COURT OF APPEAL FOR ONTARIO

CITATION: McCabe v. Roman Catholic Episcopal Corporation for the Diocese of Toronto, in Canada, 2019 ONCA 213
DATE: 20190319
DOCKET: C63950

Strathy C.J.O., Benotto and Roberts JJ.A.

BETWEEN

Robert Joseph McCabe

Plaintiff (Respondent)

and

The Roman Catholic Episcopal Corporation for the Diocese of Toronto

Defendant (Appellant)

Chris Blom, for the appellant

Dena Varah and Chris Kinnear Hunter, for the respondent

Heard: November 19, 2018

On appeal from the judgment of Justice Gordon C. Lemon of the Superior Court of Justice, sitting with a jury, dated May 30, 2017.

Benotto J.A.: (for the majority on all issues except punitive damages; dissenting on the issue of punitive damages)**.**

[1] When the respondent was 11 years old, he was sexually abused by a now deceased priest. Years later he sued the appellant for damages. A jury awarded general and aggravated damages, damages for loss of income, and punitive damages. The appellant claims that damages were inflated by the jury because

of inflammatory remarks the respondent's counsel made to the jury in closing submissions. It further submits that the trial judge erred in a ruling on the admissibility of hearsay evidence and that the award for punitive damages was unwarranted.

FACTS

The abuse

[2] The respondent, Robert McCabe was born in 1952. He was raised in a devout Roman Catholic family. The church, the sacraments, and the catechism were an integral part of his life. He believed that a priest was "God's representative" to be respected and obeyed.

[3] He became an altar boy at age 11, around the time that Father Alphonse Robert had been assigned to his parish and took over the training of altar boys. Father Robert befriended Mr. McCabe, spent time with his mother and visited his home regularly. In 1963, Father Robert invited the 11-year-old on a trip to Montreal to visit the Basilica of Notre Dame. He arranged for the two of them to spend the night in a motel room in Cornwall. The room had only one bed. Father Robert sexually assaulted him that night by fondling him sexually and performing oral sex on him. Mr. McCabe believed that because Father Robert was a priest, the events of that night were his fault and that he was damned to hell. He

suffered guilt and shame. He was not able to confide in anyone and could not go to confession because Father Robert was his confessor.

[4] The impact on Mr. McCabe led to difficulties in family relationships and alcoholism.

[5] None of these facts is disputed.

The legal action

[6] Mr. McCabe brought an action for damages against the Roman Catholic Episcopal Corporation for the Diocese of Toronto ("the Diocese") in December 2014. By this time, Father Robert was dead.

[7] He claimed general and aggravated damages, special damages for both past and future loss of income, pecuniary damages, damages for mental distress, and punitive damages.

[8] After years of denying liability, the Diocese admitted liability on the first day of trial. The only issue at trial was the amount of damages.

[9] Both parties presented expert evidence about the effects of the abuse on Mr. McCabe.

[10] Dr. Jeff McMaster was called by the Diocese. He was qualified to give evidence as a forensic psychologist on the impact of childhood sexual abuse. He testified that the abuse was not at the severe end of the spectrum, but rather toward the middle because of the relative non- intrusiveness of the abuse, the

short period of time over which it occurred, the fact that it occurred only once, the young age of the victim, the absence of physical coercion or violence, and the child's ability to return to a place of safety afterwards. He opined that the abuse did not affect Mr. McCabe's educational trajectory. He referred to the abuse as "extremely unpleasant".

[11] Dr. Peter Jaffe was also qualified as a forensic psychologist on the impact of childhood sexual abuse. He took issue with Dr. McMaster's minimization of the abuse. In his opinion, the abuse was at the severe end and caused post-traumatic stress disorder ("PTSD") and a severe alcohol use disorder, which led to educational and employment difficulties and economic consequences. He did acknowledge in cross-examination that Mr. McCabe may overattribute his symptoms to the abuse and that there were several other factors that could have affected his accomplishments in life.

[12] Elizabeth Schramm, a social worker, was qualified to give evidence in the area of PTSD and other psychological problems stemming from sexual abuse. She began counselling Mr. McCabe in March 2014.

[13] The evidence of Ms. Schramm and Dr. Jaffe was that the respondent was vulnerable and that the process of the litigation was causing him pain. This was aggravated by the fact that he was told he might not be believed. Dr. Jaffe referred to this as re-victimization.

[14] Father Clough was the judicial vicar of the Diocese and responsible for investigating allegations of misconduct against priests. There is no suggestion that Father Clough knew of Father Robert's conduct at the time of the abuse. However, by the time the action began, Father Clough knew of other complaints against Father Robert involving inappropriate conduct and believed this may have led to Father Robert's transfer between Dioceses in 1973. Father Clough noted that Father Robert had transferred parishes a number of times and that he had been twice rejected from the priesthood.

The ruling excluding hearsay evidence

[15] The trial judge made a ruling during the trial relevant to this appeal. He found that a chart from the Homewood Sanitarium where Mr. McCabe had treatment and the comments of teachers in Mr. McCabe's academic records were not admissible.

[16] The respondent had attended Homewood in 1988 for treatment of alcoholism. The notes of the hospital employees disclosed that the respondent did not attribute his alcohol use to childhood sexual abuse.

[17] The academic records included comments and observations about positive academic results after the abuse.

[18] The trial judge determined that the history taken from the respondent at Homewood was not recorded by someone with personal knowledge of the

matters being recorded and therefore was inadmissible hearsay. He further concluded that the academic records were inadmissible opinion evidence.

Counsel's closing submissions to the jury and pre-charge conference

[19] Immediately following closing submissions, the appellant's counsel raised concerns about some of the respondent's counsel's comments during his closing submissions to the jury. Specifically, the appellant's counsel took issue with respondent's counsel doing the following: indicating that the jury should identify with the victim as an 11-year-old; asking the jury to "do the right thing"; referencing facts without an evidentiary basis such as whether Winston Churchill failed a grade or whether Mr. McCabe went to a Catholic high school or joined the Youth Corps to be close to the institution; suggesting inferences regarding why Mr. McCabe's relationships failed that were not based on the evidence; and suggesting the Diocese or Father Clough knew Father Robert was a "problem priest". The trial judge took this into account when formulating his charge to the jury.

[20] During the pre-charge conference, there was discussion about the respondent's claim for punitive damages. The respondent first argued that punitive damages were appropriate because Dr. McMaster minimized the respondent's suffering. The trial judge rejected this as a basis for punitive damages but agreed that the failure of the appellant to admit liability until the morning of trial would be put to the jury under this category.

The jury award

[21] The jury awarded general and aggravated damages of $250,000, loss of income of $280,000, treatment expenses of $5,000, and punitive damages of $15,000.

ISSUES

[22] I would frame the issues raised by this appeal as follows:

1. Did the trial judge err in the hearsay ruling?
2. Did the comments of counsel to the jury cause a miscarriage of justice?
3. Was the damages award inappropriate?
4. Was the punitive damages award unwarranted?[1]

ANALYSIS

Issue #1: Did the trial judge err in the hearsay ruling?

[23] The trial judge properly excluded the evidence in the Homewood chart and academic records. The documents had been tendered under the common law rule and not under s. 35 of the *Evidence Act.* To be admissible under the common law rule in *Ares v. Venner*, [1970] S.C.R. 608, business records must be made contemporaneously by someone with personal knowledge of the matters being recorded and under a duty to make the entry in the record. This exception as to hearsay deals with the recording of facts by individuals with first-hand

[1] As indicated, my colleagues are in the majority on the issue of punitive damages.

knowledge and observation of the matters being recorded. The Homewood records did not fall within the personal knowledge of the author and thus could not be admitted for the truth of their contents. The school records were properly characterized by the trial judge as opinion and thus inadmissible. Further, the respondent was not precluded from using the records for impeachment purposes in cross-examination yet chose not to do so.

[24] In any event, there was other evidence of Mr. McCabe's medical condition while at Homewood and his academic grades. The jury had the benefit of this evidence and there was no potential for a miscarriage of justice.

Issue #2: Did the comments of counsel to the jury cause a miscarriage of justice?

[25] The appellant submits that the comments by the respondent's counsel were inappropriate and would have inflamed the jury such that a new trial is in order. Under s. 134(6) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, this court may only direct a new trial if a substantial wrong or miscarriage of justice has occurred: see *Fiddler v. Chiavetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 9; *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767, at para. 121. In my view, the comments made by the respondent did not amount to a miscarriage of justice. I say this for two reasons.

[26] First, the comments cannot be considered apart from the judge's charge to the jury. Read as a whole, the jury charge made it clear that:

- The jury's task was to be fair and impartial;
- The jurors were to set aside all feelings of sympathy, prejudice, fear or passion;
- Justice must be administered fairly and impartially; and
- Despite the fact that counsel's closing submissions may have created sympathy, the verdict should not be based on sympathy for any of the parties or the witnesses.

[27] With respect to some of the specific impugned statements, the trial judge said:

- You must not put yourself in the position of an 11-year-old Mr. McCabe;
- There is no evidence about Winston Churchill's education;
- There is no evidence that Mr. McCabe worked for the Diocese to "get closer to God". That would be conjecture;
- There is no evidence that Mr. McCabe was fired from his employment for something other than his decision go over a budget to keep the employees safe;
- Before you can draw an inference, you must be satisfied on a balance of probabilities that the result you reach is the most reasonable inference to be drawn. You must have a solid base of proven facts. Otherwise the result is guesswork;

- You have no evidence as to why Father Robert was moved;
- You must follow the law as I state it to you. You must …disregard any views which counsel may have expressed about the law if it conflicts with what I say to you about the law;
- You are not bound to accept any of the suggested ranges [for damages]. You and you alone will determine the amount you conclude is fair to both parties.

[28] With respect to the expert evidence, the trial judge fully and fairly reviewed the evidence for the jury and properly instructed the jury.

[29] Second, the trial judge is in the best position to assess whether comments are inappropriate. As this court said in *Groen v. Harris*, 2010 ONCA 621, at para. 9:

> This court has been clear that considerable deference must be given to a trial judge's assessment of whether counsel's statements have impaired trial fairness and whether any correcting instruction is possible. The judge hearing the comments in the courtroom is best placed to assess their impact and whether the appearance and reality of trial fairness have been endangered so that correction by the appropriate charge is impossible.

[30] I note that the impugned statements came at the conclusion of a 16-day trial which was devoid of any allegation of inflammatory comments to the jury.

[31] The appellant submits that the award of damages itself is so far out of the appropriate range that it proves the jury was improperly inflamed. However, as I set out below the damages award is within a permissible range.

Issue #3: Were the damages awarded inappropriate?

[32] The appellant submits that general and aggravated damages in similar sexual assault cases are in the range of $70,000 to $137,000 in 2017 dollars: see e.g. *K.T. v. Vranich*, 2011 ONSC 683; *D.M. v. W.W.*, 2013 ONSC 4176; *D.F.M. v. J.D.*, [2000] O.J. No. 559.

[33] However, as this court recently found in *Zando v. Ali*, 2018 ONCA 680, a range of up to $290,000 can be appropriate in sexual assault cases. The jury award of $250,000 in general damages was well within the range for a serious sexual assault.

[34] With respect to the loss of income or competitive advantage, I note that the jury awarded $280,000 while the respondent's claim was for over $1.7 million. The award was well supported by the actuarial evidence and also demonstrates that the jury was not acting out of an impermissible sense of outrage caused by the closing submissions of the respondent's counsel.

Issue #4: Was the punitive damages award unwarranted?[2]

[35] The jury awarded punitive damages of $15,000.

---

[2] These are my dissenting reasons on the issue of punitive damages.

[36] The appellant's position on punitive damages is set out in para. 106 of its factum:

> The award of punitive damages is unwarranted. It was argued on the basis that the [Diocese] failed to admit vicarious liability for the abuse until the first day of trial. The [Diocese] did not commit an intentional tort to attract a claim of punitive damages. The admission of liability on the first day of trial was not conduct of a malicious, oppressive or high-handed nature.

[37] The appellant does not take issue with the trial judge's charge to the jury on punitive damages. The charge accurately sets out the law and facts. Thus, it appears that the appellant's position is actually that there was no basis for the trial judge to leave the issue of punitive damages with the jury in the first place.

[38] To address this issue, I will first summarize the nature of punitive damages. I then consider whether the trial judge erred by leaving the issue with the jury. Finally, I will address the damages awarded.

(i) Nature of punitive damages

[39] Punitive damages are meant to punish the wrongful acts "that are so malicious and outrageous that they are deserving of punishment on their own": *Honda Canada Inc. v. Keays,* 2008 SCC 39, [2008] 2 S.C.R. 362, at para. 62; see also *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130, at para. 196, and *Whiten v. Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 73.

[40] In *Hill*, the court also recognized that the jury must be given some leeway to do its job, and a jury award of punitive damages can only be reversed when it is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate": para. 107 (emphasis added).

An actionable wrong

[41] To award punitive damages, an "independent actionable wrong" is required. Although the appellant submits that the Diocese did not commit an intentional tort, in *Whiten*, at paras. 79-82, Binnie J. specified that an "actionable wrong" does not require an independent tort and that a breach of the contractual duty of good faith, or breach of a distinct and separate contractual provision, or other duty such as a fiduciary obligation can qualify as an independent wrong.

[42] The circumstances of this case are different form an ordinary breach of contract. The extreme power imbalance and vulnerability of the wronged party are significant features. Punitive damages are awarded when the impugned conduct offends "the ordinary standards of morality or decent conduct": *Norberg v. Whyrib* [1992] 2 S.C.R. 226 at para 57.

Conduct of the litigation

[43] The conduct of the litigation has been held to be an independent actionable wrong that could give rise to punitive damages.

[44] This court, in *Rutman v. Rabinowitz*, 2018 ONCA 80, 420 D.L.R. (4th) 310, at para. 100 stated that "[t]he assessment of damages in each case must account for a myriad of idiosyncratic factors particular to the parties, the misconduct in question and the conduct of the litigation" (emphasis added).

[45] In *Hilltop Group v. Katana*, 2002 CanLII 9075 (Ont. S.C.), at para. 10, the motion judge found that the defendants had, throughout the proceedings, obfuscated, delayed and were less than forthright in their evidence. The judge also found that the defendants had lied and made false affidavits. The judge found that this behaviour directly or indirectly had a profound effect on the plaintiffs and the litigation, and awarded punitive damages in the amount of $200,000, an amount much higher than that awarded here.

[46] In *Goldentuler Estate v. Crosbie*, 2017 ONCA 591, this court reversed the Superior Court finding that the respondent's conduct could not support an award of punitive damages and found that the defendants' egregious behaviour prior to and during litigation amounted to outrageous and high-handed conduct warranting punitive damages. The behaviour included the wrongful removal of the relevant client files from the deceased's offices, the transfer of those files to a competing law firm, and the persistent failure to return the removed files, in defiance of a court order*:* paras. 10-12. This court found that compensatory damages alone were not sufficient to achieve the goals of deterrence and denunciation.

[47] In *Ruston v. Keddco Mfg*. *(2011) Ltd.*, 2018 ONSC 2919, 49 C.C.E.L. (4th) 113, at para. 142, the Superior Court awarded $100,000 in punitive damages for a company's conduct in termination and during the litigation. Justice Chiappetta found that in addition to the employer's conduct in the termination meeting, the employer attempted to intimidate the plaintiff during the trial process. The defendant presented a witness list of 25 witnesses they intended to call, a new trial date was set, and as the trial progressed, the defendant ultimately called three witnesses. The trial judge stated that "this conduct prolonged the adjudication of the issues and caused the plaintiff to prepare for witnesses in vain. The defendant demonstrated an indifference to the litigation process." This was among a number of problems the trial judge identified with the defendant's litigation conduct, which gave rise to the punitive damages award.

[48] While punitive damages are the exception rather than the norm, they may therefore be awarded to address conduct of the litigation deserving of condemnation.

[49] Here, the egregious behaviour was more nuanced than in the cases above. They all involved sophisticated parties without power imbalances. By contrast, the Diocese's strategic decision not to admit responsibility to a vulnerable victim of abuse – given these circumstances- is uniquely egregious.

(ii) Was it a question for the jury?

[50] Before a question is put to a civil jury, the trial judge must determine whether there is reasonable evidence to support the claim. Justice Rouleau explained this in *M.B. v. 2014052 Ontario Ltd.*, 2012 ONCA 135, 109 O.R. (3d) 351, at para. 51:

> Whether a jury in a civil case should be asked to decide on a particular issue is a question of evidence. There must be "reasonable evidence" to allow a question to go to the jury. As Meredith J.A. stated in *Milligan v. Toronto Railway* (1908), 17 O.L.R. 530 (Ont. C.A.):
>
> > Although the jury are the sole judges of fact they are such judges only in cases in which there is a reasonable question of fact to be determined. It is the duty of the Court to determine whether there is any reasonable evidence to go to the jury, upon any question of fact; and no such question can be rightly submitted to them until that question has been answered in the affirmative: at para. 50.

[51] In *Cobb v. Long Estate*, 2017 ONCA 717, 416 D.L.R. (4th) 222, at para. 65, this court stated that trial judge's decision not to put the question of punitive damages to the jury was reasonable in the circumstances of that case and entitled to deference.

[52] In this case, the claim for punitive damages was based on the fact that the appellant's failure to admit liability caused the fragile respondent to suffer pain.

There was specific evidence that Mr. McCabe was suffering physically and mentally during the time that the appellant was denying liability.

[53] Dr. Jaffe explained that the trauma suffered by Mr. McCabe was made worse by the fact that liability was being denied. Mr. McCabe was told that he would have to prove that the events of 1963 actually happened. This, Dr. Jaffe said, re-victimized him. The impact of the litigation caused him to be fragile, stressed and anxious. He was further hurt by the stress of having to relive the abuse. He was diagnosed with chronic obstructive pulmonary disorder, a form of asthma that was made worse by the proceedings.

[54] Ms. Schramm described his reaction to the litigation process as being shaken, fatigued, feeling guilty, angered, fearful and shamed. She discussed his nightmares and night terrors. Ms. Schramm confirmed Mr. McCabe's testimony about the litigation causing him pain.

[55] Although Father Clough testified that he did not set out to deliberately to cause Mr. McCabe pain, he had read the report of Dr. Jaffe and the views of Ms. Schramm. He knew and agreed that the abuse needed to be validated. He also agreed that the refusal to admit liability was hurting Mr. McCabe and that the ongoing process was causing him pain. He knew that during the examination for discovery Mr. McCabe's lawyer was told that Mr. McCabe would have to prove the event happened. He agreed that no new information came to the Diocese

after examinations for discovery. He accepted as true what happened to Mr. McCabe. By the time the action was commenced, he was aware of other complaints made about Father Robert.

[56] Against these facts, the jury was asked the following question by the trial judge: “Does the failure of the Diocese to admit liability before the trial warrant an award of punitive damages?”

[57] The trial judge then correctly set out the law as to punitive damages and related it to the facts described above.

[58] In my view, the trial judge’s decision that there was evidence to allow the question to be put to the jury was entirely reasonable and is entitled to deference.

(iii) Quantum of damages

[59] The jury awarded a very modest amount of $15,000 in punitive damages. In the words of *Hill*, a jury award of punitive damages can only be reversed when it is “so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate”. In my view the jury’s award was a symbolic condemnation of the Diocese’s conduct in failing to admit liability despite knowledge of additional harm to Mr. McCabe. To overturn the jury’s determination would be to sanction the conduct.

[60] I see no basis to disturb the jury award.

DISPOSITION

[61] I would dismiss the appeal with costs to the respondent in the agreed-upon amount of $32,000 inclusive of disbursements and HST.

"M.L. Benotto J.A."
"I agree with the disposition with respect to grounds 1-3 (G.R. Strathy C.J.O.)"
"I agree with the disposition with respect to grounds 1-3 (L.B. Roberts J.A.)"

Roberts J.A.:

[62] I have had the benefit of reading my colleague's well-written reasons. I agree with her proposed disposition of the first three grounds of appeal but respectfully disagree with her proposed disposition of the fourth ground of appeal.

[63] For the reasons that follow, I would allow the appeal in part and set aside the award of punitive damages. In my view, the trial judge erred in leaving this issue to the jury for determination because neither the pleadings nor facts of this case supported such an award. In essence, the trial judge created a new and unprecedented category of punitive damages arising out of the timing of the appellant's admission of liability. There is no basis in law for such an award.

[64] Starting with first principles, as my colleague has described, the well-established nature of punitive damages is to punish an independent actionable wrong that is the product of egregious, high-handed and outrageous conduct. It is a very high standard that is not easily reached. Punitive damages are not meant to be compensatory, but instead act as a deterrent for exceptional misconduct. Indeed, punitive damages should not be granted where, as here, the compensatory damages awarded suffice as a deterrent: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 94.

[65] In none of the cases cited to by my colleague does the failure or delay of the defendant to admit liability serve as the standalone basis for the awards of punitive damages that were granted. Rather, in all these cases, the misconduct of the defendant supporting the punitive damages awards was a continuation of the misconduct that gave rise to and was the subject of the action within the context of a particular relationship between the parties that is absent here.

[66] In this respect, *Goldentuler Estate v. Crosbie*, 2017 ONCA 591, leave to appeal refused, [2017] S.C.C.A. No. 358, is instructive. This court allowed the appeal in part and awarded punitive damages because it found the trial judge erred in concluding the claim for punitive damages was solely related to litigation delay. Rather, the claim for punitive damages focused on the defendants' egregious pre-litigation behaviour in effecting the wrongful removal of client files, the transfer of the files to a competing law firm, and the persistent failure to return the files to the claimant. This court found the defendants' conduct to be outrageous and high-handed, and for which punitive damages was an appropriate remedy.

[67] In determining whether punitive damages should be granted, the court must ask two threshold questions: first, what is the impugned conduct; and, second, whether the impugned conduct rises to the level of egregious misconduct warranting the exceptional award of punitive damages.

[68] In the present case, the impugned conduct is only the appellant's delay in admitting liability. The question left for the jury makes this plain: "Does the failure of the Diocese to admit liability, before the trial, warrant an award of punitive damages?" Similarly, as the lone basis for any award of punitive damages, the trial judge's final charge to the jury focused solely on the appellant's delay in admitting liability: "And here you will consider the evidence of the delay in the Diocese admitting liability for the acts of Father Robert".

[69] There is no allegation or evidence of any misconduct. As the trial judge fairly instructed the jury, the appellant did not deliberately inflict pain on the respondent. As a result, the appellant's delay in admitting liability, alone, could not be characterized as egregious misconduct justifying an award of punitive damages. Rather, the appellant, as it was perfectly entitled to do, did not admit liability until the opening of trial. The appellant's exercise of its litigation rights cannot be characterized as egregious misconduct warranting punitive damages.

[70] The respondent's action against the appellant is founded on its vicarious liability for the sexual assaults suffered by the respondent at the hands of the appellant's employee priest in the course of his employment. The respondent pleaded that it was entitled to punitive damages against the appellant because of its vicarious liability for its employee's wrongful actions, not because of any misconduct on the part of the appellant, including its failure to admit liability before trial. Respondent's counsel did not raise that theory of punitive damages

until the pre-charge conference when it was acknowledged that punitive damages could not be awarded on the basis of the appellant's vicarious liability. Over the objection of appellant's counsel, the respondent's new theory of punitive damages was left to the jury.

[71] In my view, the trial judge erred in leaving punitive damages to the jury because no reasonable jury, properly instructed, could have made such an award. I say so for three reasons.

[72] First, there was no basis in fact or law for this claim that punished the appellant for not making an earlier admission of liability. 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 damages award: see generally *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, at paras. 44, 46; *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (C.A.), at p. 776. Unfortunately, that is the nature of the litigation process. It is adversarial. It is extremely expensive and often protracted. Its outcome is uncertain. Regardless of the underlying cause of action, all parties find the litigation process enormously stressful, especially

plaintiffs who bear the burden of proving liability and damages because they commence the proceedings. In sum, while a defendant's failure or delay to admit liability may give rise to an adverse costs award, it does not serve as a standalone basis for punitive damages.

[73] Second, the harm that the respondent alleges he suffered because of the continued litigation process, which formed the basis for the punitive damages claim left with the jury, was not obviated by the appellant's admission of liability. The respondent's evidence is that he felt re-victimized by having to recount the sexual assault in the litigation. However, notwithstanding the appellant's admission of liability, the respondent was still required to go through the painful details of the assaults and their impact on him to prove his damages. There is no suggestion that the appellant should also have conceded damages and that the respondent was entitled to punitive damages because the appellant failed to do so. This would be akin to saying that a defendant can never defend an action.

[74] The appellant simply put the respondent to the proof of his case. There is nothing wrong with that. There can be no suggestion that the appellant's liability was inevitable. Certainly, there can be little doubt that if the respondent had brought a motion for summary judgment, he would not have been successful and would have been required to go to trial. There was nothing improper or malicious in the appellant not admitting liability before trial.

[75] Third, it was procedurally unfair to the appellant to allow the respondent to put forward a new basis for punitive damages that had not been pleaded or alleged until after the trial evidence was completed. In the particulars pleaded, the respondent alleged vicarious liability against the appellant for the punitive damages claimed against its employee priest. The respondent's counsel raised the new theory of punitive damages based on the appellant's delay in admitting liability after the trial judge advised there was no foundation for punitive damages on the basis of vicarious liability for the misconduct of another.

[76] While I am of the view that a defendant's denial of liability, without more, does not attract an award of punitive damages, it may give rise to a considerable costs sanction.

[77] Section 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the court's inherent jurisdiction to control its process to prevent an abuse of process allow for an award of costs up to full indemnity in response to egregious misconduct by a party in the course of the proceedings. More specifically, subrules 57.01(1)(e) and (g) explicitly include consideration of a party's conduct that either shortened or lengthened the proceedings, and a party's denial of or refusal to admit anything that should have been admitted.

[78] It is important to note, however, that a defendant's failure or delay to admit liability that falls short of litigation misconduct or abuse of process may not even attract elevated costs.

[79] In *Foulis v. Robinson*, this court allowed an appeal of an elevated costs award, holding that the defendant was not required to admit liability or settle the action.

[80] The trial judge was of the view that there was no defence to the motor vehicle action having considered the pleadings, the evidence, and the fact that the defendant pleaded guilty to criminal negligence for operating a motor vehicle while impaired: *Foulis*, at p. 770. The defendant and third party insurer disputed liability and damages. The trial judge awarded solicitor and client costs against the defendant and third party because they dragged the "plaintiffs through a three day … trial when there was really no defence pleaded" and "no evidence of any defence produced at trial": *Foulis*, at p. 770. The trial judge commented that the plaintiffs were "being penalized in dollars and cents for a situation over which they have no control and of which they are victims": *Foulis*, at p. 771.

[81] This court held that the trial judge erred in principle in awarding costs on an elevated scale, noting that "defendants are entitled to put the plaintiff to the proof, and there is no obligation to settle an action": *Foulis*, at p. 776. Dubin J.A., writing for this court, continued:

> The fact that the issue of liability was not seriously contested at trial, that the defendant did not give evidence, that he had pleaded guilty to criminal negligence, and that no evidence was called by the defendant and third party on the issues of liability and damages are not factors which, by themselves, merit punitive action in the award of costs.

[82] This court acknowledged that the defendant and third party were not using the judicial process to harass the plaintiffs and that the conduct of the defendant and third party did not constitute an abuse of process: *Foulis*, at p. 776.

[83] Returning to the present case, the appellant's delay in admitting liability until trial should not have been considered under the rubric of punitive damages. Rather, it was more properly a question of costs. Whether the delay was the kind of misconduct that attracted an elevated award of costs was a question that could have been left for the trial judge's determination had the parties not agreed on costs.

[84] For these reasons, I would allow the appeal in part and set aside the award of punitive damages. I would otherwise dismiss the appeal for the reasons expressed by my colleague.

Released: March 19, 2019
"GRS"

"L.B. Roberts J.A."
"I agree G.R. Strathy C.J.O."