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COMMENTARY

Making the intangible tangible: Collecting damages for pain and suffering

Elisa Reiter and Daniel Pollack | June 8, 2023



The image that a sexual predator is a stranger trying to entice a small child is so outdated. Today, we know that sexual predators can be anyone—blood relatives, clergy, doctors, coaches, and, yes, teachers. As authority figures that students are taught to trust, when teachers breach that expectation, the psychological repercussions can last a lifetime.

Sadly, hardly a day goes by when we don't read headlines about teachers preying on children.

School districts, among other institutions, must parry and parse sexual abuse and molestation allegations (SAM) cases. The constant headlines about such cases reflect what appears to be an increase not only in cases, but also an increase in verdict values. Why the increase both in cases and in damages? An example can be found in 2019 legislation enacted in New Jersey, giving victims a two-year period in which to sue their abusers—until the victims reach the age of 55 or within seven years of the time their memory of the incident(s) caused them harm. New Jersey was the 11th state to pass such legislation. What is unique is that the statute allows individuals who were sexually assaulted as adults to file lawsuits seeking damages.

Such cases owe their foundation to juries being more empathetic to such claims given the following:

1. An informed public given the amount of press that emerged in light of the #MeToo movement, and awareness prompted by athletes speaking out against their abusers, like Larry Nassar and George Tyndall at USC.
2. Plaintiffs attorneys seeking to arouse anger in their juries, along with sympathy.
3. Defense attorneys struggling to match the theatrical presentations of plaintiffs' lawyers.

4. New laws, as in New Jersey, extending the statute of limitations, giving victims longer periods of time to file cases and to seek damages.

In the recent case of *C.W. v. Roselle Board of Education*, A-3187-21, the Superior Court of New Jersey analyzed whether a plaintiff, raising an allegation of abuse by a teacher, was barred from seeking damages for pain and suffering by the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12.3. Why would damages be barred, in spite of the New Jersey Legislature's recent statutory amendments? Because those statutory amendments did not remove "the statutory threshold regarding medical expenses."

When a personal injury lawsuit alleging sexual abuse is filed, damages for pain and suffering will invariably be sought. Even though pain and suffering are certainly intangible concepts, they can be the most serious harm in a sexual abuse personal injury lawsuit. In *C.W.*, the plaintiff alleged that a teacher sexually abused him twice—in 2004 and 2005—when the plaintiff was 16 years old.

In the plaintiff's responses to discovery, he noted that he had suffered permanent physical and mental injuries because of the perpetrator's abuse, adding that "any penetration causes [him] severe pain and makes [him] uncomfortable, even in consensual relationships." The plaintiff also opined in his interrogatory responses that he had difficulty with romantic relationships and suffered from anxiety and depression. There were no medical expenses.

In 2021, the plaintiff was the subject of a psychological evaluation, conducted by the social worker Jon R. Conte. Conte observed that the

plaintiff “has an extremely difficult time discussing the sexual abuse. ... His memory is poor but there was an obvious emotional component to his difficulty discussing the abuse.” Conte also observed that the plaintiff’s vulnerabilities rendered the impact of the abuse by the schoolteacher more significant and are a contributing factor to his subsequent functioning. The plaintiff’s self-report in the testing indicates significant current difficulties with identity, relatedness (including distrust of others, social isolation), affect regulation, and depression.

Conte supplemented his report in late December 2021 in response to a psychologist expert report from the defense, concluding that the plaintiff “has been permanently changed and harmed as a result of the sexual abuse he suffered at the hands of a former teacher.”

The defendant moved for summary judgment. The trial court granted the defendant’s motion for summary judgment in part, and as a result, dismissed the plaintiff’s claims for intentional infliction of emotional distress. The trial court left in play the plaintiff’s claims for negligence and negligent infliction of emotional distress, finding that an issue of material fact existed as to whether the plaintiff suffered a permanent injury. The trial judge did not address the plaintiff’s failure to meet the threshold of proving a minimum of \$3,600 in actual medical damages.

The defendant moved for reconsideration. In the spring of 2022, the trial court granted the motion for reconsideration in part, concluding that the plaintiff was barred by the TCA from seeking damages for pain and suffering, but denying the defendant any other relief. In a written statement, the trial court noted that Conte had not provided testimony that the plaintiff would incur at least \$3,600 in medical expenses related

to Conte's recommendation that the plaintiff would be in need of a trauma-informed approach via psychotherapy.

Creating new law was beyond the scope of the trial court. As the trial court noted in a footnote:

"Plaintiff conceded at oral argument that for the [c]ourt to hold that [p]laintiff has vaulted the threshold despite the absence of a certification of \$3,600 of medical expenses, the [c]ourt would have to create new law. However, it is axiomatic that although a trial court can []'discover' what the law has always been it cannot create new law. *State v. Knight*, 145 N.J. 233, 249 (1996). N.J.S.A. 59:9-2(d) is clear and unambiguous on its face that the \$3,600 medical expense threshold is a strict prerequisite to vault the verbal threshold under the TCA. Because this [c]ourt 'ascribes to the statutory words their ordinary meaning and significance,' *DiProspero v. Penn*, 183 N.J. 477, 492 [] (2005), [p]laintiff's failure to vault the verbal threshold's medical expense requirement is fatal to his claims for pain and suffering damages. See *J.H. v. Mercer County Youth Detention Center*, 396 N.J. Super. 1, 20 (App. Div. 2007); *Lascurain v. City of Newark*, 349 N.J. Super. 251 (App. Div. 2002); *Thorpe v. Cohen*, 258 N.J. Super. 523, 527-28 (App. Div. 1992)."

The New Jersey Superior Court found in pertinent part that:

"We disagree with plaintiff that Dr. Conte's statement that 'plaintiff should be helped' rises to an opinion that plaintiff must and will undergo treatment. Plaintiff has sought no treatment in the fifteen years since the abuse occurred. While we do not fault plaintiff in any way, any claim of costs for future medical treatment is speculative. Dr. Conte also opined plaintiff's need for psychotherapy arose from his 'complex

trauma history with significant adversities over most of his life.’ Like the psychiatrist in *J.H.*, Dr. Conte did not relate plaintiff’s need for medical treatment directly to the sexual abuse. See *J.H.*, 396 N.J. Super. at 21. Plaintiff and Dr. Conte did not present any evidence of the cost of past, present, or future medical expenses incurred as a result of the sexual abuse by the teacher. Therefore, plaintiff did not meet the requisite monetary threshold under the TCA to defeat summary judgment on his claims of pain and suffering.”

While New Jersey precedent includes many courts concluding that harm suffered by a child who is sexually molested meets the criterion imposed by N.J.S.A. 59:9-2(d) in regard to a permanent loss of bodily function, even if the injury is only reflected by and manifests as psychological symptoms, the Superior Court concludes that the monetary threshold must be met, and that the plaintiff simply failed to meet that threshold.

Fifteen years elapsed between the alleged abuse and the plaintiff filing suit. In that time, the plaintiff failed to seek treatment. While Conte recommended psychotherapy, the expert failed to opine on the estimated costs related to such counseling. The Superior Court concludes that while the plaintiff is barred from seeking damages for pain and suffering, he is not barred from seeking other damages allowed by the statute.

Lessons learned:

1. Set out the factual bases for your claims in your lawsuit, supported by discovery responses, enhanced by the testimony of an expert as to medical costs to substantiate a claim for pain and suffering.

2. Statutory analysis is key. Don't try to skirt the requirements of the statute you use to frame claims or defend those claims. Read. Analyze. Hold litigants to the criteria imposed by law.
3. Discovery matters. Trial by ambush is a thing of the past. Make your case via responses, evidence and by retaining the right experts who can help substantiate your claims.
4. When a plaintiff fails to seek aid prior to filing suit, consider counseling for that party during the pendency of the case, as well as actuarial tables reflecting projected costs for trauma-informed counseling.
5. Embrace technology. Use bells and whistles in your presentations. Graphically inform your case.

When a personal injury lawsuit alleging sexual abuse is filed, damages for pain and suffering will invariably be sought. Even though pain and suffering are certainly intangible concepts, they can provide context for the most serious harm in a personal injury lawsuit regarding sexual abuse.

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