

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Tomah v. Sylliboy, 2010 NSSC 439

Date: 20101130

Docket: 195115

Registry: Truro

Between:

Robin Tomah and Robin Tomah as
Litigation Guardian for minors Aaron Cope,
Emily Cope and Tia Googoo

Plaintiff

v.

Joanne Sylliboy and Vincent Bezanson

Defendant

DECISION
Assessment of Damages

Judge: The Honourable Justice Douglas L. MacLellan

Heard: October 21st & 22nd, 2010, in Truro, Nova Scotia

Written Decision: November 30th, 2010

Counsel: Robert M. Purdy, QC, and Ellen Sampson,
for the plaintiff
Joanne Sylliboy and Vincent Bezanson, self-represented

By the Court:

[1] This is an assessment of damages suffered by the plaintiff as a result of a criminal attack on her by the defendants on August 29th, 2001, outside her home at 15 Gerald Street in Millbrook, Nova Scotia.

[2] This action was commenced by way of an Originating Notice (Action) with Statement of Claim issued on March 3rd, 2003. The defendants did not file a defence and default judgment was entered against the defendant Bezanson on May 22nd, 2003, and against the defendant Sylliboy on April 28th, 2004, with damages to be assessed.

[3] The defendant Sylliboy received notice of the plaintiff's application to assess damages and took part in this proceeding. She was self-represented at that hearing. The defendant Bezanson did not appear at this hearing but had been provided notice of the application.

BACKGROUND

[4] On August 29th, 2001, the plaintiff was approached by both defendants when she returned home from her office at the Millbrook Band Office.

[5] The description of what happened next is set out in the plaintiff's pre-trial brief as follows:

“Briefly, the Defendants followed Ms. Tomah from her place of employment to her residence. The Defendants confronted and cornered Ms. Tomah when she got out of her car. The Defendant Sylliboy doused Ms. Tomah with gasoline. When Ms. Tomah realized what was happening, she kicked the Defendant Sylliboy to get away, and ran toward her house. The Defendant Bezanson caught Ms. Tomah before she could get inside her home, threw her to the ground, and pinned her there. The Defendant Sylliboy attempted to light Ms. Tomah on fire with a lighter, but she could not get the lighter to work. The Defendant Bezanson then provided the Defendant Sylliboy with a pack of matches. The Defendant Sylliboy lit Ms. Tomah on fire.

Ms. Tomah was able to free herself from the Defendants, and ran into her home. She went to the bathroom in an attempt to douse the fire with water from her shower. The Defendants followed Ms. Tomah into her bathroom. The Defendant Sylliboy prevented Ms. Tomah from using the shower to put out the flames.

Three of Ms. Tomah's children, Aaron, Emily and Tia, were all at home at the time of the attack, and witnessed the heinous events.”

[6] Following the attack on the plaintiff the defendants were both charged with attempted murder. They both pleaded guilty to that charge and were sentenced to prison terms of 12 years each. Both are presently on parole.

[7] I have heard evidence from a number of people including the plaintiff's family doctor and her psychologist. I have also accepted into evidence an affidavit from the plaintiff's plastic surgeon.

[8] The plaintiff filed an affidavit and was cross-examined by the defendant Sylliboy.

[9] Dr. Alana Matwychuk is a clinical psychologist working in Truro, Nova Scotia. She filed an expert report in accordance with the *Civil Procedure Rules*.

[10] In that report Dr. Matwychuk stated:

"I will summarize below my impression of Ms. Tomah's condition based on my contact with her in March thru April 2008. This contact included three counseling sessions that included interview/talking format sessions on March 6, 2008 and on April 14, 2008 and the administration of psychological testing on March 26, 2008 to aid in differential diagnosis and treatment planning.

...

On the basis of the test data from March 26, 2008, it may be assumed that Ms. Tomah was experiencing severe mental disorder symptoms. Three tests were administered on March 26, 2008: the Davidson Trauma Scale (DTS), The Beck Depression Inventory II (BDI-II), and the Millon Clinical Multiaxial Inventory-III (MCMI-III). The DTS measures whether or not an individual is experiencing symptoms of PTSD. Ms. Tomah's DTS items and score strongly suggested that she was experiencing a Post-Traumatic Stress Disorder related to the assault and resultant injuries and that she was (1) persistently re-experiencing the traumatic assault (e.g., painful images, memories, or thoughts, distressing dreams of the event, was physically upset by reminders), (2) persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness that was reportedly not present before the trauma (e.g., avoiding thoughts or feelings about the event, avoiding doing things or going into situations that remind her of the event, having some difficulty (sic) enjoying things, feeling cut off or distant from others) and 3) symptoms of increased arousal that was not reportedly present before the traumatic assault (e.g., trouble sleeping, irritability, feeling on edge, been easily distracted or had to stay on guard, jumpy or easily startled). The MCMI-III test results did also show evidence of PTSD symptoms, albeit it also indicated that Ms. Tomah may also be experiencing comorbid Axis I Disorder problems in the area of a Depressive and Anxiety Disorder, and, in the extreme, that, in addition to PTSD, she might be exhibiting a Major Depressive Disorder and Anxiety Disorder (possibly Generalized Anxiety Disorder). The MCMI-II test results also suggested that there may or may not be more enduring personality tendencies, particularly of the obsessive compulsive type, that may complicate more acute problems. Obsessive compulsive tendencies typically involve a preoccupation with orderliness, perfectionism, and mental and interpersonal control. The BDI-II assesses for depressive symptoms and the BDI-II findings again suggested that Ms. Tomah was experiencing depressive symptoms, albeit at a mild level of depressive symptoms whereas the MCMI-III suggested possible symptoms beyond the mild level. She did not report symptoms or problems suggestive of a formal thought disorder, delusional disorder, alcohol or drug abuse/dependence, bipolar disorder, dysthymic disorder, or somatoform disorder.

At the time of our contact in March thru April 2008, Ms. Tomah also reported physical health problems (e.g., fatigue) and ongoing medical treatment, I defer to medical reports regarding her medical problems and care. She reported taking a number of medications including Synthroid 0.15 mg/day, Benadryl 50 mg q.i.d., Gravol 100 mg q.i.d., Tylenol #1 750 mg q.i.d., Clonazepam 0.5 mg prn or 2-3/day for anxiety, Trazodone 100 mg hs for sleep, Effexor 75 mg/day, which can

help with anxiety, depression, and pain but dosing can be from 75 to 300 mg. She also reported that, since the assault, she had briefly seen two different mental health professionals at the Mental Health Services at Colchester Regional Hospital in 2002 and the other sometime later, but, had discontinued this contact.

When I saw Ms. Tomah in March thru April 2008, it was my professional opinion that she was suffering from severe mental symptoms and that she might benefit from mental health treatment for her mental condition.”

[11] Dr. Matwychuk was cross-examined by the defendant Sylliboy at this hearing. She confirmed her opinion that the plaintiff is suffering from post-traumatic stress disorder. She was questioned about the presence of post-traumatic stress some nine years after the incident in 2001. She explained that this is not unusual with post-traumatic stress disorder and compared it to War Veterans who suffer PTSD many years after return from active service. She also pointed out that PTSD tends to be worse if you have physical problems resulting from the same traumatic incident as is the case with the plaintiff.

[12] She was questioned about the fact that the plaintiff did not attend some scheduled followup visits with her. She said that there were many reasons why patients don't attend followup sessions.

[13] Dr. Justin Paletz is a plastic surgeon practicing in Halifax. He treated the plaintiff following the incident with the defendants on August 29, 2001. He filed an affidavit outlining his treatment over the years since that date.

[14] He reviewed the hospital records on the plaintiff and indicated as follows:

- “9. I am informed and do verily believe that Dr. Leif Sigurdson performed plastic surgery on Ms. Tomah on Sept. 14, 2001 for the treatment of her third degree burns to her chest, neck and upper arms. The operation included harvesting of the skin graft from the buttocks and lower back, meshing and preparation of split thickness skin grafting, debridement of allograft from the chest and replacement with meshed split thickness skin graft, removal of the dressings from Ms. Tomah’s upper legs and replacement with Allevyn dressings, removal of dressings from the right and left hands and replacement with Jelonet and gauze, and percutaneous pinning of the second, third and fourth, metacarpals of the left hand. Attached as Exhibit “D” is a true copy of Dr. Sigurdson’s Operative Report for the operation he performed on Ms. Tomah on September 14, 2001.

10. On November 23, 2001, I authored a Discharge Summary Report that detailed Ms. Tomah medical course in the New Halifax Infirmary and subsequent discharge to the Nova Scotia Rehab Centre. In the report I note that Ms. Tomah had sustained 23% total body surface area full thickness burns to her face, neck, chest and arms. She remained at the New Halifax Infirmary until October 15, 2001, at which time she was transferred to the Nova Scotia Rehab Centre to continue her further intensive therapy. I noted the following:
 - ‘... She attended daily hand group classes to work on both hands/wrists range of motion and hand activities. She was followed for pressure garments fabrication and fitting. She was fitted with a new Jobst vest, had two pairs of gloves

fabricated. She had received two sets of chin straps and new extension neck splint to increase compression in order to facilitate scar management and range of motion. She wears both gloves, chin straps and neck extension splint 24 hours a day. She applies Cutinova Hydro over the dorsal aspects of her hands and wrists on palmar aspects. Cutinova Hydro dressings are being used for scar management and being kept on both hands and chest. She had received pressure shorts, which she wears 24 hours a day. She was casted and had clear face mask completed Her donor sites on the thighs and buttocks have healed. She has a few small superficial open areas in her chest, which are healing, and will be followed by Home Care Nova Scotia once a day for dressing changes after discharge.

... She was provided with a home exercise program for her shoulders and hands. She will continue to attend outpatient physiotherapy three times a week and Occupational Therapy once a week at Colchester Regional Hospital in Truro.

... She has been experiencing nightmares and anxiety. She was found to be withdrawn emotionally and her motivation was poor. She was followed by our psychologist to help her to deal with both traumatic stress and symptoms. She worked on anxiety management, coping and adjustment issues. She was introduced to deep breathing exercises. She will be followed up at the Colchester Regional Mental Clinic in Truro.'

Attached as Exhibit "E" is a true copy of the Discharge Summary Report dated November 23, 2001.

11. Following Ms. Tomah's initial discharge from the New Halifax Infirmary and the Nova Scotia Rehab Centre, I performed eight (8) operations on Ms. Tomah up to March 1, 2004. The surgeries took place on June 25, 2002, Sept. 3, 2002, Nov. 5, 2002, Feb. 4, 2003, May 6, 2003, Nov. 4, 2003, Jan. 27, 2004 and March 1, 2004. The surgeries were required for

multiple reasons, including treatment of the extensive severe burns and scars on Ms. Tomah's face, neck, chest, arms and back, as well as the contractures that Ms. Tomah faced. The surgeries involved a number of different procedures, including grafting skin from different parts of Ms. Tomah's body, inserting tissue expanders to treat contractures, and reconstruction surgery. Attached as Exhibit "F" are true copies of the Operative Reports for the eight (8) operations that I performed on Ms. Tomah up to March 1, 2004.

12. Ms. Tomah's operations necessitated admission to, and subsequent discharge from, the New Halifax Infirmary. Attached as Exhibit "G" are true copies of Discharge Reports for June 26, 2002, September 9, 2002, February 6, 2003, November 8, 2003 and January 28, 2004.
13. On November 5, 2003, during one of Ms. Tomah's surgeries, Ms. Tomah suffered peri-operative complications. She was transferred to the Intensive Care Unit. Attached as Exhibit "H" is the Transfer Summary Report.
14. In addition to the operations performed on Ms. Tomah and corresponding in-hospital stays, Ms. Tomah has been required to attend the outpatient plastic surgery clinic multiple times for post-operative follow-up and consultation. Ms. Tomah attended the Halifax Infirmary Plastic Surgery Clinic on the following dates - Nov. 9, 2001, Nov. 23, 2001, Jan. 11, 2002, Feb. 22, 2002, Mar. 22, 2002, Jul. 5, 2002, Jul. 12, 2002, Sept. 13, 2002, Oct. 4, 2002, Nov. 15, 2002, Nov. 22, 2002, Feb. 14, 2003, Mar. 14, 2003, Mar. 21, 2003, Apr. 25, 2003, May 2, 2003, May 16, 2003, Jun. 13, 2003, Jun. 20, 2003, Aug. 01, 2003, Aug. 8, 2003, Aug. 15, 2003, Sept. 5, 2003, Sept. 12, 2003, Oct. 10, 2003, Nov. 21, 2003, Jan. 16, 2004, and Feb. 5, 2004. The outpatient visits were required to perform such functions as: the removal of sutures, staples and other surgical fixtures, assessment of wound healing, assessment of tissue expander function, assessment of pain issues with pain medication prescribed if necessary, assessment of potential infection, the changing of wound dressings, and saline injections to expand tissue expanders. Attached as Exhibit "I" are true copies of the Ambulatory Care Reports and Ambulatory Care Consultations regarding Ms. Tomah outpatient visits."

[15] Dr. Murdo Ferguson is presently the plaintiff's family doctor. He has treated her since 2007 and is aware of her past medical charts. In his affidavit submitted to the Court (Exhibit 4) Dr. Ferguson states:

- “5. I have reviewed my medical chart concerning Robin Tomah, and Ms. Tomah most recently attended at my office on June 24, 2010.

6. I summarize Ms. Tomah's physical and mental condition, her past treatments, and future prognosis in my report of June 24, 2010. I enclose all medical records provided by other care providers that are in my possession. Attached as Exhibit “A” is a true copy of my report, with attached medical records.

7. In my report I note that Ms. Tomah has undergone a total of 18 surgeries in relation to her physical injuries that were caused by the attack, some of which were very painful procedures.

8. Ms. Tomah suffers from Post-Traumatic Stress Disorder, including the symptoms of depression, insomnia, anxiety, fear and pervasive nightmares. These symptoms have had a crippling effect on Ms. Tomah's family and personal relationships, as well as her ability to be employed.

9. Ms. Tomah is currently prescribed the following medication: Clonazepam for anxiety and stress, various medications to assist with sleep, Benadryl and atarax for itch and discomfort, Tylenol with codeine for pain, and Gravol for nausea.”

[16] The plaintiff filed an affidavit (Exhibit 3) in which she sets out her medical treatment as a result of the attack on her in August 2001. She states:

- “50. Following the attack I was in excruciating pain.
51. I was taken immediately to the Colchester Regional Hospital in Truro, Nova Scotia and then the QEII Burn Unit at the Halifax Infirmary in Halifax, Nova Scotia.
52. I was informed by hospital staff and I believe that I was initially placed in a coma for two days and I don't remember anything of that time.
53. While at the QEII, it was necessary for me to be taken out of the coma to go to the bathroom as my kidneys were shutting down. I was immediately put under again.
54. I was in the Burn Unit for approximately 10 weeks and had to endure painful daily bandage changes.
55. I was at the QEII for many weeks and also attended rehabilitation during some of that time.
56. The rehabilitation process was extremely painful.
57. I underwent a number of surgeries which required skin to be grafted from my legs. Following the grafting, the site would be covered with specialized 'scarlet red' bandages.
58. Unfortunately I developed an infection in the grafting site and the bandages were required to be removed early. This was extremely painful.
59. I had a number of surgeries while in the hospital, was given fluids and my skin was irrigated continuously.

60. There were metal rods inserted in each of my fingers to prevent my fingers healing in a fist position.
- ...
66. I underwent many reconstructive surgeries, tissue irrigating surgeries as well as surgery to remove the metal rods from my hands.
67. I also underwent an 8-month procedure in which I had to attend at the QEII Hospital in Halifax, once per week to have saline injections in my shoulders. This was for a skin flapping procedure to allow for new skin around my neck.
68. The skin flapping procedure involved placing tissue expanders under my skin, near my shoulders to stretch my skin to allow excess tissue to form. When the procedure was completed the tissue expanders were removed. Attached hereto and marked as **Exhibit "G"** are true copies of photographs taken by Ellen Sampson on July 29, 2010, which I believe accurately depict the scar tissue on my shoulders as a result of this procedure.
69. Prior to the skin flapping procedure completion, I was unable to move my head in a normal fashion to either side due to the scar tissue that had formed.
70. Due to the tissue expanders that were inserted in my shoulder blades, for 8 months, I was unable to lay on my back during that time.
71. When enough skin was expanded, Dr. Justin Paletz performed the skin flapping procedure which took several hours and was extremely painful.

72. To date, I still have a noticeable bump on the base of my neck due to this procedure. Attached hereto and marked as **Exhibit "H"** is a true copy of a photograph taken by Ellen Sampson on July 29, 2010, which I believe accurately depicts the bump on the back of my neck.
73. I also wore burn garments for approximately 2 ½ years following the attack.
74. The burn garments were very uncomfortable and caused constant pressure on my body.
- ...
77. For approximately 2 years following the accident, I would wake up at approximately 10:00 a.m. and begin a 2 hour physio session with my sister. Following this, I would have a sponge bath while my sister would prepare the garments for me to put on again. I would sleep in the garments and they were very uncomfortable.
78. Following the accident I was prescribed Dilaudid, Morphine, Atavan, Tylenol 3, Benadryl, Gravol and a stool softener.
79. I was unable to drive for two years following the accident as I was unable to move my neck sufficiently for driving until the skin flapping procedure was completed."

[17] She described the effect her injuries have had on her life generally.

- "102. Currently I would describe my mental and emotional health as poor. At times I become irritable and feel so anxious that I am unable to leave my home, even for medical appointments.

103. Certain triggers such as the smell of gasoline, driving by the apartment I had on August 29, 2001, or a fire shown on television can cause me severe stress such that I stay in bed for days and feel unable to get up.
104. While the skin flapping procedure on my neck did assist with movement, I am no longer able to turn my head quickly. I also have a deformity in my left baby finger. Due to these limitations I can no longer play hockey or baseball as I used to.
105. I have attempted several times to begin weight training and attending the local gym. However, I often experience very painful cramps in my shoulder areas in which the skin flapping procedure was conducted.
106. I have difficulty with certain household tasks such as mopping, sweeping or scrubbing floors. My hands blister very quickly and I often am unable to complete these activities.
107. I feel an enormous amount of guilt in having my depressive episodes as it often makes me unavailable to my children.
108. My guilt is increased as my children often ask why I do not come to their extracurricular activities, why I am not fun anymore and why don't we have the disposable income we once had.
109. I no longer regularly attend my children's social and extracurricular activities. I am often too embarrassed to be seen in public because of my extensive scarring and therefore do not participate in many of their activities.
110. I experience nightmares, night tremors and insomnia approximately 4 times per week.

111. I have severe episodes of depression every 2 months on average. These depressive moods can last anywhere between 15-30 days. When I am in a depressive state, I cannot answer the door or the telephone and I do not leave the house for any reason.”

[18] She finally concludes:

“128. I am currently covered in scars on my face, neck, hands, arms and chest as a result of the attack. Prior to August 29, 2001, I had no scarring.

129. I suffer from Post-Traumatic Stress Disorder and depression. I am afraid to live alone as I am afraid someone will attack me again. Sometimes I am too afraid to open the door. At present my son, Aaron Cope, is living with me.

130. I do not like to go out in public as I do not want strangers to see me and to stare at me, because of my extensive scarring. The scarring makes me feel disfigured and ugly.”

[19] The plaintiff makes the following claims for damages.

(1) General non-pecuniary damages;

(2) Aggravated damages;

(3) Punitive damages;

(4) Past loss of income;

(5) Future loss of earning capacity;

(6) Loss of valuable services;

- (7) Future medical care;
- (8) Prejudgment interest;
- (9) Costs.

[20] Originally this action contained a claim by the plaintiff's children, however, counsel for the plaintiff has confirmed that the plaintiff is not advancing a claim on behalf of the children.

General Non-pecuniary Damages

[21] The plaintiff claims under this heading the sum of \$180,000.00. Counsel submits that the following cases are on point. In *Stoyka v. Dudney*, [1996] O.J. No. 5416, the plaintiff was severely burned and was awarded the sum of \$250,000.00 after proving he suffered from severe burns and Post-Traumatic Stress Disorder, short-term memory loss and a mild stroke. That award adjusted to 2010 dollars would be \$326,000.00.

[22] In *Cheevers v. Halifax (Regional Municipality)*, [2005] N.S.J. No. 244, the plaintiff was severely burned. He had recovered at the time of the trial and was

back to work as an electrician. He received \$90,000.00 in general damages (PDV adjusted to \$97,000.00).

[23] In *Anderson v. Miner*, [1999] B.C.J. No. 4, the plaintiff, a nine year old child, received \$170,000.00 (PDV adjusted to \$212,000.00) as a result of severe burns.

[24] In *Bueckert v. Mattison*, [1996] S.J. No. 660, the plaintiff received \$80,000.00 (PDV adjusted to \$104,000.00) for burns which resulted in a permanent disfigurement as well as a functional disability.

[25] In *J.K.G. v. T.S.G.*, [2005] B.C.J. No. 209, the plaintiff suffered serious and significant injuries to her face, arms and hand. She was considered both physically and psychologically disabled. She was awarded non-pecuniary damages in the amount of \$225,000.00 (\$50,000.00 was for aggravated damages). PDV adjusted value \$244,000.00.

[26] Considering the particular circumstances of the plaintiff here, the major injuries she has sustained and the medical treatment she has endured since 2001 I conclude that an award of \$150,000.00 is appropriate for non-pecuniary damages.

Aggravated Damages

[27] The plaintiff claims \$40,000.00 under this heading. Counsel submits that this case would fit into the category where aggravated damages should be awarded.

[28] In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), the Supreme Court of Canada dealt with a claim for aggravated damages in addition to general non-pecuniary damages in relation to a case of defamation.

Cory J. said:

“188 Aggravated damages may be awarded in circumstances where the defendants’ conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff’s humiliation and anxiety arising from the libellous statement. The nature of these damages was aptly described by Robins J.A. in *Walker v. CFTO Ltd.*, *supra*, in these words at p. 111:

Where the defendant is guilty of insulting, high-handed, spiteful, malicious or oppressive conduct which increases the mental distress -- the

humiliation, indignation, anxiety, grief, fear and the like -- suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as 'aggravated damages'.

189 These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through to the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant."

[29] See also *Merrick v. Guilbeault*, 2009 N.S.S.C. 60, *Spencer v. Rozon et al.*, 2000 B.C.S.C. 674, and *J.K.G. v. T.S.G.*, [2005] B.C.J. No. 209.

[30] I conclude here that the attack on the plaintiff by the defendants was sudden, unprovoked and brutal and that the plaintiff has suffered a loss of dignity and humiliation. Therefore an award of aggravated damages is justified. I would award the sum of \$30,000.00 for aggravated damages.

Punitive Damages

[31] The plaintiff claims the sum of \$10,000.00 as punitive damages. In support of that position counsel refers the Court to the following cases:

Herman v. Graves, 1998 A.B.Q.B. 471

Stewart v. Button, 2009 N.B.Q.B. 45

Martin v. Martin, [1995] N.B.J. No. 83

[32] I have also reviewed the case of *Roose v. Hollett et al.* (1995), 143 N.S.R. (2d) at 38, and on appeal (1996), 154 N.S.R. (2d) at 161, and Justice Goodfellow's comments in *McDonald v. Mombourquette et al.* (1995), 145 N.S.R. (2d) at 360.

[33] I conclude that here the sentence imposed on the defendants of 12 years in prison was appropriate and it is therefore not appropriate to award punitive damages. I would dismiss the claim for punitive damages.

Past Loss of Income

[34] The plaintiff was working at the Millbrook Band Office in August 2001. Her income in the year 2000 was \$26,278.00. At the time of the attack on August 21st, 2001, she had earned \$23,374.00 from January 1st, 2001 to that date. Her counsel suggests that therefore her income for 2001 would have been higher than the \$26,278.00 she earned in 2000.

[35] She went off work for the rest of 2001 and then for all of 2002.

[36] James Arthur Prodger works for the Millbrook Band Office. He filed an affidavit as a result of his search of the employment records at that office.

According to the records the plaintiff's income for the years 2001 to 2006 is as follows:

- 1) 2001 - \$23,374.00
- 2) 2002 - nil
- 3) 2003 - \$3,922.00
- 4) 2004 - \$15,139.00
- 5) 2005 - \$28,920.00
- 6) 2006 - \$15,242.00

[37] Evidence presented by the plaintiff herself indicates that she had some other income during these years which was not reflected in the Band records. She confirms that in 2003 she had other income of about \$18,000.00 based on a separate contract she had with the Band Office.

[38] She also testified that in 2006 she stopped working because she was suffering from Post-Traumatic Stress Disorder and didn't want to stay alone at her office at The Power Centre in Truro. Prior to that year she had an associate working with her in the office.

[39] Plaintiff's counsel has suggested that I should use the figure of \$26,278.00 as annual income that she would have received if she had not been assaulted by the defendants and to subtract from that figure her actual income for the years since the assault in 2001.

[40] His calculations to 2009 would result in the following:

9 years @ \$26,278.00	\$236,502.00
Less actual income earned	<u>(98,766.00)</u>
Net loss	<u>\$137,736.00</u>

[41] I accept the proposal put forth by plaintiff's counsel, however, I would deduct the sum of \$2,904.00 to reflect the fact that in 2003 she had more than \$26,278.00 in income because of her contract work.

[42] The plaintiff has not advanced a claim for loss of income for the year 2010. She testified that she did some work on contract for the Band Office in the summer of that year, however, she did not testify as to what amount she made from that work.

[43] I would therefore conclude that the plaintiff has established a loss of past income in the amount of \$134,832.00.

Future Loss of Earning Capacity

[44] The plaintiff claims the sum of \$262,780.00 based on her not working in the future to age 65 (20 years) reduced by 50% to deal with the possibility that she will return to work. In the alternative the plaintiff submits that the Court should make an award for diminished earning capacity.

[45] In light of the possibilities ahead for the plaintiff I prefer the latter calculation and I would award the sum of \$50,000.00 for diminished earning capacity.

Loss of Valuable Services

[46] The plaintiff claims \$15,000.00 under this heading for past and future damages.

[47] I am not prepared in this case to make such an award under this heading.

[48] The plaintiff received assistance for household needs from the Millbrook Band for 2.5 years following the assault and while she has some difficulty doing household tasks I find it is not appropriate to make such an award.

Future Medical Care

[49] The plaintiff claims \$5,000.00 to cover the costs associated with counseling for Post-Traumatic Stress Disorder. Her medication costs are covered by the Band and her surgical needs are covered under MSI.

[50] Presently the plaintiff is not receiving counseling, however, I accept the argument that considering her situation psychological counseling for PTSD is likely needed and will result in some cost to her.

[51] I would award the sum of \$3,000.00 under this heading.

Prejudgment Interest

[52] Counsel for the plaintiff claims prejudgment interest of 2.5% on the award for general and aggravated damages and 3% on the award for past lost income. I basically accept that submission and I would award interest on that basis.

[53] I raised with counsel the issue of delay in bringing this action forward to hearing. The assault was in March 2001. This action was started in March 2003. Default judgment was entered in May 2003.

[54] There were a number of applications including an application to disqualify present counsel because of a possible conflict of interest. That was made in February 2006. The matter was finally set for hearing on the assessment of

damages for April 2006. It was adjourned on the request of counsel for the plaintiff and is now being finally heard in October 2010.

[55] I conclude that for purposes of prejudgment interest on the general and aggravated damages the plaintiff should be entitled to interest for the period 2001 to the end of 2006 being a period of five years. On the damages for past lost income the interest will be for half of the eight year period.

[56] Therefore the plaintiff would be entitled to the following:

- 1) General damages - \$150,000.00
- 2) Prejudgment interest - 2.5% X 5 years -
\$18,750.00
- 3) Aggravated damages - \$30,000.00
- 4) Prejudgment interest - 2.5% X 5 years -
\$3,750.00
- 5) Past loss of income - \$134,832.00
- 6) Prejudgment interest - 3% X 4 years -
\$16,179.84
- 7) Diminished earning capacity - \$50,000.00

8) Future medical care - \$3,000.00

Total - \$406,511.84

Costs

[57] The plaintiff claims costs and disbursements on the basic scale for the amount involved.

[58] Plaintiff's counsel provided a list of the disbursements incurred on the file and I accept that account as being reasonable. I would award the sum of \$6,445.19 for disbursements.

[59] Plaintiff's counsel points out that costs here should be under the "old" Tariff A (basic) scale because the action was started in 2003. Applying the "old" Tariff A would result in costs of \$16,570.30.

[60] The plaintiff shall therefore have judgment against both defendants, jointly and severally, in the amount of \$429,527.39.

J.