

A stark Ohio case shows how tort reform harms victims of sexual assault.

By Nora Caplan-Bricker



Tort reform is having unforeseen consequences as more and more victims of sexual assault take their cases to the civil justice system.

Photo illustration by Sofya Levina. Images by 4774344sean/Thinkstock and Vladimir Cetinski/Thinkstock

In the early 1990s, Brian Williams, a youth pastor at Delaware Grace Brethren Church in Ohio, allegedly tried to put his hand down the pants of a teenage girl named April Jokela. Years later, Jokela's mother testified in court that when she complained to church officials, they told her, "Let's just keep this quiet to protect our brother."

In the early 2000s, Williams allegedly told 18-year-old Robin McNeal, during a meeting in his office, that "most men view women as a thing to be fucked." She said he also told her that "he probably could get away with having sex with me right then and there in his office." The woman, whose married name is Robin Weixel, testified that she reported Williams to church officials but that they made no record of it.

In 2004, the leadership of Delaware Grace started a second church, Sunbury Grace Brethren Church. They chose Williams to be its senior pastor.

A bill to remove caps in cases of rape and assault found 38 Democratic co-sponsors but not a single Republican.

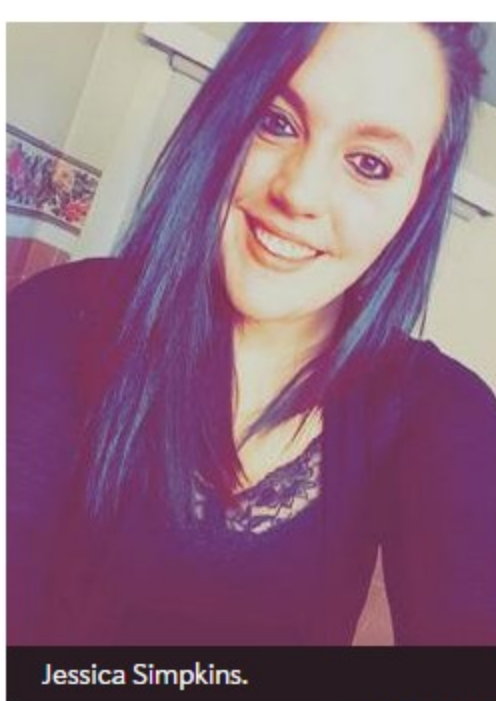
In 2008, according to court testimony, Williams forced 15-year-old Jessica Simpkins to perform oral sex during a counseling session in his office. Then he blocked the door and vaginally raped her. Williams subsequently pleaded guilty to two counts of sexual battery and was sentenced to eight years in prison.

Like many sexual assault victims, Simpkins also pursued a civil suit against the church. In a criminal case, "the perpetrator is only

going to be held accountable to the state, not the victim," says Joanne Doroshov of the Center for Justice and Democracy at New York Law School. "Sometimes, the civil justice system is the only way for a perpetrator to be held directly accountable to the victim for the trauma and the pain that they've caused."

The jury that heard Simpkins' case awarded her more than \$3.6 million, \$3.5 million of which was intended to compensate her for depression, PTSD, and other "pain and suffering" that she experienced as a result of the rape. There was just one problem: In Ohio, non-economic damages—which compensate for things such as disability, disfigurement, and trauma—are capped in most cases at \$250,000. Now, Simpkins and her lawyer are trying to get the caps

declared unconstitutional as they apply to minors who are victims of sexual abuse. Their latest brief argues, among other things, that the limits are "arbitrary and unreasonable, and thus a denial of due process," and that "the effect of the statute is to clearly alter the jury's finding that she suffered a catastrophic injury. ... By arbitrarily overruling that finding, [the cap] violates Jessica Simpkins' right to a trial by jury." Ohio's Supreme Court is expected to rule any day now.



Jessica Simpkins.

Jessica Simpkins

These caps weren't designed with victims like Simpkins in mind. They're a central tenet of the tort reform movement, a pet cause of many Chamber of Commerce-style Republicans. Alongside Ohio, Alaska, Colorado, Kansas, Maryland, Mississippi, Missouri, South Dakota, Tennessee, and Wisconsin also impose varying caps on non-economic damages, according to the American Association for Justice, which represents plaintiffs' lawyers. (Idaho does, too, though they don't apply in cases that involve a "felonious act.") They protect insurance companies who cover doctors charged with medical malpractice, for example, or pharmaceutical companies accused of making bad drugs.

But as more and more victims of sexual assault are taking their cases to the civil justice system, the caps are having unforeseen consequences. "If you rape a child, you get the benefit of tort reform," says Simpkins' lawyer John Fitch. Tort reform, he adds, "makes it financially impractical for children like this to hold those responsible accountable in the legal system."

The civil justice system contains obvious benefits for victims seeking restitution after sexual violence. Ellen Bublick, a legal scholar at the University of Arizona, has compared the number of sex crime-related tort cases in the early 1970s with the prevalence of such cases in the early 2000s. She found that "over this 30-year time frame, reported state supreme court decisions in sexual assault cases rose by more than 1,000 percent." She concluded that the increase at the trial court level must be even steeper. The civil system operates by a "preponderance of evidence" standard rather than one that demands "proof beyond a reasonable doubt"; in the slippery context of sexual assault, juries are often faster to assign civil "liability" than criminal "guilt." Even in cases like Simpkins', in which the rapist is convicted in criminal court, the civil system makes it possible to hold a third party—such as the church—accountable. As Simpkins told me, "I understand that the actual act of it is on him, but they're the ones that allowed it to happen."

But for victims whose states impose caps on damages, this route may be closed. Plaintiffs' lawyers generally work on contingency, taking one-third of whatever judgment they win for their clients, and potentially, recompense for expenses. (Fitch wouldn't discuss his agreement with Simpkins, but he said his firm has already spent tens of thousands on expert witness testimony and other aspects of her case.) "Once a cap is in place, lawyers may factor it into their willingness to even bring certain cases," says Lucinda Finley of the University at Buffalo Law School.

The American Association for Justice also believes that its members are bringing fewer cases involving trauma and other non-economic damages in states that have caps. (It points to data from the National Center for State Courts, which show that tort filings declined by roughly 25 percent between 1999 and 2008.) Pro-caps Republicans try to paint torts claims as "ambulance chasing," and it's true that the AAJ's advocacy is in its members' pecuniary interest. But, as AAJ President Larry Tawwater points out, lawyers simply can't afford to take the cases in which a low cap guarantees that the damages won't begin to pay for their time. The biggest losers are the victims who have suffered the greatest harm—whose suffering, like Simpkins', was valued in the millions by juries, only to be whittled down by a factor of ten.

When tort reform reconfigures a state's legal landscape, women are the most affected. "[W]hile overall men tend to recover greater total damages, juries consistently award women more in noneconomic loss damages than men," Finley has written. "Noneconomic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women." Republican legislators and courts generally don't limit "economic damages," which compensate victims for lost wages or concrete medical expenses—but that category only serves to replicate the wage inequalities that women, and people of color, already suffer in the marketplace. Meanwhile, a deeper gender divide is also at work. Finley argues:

Several types of injuries that are disproportionately suffered by women—sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice—do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market. ... [N]oneconomic loss damages become the principal means by which a jury can signal its sense that these types of harm are serious and profound and provide a woman plaintiff with what it regards as adequate compensation.

Fitch cites Finley's research in his brief to Ohio's Supreme Court and hopes that his arguments will induce the judges to throw out the caps as they apply to sexually abused minors. It's not impossible: The AAJ counts the states of Alabama, Florida, Georgia, Illinois, Missouri, New Hampshire, Oregon, Washington, and Wisconsin whose courts have struck down cap laws, though sometimes only in part, or only in cases of medical malpractice. (In Florida, the caps have been declared unconstitutional solely in cases of wrongful death, but the state Supreme Court will soon hear arguments to strike them down more broadly.)

Still, there's reason to think that the caps retain powerful partisan support in Ohio. In 2014, a Democratic state representative named Connie Pillich introduced a bill that would have removed them solely in cases of rape and assault; she found 38 Democratic co-sponsors but not a single Republican.

The only exceptions to Ohio's caps are for plaintiffs with a "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system." Simpkins is angry about these specifications. "There's nothing there for an effect of emotional damages," she says. "Just because I didn't lose a limb and because I can carry on a life, they're saying it basically doesn't affect me." She argues otherwise: "Every week, two to three times a week, a tape of the whole day will play in my head," she says. When this happens, "I'll have to freeze."

Simpkins says that court psychiatrists have told her she should be in counseling, but she doesn't have the money to pay for it—and, after legal fees and taxes are paid, she doesn't see \$250,000 in damages as nearly enough to provide help over the course of her lifetime. She considers the \$3.6 million that the jury awarded her to be a fit punishment for the Delaware Grace church. She filed her first civil suit in 2009; meanwhile, her rapist is due to be released this summer. After everything, Simpkins worries that if the church only pays the capped amount, "the justice won't be there for them. ... They won't feel held responsible for it. They won't lose anything."

Nora Caplan-Bricker is a contributing writer for DoubleX. Follow her on Twitter.



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