

Evaluating Sexual Abuse Claims: The Damages Perspective

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The most logical place to begin a damages analysis of a sexual abuse claim is to examine the standard jury instructions of the jurisdiction where the liability action may be venued. Typically, a plaintiff has the burden of establishing by a preponderance of the evidence each item of damages that he or she claims. The plaintiff must also prove that the damages were the natural and probable consequence of the defendant's negligence. The incident must have been a proximate cause of the damages. Damages may not be based on conjecture or speculation. The fact finder must determine what sum of money will fairly and reasonably compensate the plaintiff for damages that he or she sustained as a proximate result of the incident.

By nature, victims of alleged sexual abuse cannot be fully made whole by money damages. Neither a single dollar nor all the money in the world can undo the impact that sexual abuse can inflict on a victim. Abuse will affect each victim differently, even victims who were abused by a common perpetrator in the same or similar physical environment. There may be no amount of money that a victim of sexual abuse may perceive to be fair and reasonable. The defendant institutions and their insurers can only evaluate fair and reasonable value from the perspective of a defendant faced with a claim and in light of amounts for which other similarly situated victims have settled.

Each claim of sexual abuse should be evaluated individually. Factors to consider include:

- The age of the victim
- The number of times the victim was abused
- The nature of the abuse, ranging from over clothes touching to anal or vaginal penetration
- The frequency of the abuse

¹ John is an attorney licensed since 1997 to practice law in New Jersey and Pennsylvania. He graduated from Lehigh University in 1994, from Widener University School of Law in 1997, and from the Judge Advocate General's School of the U.S. Army in 2002. During his career, he has evaluated thousands of claims brought by child victims of sex crimes and their families. While serving in the JAG Corps overseas from 2002 to 2005, John prosecuted sex crimes, including human trafficking, involving the abuse and exploitation of children. In civil practice, he evaluates claims involving the sexual abuse of children that have involved single victims and single perpetrators as well as sexual abuse involving multiple victims of common and of multiple perpetrators. He has evaluated claims involving single instances of abuse as well as claims involving systemic and frequent abuse lasting for years. He is routinely engaged by institutional and insurance clients to investigate, to evaluate, and to defend claims and lawsuits involving allegations of sexual abuse and human trafficking. John is also assigned frequently by liability insurers to evaluate claims for coverage. He has served in various roles for institutional clients, insurers, and debtors in bankruptcy in matters including *In re USA Gymnastics*, *In re Boy Scouts of America*, several cases involving Catholic dioceses, and many other cases involving religious and civic organizations and corporations. A significant portion of John's law practice is dedicated to evaluating value ranges for settlements of single claims as well as mass tort claims at every stage from pre-suit investigations and ADR, in the tort system, in bankruptcy courts, and in mediation and settlement administration processes.

- The duration of abuse, ranging from a single occurrence to frequent abuse over years or decades
- The age of the alleged perpetrator
- Whether the perpetrator held a position of authority over the alleged victim
- Whether the child was exploited for child pornography
- Coercion or threat or use of force or violence
- The impact of the abuse on the victim
- Whether a victim has received psychiatric or psychological treatment or counseling as a proximate result of the alleged abuse
- Whether treating and examining mental health professionals indicate a need or benefit to be derived from future psychiatric or psychological treatment or counseling
- The costs for future care

Harm can be inflicted on a child victim of sexual abuse by the litigation experience as the child may be asked to describe and thereby relive the abuse that the child may have experienced years earlier. Some parents of child victims are known to tell or to suggest to the child, verbally or through suggestions, actions, or non-verbal cues that he or she is damaged or defective because of the abuse he or she experienced. A child victim may be harmed by attorneys or guardians instructing a victim how to testify at a deposition, at trial, or to a settlement administrator to maximize financial recovery. Emotional damages caused by the litigation process are not compensable damages as natural or probable consequences of a defendant's negligence or an abuse incident. An incident of sexual abuse must have been a proximate cause of the damages, not the litigation process, in order for a plaintiff to recover.

Comparative negligence statutes in some states require an apportionment of liability among defendants, including the perpetrators of sexual abuse. Trends have emerged over the past few years of fact finders, including courts and settlement trust administrators, of allocating greater percentages of liability to insured institutional defendants than to perpetrators.

Given the limitation in publicly available information about sexual abuse cases, traditional jury verdict and settlement analyses may be under certain circumstances incomplete. Nevertheless, such data is informative for purposes of case valuation. There are some verdicts in and settlements of sexual abuse cases in the millions of dollars, particularly where there are numerous instances of abuse involving intercourse or penetration. More commonly, however, verdicts and settlements in sexual abuse cases are under \$1 million and often far less.

While settlements in sexual abuse cases are often confidential, public settlement data is available for Catholic Diocese settlements reached in bankruptcies. In the most recent 25 Catholic Diocese bankruptcy settlements, the median per-claimant amount was \$320,000 and the mean was approximately \$341,000. In only in four of the 25 settlements was the average per-claimant amount above \$500,000.

Another point of comparison is settlement matrices. Efforts have been made by claimants' attorneys and settlement administrators to create matrices intended to fairly, reasonably, and uniformly compensate victims of sexual abuse. One example of such a matrix is contained in the publicly available Fifth Amended Chapter 11 Plan of Reorganization in *In re: Boy Scouts of America and Delaware BSA, LLC*.^{2,3} It should be noted that the BSA Matrix was created by attorneys representing abuse victims and opposed by insurers. Further, the BSA Matrix makes no distinction among allegations of single instances of abuse from allegations of multiple, frequent, and prolonged abuse. Accordingly, it can overvalue claims that involve only a single instance of abuse. The BSA matrix may on a case by case basis present a useful guidepost as it and similar matrices can be used as a point of reference when negotiating settlements.

² *In re: Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS), Doc 6212 filed 09/15/2021.

³ It is important to note that this matrix was authored by attorneys representing plaintiffs and inserted in the BSA Chapter 11 Plan over the objections of parties, including insurers, and that the Plan is still under appeal. Although the settlement administration process is continuing, the Matrix is referenced here for informational purposes only.