12 years old and advised she would report the abuse if he did not stop the assaults. This threat brought an end to the assaults.

[7] Largely, the CCAST was involved in the home because of familial dysfunction, including abuse directed at the plaintiff's older brother, and the mother's need for respite due to mental health issues. It was alleged that the CCAST failed to address the dysfunction in the home. It was alleged that had the CCAST been more attentive and diligent, Ms. Evans would have been removed from the home or the assaults would have been uncovered and, as a result, CCAST would have taken steps to protect the plaintiff from the assaults of Peter Kaczmarczyk.

[8] The plaintiff spoke to the CCAST in 1967 when she was about 16. This meeting was facilitated by her school guidance counselor. At that time, she complained that her younger brother was being physically and emotionally abused. The CCAST was also advised that Ms. Evans was subject to abuse, but not sexual abuse. It was alleged that CCAST failed to investigate this 1967 complaint, and had it done so, protective measures would have been imposed to remove Ms. Evans from the home. It is argued that the failure to do so caused continuing and compounding damage to Ms. Evans because she was compelled to live with Peter Kaczmarczyk for two more years.

Issues

[9] The issues to be considered are as follows:

i) Should the statement of claim be amended in accordance with the jury verdict;

ii) Should the punitive damage award be set aside or reduced;

iii) Should CCAST be severally and not jointly liable for the general and special damage awards; and

iv) What is the appropriate amount of pre-judgment interest.

Amendments

[10] The plaintiff seeks to amend her claim for damages pursuant to rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194. In her current pleading, the plaintiff seeks $350,000 for general damages and $250,000 for punitive damages. As noted, the plaintiff was awarded $400,000 for general damages and $1,000,000 for punitive damages. No issue was taken with the amendment to the claim for general damages.

[11] The Estate opposes the amendment to increase the claim to accord with the punitive damage award. Plaintiff‘s counsel wrote to the defendants’ counsel prior to closing that she intended to raise with the jury that cases had provided punitive awards up to $25,000. However, no such submission was made and on the consent of the parties, no range for punitive damages was given to the jury by either the parties or the court.

[12] Rule 26.01 is phrased in mandatory language; an amendment “shall” be permitted, unless prejudice would result that cannot be compensated by an order of costs or an adjournment. This includes the ability to amend the relief sought in a claim to accord with a jury verdict: *Hill v. Church of Scientology of Toronto* (1992), 7 OR (3d) 489 affd on other grounds (1994), 1994 CanLII 10572 (ON CA), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1 (C.A.), affd on other grounds 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129; *Padfield v. Martin*, 2003 CanLII 36239 (ON CA), at para. 37. In the case of *Hill v. Church of Scientology*, the amendment also involved amending a punitive damage claim to accord with a jury verdict. In that case, the plaintiff moved at the end of trial to amend the pleading to seek punitive damages in the amount of $400,000. The prior number of punitive damages was not disclosed in the decision. The jury ultimately awarded $800,000. A further request was made to amend the claim to accord with the verdict. It was argued that it was prejudicial to permit an amendment beyond the amount pled. The court concluded that the “fact of the jury's assessment being higher than the amounts claimed in the statement of claim does not, of itself, satisfy that onus of establishing prejudice”.

[13] The Estate cites only one case, being *C.O. v. Williamson*, 2020 ONSC 3874 wherein the plaintiff requested $100,000 in punitive damages in a sexual assault context. The trial was conducted by a judge without a jury. The judge noted he would have awarded $150,000 but limited the award to the amount specifically requested. There was no issue with the pleading. This authority is not apt to this situation.

[14] *Hill v. Church of Scientology* is the appropriate lens to view this request. As stated by Carruthers, J. the award itself is not a reason to deny the amendment. The fact the amount was not initially pled does not give rise to prejudice. It was suggested that the plaintiff counsel had suggested that she might refer to an amount in closing but never did. Rather, the parties left it in the hands of the jury which was the agreement amongst counsel. I see no prejudice in how the closings transpired. No other prejudice was claimed by the Estate. The remainder of the argument by the Estate really goes to the appropriateness of the amount of the award which is more appropriately addressed in the argument as to whether the punitive award should be set aside. That issue is addressed below.

[15] Accordingly, leave to amend the relief sought for general and punitive damages in the statement of claim is granted.

Role of the Trial Judge

[16] In considering the motions advanced by the defendants, I am cognizant of the limited role of a trial judge in rejecting a jury's verdict. The common law provides that a trial judge can disregard the answers which form the jury verdict only: (i) if there is no evidence to support the jury finding; or (ii) if the jury gives an answer to a question which cannot in law provide a foundation for a judgment: *Hill v. Church of Scientology*; *McLean v. Knox*, 2013 ONCA 357 at para. 20.

[17] Aside from the common law, rule 52.08 of the *Rules of Civil Procedure*, R.R.O. 1990, O.Reg. 194, also speaks to the powers of a trial judge in relation to a jury verdict. That rule provides:

> 52.08 (1) Where the jury,
>
> (a) disagrees;
>
> (b) makes no finding on which judgment can be granted; or
>
> (c) answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings,
>
> the trial judge may direct that the action be retried with another jury at the same or any subsequent sitting, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, the judge shall dismiss the action.

[18] However, it is not the role of the trial judge to substitute his or her decision for the jury or effectively sit in appeal of the jury verdict. As Eberhard J. observed in *Salter v. Hirst*, 2010 ONSC 3440, 2010 CarswellOnt 3940, affd 2011 ONCA 609, 107 O.R. (3d) 236, leave to appeal ref'd

[2011] S.C.C.A. No. 503, the circumstances in which a trial judge will not enter judgment in accordance with the jury's verdict on account of "no evidence" are rare:

> 15. Indeed, nothing could jangle more profoundly against the accustomed role of a Trial Judge sitting with a jury than to replace their finding with one's own view of the facts or set aside their verdict where there was some evidence to support it. This is so deeply ingrained in the administration of justice as we value it and the jury system as we respect it, that a Trial Judge's disagreement with jury findings, however often or seldom it may occur, is never known.

[19] Moreover, it is important not to conflate the role of a trial judge in a jury case with an appellate court. As stated by Eberhardt, J., the trial judge has a very limited role and ought not to interfere with the findings of a jury absent the very limited circumstances discussed above. Absent the limited basis for refusing a verdict, any error must be corrected on appeal. The Court of Appeal has the statutory power, if it considers it just, to substitute an award in a personal injury claim: s. 119, *Courts of Justice Act*, RSO 1990, c. C. 43. Even then appellate courts will only intervene on an amount awarded where the "award is so inordinately high [or low] that it must be a wholly erroneous estimate of the damages": *Koukounakis v. Stainrod* (1995), 1995 CanLII 621 (ON CA), 23 O.R. (3d) 299 at 305 (C.A.).

Punitive Damages

[20] The Estate seeks to set aside the $1,000,000 punitive damages. The Estate makes three arguments. First, it argues that since Peter Kaczmarczyk is now dead there is no reason to award punitive damages as there is no specific deterrence that can be achieved, and any award will only punish his heirs. Second, the Estate says Peter Kaczmarczyk was pursued in the courts for his conduct and subject to conditions of bail. It asserts the prosecution and bail conditions may be seen as punishment which ought to vitiate the need for an award of punitive damages. Third, it is argued that the amount of the award is out of step with other awards.

[21] Peter Kaczmarczyk was charged with sexual assault, but his case never went to trial. The record before the court was not at all clear as to exactly what occurred. What is known is that in 2010 the plaintiff came across a photograph of Peter Kaczmarczyk on the internet when checking her lottery tickets. Peter Kaczmarczyk had won $8 million, and his picture was on the lottery website. It was at that time that the plaintiff made a complaint to the police. Peter Kaczmarczyk was later charged. The criminal proceeding continued for many years, and, during that time, Peter Kaczmarczyk was free on bail with conditions, although the bail conditions are not known to this court. There was no trial and thus no conviction. There is no appreciable evidence as to why the prosecution did not continue to trial.

[22] Also relevant to the assessment of punitive damages is the evidence of Dr. Klassen, a psychiatrist working with sexual abuse survivors. He was a witness called by CCAST. He testified that if the abuse relayed to him by Ms. Evans occurred it was the worst case of child sexual abuse he had ever encountered. From the jury's verdict, it can be inferred that the jury accepted the

plaintiff's evidence of the repeated years of sexual assaults as a child by Peter Kaczmarczyk and thus Dr. Klassen's opinion.

[23] As mentioned, the parties agreed that neither they nor the court would provide any range of punitive damages to the jury.

[24] In respect of the first argument, the Estate argues that the objectives of punitive damages no longer apply because Peter Kaczmarczyk is dead. This interpretation of the objectives of punitive damages is too narrow. While the objectives of punitive damages include punishment (in the sense of retribution) and deterrence of the wrongdoer, the objectives also include deterrence of others, and denunciation by the jury or judge of the egregious conduct: *Whiten v. Pilot Insurance Co*., 2002 SCC 18 (CanLII), [2002] 1 SCR 595, at para. 68. In my view these latter objectives still resonate even though Peter Kaczmarczyk is dead.

[25] The verdict clearly indicates that the jury found Ms. Evans to be credible and that she suffered repeated sexual abuse by Peter Kaczmarczyk over many years as a young child. As mentioned, it may be inferred that the jury accepted that this is one of the worst cases of sexual assault, as stated by Dr. Klassen. This is highly egregious conduct. Justice Leach described such conduct as follows: "Sexual abuse, and sexual abuse of a child in particular, unquestionably is misconduct that must be regarded as 'highly reprehensible', which 'departs to a marked degree from the ordinary standards of decent behavior' ": *D.M. v. W.W.,* 2013 ONSC 4176) at para 151. This type of conduct not only warrants the denunciation of the jury but warrants a strong general deterrence to others. Both are objectives of a punitive damage award and justify an award of punitive damages by the jury. As such, I do not accept that simply because Peter Kaczmarczyk is dead that punitive damages do not have a role to play in denouncing the conduct and deterring others.

[26] The Estate relies on *P.M. v. Evangelista*, 2015 ONSC 1419.In that case, the plaintiff was assaulted by the deceased defendant. It was not a case of a childhood sexual assault by a trusted adult, as is the case here. The judge dismissed a punitive damages award without analysis on the basis that the defendant's "death negates the main purpose to be served by such awards", at para. 51. The lack of analysis undermines the precedential value of the decision and, in my view, it cannot stand for the proposition that in every case simply because the defendant is dead that punitive damages are never warranted. Each case is different. In this case, the jury had ample reason to award punitive damages given the facts as presented. There is simply no basis for me to interfere with the jury's decision to award punitive damages.

[27] In considering an award of punitive damages, the jury could consider whether prior sanctions would effectively achieve the same objectives. As noted in *Whiten*, "the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint": at para. 69.

[28] Peter Kaczmarczyk was never "punished" for this conduct. The Estate argues that having been charged and being subject to conditions upon bail should be considered "punishment". In my

view, by themselves, being charged and being subject to bail conditions pending trial is not punishment. There was never a finding of guilt, or a public denunciation of the conduct. Even if he had been convicted, this does not preclude an award of punitive damages. Rather, as provided for in the *Victim's Bill of Rights*, 1995, S.O. 1995, c. 6, s. 4(4) , the conviction is to be considered when assessing whether punitive damages are appropriate but punitive damages are not prohibited because of a conviction.

[29] Even if the bail conditions and the charges could constitute a penalty or punishment under *Whiten*, it was for the jury to weigh and consider. The jury was never asked to consider either and, indeed, there was scant evidence in the record about either. It is not for the trial judge at this stage to set aside the award when the proposed issue of concern was never put to the jury.

[30] On the quantum, the Estate says punitive damages in similar cases have never been as high as $1 million. They cite two cases. In *C.O. v. Williamson*, the plaintiff was assaulted on four occasions by a teacher. The abuse in this case was over an extended period. The award of punitive damages was a $100,000, although the judge indicated that $150,000 would have been more appropriate. In *MacLeod v. Marshall*, 2019 ONCA 842, the Court upheld $500,000 in punitive damages against a religious organization that knowingly enabled abuse for years, concealed misconduct, moved the offending priest to other parishes, and ignored safeguarding policies. While the plaintiff sustained repeated abuse at the hands of the defendant Marshall, the punitive damage award was directed at the religious order, not the offender.

[31] As I have already noted, my role is not to sit in appeal of the jury's verdict. Rather, a trial judge can only "refuse to accept the verdict of a jury only when she or he considers that there is no evidence to support the findings of the jury": *Canadian National Railways v. Lancia*, 1949 CanLII 24 (SCC), [1949] S.C.R. 177, at pp. 191-92. In my view, there was evidence for the jury's finding that punitive damages were appropriate.

[32] In *Hill v. Church of Scientology of Toronto*, the jury was faced with a recalcitrant defendant who had libeled the plaintiff. The jury awarded punitive damages of $800,000 in 1992, undoubtedly a much greater sum than the award in this case in current dollars. In that case, the trial judge was asked to disregard the award. Like this case, the trial judge was asked to substitute an amount that was lower than the jury awarded as it was argued that the award was said to be unreasonably high. The trial judge found that the jury had a basis for the award and refused to amend the damage award, noting that he could not "invade the province of the jury" without the consent of all the parties. That decision was appealed. The appeal was dismissed, and the trial judge's limited role was not a matter of debate.

[33] The Court of Appeal remarked that even on an appeal, the damages ought not to be altered unless, "[t]he awards are so large as to lead this court to conclude that no group of six reasonable persons could have arrived at them or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice". Later, the court noted that "the appellate court's duty to interfere arises when it is convinced that an award of punitive damages, in addition to the compensatory award, serves no rational purpose". In the Supreme Court, the award was upheld and the court

noted, "[t]he most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous": at para. 199. In that case, the award of $800,000 was said to serve a rational purpose given "the circumstances presented in this exceptional case demonstrate that there was such insidious, pernicious and persistent malice": at para. 203.

[34] While this case is factually distinct from *Hill v. Church of Scientology of Toronto*, the issue remains whether there is any factual or legal basis for the award. The jury clearly accepted this was a heinous case of repeated sexual abuse over years of a young child by a person in a parental role. Dr. Klassen, a respected expert called by CCSAT, testified that if this assault occurred over the many years as alleged, it was the worst case of sexual assault that he had encountered. The abuser was never punished nor did the abuser show any remorse. The Estate never acknowledged the abuse but rather took the position that the allegations were fabricated after the plaintiff learned that Peter Kaczmarczyk won $8 million in a lottery. In my view, there was a clear factual foundation for an award of punitive damages and the amount is reflective of the jury's acceptance of the severity and duration of the abuse, and the fact there was no punishment or acknowledgement of the abuse. Even if I thought the punitive damages award was too high, I would not interfere as this is the role of the Court of Appeal, not a trial judge.

[35] Finally, it is argued that this award punishes the heirs. The award does not punish the heirs. It compensates a victim of the deceased. The heirs are only entitled to the residue of the deceased's estate which is now indebted to the plaintiff. The heirs will receive whatever residue is available after the deceased's debts are settled, including the debt owed by the Estate to the plaintiff arising from the jury verdict.

[36] For the above reasons, I do not see any basis for this Court to interfere with the jury's punitive damage award.

Joint and Several Award

[37] The CCAST makes several arguments seeking to reduce its exposure. The jury was asked what responsibility each defendant should bare for the damages to the plaintiff. The jury assessed Peter Kaczmarczyk as 75% responsible and CCAST as 25% responsible for the damages, except for the punitive damage award which is the sole responsibility of the Estate.

[38] Section 1 of the *Negligence Act*, RSO 1990, c N.1 provides that concurrent tortfeasors are jointly responsible for the damages to a plaintiff:

> 1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify

> each other in the degree in which they are respectively found to be at fault or negligent.

[39] The impact of section 1 is that concurrent tortfeasors are jointly responsible to the plaintiff for the loss. A plaintiff may recover against either tortfeasor, leaving it to the tortfeasors to sort out the proportionate loss between them. The practical impact of joint responsibility is that where a tortfeasor is even 1% responsible, that tortfeasor may be called upon to pay 100% of the loss. It is for this reason that the CCAST seeks an order that the defendants are severally, not jointly, responsible for the loss: *Martin v. Listowel Memorial Hospital* (2000), 51 O.R. (3d) 384, [2000] O.J. No. 4015 (C.A.), leave to appeal to S.C.C. refused [1993] 3 S.C.R. vii, [1992] S.C.C.A. No. 447, at para. 34.

[40] Regardless of how one describes the negligence of CCAST, CCSAT is a concurrent tortfeasor with Peter Kaczmarczyk. Even though the tortious conduct alleged against the defendants is different and may even be separated in time, the evidence was that the actions of each "[ran] together to produce the same damage": *Lawson v. Viersen*, 2012 ONCA 25 (CanLII), at para. 31.The evidence was that the plaintiff suffered both psychological and physiological harm. The issue of whether the CCSAT's conduct caused the psychological and physiological injuries of the plaintiff was a matter raised in the jury addresses and charge relating to causation. The verdict indicates that the jury accepted that the CCAST conduct was causative. Given the nature of the injury and the verdict, the jury saw the defendants as concurrent tortfeasors. I agree with that assessment.

[41] CCAST argues that the *Negligence Act* applies to fault or negligence and that the deliberate conduct of Peter Kaczmarczyk is neither. CCAST relies on *Hollebone v. Barnard*, 1954 CanLII 127 (ONSC). In that case, the court found that a trespass of the person was neither fault nor negligence. In that case, the plaintiff was struck by a golf ball on a golf course. The trespass was a deliberate act. While clearly not negligent, the court took a narrow view of fault such that it did not apply to an intentional tort.

[42] The ratio in *Hollebone v. Barnard* was rejected by Linden J. in *Bell v Cope* (1980),11 C.C.L.T. 170 at p. 180. That case also addressed a trespass. Linden J. explained as follows:

> Fault and negligence, as these words are used in the statute, are not the same thing. Fault certainly includes negligence, but it is much broader than that. Fault incorporates all intentional wrongdoing, as well as other types of substandard conduct. In this case, both intentional and negligent wrongdoing were satisfactorily proved.

[43] The Court of Appeal expressly adopted the above comments of Justice Linden: *Bell Canada v. Cope* (Sarnia) Ltd., 1980 CanLII 1868 (ON CA) at p. 571.

[44] The Supreme Court of Canada has commented that cases have gone both ways in Canada as to whether "fault" includes intentional torts and torts other than negligence. The court has not pronounced further on the issue: *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 SCR 3, at para. 67.

Nonetheless, the Court of Appeal in *Bell v Cope* has accepted that intentional torts fall within the definition of "fault". This is the law in Ontario. Accordingly, there is no reason why CCAST which was negligent cannot be jointly liable along with Peter Kaczmarczyk whose conduct was an intentional tort.

[45] In this motion, there is no attack on the jury verdict, rather it is argued by CCAST that only several liability should be imposed. The evidence was sufficient to find that any negligence by the CCAST's failure to act would have contributed to the damages of Ms. Evans. As such, there is nothing offensive about holding CCAST to be jointly and severally liable with Peter Kaczmarczyk. However, CCAST asserts that the acts of Peter Kaczmarczyk are of such a heinous nature that the Estate should be held 100% responsible and CCAST should be 0% responsible. I am effectively asked to set aside the liability and apportionment verdict of the jury.

[46] The CCAST relied upon *obiter dicta* in two cases where courts have commented that the fault or negligence of one tortfeasor might be so egregious so as to eclipse the negligence or fault of the other party such that no liability should arise for the latter tortfeasor: *Rabideau v. Maddocks*, 1992 CanLII 7622*; Gerling Global General Insurance Co. v. Siskind, Cromarty, Ivey & Dowler*, 2004 CanLII 4856 (ON SC). As these were *obiter dicta* comments, the concept was not fully explored, and I do not see either case as determinative or persuasive in addressing this case. In any event, what CCAST seeks is for this court to assess its responsibility at 0%. The issue of apportioning liability is a matter for the trier of fact, in this case being the jury. In *Ingles v. Tutkaluk Construction Ltd*., 2000 SCC 12 (CanLII), [2000] 1 S.C.R. 298 at p. 338, 49 C.C.L.T. (2d) 1, Bastarache J. stated:

> The apportionment of liability is primarily a matter within the province of the trial judge. Appellate courts should not interfere with the trial judge's apportionment unless there is demonstrable error in the trial judge's appreciation of the facts or applicable legal principles.

[47] As the apportionment of liability is a matter for the jury, and there being a factual and legal foundation for the apportionment, I see no basis for me reducing CCAST's liability to 0%.

[48] In conclusion, there is no basis for holding the CCAST as only being severally and not jointly liable with Peter Kaczmarczyk or for reducing its liability to 0%.

Pre-Judgment Interest

[49] The plaintiff is entitled to prejudgment interest on the award. As Doherty, J.A. stated, "prejudgment interest must be viewed as part of the compensatory package provided to the person wronged": *Graham v. Rourke*, 1990 CanLII 2596 (ON CA). In this case, there is a debate how that interest should be calculated.

[50] The calculation of pre-judgment interest is governed by *Courts of Justice Act* R.S.O. 1990, c. C.43 and applicable *Rules of Civil Procedure*. Awards vary depending on the of nature of the award. Section 128 of the *Courts of Justice* provides for awards of prejudgment interest as follows:

Prejudgment interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

Exception for non-pecuniary loss on personal injury

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w).

Special damages

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

Exclusion

(4) Interest shall not be awarded under subsection (1),

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;

(f) where the order is made on consent, except by consent of the debtor; or

(g) where interest is payable by a right other than under this section.

[51] Rule 53.10 provides that prejudgment interest on non-pecuniary personal injury damages is 5% per year.

[52] Under s. 130(1)(b) of the *Courts of Justice Act*, the court may disallow or vary interest "where it is just to do so." The discretion is exercised based on a mandatory list of factors in s. 130(2):

(2) For the purpose of subsection (1), the court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration.

[53] In this case, prejudgment interest applies to the general damage award of $400,000 and the loss of past income award of $940,000. There is no prejudgment interest applied to either the punitive damage award or the future care award.

General Damages

[54] In respect of general damages, the plaintiff asserts that she ought to be awarded interest from 1964 when she confronted Peter Kaczmarczyk. The plaintiff's claim is based on the wording of the current s. 128(1) which directs that interest accrues from when the cause of action arose, subject to the discretion in s. 130(1). However, that section came into force in 1989. Prior to 1989, interest on non-liquidated damages was calculated "from the date the person entitled gave notice in writing of his claim to the person liable therefor to the date of the judgment": s. 36(3) of the *Judicature Act* R.S.O. 1980, c. 223. This reflects amendments from 1977. Prior to that date, interest was not payable prior to judgment on unliquidated damages: *Heeney v. Best* (1979), 1979 CanLII 2084 (ON CA), 108 D.L.R. (3d) 366, 28 O.R. (2d) 71(C.A.).

[55] There was no notice in writing prior to 1989. The plaintiff argues that this ought not to prevent interest being calculated back to 1964. However, this interpretation rejects the plain wording of the section. It also rejects other policy considerations including that notice in writing allows the defendant to assess its exposure and make an offer to settle if appropriate. In any event, given the plain wording of the *Judicature Act*, interest should not be calculated prior to 1989 on the $400,000 general award.

[56] The issue then remains when did the cause of action arise. The plaintiff says 1964 and thus interest should run from 1989 when the legislation changed. Alternatively, it says June 1992 when the plaintiff was hospitalized and sought counselling. The defendants state it should be 2019 when the claim was served or 2010 when the plaintiff was reengaged because of encountering the news that Peter Kaczmarczyk had won the lottery.

[57] The various options as to when interest might commence in an historical sexual assault case was canvassed in *L.R. v. S.P.*, 2019 ONSC 1737. I will not repeat them here. However, I agree with the approach in that case that the appropriate date for assessing when the cause of action arose is when the plaintiff draws a connection between the assaults and the harm caused. This may be inferred from the date when the plaintiff first sought therapeutic assistance: *C.O. v. Williamson*, 2020 ONSC 3874, at para. 241. This is consistent with the Supreme Court's approach when it considered the discoverability principle in relation to the then limitation period for sexual assaults: *M. (K.) v. M. (H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6. In that case, LaForest, J. stated that "Presumptively, that awareness will materialize when she receives some form of therapeutic assistance, either professionally or in the general community".

[58] In this case, Ms. Evans first sought therapeutic assistance in June 1992 when she was hospitalized. It was at that time she disclosed she was assaulted by Peter Kaczmarczyk who she described as a stepfather. I therefore conclude interest on the general damages should commence beginning in June 1992.

[59] As to the rate of interest on the general damage amount, the stipulated rate is 5%. However, per s. 130 of the *Courts of Justice Act*, judges are given latitude to vary that rate, higher or lower, where appropriate.

[60] In considering whether to adjust the applicable interest rate, s. 130(2) of the *Courts of Justice Act* provides that the court shall take into account,

> (a) changes in market interest rates;
>
> (b) the circumstances of the case;
>
> (c) the fact that an advance payment was made;
>
> (d) the circumstances of medical disclosure by the plaintiff;
>
> (e) the amount claimed, and the amount recovered in the proceeding;
>
> (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
>
> (g) any other relevant consideration.

[61] Notwithstanding the discretion provided by s. 130(2), the presumption is that the plaintiff is entitled to the prescribed interest rate: *Henry v. Zaitlen*, 2024 ONCA 614 (CanLII), at paras. 16 and 20. The presumption is not an entitlement or vested right but the presumptive rate should only be dispensed with when the court "considers it just to do so".

[62] The onus is on the defendants to establish that it is "just" to alter the rate. Here, the defendants first rely on the fact that the prejudgment interest rates have varied greatly over the

period 1992-2025 and that the pre-judgment interest rates were on average well below 5% provided for in r. 53.10.

[63] As explained in *MacLeod v. Marshall,* 2019 ONCA 842, at para. 45, the 5% interest stipulated in r. 53.10 was imposed as a default interest rate to cap interest when inflation was high in the 1980s. That rationale for the cap was said to no longer apply given the low-interest rate environment at the time of *McLeod*. The court awarded 1.3% from the date of the Notice of Action being 2012.

[64] However, as noted in the more recent case of *Henry v. Zaitlen*, the onus is on the defendants to establish the market interest rates. Market interest rates are not to be conflated with the published prejudgment interest rates: see also *Aubin v. Synagogue and Jewish Community Centre of Ottawa (Soloway Jewish Community Centre),* 2024 ONCA 615 (CanLII), at para. 57. The parties may agree on an applicable market interest rate but absent an agreement, evidence is required as to market interest rates and the fluctuation of those rates over the relevant time. As stated in *Henry v. Zaitlen*:

> In the absence of such an agreement, the party seeking to have the court exercise its discretion to deviate from the presumptive interest rate in issue must produce evidence of rates available in the market over the relevant period. This goes back to the purposes of prejudgment interest rates – to fairly compensate a plaintiff for the loss, to encourage settlements and efficiently run proceedings, and to deprive the defendant of the benefit derived from the use of the funds ultimately awarded.

[65] In this case, there was no evidence of market interest rates. The defendants simply relied on the published prejudgment interest rates which is insufficient. As such this factor does not warrant an adjustment.

[66] There is no issue about medical disclosure. There was no argument about the amount claimed and awarded. These factors do not warrant an adjustment to the prejudgment interest rates.

[67] There was no advance payment by the defendants. The claim was served in 2019. While Peter Kaczmarczyk would have been aware of the events as they transpired and the criminal allegations as of 2010, I accept the CCAST first heard about the allegations in 2019 when it was served with the claim. However, there was still no advance payment by either party in the intervening 6 years.

[68] There was no conduct by any party that may be considered to have lengthened or shortened the duration of the proceeding.

[69] Aside from the change in the pre-judgment interest rate, the defendants suggest that the circumstances of the case warrant an adjustment to the interest rate. They also rely on the catch-all ,“any other relevant consideration”.

[70] The defendants assert that the action was not commenced until 2019 and that it would be unjust to impose interest back over 30 years. In the case of the CCAST, it asserts it made genuine offers to settle, albeit less than the ultimate award. It further argues that the CCAST is an organization that receives funding on a yearly basis. It has no reserves. It has therefore not profited from the passage of time. It is further argued that but for amendments to the *Limitation Act* which came into force in 2004 removing the limitation period for sexual assaults, this action could not be brought.

[71] The purpose of pre-judgment interest is compensatory. The legislature eliminated the limitation period for sexual assaults in 2004, including historical cases. The legislature would have been aware that the interest was calculated on these awards from the date the cause of action arose. There was no legislative change to the pre-judgment interest rate for non-pecuniary damages in historical sexual assault claims. In my view, the legislature has provided that interest in historical sexual assault cases is to presumptively be calculated like any other case. In addition, I do not see anything unique in this action which would allow me to deviate from the legislative intention that pre-judgment interest should accrue from when a cause of action arose. In the circumstances, the fact that the action was commenced in 2019 ought not to disentitle the plaintiff to the presumptive interest calculation.

[72] Moreover, as pre-judgment interest is compensatory, it ought not to be withheld for a delay in commencing the action. In addressing delay in getting to trial, the court of Appeal in stated in *Royal Bank of Canada v. Roband Home Improvements Ltd*., 1994 CanLII 871 (ON CA), [1994] O.J. No. 2149: “Prejudgment interest is part of the value of the award, and just as the court would not reduce the amount of the award proper because of delay in bringing the matter to court, so should it not reduce the value of the award by reducing the interest to which the claimant would otherwise be entitled”. The Court noted that prejudgment interest is part of the award and to withhold prejudgment interest because of a delay in getting to trial operates as a penalty and is improper. In my view this rational applies to commencing the action. In the circumstances, the fact that the action was commenced in 2019 ought not to disentitle the plaintiff to the presumptive interest calculation.

[73] Similarly, I do not see CCAST’s financial status as a reason to deviate from the presumptive interest. This would presumably apply to any public or charitable organization that does not accrue revenue. Had such an exemption been warranted, it could have been provided for in the legislation. Moreover, that argument has no application to the Estate. Aside from the impracticality of having two prejudgment interest calculations, the defendants are jointly responsible for loss which would include the compensatory interest.

[74] Accordingly, I decline the request to modify the 5% interest rate on the non-pecuniary damages. Interest shall commence as of June 1992.

Income Loss

[75] On the issue of prejudgment interest on the income loss award, the interest again runs when the cause of action arose which I have found to be June 1992: s. 128(1) of the *Courts of Justice Act*. Section 128(3) provides the formula for calculating interest on pecuniary losses such as the income loss award:

> If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

[76] The Plaintiff relies on the calculation of its expert who calculated a wage loss based on three scenarios with interest calculated on the accrued amount every 6 months. In doing so, the Plaintiff acknowledges that the loss as awarded was 71% of the loss identified by the forensic accountant expert when comparing the plaintiff's income to the income of an average worker with a high school degree which I accept is the correct comparator.

[77] I accept that the wage loss has been accruing since 1971 and it stopped accruing on March 19, 2017, when the plaintiff turned 65. However, prejudgment interest does not begin to accrue until the causes of action arises. For the reasons already stated, that is not until June 1992 and, as such, interest begins on that date. Interest is then to be calculated every six months on the total pecuniary loss thereafter. The "pre-judgement interest rate" is defined in the *Courts of Justice Act* as the bank rate at the end of the first quarter in which the action was commenced. In 2019, when the action was commenced, the rate was 2%.

[78] It was submitted by CCAST that this rate should be halved relying on the arguments already disposed of above which I will not repeat, and its interpretation of *Borland et al. v. Muttersbach*, 1985 CanLII 2134 (OCA). In *Borland*, it was argued that the trial judge erred in awarding interest on the pecuniary loss at one-half of the prime rate for the month preceding the issue of the writ, rather than at one-half the average prime rates between the month preceding the issue of the writ and the judgment month. Reference was made to a practice of doing so. In that case, the Court was addressing s. 36 of the then *Judicature Act*, R.S.O. 1980, c. 223 which permitted the judge to vary the prescribed rate of interest and the period for which it is payable, "where he considers it to be just to do so in all the circumstances". The Court found the trial judge exercised appropriate reasoning in his choice of interest rates.

[79] In my view, *Borland* does not stand for the proposition that pecuniary interest rates should be halved. Instead, the Court simply accepted that the court below exercised appropriate discretion in respect of a different statutory scheme than applies now. I have already applied the current exemption provisions in s. 130(2) in the *Courts of Justice Act* with the guidance from *Henry v. Zaitlen* and concluded there is insufficient grounds to deprive Ms. Evans of the stipulated prejudgment interest for both the pecuniary and non-pecuniary damages.

[80] The request to vary the pecuniary interest rate of 2% is denied.

[81] The pecuniary interest shall commence June 1992 and shall be calculated using the formula of 71% of the income loss as calculated by the expert which was based on the calculations assuming Ms. Evans earned the same as all occupations with a high school education. The interest shall be calculated bi-yearly as required pursuant to s. 128(3) of the *Courts of Justice Act* using the prescribed rate of 2%.

Disposition

[82] The parties are directed to calculate the interest owing on both the pecuniary and non-pecuniary rates based on the above directions. If there is any dispute, they may seek a case conference with me.

[83] Pursuant to Rules 52.09, the jury's verdict is hereby endorsed, and judgment is granted in accordance with that verdict.

[84] There remains the issue of costs. Any party seeking costs shall file submissions of no more than 15 pages along with a bill of costs within 10 days of the release of these reasons. Any party opposing a request for costs shall file submissions of no more than 15 pages along with a bill of costs within 10 days of the receipt of a party's request for costs. The submissions shall be sent to my assistant and upload to case centre.

Released: October 9, 2025 Callaghan J.