



WHAT IS ELDER LAW? : DOES IT AFFECT YOUR PRACTICE?

The answer is fluid; it can look like any legal issue involving an older adult. Elder abuse can be prevalent in any practice area. It can be sexual, emotional, or even financial in nature, it can be neglect; whatever the issue is, it usually involves an abuse of trust or power, where the adult is dependent, vulnerable, or susceptible to undue influence, yet, not necessarily mentally compromised as to decisional capacity.

According to the Canadian Department of Justice, financial exploitation is increasingly commonplace, yet it is tremendously under reported.

Our population is aging rapidly. Our society is made up of complex family structures influenced by advances in technology and an international economy. Globally, we are facing the largest demographic shift in the history on human-kind; the statistics on ageing are staggering.

Abuse can be perpetrated by any number of vehicles-fraudulent procurement/use, of a Power of Attorney document, securing a joint account/tenancy to perpetrate misappropriation of assets, sharing an older adult's home without payment, and even targeted financial scams.

Ontario has legislation meant to play a role in protecting vulnerable adults. *The Substitute Decisions Act, 1992*¹ is one statute providing legal process for issues arising from compromised mental capacity, or vulnerability. It offers a framework for identifying decisional incapacity and provides for the implementation of substitute decision-making.

Our legal frameworks are not perfect and were not legislated at a time when the sorts of issues we are now facing, were prevalent. As such, we are seeing different civil remedies being morphed into claims seeking to employ an appropriate result. We are learning through these decisions just how far our courts are prepared to go, as well as the limitations faced.

The case of *Juzumas v. Baron*,² is one such case that involves elder financial abuse through several vehicles.

The help of a neighbor is how this matter came to light; demonstrating the importance of community and societal awareness.

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¹ *The Substitute Decisions Act, 1992*, S.O. 1992, c.30

² *Juzumas v. Baron, 2012 ONSC 7220*

The case involves a common scenario; an older adult who comes into contact with an unscrupulous individual who, under the guise of “caretaking”, moves to fulfill more of the latter part of that verb; Mr. Juzumas, the plaintiff, was 89 years old, with limited English skills. The substantially younger defendant “befriended” him, offering services, so as to avoid the consequence he most feared, moving to a nursing home. Ultimately, she convinced him to marry, seeking eligibility for a widow’s pension following his death.

The day before their wedding, a Will in contemplation of marriage was executed. Notably, the lawyer did not meet Mr. Juzumas alone.

Mr. Juzumas’ house was subsequently transferred into her son’s name. Lang J., found that even if the “agreement” legally drafted, had been shown to Mr. Juzumas, his English skills would not have sufficed to enable him to understand it. The lawyer’s notes indicated that Mr. Juzumas was “cooperative” during the meeting. Lang J., took this to mean that he was “acceding to someone else’s direction,” and not a willful and active participant to the transaction. Lang J. found that Mr. Juzumas had been under the influence of emotional exhaustion or over-medication, possibly the result of Ms. Baron drugging his food.

Lang J. considered a “cluster of remedies” that may be used “where a stronger party takes advantage of a weaker party in the course of inducing the weaker party’s consent” and outlined the legal doctrines of undue influence, and unconscionability.” Deciding ultimately that the presumption of undue influence existed between the parties and the relationship not one of equals; and further, that the doctrine of unconscionability armed the court with the jurisdiction to set aside the agreements, the Court did just that. The defendant was unable to rebut the presumptions. Additionally, a divorce was granted.

This case is insightful and, somewhat of a rarity: unusual because Mr. Juzumas had decisional capacity to right the wrong, whereas often the victim is of compromised capacity and unable to right the wrong.

Importantly, criminal remedies also exist. Whereas our Canadian Criminal Code does not provide for a specific offence of elder abuse, it does provide for the following charges:

*Theft by a Person Holding a Power of Attorney (s. 331); Theft (s. 322); Criminal Breach of Trust (Conversion by Trustee)(s. 336); Forgery(s. 366,);Extortion (s.346);Fraud (ss. 386-388); Neglect: Failure to Provide the Necessaries of Life (s. 215); and, Criminal Negligence (s. 219).*³

Moreover, the recently enacted, *Protection of Older Adults Act*⁴ expanded the list of aggravating factors, specifically targeting offences against victims “who are vulnerable due to their age and other personal circumstances.”

³ *Canadian Criminal Code*, RSC 1985, c C-46, s 718 [Criminal Code] online at <http://canlii.ca/t/523m4>

⁴ *Protection of Older Adults Act* S.C. 2012, c. 29; Department of Justice, Background: Protecting Canada’s Seniors Act, online:http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_32826.html

Notably, however the only reported case that could be found regarding S.331 was the case of *R. v. Kaziuk*⁵, where the court sentenced Kaziuk to the maximum 10 year sentence for theft and fraud. Unfortunately, the sentence was reduced on appeal, from 10 years to 8, but the Court of Appeal noted, “This was a case, that clearly called for an exemplary sentence. “

The circumstances of this case were severe, yet not unique. Elder law is and will be an area of growth. Accordingly, an approach to legal remedies in this area may include both civil and criminal legal considerations as well as a practical approach.

⁵ *R v. Kaziuk*, 2011 ONCJ 851