
HIGH DAMAGE AWARD FOR SEXUAL ASSAULT IN THE WORKPLACE UPHeld

*By Barry W. Kwasniewski**

A. INTRODUCTION

The Ontario Court of Appeal recently released its decision in *M.B. v 2014052 Ontario Ltd. (Deluxe Windows of Canada)*,¹ upholding a Superior Court of Justice decision in which the jury awarded the plaintiff \$468,969.18. The appeal was brought by the defendant, Mickey Weig, who was found liable for assault and battery, and the damages arising therefrom, for repeatedly sexually assaulting the plaintiff, who was an employee under his direct supervision. Though only Weig appealed the verdict, both the employer, Deluxe Windows of Canada (Deluxe), and Weig were held jointly and severally liable for the damage award. Deluxe was held vicariously liable for Weig's acts. While this case involved employment in the for-profit business sector, the principles relating to liability for workplace violence and harassment also apply to not-for-profits and charities.

B. FACTS

The plaintiff, referred to as M.B. to protect her identity, moved to Canada in June of 2002. She worked for Deluxe as a commissioned salesperson from 2003 to 2005. During the period of January to October 2004, Weig sexually assaulted M.B. four times, for which he was criminally convicted and incarcerated. In her lawsuit, M.B. claimed general and aggravated damages for psychological conditions arising from the assaults, including feelings of fear and shame, nightmares, insomnia, trauma, flashbacks, depression and

* Barry W. Kwasniewski, B.B.A., LL.B., practices employment and risk management law with Carters' Ottawa office and would like to thank Michelle Thériault, B.Soc.Sci. J.D., Student-At-Law, for her assistance in the preparation of this *Bulletin*.

¹ 2012 ONCA 135 (released March 2, 2012)

anxiety. M.B. claimed further damages for loss of income resulting from her fear of the workplace following the assaults, and from being given less lucrative sales clients as a punishment for not acceding to Weig's sexual demands. However, the claim for loss of income was not left with the jury because the trial judge determined that the claim was not sufficiently supported by the evidence. Following an eight-day trial, the jury awarded damages for assault and battery against Weig and Deluxe, as well as ordering them to pay M.B.'s legal costs, fixed at \$150,000 plus GST, and \$24,382.82 in legal disbursements. The award against Weig and Deluxe was as follows:

- \$300,000 in general damages
- \$25,000 in aggravated damages
- \$45,000 in future health care costs and
- \$98,969.18 in prejudgement interest.

C. DECISION OF THE COURT OF APPEAL

The employer, Deluxe, did not appeal the trial decision. The defendant, Weig, raised several arguments on appeal. However the court determined only two issues to be central: whether the jury should have been instructed to assess whether a portion of the damages to M.B. were attributable to other causes, and whether the jury award for general damages was so inordinately high as to warrant intervention by the Court of Appeal. M.B. also cross appealed on the decision of the trial judge to not allow the jury to consider the issue of loss of income, which was dismissed by the Court of Appeal.

Weig argued that the trial judge should have instructed the jury to consider previous traumatic events in M.B.'s life as factors that materially contributed to her situation. Accordingly, Weig argued that he should not have been held legally responsible for all the conditions from which she now suffered. The Court of Appeal determined that the trial judge **did err** in not instructing the jury to consider these other events. However, the Court determined that this error **did not** lead to a substantial wrong or miscarriage of justice, because there was no reasonable evidence of either a pre-existing condition or the contribution of events to M.B.'s condition that would warrant leaving these questions with the jury. As such, the trial judge's error was not so crucial as to warrant either a variation of the jury award or a new trial.

With regard to the amount of the damage award, Weig argued that the appropriate range for a general damage award for the sexual assault of an adult victim is between \$75,000 and \$125,000. However, the Court of Appeal found that while the award was outside of the expected range, it would not interfere because jury awards are given significant deference by the courts, and the award “is not so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole, and acting judicially could have reached it.”²

D. CONCLUSION

This decision is an example of the type and extent of liability employers may face should they fail to take reasonable steps to eliminate workplace violence and harassment. The damage award in this case could have been significantly higher if the plaintiff was able to establish a claim for lost income. In light of the 2010 amendments to the Ontario *Occupational Health and Safety Act*,³ charities and not-for-profits need to know their duties as employers to implement and enforce workplace violence and harassment policies. Employers should see this case as a warning of the significant liability they may face in cases of workplace violence and harassment.

² *Ibid*, at para 70.

³ R.S.O. 1990 c. O.1