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Volume 66, numéro 1, 1998

URI : https://id.erudit.org/iderudit/1105188ar
DOI : https://doi.org/10.7202/1105188ar

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Éditeur(s)

HEC Montréal

ISSN

0004-6027 (imprimé)
2817-3465 (numérique)

Découvrir la revue

Citer ce document

Bell, R. (1998). SEXUAL ABUSE CLAIMS IN CANADA AND THE ISSUES FOR INSURERS. *Assurances*, *66*(1), 15–21. https://doi.org/10.7202/1105188ar

Résumé de l'article

Le but de cet article est d'examiner l'étendue du crime d'abus sexuel sous l'angle des décisions rendues par les tribunaux canadiens et de résumer brièvement les récentes théories juridiques à cet égard. L'auteur explique que les réclamations fondées sur l'abus sexuel sont caractérisées par une relation de pouvoir et de dépendance, notamment entre parents et enfants, médecins et patients, professeurs et étudiants, avocats et clients ou employeurs et employés. La bataille judiciaire se livre généralement sur le champ de la responsabilité de l'institution et rarement sur celle de l'abuseur.

Une grande partie de l'article est aussi focalisée sur le libellé des contrats d'assurance et sur les moyens de défense que peuvent utiliser les assureurs pour qui, l'auteur n'est pas sans le rappeler, les causes judiciaires demeurent douteuses, tant celles qui concernent l'application du contrat face aux réclamations que celles qui ont trait aux différents moyens de défense qu'ils peuvent offrir, parallèlement à leurs obligations contractuelles.

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by Robert B. Bell

RESUME

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ABSTRACT

The purpose of this article is to examine the scope of sexual abuse from the standpoint of the Canadian Courts and to briefly comment on the actual legal theories. The author explains that claims from sexual abuse generally arise from what has been characterized as "power dependency relationhips", which include relations between parent and child, physician and patient, clergy and penitent, professor and student, solicitor and client and employer and employee. The battleground is always whether the institution is liable, and quite rarely, whether the perpetrator is liable.

A large plan of the article is focused on insurance wordings and defence issues for insurers. Insurers face uncertainty in terms of how the courts will deal with claims, and, in addition, face uncertainty as to how the courts will decide issues with respect to defence and indemnity obligations.

L'auteur:

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For the past five years, the popular press in Canada has been filled with graphic details of sexual abuse of children at the hands of those in authority in government institutions, churches of every denomination and community organisations. Civil claims for compensation are multiplying rapidly.

A number of plaintiffs' counsel have specialised in the pursuit of such claims and are prepared to commit significant resources towards maximising recovery. In many cases, the incidents of abuse are alleged to have occurred 20 or 30 years ago.

Often, such claims result from longstanding criminal conduct of paedophiles. Groups of the paedophiles' victims represented by one or more counsel come forward with their claims. The proceedings become very complex and expensive.

The courts have refused to date to dismiss claims on the basis of a limitation period defence. Further, in cases which have proceeded to trial, judges and juries alike have been horrified, are extraordinarily sympathetic to the victims of abuse, and seek to find ways to force compensation at very high levels.

■ NATURE OF THE CAUSE OF ACTION

□ Factual basis

Claims for sexual abuse generally arise from what has been characterised as "power dependency relationhips". These relationships include those between parent and child, physician and patient, clergy and penitent, professor and student, solicitor and client and employer and employee. The dominant party is usually able to completely control the environment and, through a combination of threats and offer of threats, the acts are not complained of by the victim to outside persons.

The victim remains silent with a secret, which psychologically can be more damaging than the assaults themselves. It is important to note that in awarding damages, the trend has been to focus on the psychological and emotional impact of the abuse, rather than the nature of the physical act.

There are also a number of cases which arise because well-intentioned mental health professionals "retrieve" uncorroborated memories of incest and abuse. A great deal of clinical research and professional debate is ongoing with respect to the so-called "false

memory syndrome". There is no doubt, however, that the incidents of childhood sexual abuse, both within the family setting and within some institutional settings, have been tragically common and devastating for the victims.

☐ Legal theories

In cases where an institution was the setting for exploitation of a power dependency relationship, it may be exposed for failing to take proper or adequate steps to prevent abuse or for failing to address problems of which the institution knew or ought to have known. On the latter point, difficulty arises because even if persons with supervisory responsabilities within an institution hear rumours of problems, they may do nothing out of concern that taking steps could devastate an innocent colleague's career.

Claims have been presented for breach of fiduciary obligations, occupier's liability and negligence. The battleground is always whether the institution is liable, and quite rarely, whether the perpetrator is liable. The perpetrator is often either in jail, penniless or both.

The latest attack by plaintiff's counsel has been in the aria of vicarious liability. The Nova Scotia Court of Appeal in *FMW v Mombourquette* held that there should be no vicarious liability upon a church for the criminal activity of one of its clergy. However, the British Columbia Court of Appeal in *B (PA) v The Children's Foundation* held that if there is a "close connection" between the employee's duties and the abuse, that vicarious liability can be imposed.

It is anticipated that the Supreme Court of Canada will probably grant leave and consider this issue of imposing liability upon institutions for criminal activity by their employees. There is a good chance that when the Supreme Court of Canada hears the issue, it will place an onus on institutions to prove that reasonable steps were taken to safeguard children from abuse.

☐ Level of damages

General damages in Canada are awarded to compensate for pain and suffering and are not subject to precise calculation. As noted above, in sexual abuse claims, the physical aspect alone is not the determining factor in assessing the general damages.

Aggravated damages are also compensatory in nature but are awarded in abuse cases because of extreme factors causing stress, humiliation and suffering. Trial decisions reported prior to 1996 assessed general plus aggravated damages ranging from C$5.000 (US$3.860) to $85.000. The range in cases reported in 1996 for general plus aggravated damages was $7.000 to $250.000.

Punitive damages are not meant to be compensatory in nature but rather to punish the wrongdoer and set an exemple to deter others. Punitive damages may or may not be awarded if the perpetrator has been jailed and may or may not be part of the award against the employer or institution. Punitive damages are regularly awarded in abuse claims in addition to general and aggravated damages. The range is an additional $10.000 to $50.000.

Claims for lost income, lost economic opportunity and impairment of earning capacity are growing, with one 1997 decision allowing $212.000.

Moreover, defence costs for such claims are extremely high. Numerous experts become involved and there is usually great difficulty in completing a factual investigation.

The process of litigating these claims is also complex. As an exemple, the Nova Scotia provincial government has been sued by former residents of the Nova Scotia School for Boys.

The province established a $35m compensation fund and conducted its own inquiry into what happened, releasing a report which found that the residential school was no more than a "warehouse for boys".

After establishing the compensation fund, the provincial government sought to engage insurance coverages. In one case, the liability premium for the policy which the government sought to engage was less than $50! The litigation involves 460 claimants and complex proceedings.

■ INSURANCE AND DEFENCE ISSUES

Insurers face a number of issues on whether any defence or indemnity obligation exists for abuse claims.

- Is there sufficient evidence that a policy existed?
- What has triggered the defence obligation?

- What is the occurrence: (i) the first act of abuse, regardless of the number of victims? (ii) each act of abuse, meaning there would be not limit under a policy? or (iii) the first act of abuse upon each victim?
- Has there been bodily injury within the policy definition?
- Was there a failure to disclose potential claims in applying for the policy or upon renewal?
- Consider whether there is an intentional act exclusion: "the insured" or "an insured".
- The moral hazard in affording coverage for criminal activity.
- Was there any reasonable expectation that claims for abuse would be covered given the amount of the premium compared to the amount of the exposure?
- Has there been breach of policy condition, for example, the institution admitting liability expressly or by implication with an apology and funding of counselling?
- Does interest accumulate on the policy limits, if the policy limits can even be determined?
- If the insurer extracts a non-waiver or reservation of rights agreement, will there be a proper flow of information with respect to defence?
- Should there be a defence funding agreement with other involved insurers?
- What about the involvement of excess carriers and reinsurers?

There are also other difficult considerations, such as the inevitable media frenzy; gathering medical and family information; funding psychological/psychiatric counselling to mitigate damages; and maintaining a relationship with the insured.

In Canada, an insurer has a defence obligation if facts are alleged in a statement of claim which, if proved, would require the insurer to indemnify. Therefore, most plaintiffs make allegations of simple negligence against the institution in order to engage the insurance company.

An institution seeking to engage defence obligations faces a difficult choice. Many institutions will wish to respond with help for victims and would probably seek to control the overall defence because its "constituency" will be watching carefully and the institution itself could be destroyed as a result of the allegations.

Further, the institution may not have any right to indemnity once all of the facts have been determined, despite allegations that triggered the defence obligation.

The involvement of multiple insurers also presents challenges. The abuse could have occurred over a period of many years with a number of different victims. Each potential claimant may have decided not to step forward for extended periods. During the period of time, the institution may have placed coverages with a number of different insurers.

Most of the policy wordings will be on an occurrence basis, but when the claim was presented, it is possible that the institution had a claims-made policy in place, with the typical exclusion that it would not respond if other insurance responds.

In some cases, it becomes even more complex, because the institution cannot find evidence of insurance so there are "uninsured years". It may also turn out that one or more of the insurers has gone bankrupt.

There is very little Canadian case law which assists in resolving these complexities. By analogy, we may have regard for developments in the asbestos cases and US case law in various jurisdictions on trigger theories. Trigger theories relevant to sexual abuse claims would be: the manifestation theory; the injury in fact theory; and the double trigger theory.

The manifestation theory is that there is no injury or desease within the meaning of a CGL policy until the injury manifests itself in diagnosable form and the victim knows or reasonably should have known of its existence. If the manifestation theory is adopted by the courts, the insurer with the occurrence-based policy in force when the assaults occurred may argue that the policy ought not to respond, because no injury was manifested during the policy period.

The injury in fact theory is that an injury occurs when damage is actually sustained. This would mean that any policy in place when abuse occurred could be triggered, as that is arguably when the "injury" occurred.

The double trigger theory might be interpretated in abuse cases to mean that a policy is triggered at the time of the abuse occurred and the time memory of the abuse is retrieved, but not during the period in between.

Finally, the claims-made policy in place when the institution is notified of the claim may be engaged if other insurers have properly taken an off coverage position.

Each case must be researched on the specific facts and specific policy wording.

CONCLUSION

There is great uncertainty in Canada on what liability theories will apply in cases of sexual abuse. The trend is toward imposing liability on institutions. The damages issues are still evolving. For exemple, insufficient clinical studies have been undertaken to determine whether psychiatric or psychological treatment can effectively rehabilitate victims of childhood abuse.

Insurers face uncertainty in terms of how the courts will deal with claims, and, in addition, face uncertainty as to how the courts will decide issues with respect to defence and indemnity obligations.

Creative resolutions are sought in these cases, but resolution inevitably calls for payment of money exposing insurers to large claims and significant expenditures. As the case law develops, properly worded exclusions and new coverages will restore some certainty for insurers.