

CANADA / JUDGMENT

B. (E.) v. Order of Oblates

2001 BCSC 1783

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

E.B.
PLAINTIFF

AND:

ORDER OF THE OBLATES OF MARY IMMACULATE IN THE
PROVINCE OF BRITISH COLUMBIA and MATTHEW WILLIAMS
DEFENDANTS

AND:

THE ATTORNEY GENERAL OF CANADA
THIRD PARTY

AND:

ORDER OF THE OBLATES OF MARY IMMACULATE
IN THE PROVINCE OF BRITISH COLUMBIA AND
THE ROMAN CATHOLIC BISHOP OF VICTORIA
FOURTH PARTIES

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE COHEN

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Dates and Place of Trial: February 19-23, 26-28,

March 1, 2, April 23, 26, 27 and August 2 & 3, 2001

Vancouver, B.C.

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I. The Claim

- [1] The plaintiff claims that between 1957 and 1962, while he was a resident student at the Christie Indian Residential School ("Christie"), located on Meares Island, near Tofino, British Columbia, and operated by the defendant Order of the Oblates of Mary Immaculate in the Province of British Columbia ("Oblates"), he was repeatedly sexually assaulted by one Martin Saxey ("Saxey"), a man who was employed by the Oblates to work at Christie, primarily as a baker.
- [2] The plaintiff, now aged 51, alleges that Saxey, who died in 1986, commenced sexually assaulting him when he was seven years old, and that the assaults continued on a regular and frequent basis until he was 11 or 12 years old. He also alleges that all of the assaults took place in Saxey's living quarters which were situated in a building on the grounds at Christie.
- [3] Plaintiff's counsel submitted two theories of liability: first, the vicarious liability of the Oblates based upon the contention that the unique circumstances and environment of Christie created and materially enhanced the risk of sexual assaults on the plaintiff by Saxey; second, the direct liability of the Oblates arising out of the negligence of Christie's principal for hiring Saxey, a person known to him to have a history of violent homicide. Plaintiff's counsel submitted that to hire a person with Saxey's background to work at Christie constituted an immediate and continuing breach of duty to all of the children attending Christie, including the plaintiff.

- [4] Counsel for the Oblates submitted that the constant supervision of the children, coupled with their daily schedules, left no opportunity for Saxey to have sexually assaulted the plaintiff. Furthermore, counsel submitted that even if the plaintiff could prove on the requisite standard that he was sexually assaulted by Saxey, the current law surrounding the issue of vicarious liability can have no application to the case at bar because Saxey was an employee who had no authority over, or responsibility for the children at Christie.
- [5] On the issue of direct liability, counsel submitted that the court must decide this issue based upon the standard of care expected of the Oblates in the context of operating a residential school in the 1950s and 1960s, and not based upon the current standard of what is known about the nature, degree or extent of sexual assaults upon children. Counsel submitted that the Oblates met this standard of care, and that any damages suffered by the plaintiff as a result of the alleged sexual assaults were not foreseeable.

II. The Parties

- [6] Prior to attending Christie, the plaintiff lived with his parents and siblings in Queens Cove, a village on the West Coast of British Columbia, then consisting of about eight families. The plaintiff, then six years old, and an older brother, L.B., arrived at Christie on September 18, 1956. He left Christie in June 1965.
- [7] The Oblates, incorporated by a special Act of the British Columbia Legislature, is the corporate vehicle through which the Oblates of St. Paul's Province own property and transact business. From 1900 to 1938, Christie was owned and operated as an Indian residential school by the Benedictine Order. In 1938, the Oblates purchased the land and buildings comprising Christie and from that time forward, Christie has been owned, operated and staffed by the Oblates.
- [8] With respect to Saxey's background, on May 2, 1951 he was sentenced to death after being convicted by a jury for murdering a man in February 1951 during an argument over a driftwood log. On September 13, 1951 the Court of Appeal reversed his conviction and ordered a new trial. On October 17, 1951 a second jury found him guilty of manslaughter. He was sentenced to six years in jail. Following his release, he became employed by the Oblates, commencing his employment at Christie on September 14, 1955.

III. The Issues

- [9] The issues in this trial are those raised between the plaintiff and the Oblates. The Third and Fourth party issues have been severed and adjourned generally, as have the issues between the plaintiff and the defendant Matthew Williams. The issues then are, as follows:
1. Has the plaintiff met the required standard to prove that he was sexually assaulted by Saxey?
 2. If the answer to 1 above is yes:

- (i) are the Oblates vicariously liable?;
- (ii) if not, are the Oblates liable in negligence?;
- (iii) if the Oblates are vicariously liable, or negligent, what specific injuries has the plaintiff suffered as a result of the sexual assaults?;
- (iv) if the plaintiff has proven that he suffers from specific injuries caused by the sexual assaults, what compensation is the plaintiff entitled to?

IV. Decision on Liability

Issue 1

Has the plaintiff met the required standard to prove that he was sexually assaulted by Saxey?

Answer: Yes.

[10] In this case, as in most cases of alleged sexual assault, there are no eye witnesses to the central events. The court's assessment of the reliability of the plaintiff's allegations in the instant case is made even more difficult and complicated not only by the fact that the plaintiff is recalling events that took place more than 40 years ago, but also by the fact that Saxey is now deceased.

[11] The applicable law on this issue is that stated succinctly by Brenner C.J. in *Blackwater v. Plint*, 2001 BCSC 997, where at para. 17 the Chief Justice said, as follows:

The test the law requires is not whether the plaintiffs hold an honest belief that the events of which they complain occurred; rather, it is whether they have proven to the standard that the law requires that those events in fact occurred.

[12] As for the appropriate standard to be applied, the Chief Justice said, at paras. 10-12 of the decision, as follows:

The more serious the allegations the greater the care that must be exercised when considering the evidence. As stated by the Supreme Court of Canada in *Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al* (1982), 131 D.L.R. (3d) 559 at 563 per Laskin C.J.C.:

There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial Judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered. I put the matter in the words used by Lord Denning in *Bater v. Bater*, supra, as follows [at p.459]:

It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends

on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

I do not regard such an approach as a departure from a standard of proof based on a balance of probabilities nor as supporting a shifting standard. The question in all civil cases is what evidence with what weight that is accorded to it will move the Court to conclude that a proof on a balance of probabilities has been established.

This principle was recently considered and the leading cases summarized by Stromberg-Stein J. in *V.(J.L.) v. H.(P.)* (1997), 31 B.C.L.R. (3d) 155 at 189-190, paras. 117-120:

The civil standard of proof on a balance of probabilities is a flexible standard that enables Courts to require a higher degree of probability or persuasion in a case involving allegations of sexual, physical and emotional abuse made by a child against a parent. The seriousness of the allegations and the gravity of the consequences require a high degree of probability that the allegations are true. This approach was set out by Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at 459:

...

The Supreme Court of Canada considered the standard of proof in civil cases in *Continental Insurance Co. v. Dalton Cartage Co.* [1982] 1 S.C.R. 164. In adopting Lord Denning's approach in *Bater*, Laskin, C.J.C. held that where allegations of conduct that is morally blameworthy are made in civil cases, the relevant standard remains the civil one though there is necessarily a matter of judgment involved in weighing evidence and a trial judge is justified in scrutinizing evidence with care. Asserting that there is no shifting of the burden of proof, he stated at p.171: "[the] question in all cases is what evidence with what weight that is accorded to it will move the court to conclude that proof on a balance of probabilities has been established."

The issue of the standard of proof in civil cases was addressed again by the Supreme Court of Canada in *R. v. Oakes* (1986), 26 D.L.R. (4th) 200. Dickson, C.J.C. stated, "Within the broad category of the civil standard, there exists different degrees of probability depending on the nature of the case" In support, at p.226, he cited *Bater*.

In a case such as this, involving allegations of sexual, physical and emotional abuse by a father against his daughter, spanning approximately twenty years, a high degree of probability "commensurate with the occasion" is the appropriate standard of proof of misconduct by the defendant toward the plaintiff.

In *V.(J.L.) v. H.(P.)* (1998), 109 B.C.A.C. 165 [1998] B.C.J. No. 1546, the Court of Appeal upheld the trial judge's analysis. Lambert J.A. stated:

The argument on this appeal started with the finding of liability made by the trial judge, which rested on the standard represented by the balance of probabilities (using an exacting standard of assessing that balance based on the fact that these accusations of sexual assault involved moral blameworthiness). It was pointed out that the trial judge found that three of the serious sexual assault incidents had been established to have taken place under that standard of proof, that the remainder, and she particularized four and one assumes one other since there were eight in total, had not been proved to the required standard.

It was argued in relation to this question of liability that those findings were perverse in view of the fact that the evidence in relation to all eight incidents seemed, in the submission of the appellant, to be very much the same and that a conclusion with respect to credibility could scarcely properly be regarded as supporting a finding that three of these sexual assaults had been proved but five had not.

However, it is important to realize that it was not that the five had been proven not to have occurred but just that they had not been proven, to the required standard, to have occurred. So I see nothing perverse in the finding that the trial judge rested her judgment on a conclusion that only three of these incidents had been proven to the requisite standard to have occurred.

[emphasis mine]

[13] In *B.(M.) v. British Columbia* (2001), 87 B.C.L.R. (3d) 12 at para. 25 Prowse J.A. said, as follows:

I am unable to agree that Madam Justice Levine failed to apply to correct standard of proof to the evidence before her in coming to the conclusion that Mr. P. had sexually assaulted the plaintiff. She was fully alive to the fact that the allegations before her were of a criminal nature, and she stated (at para. 69 of her reasons) that she found the relevant facts to be proved "on a standard of a 'high probability' commensurate with the occasion." This standard was referred to by Lord Denning in *Bater v. Bater*, [1950] 2 All E.R. (Eng. C.A.) in the following passage at p. 459:

The case may be proved by preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher standard of probability than that which it would require considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still does require a degree of probability which is commensurate with the occasion.

In my view, this statement is consistent with the general proposition that, while there are only two standards of proof known to our law: the civil standard of proof on a balance of probabilities, and the criminal standard of proof beyond a reasonable doubt, there are degrees of probability within the civil standard to take cognizance of the seriousness of the allegations at stake.

[14] Recognizing then that where a civil claim alleges sexual abuse, a higher degree of probability within the civil standard is appropriate, and that in the instant case the matter turns largely, if not almost entirely on the plaintiff's credibility, I wish to start my reasons by

stating that I found the plaintiff's testimony on this issue to be very compelling. I hold a strong impression that he was telling the truth when he testified about Saxey's sexual assaults upon him. I am also convinced that his anxiety on the witness stand when recalling the events was most genuine, and that he was very sincere when he said, in cross-examination, that he could still smell the room where the assaults took place, even as he sat in the witness box, and that while he could not describe the smell, he did not like it. When describing Saxey's living quarters, he said, "it's very disturbing and it's such a horrifying thought to have to try to think about that place".

- [15] Turning then to the plaintiff's account of the sexual assaults, he said that Saxey repeatedly sexually assaulted him beginning early in the fall of 1957, when he was seven years old, and that all of the assaults took place in Saxey's living quarters. The plaintiff recalled that Saxey assaulted him about twice a week until he was 11 or 12 years old.
- [16] When asked how he felt emotionally when Saxey approached him, the plaintiff said that he was upset and scared and wanted to get away and go play somewhere else but that Saxey kept on telling him that he had candy up in his room and that he would give him lots. The plaintiff said he ultimately went with Saxey because of the candy, and that in doing so he was scared.
- [17] The plaintiff, who testified that Saxey's living quarters was one bedroom and a living room area, and that Saxey lived by himself, described the first incident of sexual assault by Saxey, as follows:

Q Can you describe what happened?

A He lured me into his place, he had a place in a two storey building and he was upstairs. And he lured me up there. And when he got me up into his room he said that he had some candy and I was going to grab that candy and go and he caught me and he brought me to his bedroom and he threw me on his bed. He got me on the bed he took my clothes off, my pants, my shorts, and I was scared, I didn't know what to do, didn't know what to say, I wanted to get out. But he held me down and he started having sex with me.

- [18] When asked by his counsel to describe what happened after Saxey threw him on the bed, the plaintiff testified, as follows:

Q Now, after Martin Saxey threw you on the bed as you've testified, exactly what happened next?

A He got my pants and shorts off and he started playing with my penis and then he spit between my legs and he put saliva between my legs and he closed my legs together, I thought he was going to tie me up when he did that. And then he continued, he pulled off his pants, and he put his penis between my legs and he partially penetrated my anus.

Q Were you lying down?

A I was on my back, yes.

Q What happened next?

A He continued having sex with me until he ejaculated.

Q And did you try to get away at any time during this episode?

A I was so scared I didn't know what to do.

Q Did you say anything to him?

A I couldn't say anything, I was too scared.

Q Was Martin Saxey violent with you during this episode?

A I would say, yeah, he was, yeah.

Q In what sense?

A Well, he got me on his bed he was practically ripping my pants off, you know, I mean, he wasn't gentle about nothing, you know.

...

Q [E.B.], what else do you remember about this episode of abuse?

A After he finished, after he ejaculated, he got up, left, went into the living room area and I was left there and he threw me a towel. And I was left there to clean myself up.

Q Did you stay in the room afterward?

A I wanted to run out.

Q Did you?

A No. He was guarding the door. When I got into the living room he was sitting right by the door. He had some candy in his hand, it wasn't a lot of candy, but, you know, there was some, and he gave it to me and he said, "You be quiet, you don't tell nobody". And I left. I wanted to hide. I didn't know what to do. I know I stayed away from other boys because I felt a lot of shame. I was so violated.

[19] The plaintiff testified that the sexual assaults by Saxey upon him varied from time to time, stating as follows:

Q Can you elaborate on how they varied?

A Like I told you about the first time it was done that way, and the other times he would have me masturbating him and I would have to be facing right to him on my knees. And like he was sitting on the bed, you know, I would be kneeling in front of him.

Q Were there any other variations?

A No, no.

- [20] The plaintiff testified that he did not tell anyone about the assaults up to the time that he left Christie, and that he did not know of any other children being sexually abused while he was there. He said that he used to think he was the only one who was sexually assaulted at Christie. The plaintiff said the first time that he ever told another person about the sexual assaults was in 1978, and that person was his lawyer. When asked why he did not tell anyone about the sexual assaults while he was at Christie, he said it was because he was, "too scared and ashamed".
- [21] The main basis of the defence attack on the plaintiff's credibility is the assertion that the plaintiff gave different descriptions of the alleged sexual assaults to the experts, the police and at trial.
- [22] On cross-examination, counsel for the Oblates put to the plaintiff the clinical records of Ms. Eroca Shaler, a psychologist consulted by the plaintiff in 1995. She recorded in her clinical records that the plaintiff told her that in his first experience with Saxey, Saxey tried to bribe him into his place and that, "he did oral stuff as well as fondling, masturbation, frottage - several times", and that it made him angry just to have to think about it. The plaintiff confirmed that Ms. Shaler's clinical records, although not exactly in the words he used to her, correctly set out what he had told her.
- [23] The plaintiff also confirmed as being correct a written record made by the R.C.M.P. of what the plaintiff told the interviewing constable on October 27, 1995. The plaintiff described the sexual assaults to the police, as follows:

A And I didn't know about this that uh, that this man had uh, committed this felony, till later on. Over the years I had, I had heard through grapevine that he had uh, committed this, felony. And uh when I heard that uh, I was really I got really scared. Really anxious. Because uh, what he did to me in his house and at that residential school. Like he forced me into his bedroom. He, you know, almost like, uh, you know rippen' my pants off. And I was really scared and, didn't know what was happening what was going on. And why he was doing that, to me. And then uh, and he had my pants off and my shorts off and, he uh, he tried grabbed hold of my genitals like he knew what he was gonna do with me. And I started to cry. He got kind of um, angry. He was telling me to, to stop. Stop crying and to be quiet. I couldn't stop crying. I just continued crying. And uh, he grabbed my genitals and he started uh, masturbating me. He continued doing that. And uh, as soon as it was over he pushed me out of his door. He told me not to say anything to anybody. Told me to keep quiet about what happened. And I felt so ashamed. I didn't know what to do. I didn't know who to, who to turn to or who to talk to. And I went uh, like there was a basement, in the building I went down there. I went in the corner, and just started crying. And everybody else was all the boys were playing outside. Playing down on the beach. And I was alone. And I just cried cried...

...

A ...And this carried on and he continued to punish me and he'd always do, do the same thing. Take my pants off and he'd masturbate me all the time. This uh, went on till, right up to twelve years old...

[24] In his report dated November 4, 1996, Dr. P. Janke, the defence psychiatrist, set out what the plaintiff told him about the alleged sexual assaults, as follows:

At age seven [E.B.] began being sexually abused by Martin Saxey who was an employee at the residential school. He stated that it began when Mr. Saxey offered [E.B.] candy. He stated that every Friday the children who had money could buy some candy. As [E.B.] never heard from his parents he had no money.

[E.B.] indicated the sexual assaults began immediately and there was no grooming or preparation. He states that Mr. Saxey would take him to his room which was upstairs in a home occupied by one of [E.B.'s] aunts and uncles who themselves worked at the school, the aunt helping in the kitchen and the uncle working as a maintenance man.

[E.B.] states that Mr. Saxey gave him some candy and when [E.B.] was finished he wanted to leave but Mr. Saxey gave him more candy and "all of a sudden told me to go into his bedroom". [E.B.] states that when he went into the bedroom Mr. Saxey "grabbed me and threw me on the bed". [E.B.'s] pants were taken off and Mr. Saxey began masturbating [E.B.] then lay on top and simulated intercourse until he ejaculated. [E.B.] stated that Mr. Saxey told him to clean himself up and told him "don't tell anyone else or else". [E.B.] was then pushed out the door. He states the second incident occurred about two weeks later and the rate of the incidents increased to about three or four times per week. He indicated to me that the nature of the assaults remained essentially the same. [E.B.] indicated to me that as he got older and especially as he approached age 12 that Mr. Saxey seemed to be increasingly afraid while the assaults were occurring.

[25] When the plaintiff's history as recorded by Dr. Janke was put to the plaintiff on his cross-examination, he confirmed it as being correct.

[26] With respect to the plaintiff's direct testimony that the sexual assaults included partial anal penetration, defence counsel referred to the report and testimony of the plaintiff's psychiatrist, Dr. K. Riar on this point. In his report dated July 13, 2000 Dr. Riar described what the plaintiff told him about the alleged sexual assaults, as follows:

...[E.B.] indicated that the perpetrator lured him into his place by saying that he had some candy there and took him upstairs. It was daytime. Once in the perpetrator's residence [E.B.] said, "He had me by my arm and dragged me into his bedroom". Once there [E.B.] was put on the bed and the perpetrator took off his clothes. The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him. He recalled that it was very painful and he was crying. Once the perpetrator finished he left him on the bed and he had to clean himself up. He then gave him an orange and pushed him out the door.

...

...The perpetrator also made [E.B.] perform oral sex on him approximately once a week but never ejaculated in his mouth...

[27] When Dr. Riar learned that the plaintiff had given different descriptions of the alleged sexual assaults, he telephoned the plaintiff to check his understanding that the assaults included anal penetration. In cross-examination, Dr. Riar testified, as follows:

Q Thank you. Now, doctor, I understand that this was the two-hour interview that you told his lordship about?

A That's right.

Q And then you had two phone calls with him?

A That's right.

Q And I understand that you were sent a letter from his lawyer, Mr. Shewfelt?

A That's correct.

Q And he sent this letter asking you to clarify something; isn't that correct?

A I think I called him about some discrepancy after talking to Dr. Janke what he told me and what he told Dr. -- told me, and then I called Mr. Shewfelt asking him the clarification on that.

Q His lordship knows about the discrepancy in the sense that he had told you that there was anal sex?

A That's right.

Q And he had not told Dr. Janke that; is that correct?

A That's correct.

Q So you received a letter from the lawyer, Mr. Shewfelt, and he says that it appears clear from the sworn statements as well as statements made in less formal interviews that the assaults did not entail deep anal penetration?

A That's right.

Q However, given the multiplicity of the assaults and the mechanics as described in [E.B.'s] evidence, occasional shallow and incidental penetration is a possibility?

A That's right.

Q And then he goes on to say "Perhaps you should speak to [E.B.]"?

A That's right.

Q And then you had the two calls with [E.B.]?

A That's right.

Q And?

A That was the second one. The first one we had to interrupt, I don't know whether -- where he was calling from, the money kind of ran out or whatever.

Q So this is just a short note?

A Short, yeah. I think it's June 12th.

Q June 12th?

A 2000, yeah.

Q Told me -- intercourse with me, that would be Mr. Saxey?

A That's right.

Q He put his penis in him, meaning [E.B.]?

A [E.B.], yeah.

Q Would have sex with him on?

A Continuous basis.

Q Continuous basis. He had to clean himself?

A Clean himself up and then leave.

Q And then the longer call you had, that was in June -- on June 13th, the next day, sir?

A That's right.

Q And said that -- okay. If I read this correct, and correct me, doctor, I'm sorry, he says he always?

A "Somehow got me. He took advantage of my

[weaknesses], as did not have no candy with me, so I did not know what to do or think about it." Yeah. Then I talked to him about his own sexual problems.

Q And, doctor, you were not here, but when he started talking about his sexual problems, he told his lordship that he would have difficulty explaining it?

A Yeah.

Q So you would have written exactly what he said to you, right?

A Yeah. On the phone, yeah.

Q And he says "Sexual problem unable to get up, premature ejaculation"?

A That's right.

Q "Always felt unable to satisfy a"?

A "A woman".

Q A woman?

A Yeah.

Q And?

A Not told -- the woman did not tell them verbally, but their reaction, he felt that that was -- that's why they were rejecting him.

Q Thank you. Doctor, from what I understand from your report, and I may come back to it, is that when you said in your report that there - you know, [E.B.'s] self-report to you was he was very clear that there was anal penetration; isn't that correct?

A That's right.

Q And even after which we both agree to this, there is nothing -- I'm not making an issue of that, please don't take it that way, that even after you spoke to Dr. Janke you saw Dr. Shaler's reports?

A That's right.

Q You read the discovery?

A Yes.

Q And you still felt that he was very clear in his self-report to you that there was anal penetration; is that right?

A That's right.

[28] Dr. Riar also testified, on cross-examination, as follows:

Q And then he tells you about Saxey, if I may please ask you to look at paragraph 2?

A Yeah. 2 or 3?

Q Paragraph 2 of page 3.

A Okay.

Q He says "While talking about abuse he indicated the sexual mistreatment by an employee"?

A That's right.

Q And then he goes on, I'm skipping, that the downstairs was occupied by his grandparents?

A That's right.

Q And then [E.B.] indicated that the perpetrator lured him into his place by saying that he had some candy there, and he took him upstairs?

A That's right.

Q It was daytime. Once in the perpetrator's residence, [E.B.] said, "he had me by my arm and dragged me into his bedroom." Once there [E.B.] was put on the bed and the perpetrator took off his clothes. The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him, he recalled that it was very painful and he was crying. Once the perpetrator finished he left him on the bed to clean himself. This is what he told you; is that correct?

A That's right.

Q And not only did he tell you that once, he -- you confirmed that with him after his lawyer wrote a letter to you; is that correct?

A That's right.

Q And you also have seen what he told Dr. Shaler, which was different than what he told you?

A Yes.

Q And you also have commented that he told Dr. Janke a different version; isn't that correct?

A That's right.

Q And when my friend was asking you questions, you said that you and Dr. Janke had consulted about this, and he had told different versions to him and to you; is that correct?

A That's my understanding, yeah.

Q Doctor, out of absolute fairness to [E.B.], I had asked him about this, about him having -- sorry, about him having told you about anal sex, and I would like to read what he said to you -- said to me -- or to his lordship. I will just be one second. I'm sorry, your lordship. ..

Q Your lordship, it was page 109, sorry. It's question 743, your lordship. It's -- it's your report that I'm reading to him, doctor, and I say "The whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him. Is that what you told him, sir?" Meaning told you. "I don't think so, I don't think so I said anal sex." "You never told Dr. Riar anal sex?" Answer "No." Doctor, you're not sure that he did tell you that Mr. Saxey had anal sex with him?

A If we are talking about the term, like if he used the term "anal", I'm not, your honour, sure whether he said anal sex, but he was very clear that there was intercourse.

Q There was intercourse?

A Yes.

Q And between men that's what it would be?

A Yeah. That's what I probably presumed, yes.

Q And when we looked in your notes it does, you know, to refresh your memory, does say anal, doesn't it?

A Yeah, I wrote that, but I must have asked him "Did he put his penis inside you?" And he must have said yes or something, yes.

Q Okay.

A And if he used the term, I can't say that, whether he used that term or not.

Q But that's what he meant?

A Yes. What I meant, yeah, I mean he told me that, that's what I wrote, that it was anal sex.

Q Okay. Maybe I can start again. He told you that Mr. Saxey had intercourse with [E.B.]?

A That's right.

Q Okay. And that would have to be anal sex?

A That's right.

[29] Defence counsel pointed out that in cross-examination, the plaintiff denied telling Dr. Riar that the sexual assaults included anal sex. He testified, as follows:

Q And the whole experience was very frightening for [E.B.] and he did not know what to do. The perpetrator put [E.B.] on the bed and started having anal sex with him, is that what you told him, sir?

A I don't think I said anal sex.

Q You never told Dr. Riar anal sex?

A No.

Q So he's mistaken on that?

A Yes.

Q And then he recalled that it was very painful and he was crying. Did you tell him that, sir?

A Yes.

Q And that once the perpetrator finished, he left him on the bed and he had to clean himself, he then gave him an orange and pushed him out of the door. Just so I understand you correctly, sir, its your evidence today that you never told Dr. Riar that Saxey assaulted you by having anal sex with you?

A Yes.

- [30] Dr. Janke testified that he would normally expect some variability in the description given by a victim of sexual assault to different persons. He also testified that he would not expect any major differences, explaining that he would expect the victim to be able to relate all the major elements of the assault he had experienced, and not to make sudden recall or to add to the descriptions some extreme form of abuse, or for that matter retract it subsequently.
- [31] In my opinion, the plaintiff's testimony that he was frequently sexually assaulted by Saxey is reliable. In arriving at my conclusion, I think it must not be forgotten when assessing the credibility of the plaintiff's testimony about the assaults that the plaintiff was recalling details of events long after the time that they had happened to him, as well as the fact that, according to the plaintiff, the length of time between the assaults varied, and that given the frequency of the assaults they have tended to mix together in his mind so that he cannot now remember them all individually.
- [32] As for the controversy surrounding the plaintiff's testimony about partial anal penetration, it strikes me that the plaintiff did not consider this manner of the abuse upon him by Saxey as being a major element of the sexual assaults, but rather as being perhaps incidental to his description of the simulated intercourse. In any event, I do not consider there to be a serious conflict in the evidence between the plaintiff and Dr. Riar on this narrow point. First, the plaintiff did not deny that he told Dr. Riar that the sexual assaults included anal penetration. Rather, he denied telling Dr. Riar that the sexual assaults included "anal sex". By the same token, Dr. Riar did not purport to quote the plaintiff verbatim. He said, in chief, that he did not go into the graphic details of the sexual assaults with the plaintiff, partly because the plaintiff was, "quite anxious". Most significantly, when the plaintiff's direct testimony describing the assaults was put to Dr. Riar, and he was asked whether it was the same as what the plaintiff had described to him, Dr. Riar answered, "yes, along that lines, yes. I won't -- I don't recall partially, but that's what I would say, yes". In cross-examination, Dr. Riar was not sure whether the plaintiff had actually used the words "anal sex", although he was certain that the plaintiff told him that the assaults included intercourse. I think that plaintiff's counsel's argument that both witnesses were merely describing the same facts using different words is a reasonable inference to draw from their testimony.
- [33] Furthermore, I agree with plaintiff's counsel that the question of whether or not there was anal penetration is largely insignificant in any event in light of the following testimony by Dr. Riar:

Q Doctor, would you agree with me that if it was simulated intercourse and masturbation, the impact of that would be a lot less than anal sex?

A Not necessarily. I mean it's the perception of the person. It depends on various factors. It doesn't depend upon what just happened. We know severity and penetration are one factor, but there are other factors too to make it severe, so I would say that that's not the way I'm thinking that it's severe, that he penetrated him.

- [34] As for the other factors argued by counsel for the Oblates in her challenge to the reliability of the plaintiff's testimony about the manner and frequency of the sexual assaults, I think, with respect, that they are without merit.
- [35] First, Dr. Janke testified that he would expect to see behavioural problems in a child who suffered repeated sexual assaults. Concepcion Anita Tavara, whose religious name is Sister Anita, now retired, was at Christie from 1962 until 1964. She testified that if she was involved in supervising a dance on the weekend she would see the plaintiff, or she would see him at choir practice. She said that she did not notice any behavioural problems with the plaintiff.
- [36] Thomas Richard Cavanaugh, whose religious name is Brother Cavanaugh, was at Christie in 1964 as a child care worker. He testified that he knew the plaintiff and said that he could remember, "[E.B.] was a big boy for his age but he was certainly a good boy. He was a typical boy. Certainly he did things at times that you wished they wouldn't but at the same time he was a good kid."
- [37] When Brother Cavanaugh was asked whether he ever experienced any behavioural problems with the plaintiff, he said, "No not any".
- [38] Thomas Lorne Mackey, whose religious name is Father Mackey, said that he knew the plaintiff, and used to call him by the nickname, "Zeek". He said that the plaintiff would often just drop into his office while passing by, that he enjoyed the plaintiff's presence, that the plaintiff was a bit of a joker and a very pleasant fellow who had a great smile and a good sense of humour. As well, Father Mackey would see the plaintiff out on the ball field, or at dances and said that for a quiet fellow he did very well, that he was quite popular with the girls, and that it was just a pleasure to see him.
- [39] When Father Mackey was asked whether he ever noticed any behavioural problems with the plaintiff, he answered:

Q And did you ever notice any behavioral problems with him?

A No, I didn't. He (didn't) stand out from that point of view he wasn't a troublemaker of any sort he was quiet but not morose or withdrawn, he was quiet, but as I say that gentle joyfulness and a good spirit, joking kind of fellow. So there was no evidence that he was hiding something very deeply buried and was morose about it to my knowledge. I always saw him as a very happy just quiet fellow, a little distant but not morose.

- [40] Stella Theresa Distaso, whose religious name is Sister Mary Laura, started working at Christie in 1960. She was a teacher assigned to Grades 5 and 6, and was also a child care worker for the senior girls. She said she taught the plaintiff in Grades 5 and 6. When asked what he was like, she said:

Q Can you tell his lordship what [E.B.] was like?

A Yes. [E.B.] was just a regular student. He didn't stand out behaviour-wise in any way that I could remember. He (w)as a very happy boy, had big dimples and smiled frequently and I recall that. But never displayed any unusual behavior that would have sort of given me a clue that something was wrong. Never caused problems for me in the classroom and was just a good behaved, well behaved student.

[41] As plaintiff's counsel pointed out, the impressions of Sister Anita, Brother Cavanaugh, Father Mackey and Sister Mary Laura of the plaintiff date back well over 30 to 40 years about one child in a school of hundreds of children. Therefore, I agree with plaintiff's counsel that their evidence is self-serving on this point and should not be accorded substantial weight. In my view, this is particularly so in the case of Brother Cavanaugh's testimony, who after stating that he never had any behavioural problems with the plaintiff, said, when asked whether he ever had to punish the plaintiff for being out of bounds, or having left the boundaries or not obeying rules, "Yes, yeah, I had to punish him for a number of things". He also "vaguely" recalled that he might have punished the plaintiff for stealing from the candy goods store at Christie.

[42] Another factor raised by the Oblates was the evidence of Brother Cavanaugh describing Saxey's living quarters, which were on the top floor of the staff building. He said there were two bedrooms, sort of a sitting room, and a place where Saxey could do a little cooking, and that access to Saxey's living quarters was by way of a set of stairs at the back of the building.

[43] Defence counsel also referred to the evidence of the defendant Williams who testified, in cross-examination, as follows:

Q Can you describe for me Mr. Saxey's room in this house?

A Always seemed clustered, got a bed, clothes hanging up and clothes on chairs, small, real warm. Lots of light in there all the time. That's about all there was. Just a couple of chairs, beds.

Q Were you actually in this room, Mr. Williams?

A I had been there before, yeah. I know what the rooms look like.

Q But were you in there when Mr. Saxey wasn't there is that it?

A Yeah. There was times when I was there when he wasn't there.

Q Was there just the one room in the upper floor of this house?

A There was two.

Q How did you get from one room to the other was there a hallway of some sort?

A There was a division between them in the room.

Q But when you saw your friend being abused by Mr. Saxey you saw this from the outside door?

A I ran upstairs and I was -- pretty well at the top stair when I seen it.

Q But you didn't go inside?

A Didn't have to.

Q In fact, Mr. Williams, Barney Williams lived in that other room, didn't he?

A Yes.

Q He was another native man that you said was the boat builder?

A Yes.

Q Is he any relation to you?

A No.

Q He was a kind, old man at the school wasn't he?

A Yes.

[44] Defence counsel submitted that the above descriptions of Saxey's living quarters, and who lived there were not consistent with the plaintiff's evidence on this point. Counsel referred to the plaintiff's description of Saxey's living quarters, as follows:

Q Was Martin Saxey's quarters one big room or did it have multiple rooms?

A It was one bedroom.

Q It had one bedroom did it have other rooms?

A He had one bedroom and a living room area.

Q Do you know whether he lived there by himself?

A Yeah, he lived by himself.

[45] Counsel contended that because Saxey shared his living quarters with Mr. Barney Williams this raised serious doubts that the abuse the plaintiff described could have gone on for so long without being detected.

[46] However, as plaintiff's counsel noted, the defendant Williams' testimony about Mr. Barney Williams sharing Saxey's living quarters was by way of an affirmative answer to a leading question in cross-examination, and that there was no other evidence on this point from any source, nor an indication of where the factual or evidentiary foundation for the leading question came from. Counsel also noted that Brother Cavanaugh was the only defence witness to whom a question on this point was directed. He testified, as follows:

Q And with Mr. Martin Saxey there was someone else sharing that?

A They were separate apartments really, the bottom section where Joe and Ester lived was the entranceway for that building was or that section of the building was in the front. And the only way Martin could get into his apartment upstairs was through a back door which was up on top, you had to go up a flight of stairs.

- [47] Counsel said that none of the remaining defence witnesses who were at Christie, namely Father Mackey, Sister Mary Laura or Sister Anita, were asked about Mr. Barney Williams, and whether he shared Saxey's living quarters. In the circumstances, I agree with plaintiff's counsel that the court should draw an adverse inference from defence counsel's failure to pose this question to any of the other defence witnesses.
- [48] Further on this point, counsel noted that the Christie Codex Historicus for the date April 17, 1958 contains a reference to Mr. Barney Williams being "over from" the nearby village of Opitsat on that day.
- [49] Regarding Brother Cavanaugh's evidence about the layout of the interior of Saxey's living quarters, plaintiff's counsel said that this evidence was not reliable. He pointed out that Brother Cavanaugh testified, in chief, that he had not been into Saxey's living quarters "that much" while Saxey was living there, and that he was in Saxey's living quarters after it had been renovated.
- [50] In the result, I agree with plaintiff's counsel that the defence evidence does not undermine the reliability of the plaintiff's recollection as to the configuration of Saxey's living quarters. I also agree with plaintiff's counsel that the defence has not established that Saxey shared his living quarters with Mr. Barney Williams at the material times surrounding the events testified to by the plaintiff.
- [51] Finally, as to the plaintiff's evidence on the timing of the assaults, defence counsel referred to the following evidence of the plaintiff, in cross-examination:

Q And then from 4:00 to 5:00 you had the study hour is that correct?

A Yes.

Q And again the teachers would supervise you?

A Yes.

Q And in study hour you would go back into the classroom?

A Yes.

Q And do your homework?

A Yes.

Q And the teachers would supervise you?

A Yes.

Q And then 5:00 o'clock was time to do some chores, clean up and go for supper at 5:30 is that correct?

A Yes.

Q And at this time the child care supervisors would supervise you?

A Yes.

Q And then after supper, which would be around 6:30, there would be activities?

A Yes.

Q Like you already have told His Lordship, going to the movies, carpentry shop, playing games; is that correct?

A And again a child care supervisor would supervise at that time?

A Yes.

Q And you also told His Lordship that the principal would be walking around?

A Yes.

...

Q And did at any time Mr. Saxey ask you to do any jobs?

A No.

Q And you also have stated that Mr. Saxey lured you to his room around 4:00 o'clock; is that correct?

A Yes.

Q And (he) would find (you) when you were playing?

A Yes.

Q And he would take you to his place?

A Yes.

[52] Defence counsel argued that the evidence from the defence witnesses rendered the plaintiff's testimony on this point implausible. Defence counsel pointed to Sister Anita's testimony describing the children's activities during the "study hour" between 4:00 to 5:00 p.m. She said that the children came to classrooms where they were taught during the day, and that they would do the homework that was assigned to them as well as get extra help in any area that they were weak in. She said the teachers were always there with the children to help them, if they needed it.

[53] When Sister Anita was asked what she would do if a student was missing, she said:

Q And if a student was missing on a regular basis or any time, what would you do that about that?

A We would immediately send a note to the superior or the child care worker in charge and tell them that the child was not in class.

Q Would it be -- any time that a -- you would notice that a child was missing?

A No, we couldn't. There is just enough desks for the children so we would know if there was no one there, we also had to take roll when they came in.

Q Okay. And if for any reason you were not able to do -- be at the study hour, what would happen to the student?

A There would always be someone to relieve us we had extra staff for example the junior senior supervisors who did not have children to teach would be available as well as the sisters who were in the sewing room would be available to relieve us or if we had to go to Tofino for any reason or anything came up.

Q Would you ever leave the children alone?

A No. Of course, never.

Q Why?

A There were under our care, they were our children. We were responsible for them. This was no way we could possibly leave them alone. It was -- they were under our charge.

[54] In chief, Sister Anita said that after 5:00 o'clock the children would go back to the dorms and get washed up for dinner, and that they would most likely not have that much time for play because the children ate at 5:30. She said there was always someone in the dorm with them as they were cleaning up.

[55] Father Mackey was also asked, in chief, about study hour. He answered, as follows:

Q Father, you are aware that there was study hour from 4:00 to 5:00 p.m. every evening?

A Right.

Q What would you (do) during the study hour?

A During the study hour I felt kind of free. First of all may have some things to do in my own office but most of the time I like to be outdoors so I would be either down at the boat house or up around the front of the building or visiting with some of the staff. I liked to go in to visit people in the laundry, I like to watch these things these old machines and so forth that were quite old. I had to keep an eye on all the machinery and then I would have to keep an eye on the tractors and that would be in the boat house, so I would take this opportunity to go around the grounds and just to stroll around and to be in touch with the different members of the staff. I considered it really important to have that contact with the different area of work that the staff was doing. Sometimes visiting in their own little units if they were not on duty at the time.

Q And what else besides the staff were you concerned about during the study hour Father?

A Oh, well of course I would have an eye out always for children. One of the reasons I did make a point of getting out of the building at that time after school hours was to be in contact with the children, and if anybody was seen outside I would see them immediately. I used to see, for example, the boys had an out door washroom so I would occasionally see a boy there going to the out door washroom which is understandable so that was the only thing that I would observe. Never, I didn't see anybody wandering around or anything like that at all. Nobody was out of place. The -- part of the regulations of the study hour was that I would ask the teachers that was always reinforced by Sister Laura who was the senior teacher to have a roll call for every study hour even outside of the regular class, to have the roll call. So that we would be quite sure that everyone was there and we wouldn't have any worry about some child not being where he or she should have been at that time.

[56] I disagree with the defence submission on this point because, in my opinion, the evidence does not establish that all of the assaults occurred at exactly the same hour of the day. It was the plaintiff's testimony that Saxey lured him to his room at, "around 4:00 o'clock", which, as I think plaintiff's counsel correctly suggested, could be interpreted to mean they took place sometime in the late afternoon, or possibly early evening.

[57] Accordingly, I am satisfied that the plaintiff has proven, to the required standard, that Saxey commenced assaulting him when he was seven years old, and that the assaults continued on a regular and frequent basis until he was 11 or 12 years old; that all of the assaults took place in Saxey's living quarters at Christie; that the sexual assaults consisted of fondling, masturbation and simulated intercourse, which included partial anal penetration. However, given that the plaintiff failed to testify at trial about the allegation of oral sexual abuse, I find that this allegation has not been proven to the requisite standard.

Issue 2 (i)

Having concluded that the plaintiff was sexually assaulted by Saxey, are the Oblates vicariously liable?

Answer: Yes.

[58] It is conceded by the defence that Saxey was an employee at Christie during the material times, and there is no denial regarding the nature of the employment relationship between Saxey and the Oblates.

[59] As to the current test for vicarious liability, in *Bazley v. Currie* ("Children's Foundation"), [1999] 2 S.C.R. 534, and a companion case, *Jacobi v. Griffiths* ("Boys' and Girls' Club"), [1999] 2 S.C.R. 570, the Supreme Court of Canada set out the law with respect to the imposition of vicarious liability on an employer.

[60] In *Children's Foundation*, supra, McLachlin J. (as she then was), at para. 10, answered the question of whether employers could be held vicariously liable for their employees' sexual assaults on persons within their care, by approving of and summarising the Salmond test:

Both parties agree that the answer to this question is governed by the Salmond test, which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an unauthorized act.

[61] In dealing with the second branch of test, the following approach was put forward by her Ladyship in para. 15:

First, a court should determine whether there are precedents which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.

[62] In considering "broader policy rationales" McLachlin J., in para. 41, set out the following principles to be followed in finding vicarious liability where precedent cases are inconclusive:

Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

- (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
- (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
- (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

- (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
- (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- (d) the extent of power conferred on the employee in relation to the victim;
- (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[emphasis in original]

[63] McLachlin J. provided further guidance, stating at para. 42:

Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify the imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

[emphasis in original]

[64] McLachlin J. also laid out some additional factors in paras. 43-45, as follows:

- a) the employee is permitted or required to be alone with a child for extended periods of time;
- b) the employee is expected to supervise the child in intimate activities like bathing or toileting;
- c) the employment puts the employee in a position of intimacy and power over the child enhancing the risk of the employee feeling that he is able to take advantage of the child and the child submitting without effective complaint; and
- d) time and place may be relevant.

[65] Defence counsel submitted that the "opportunity" cases, as described by Binnie J. in *Boys' and Girls' Club*, supra, do "unambiguously determine on which side of the line between vicarious liability and no liability the case falls". In discussing the opportunity cases, Binnie J. states, at para. 45, as follows:

As McLachlin J. notes at para. 40 of *Children's Foundation*, "any employment can be seen to provide the causation of an employee's tort. Therefore, 'mere opportunity' to commit a tort, in the common 'but-for' understanding of that phrase, does not suffice" to impose no-fault liability. The "janitor" cases, for example, illustrate that the creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the "strong connection" required to attract vicarious liability.

[emphasis in original]

[66] Defence counsel relied heavily upon the decision in *G.(E.D.) v. Hammer* (1998), 53 B.C.L.R. (3d) 89 (S.C.), where the defendant school board was found not to be vicariously liable for the sexual assaults committed by a janitor on a student. In that case, Vickers J. found that the janitor did not have power or authority to discipline a child misbehaving at the school. Relying on the Court of Appeal decision in *Children's Foundation* (1997), 30 B.C.L.R. (3d) 1, Vickers J. held that the janitor had no direct duties involving the students, and that in performing his duties as janitor he was not assigned specific duties to care for and provide support to children and children were not assigned to his care. At para. 52 Vickers J. said:

All that can be said to support a finding of vicarious liability is that Mr. Hammer was employed as a janitor at the school and his duties provided him with the opportunity to commit the wrongful acts. In my view, that is insufficient to impose liability on the Board.

[67] In *Boys' and Girls' Club*, supra, Binnie J. cited with approval the decision of Vickers J., and other "opportunity" cases, stating at para. 51, as follows:

While these cases did not have the benefit of the *Children's Foundation* framework of analysis, they do illustrate the historical reluctance of judges in this country to fix employers with no-fault liability on the basis merely of job-created opportunity even where accompanied (as in the present appeal) by privileged access to the victim. In such cases it may be acknowledged that proximity and regular contact may afford a pool of potential victims. Nevertheless, while each of the enterprises in the above cases foreseeably created risks that were not otherwise present, it was concluded (to put it in terms of the *Children's Foundation* analysis) that there was an insufficiently strong connection between the type of risk created and the actual assault that occurred to warrant imposition of no-fault liability.

[68] *G.(E.D.)*, supra, was appealed: see (2000), 86 B.C.L.R. (3d) 191 (C.A.). The trial judge's finding on vicarious liability was not an issue on the appeal. In reasons handed down March 27, 2001 Prowse J.A. noted that this was not surprising given Binnie J.'s approval of the trial decision.

[69] Counsel for the Oblates submitted that the fact situation in the case at bar was one of "mere opportunity". Counsel argued that Saxey, a baker at Christie, had no special power or authority over the children, and said that while Saxey's position as an adult at Christie lead to respect from the children, this would be no different from the respect a janitor would receive from children at a public school, as was the case in *G.(E.D.)*, supra.

[70] Counsel also submitted that the test is not whether it was "reasonably foreseeable" that the plaintiff might be sexually assaulted while at Christie, or that "but for" Saxey's position at Christie he would not have assaulted the plaintiff, but rather, according to McLachlin J., at para. 42:

...there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.

[emphasis in original]

[71] Defence counsel also referred to the decision in *Boys' and Girls' Club*, supra, where Binnie J. reviewed cases where the employer's enterprise created a risk that went beyond the mere creation of an initial opportunity for the assailant to encounter his victims. Counsel said that in such cases, it was only when a strong connection between the job-creating enterprise and the sexual assault was enhanced by job-created power and intimacy that vicarious liability was found. Counsel reviewed *A.(C.) v. C.(J.W.)*, (1998) 60 B.C.L.R. (3d) 92 (C.A.); *B.(K.L.) v. British Columbia* (1998), 51 B.C.L.R. (3d) 1 (S.C.). Counsel also reviewed *M.B. v. British Columbia*, 2000 BCSC 735, appeal dismissed (2001), 87 B.C.L.R. (3d) 12 (C.A.); and *John Doe v. Bennett* (2000), 190 Nfld. & P.E.I.R. 277 (Nfld. S.C.(T.D.)).

[72] Defence counsel also submitted that other residential school cases decided to date have relied on the enhanced job-created parent-like power and intimacy to find vicarious liability. For example, in *B.(W.R.) v. Plint* (1998), 52 B.C.L.R. (3d) 18 (S.C.), the United Church and Canada were found to be jointly vicariously liable for the assaults committed at an Indian residential school by the dormitory supervisor. Relying on the Court of Appeal decision in *Children's Foundation*, supra, Brenner J. (as he then was) determined that there was a sufficient connection between the duties of the dormitory supervisor and his misconduct, as a result of the power conferred on him by his employment. He stated, at para. 24, as follows:

In the case at bar Plint, as a dormitory supervisor, had the authority of a parent conferred upon him. He was not just a person into whose care children were placed for a relatively small portion of the day. He awoke the children and ensured they were readied to go to school. He met them when they returned from school, supervised their homework and in all respects functioned as their parent at AIRS.

[73] The test from *Children's Foundation*, supra, was also applied in *M.(F.S.) v. Clarke*, [1999] 11 W.W.R. 301 (B.C.S.C.), a case involving sexual assaults by a dormitory supervisor at an Indian residential school. In that case, Dillon J. found that there was a strong connection between the type of risk created by the employment of the dormitory supervisor and the sexual assaults: the supervisor was in a parental position with prolonged and intimate contact with the children in his care; the children were away from their home and parents making them particularly vulnerable; the social architecture of the school ensured that the dormitory supervisor was not viewed just as a parent, but as the most powerful influence in the children's lives; the supervisor was white as were all the staff, making the supervisor even more unassailable; and the supervisor's room was immediately adjacent to the dormitory. At para. 140, Dillon J. said:

There is no doubt that Clarke's duties as dormitory supervisor created an obvious opportunity for abuse within a relationship of absolute dependency for the child and uncurtailed power for Clarke.

[74] Dillon J. found that the precedents set by the *Children's Foundation*, supra, and *Boys' and Girls' Club*, supra, favouring vicarious liability where the employee was in a parent-type relationship, were decisive.

[75] Counsel also cited *V.P. v. Canada (Attorney General) and Starr* (1999), 186 Sask. R. 161 (Sask. Q.B.), and *D.W. v. Canada (Attorney General) and Starr* (1999), 187 Sask. R. 21 (Sask. Q.B.), two decisions involving the same perpetrator at the same Indian residential school. In both cases the trial judges found vicarious liability: in *V.P.*, at para. 107, because, "the discipline power the administrator had over the student residents gave the administrator meaningful power over the children and staff and meaningful parent-like power over the children"; and in *D.W.*, at para. 24, because the perpetrator was the legal guardian of the children with 24-hour-a-day parental authority and control over them.

[76] Counsel for the Oblates submitted that the instant case is one involving the creation of opportunity, without job-created power over the victim or other link between the employment and the sexual assaults. Counsel said that parent-like authority of the employee over the student is the common finding in the cases that leads to the imposition of vicarious liability and that Saxey only received the normal respect expected to be given by children at an educational institution. Counsel submitted that there was nothing parent-like about his relationship with the plaintiff and there was nothing to constitute the "strong connection" required by the risk created by the employer's enterprise and the wrongful act. Counsel said that while Saxey's duties provided an opportunity for him to come into close contact with the plaintiff, his duties as a baker did not put him in a position anywhere close to that of a surrogate or foster parent-like relationship. Thus, counsel argued, the opportunity cases do provide an unambiguous precedent, with the result that there should be no finding of vicarious liability against the Oblates for the sexual assaults committed by Saxey.

[77] I disagree with the defence argument on this issue for several reasons. First, the mere fact that many cases imposing vicarious liability happen to involve "parent-like" fact situations should not be construed as meaning that such situations are a prerequisite for the imposition of vicarious liability. To the contrary, McLachlin J. in *Children's Foundation*, supra, after noting the "parental relationship" and other factors in that case stated, at para. 58:

This is not to suggest that future cases must rise to the same level to impose vicarious liability. Fairness and the need for deterrence in this critical area of human conduct - the care of vulnerable children - suggests that as between the Foundation that created and managed the risk and the innocent victim, the Foundation should bear the loss.

[78] As well, Justices McLachlin and Binnie expressed the view in *Boys' and Girls' Club*, supra, that creation of a parent-type relationship does not constitute a precondition to vicarious liability in child abuse cases. At para. 26 McLachlin J. said, as follows:

Finally, I would reject any suggestion that an employee's job must bear a sufficient similarity to parenting to invoke vicarious liability in child abuse cases. Such an analysis seems to me to focus inordinately on the power exercised by the employee to the exclusion of other factors in the test propounded in *Children's Foundation* and is to be eschewed.

[emphasis in original]

[79] Secondly, the decision in *G.(E.D.)*, supra, arose in a very different factual context than the instant case. It concerned sexual assault by an employee, a janitor at a public school. As Vickers J. notes at para. 16 of his decision, the janitor had no job-created power or authority over the plaintiff. The circumstances which existed at Christie were vastly different by comparison. For example, the defendant Williams described the strict regimen at Christie:

Q Mr. Williams, what was the discipline at the school like?

A Very threatening if you didn't, you would get punished. They were very stern, you had to. There was --

Q Sorry?

A There was no ifs, ands or buts about what you had to do. There was no excuses, you had to do it.

Q When you say you had to do it, what's the it that you have in mind? What sorts of things did you have to do?

A Everything. We had no life of our own. You had to get up when they told you to get up, dress up when you were told to dress up, kneel when you were told to kneel, stand when you were told to stand, we had no life. Everything they told us to do, that's what I mean.

[80] The defendant Williams' recollection of the treatment by both religious and lay staff members was of physical and emotional violence, deprivation, belittling, and intimidation. He described the discipline at Christie as "very threatening" and "very stern". L.B. described discipline at Christie as "very strict, very harsh".

[81] Plaintiff's counsel submitted that fear played a large role in maintaining order and discipline within Christie during the time of the plaintiff's attendance. He said that the link between fear and obedience was clear from the plaintiff's cross-examination, as follows:

Q [E.B.], I understand that you were a fairly obedient child at school, right you listened to your supervisor isn't that correct?

A Yes

Q And when the child care supervisor asked you to do something you would do it isn't that correct?

A Lots of fear, yes.

Q Sorry I didn't hear you?

A. Lots of fear, yes.

[82] With regard to the plaintiff's fear at Christie, Dr. Riar testified, in cross-examination, as follows:

Q Page 3, paragraph 2. The brother who looked after them was very strict. This would be the brother who was looking after the children, right?

A That's right.

Q And he used to strap other children?

A That's right.

Q [E.B.] was very afraid of him and kept his distance from him?

A That's right.

[83] The defendant Williams rejected counsel's suggestion that the First Nation's cultural value of respect for one's elders was no different than the respect for adults taught at Christie. He stated "[t]hey didn't teach you stuff like that in that school. They taught you fear, lots of fear. They got everything they wanted through fear and intimidation. I don't think that's respect".

[84] Most importantly, children at Christie were told to show respect to the adult staff members and do what the staff asked them to do. Such a rule applied to all staff members including Saxey. On examination for discovery, Brother Cavanaugh gave the following important piece of evidence:

Q Were the children told to show respect for adults?

A Yes, I would say so.

Q That would include the adult staff members at Christie?

A That's correct.

Q All of them?

A That's correct.

Q They were instructed to speak respectfully to all adult employees?

A I would say so, yes.

Q They were instructed to listen to staff members when they spoke to the children and obey what they said?

A I would say they -- they would have to respect the adults and do what they were asked to do.

[85] Sister Anita agreed with these answers given by Brother Cavanaugh. She added "I would say when they were assigned a charge they would have to do what the kitchen staff said and in the laundry, they would have to do what the laundry staff said".

[86] Brother Cavanaugh also testified that children who worked in the kitchen took their instructions and directions from the cooks. He agreed that all kitchen staff had the power to instruct the children when they were doing chores in the kitchen.

[87] The plaintiff testified that he and other children at Christie had to do what they were told to do by adult staff members. L.B. testified that he recalled children being told at the beginning of the year, and just about every month, that the children had to listen to the lay staff if they requested children to do something. The defendant Williams testified that the children were expected to listen to and obey staff, including Saxey.

[88] The defendant Williams described how the Oblate disciplinarians made it clear to the children that they were supposed to listen to and obey the lay staff:

Q How as children, did you know that you were supposed to listen to the staff?

A Didn't take long. You get slapped around a couple of times, you're told "you listen to that man, when he tells you something, you learn fast who to listen to.

Q Who is it that told you that?

A It was guys like brother Osborne, Father Sheahan. Brother O'Brien used to tell us the same thing you but he wasn't cruel about it he used to just tell us kindly listen to him and you won't get hurt, you won't get in trouble.

[89] The plaintiff testified about how Brother Blackburn would "threaten to shove a bar of soap in your mouth and wash out your mouth" for speaking against a lay staff member. L.B. recalled that both the religious and the lay staff had "ultimate power in that institution".

- [90] The defendant Williams testified that all staff, including the lay staff, assigned chores to children Christie. He further testified that chores were occasionally assigned "on the spot". His recollection, from the perspective of a child at Christie, was that all of the lay staff had the authority to instruct the children to "do this and do that. And you had to do it." He described some of the chores assigned to children to be "washing pots and pans, cleaning tables, sweeping floors, cleaning out bathrooms, splitting wood. Mopping stairs, hallways and cleaning out the chapel".
- [91] L.B. recalled that lay staff assigned various tasks in the course of taking garbage to the dump, doing laundry, repairing the road, transporting supplies, and cleaning up the schoolyard and beach. The plaintiff identified that lay staff would instruct children to do tasks in the course of their supervision of particular chores relating to garbage detail, laundry chores, kitchen chores related to cleanup, and food preparation.
- [92] Brother Cavanaugh was asked in direct examination whether "children would be asked to do spot chores." He responded "not normally". Plaintiff's counsel argued that whether such spot chores were "normally" assigned was not the relevant point. He said that given the supervisory role of lay staff in assigned chore situations, a child at Christie would reasonably perceive all staff members as having blanket authority, regardless of the particular context. He claimed that such implicit power and authority was an unavoidable corollary of the lay staff's supervisory functions during assigned chores.
- [93] Plaintiff's counsel contended that while Saxey had bakery duties, he was clearly more than just a baker at Christie. He pointed to the Olbates' interrogatory answers which identified Saxey as a "Boat Operator and Baker". Principal Kearney's staff lists for 1959 to 1961 identify Saxey's functions as "bakery and maintenance". A report of the Regional Dietician in 1964 identifies Saxey as being "[f]ull-time at school" and only a "[p]art-time baker". Sister Anita recalled that Saxey was "primarily the baker and the boat driver and maintenance person". The defendant Williams recalled Saxey as "a baker" who sometimes "worked on freight". Counsel submitted that Saxey's general role at Christie was evidenced by the July 1960 letter from Principal Noonan which identifies Saxey as the "main cog around here right now". Counsel said that the evidence discloses no clear demarcation of Saxey's employment duties, powers and responsibilities.
- [94] Counsel also said that due to understaffing at Christie, there could be no rigid delineation of employment duties for any staff member. Duty allocations were entirely oral. If work needed to be done at Christie, everyone, staff and children were expected to contribute. According to the evidence of Sister Anita and Brother Cavanaugh, Christie was not a place where staff were heard to say, "I'm not going to help you with that particular task because it's not a part of my job description".

[95] Counsel also pointed to a photograph of Saxey "burning trash" with a tractor. He said that this was another one of many miscellaneous tasks that comprised Saxey's role at Christie. The plaintiff testified that Saxey used to give rides to the children on the tractor. He was cross-examined, as follows:

Q Now, the rides that he would give is when the children arrived at the dock is that correct?

A No, like he was on garbage detail too, eh, and he would run the garbage down the beach and after dumping the garbage he would give them a ride around the beach.

Q So he would give the children a ride on the tractor?

A Yes.

[96] The plaintiff also testified that Saxey "spent a lot of his time in" the bakery and that sometimes he would see Saxey preparing dough for the bread in the bakery. The plaintiff also recalled seeing children in the bakery at the same time as Saxey. He described how there were stairs coming from the upstairs senior boys' dormitory from which he could see into the bakery. He testified that he recalled seeing children through that window in the bakery "helping Martin bake bread". The plaintiff further testified, as follows:

Q Okay. Exactly what were they doing, what's the visual memory that you have?

A I would see them with the bread pans, that they put the dough in, they were putting the grease in them.

Q Do you [have] any other memories?

A They were rolling the dough, making it into bread size.

Q Anything else?

A And cleaning up after they finished.

Q Do you remember whether Martin Saxey was the only adult that you saw in the bakery on those occasions?

A He's the only one I recall.

[97] Evidence was called that Saxey baked bread at night. However, there is no evidence that Saxey was never in the bakery at other times of the day. The defendant Williams testified that he often saw Saxey in the bakery from the morning until the late afternoon. He recalled that many children worked in the kitchen and bakery, both boys and girls.

[98] Brother Cavanaugh estimated the amount of bread baked at Christie to be 30,000 loaves per year. He testified that there was "a lot of work involved in making the bread". Father Mackey estimated that Saxey would "bake in the realm of 200 loaves a night not every night consistently but depending on need". He agreed that such an amount of baking required "very much" cleanup. Counsel argued that given the magnitude of the daily task of bread

baking, it is inconceivable that children would not be involved in some of that work, as testified to by the defendant Williams and the plaintiff.

- [99] Counsel also argued that the documentary evidence supports the testimony of the plaintiff and the defendant Williams on this point. The 1953 Regional School Inspector's Report states that older girls are "obliged to do chores in the bakery and kitchen". The 1954 Regional School Inspector's Report states that "[s]enior girls receive practical training in the bakery, kitchen, laundry and sewing room". The 1955 Regional School Inspector's Report states "[a]ll senior and intermediate girls assist in the kitchen and bakery". The 1959 Regional School Inspector's Report states "[t]he senior girls receive good experience as a result of their chore duties in the kitchen and bakery". There is a photograph from 1960 showing several girls at Christie preparing loaves of bread dough. The photo is titled "Bakery". A 1964 report states that children's chores included "slicing the bread".
- [100] Plaintiff's counsel submitted that the Oblates called evidence for the apparent purpose of drawing a strict distinction between the kitchen and the bakery. However, counsel submitted that it was unlikely that the people at Christie between 1957 and 1962 recognized such a distinction. For example, Sister Mary Laura testified that the "Bakery" photo was actually taken in the adjacent kitchen. After baking, the bread was sliced and stored in the adjacent kitchen. The bakery was accessible only by passing through the kitchen. Counsel submitted that, in reality, the bakery was simply the part of the kitchen where bread was baked.
- [101] The testimony of Brother Cavanaugh was only that children did not work in the bakery; the bakery being the small room "just outside of the kitchen sort of adjacent to the kitchen". In direct examination, the only reason he could think of for this practice was because of the danger posed by the dough-making machine and the ovens. In cross-examination he added that he believed that "Martin would prefer to bake by himself." Brother Cavanaugh did not testify that children performed no bakery-related chores in the adjacent kitchen. The documentary evidence clearly indicates they did.
- [102] Father Mackey's testimony was to the same effect. Counsel said that he focused on the narrow and irrelevant issue of whether children worked in the adjacent room "where the oven was":

Q So would there ever be any children in the bakery with him?

A If you mean in the bakery where the oven was your lordship never. No, no, Martin would not allow anybody else in there with him. It was his area and he was in charge.

..

Q I don't want you to guess but do you know if the children had any role in such clean up?

A This is absolutely not a guess your lordship. As I said earlier, Martin was very jealous of his bakery and would not allow any of the children to do any of the clean-up in the bakery.

- [103] Counsel argued that as the staff member responsible for bread baking, Saxey would certainly have had implicit, and probably had explicit authority over the children performing kitchen and bakery-related chores, such as clean-up, bread slicing and dough preparation. He said that whether those children were in the bakery, or a few feet to the north in the adjacent kitchen was immaterial.
- [104] Father Mackey's categorical assertion that Saxey permitted "absolutely no one in the bakery" is contradicted by documents recording that Ms. Paul, the cook, lost a part of her finger in the big bread mixer in December 1963. Brother Cavanaugh testified that this particular machine was located in the bakery. Counsel submitted that, indeed, this accident, which preceded the arrival of both Brother Cavanaugh and Father Mackey, may have prompted a change in practice concerning access to the bakery room after 1964.
- [105] Counsel submitted that this much was clear from the evidence of Father Mackey: Saxey was "in charge" of the bakery and had powers second only to the principal in that regard. The bakery was a room adjacent to the kitchen and accessible only through the kitchen. He said that there was abundant evidence that the kitchen was a part of Christie where many children worked under the direct authority and supervision of lay staff members. Father Mackey testified that Saxey exercised his authority to "not allow anybody else" in the bakery and to "not allow any of the children to do any of the clean-up in the bakery". Counsel also contended that the fact that Saxey had such power and authority over the children by virtue of his employment was highly relevant, and the fact that Saxey chose to exercise his power and authority so as to exclude children from the bakery was beside the point.
- [106] Counsel also argued that the fact that the plaintiff never helped Saxey in the bakery did not mean that the plaintiff was shielded from the power and authority that Saxey held by virtue of his position and status within Christie's institutional environment. He said that children in this setting would perceive Saxey as having authority regardless of whether they encountered him in the bakery, in the kitchen, or elsewhere at Christie.
- [107] Among the specifically enumerated subsidiary factors to be considered in determining the sufficiency of the connection between the employer's creation or enhancement of the risk of sexual assault is "the opportunity that the enterprise afforded the employee to abuse his or her power". See *Children's Foundation*, supra, at para. 41. McLachlin J. commented further on the factor of opportunity, at para. 40:

Of course, opportunity to commit a tort can be "mere" or significant. Consequently, the emphasis must be on the strength of the causal link between the opportunity and the wrongful act, and not blanket catch-phases. When the opportunity is nothing more than a but-for predicate, it provides no anchor for liability. When it plays a more specific role - for example, as permitting a peculiarly custody-based tort like embezzlement or child abuse - the opportunity provided by the employment situation becomes much more salient.

- [108] On this point, plaintiff's counsel noted that Saxey lived in the upper floor of a building situated on that portion of the grounds of Christie to which the junior and senior boys were given free access. Directly outside his window were the swings where children played. He had unrestricted access to everywhere where children might be found playing. The plaintiff testified that during recess the children would routinely play on the swing or in the yard close to where Saxey lived.
- [109] The defendant Williams recalled that Saxey "lived in amongst us".
- [110] The children and the lay staff at Christie referred to each other by their first names. There was no rule at Christie prohibiting the adult staff members from forming casual acquaintances with the children. Staff members did in fact play with the children and were allowed normal physical contact in the course of such play. Counsel said that whether or not Saxey elected to engage in such activity with the children was immaterial.
- [111] The plaintiff testified that during longer periods of free time, children played at different locations such as in the gym, the beach, on the rocks, or in the trees. Brother Cavanaugh testified that children were allowed outside in the evening until it was close to bedtime.
- [112] When asked whether a supervisor was present during recess, the defendant Williams testified "No. They were usually busy doing whatever they had to do". The plaintiff recalled that the children would often climb trees in the back wooded area and that there "never used to be an adult there, there just used to be boys". During free time, the plaintiff testified that adults could be found "wandering around". He agreed, in cross-examination, that the supervisors were seldom immediately present but were "around":
- Q What you're saying is that they weren't standing right there but they were around is that correct?
- A Yes.
- [113] According to Brother Cavanaugh, the reality of the supervisory structure at Christie was that "you'd be involved with part of the group in an activity, or whatever, and the other group was free to -- to roam around".
- [114] The plaintiff recalled that there were organised sports on some days, but not every day. L.B. did not recall organised activities being a common or every-day event. The plaintiff recalled some improvement in terms of sports during his final year at Christie, with the arrival of Father Mackey. Counsel submitted that it is likely that organised sports were much less common prior to the tenure of Father Mackey as principal, and that the higher federal grants in the mid-1960s may have allowed for more organised sporting activities as well.
- [115] Organised events, such as volleyball or basketball, involved a portion of the students, while the remainder were free to participate in other activities at other locations (to "roam around" as Brother Cavanaugh stated). The defendant Williams testified, as follows:

Q What did those children who did not have chores do after supper on a week day?

A Go to the gym, play volley ball, basketball, marbles.

Q Were there children at different locations at the same time?

A Like what do you mean?

Q Some children in the gym, some children on the beach, some children in another building?

A Yeah.

[116] Counsel argued that organised activity ensured that those students who were not directly involved were unsupervised, and that any given organised activity would have consumed the attention of the limited staff and confined them to a particular location. He said that in such circumstances, organised activity would have actually enhanced the opportunity for abuse.

[117] In light of the evidence outlined above, I agree with plaintiff's counsel that G.(E.D.), supra, and the other cases relied upon by defence counsel are of limited value to assessing the plaintiff's claim against the Oblates. I am persuaded by plaintiff's counsel's argument that the cases relied upon by the defence do not "unambiguously determine on which side of the line between vicarious liability and no liability the case falls". Therefore, I find that this issue must be determined by the application of the policy based approach as prescribed in Children's Foundation, supra.

[118] In addressing this approach, plaintiff's counsel contended that, in summary, Saxey's living quarters was located in the midst of an overcrowded and understaffed playground populated by especially vulnerable children; and that the closed boundaries of Christie, its custodial character, its isolation, and the high ratio of students to adult staff members materially enhanced the risk of abuse. Counsel also submitted that while Saxey's approach to the plaintiff was one of superficial enticement with candy and other sweets, it was clear from a close reading of the plaintiff's evidence that Saxey used authority to exert power over the plaintiff:

Q And did you know after a couple of years of this pattern of abuse that when Martin Saxey came to you and started talking about candy, did you know what was really going on?

A I used to -- I used to try and avoid him and stay away from him. I used to want to run and hide every time I seen him I would be scared to be close to him. I never wanted to see him.

Q Did you go with him because you wanted the candy?

A No it's more like being threatened.

Q Did you feel threatened?

A Yeah.

[119] Plaintiff's counsel argued that while the plaintiff did not say that he was threatened, he said it was "like being" threatened and that the only thing that is "like" being threatened is the experience of being told to do something by a person in authority. Counsel also argued that job created authority need not be the sole source of authority facilitating Saxey's sexual assaults upon the plaintiff. He said it was sufficient that the authority conferred upon him contributed to his ability to perpetrate the assaults, and thus, materially enhanced the risks of the assaults occurring.

[120] On the other hand, defence counsel submitted that of the factors put forward by McLachlin J. in *Children's Foundation*, supra, few of them applied to the facts in the case at bar. Counsel also referred to the following point made by McLachlin J. at para. 46 of the case:

The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability - fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[121] Defence counsel contended that Saxey's employment as a baker at Christie did not give him "special opportunities" and, in particular, did not give him a power or dependency relationship with the children at Christie. Counsel submitted that if sexual abuse perpetrated by a baker at a residential school can give rise to vicarious liability, it is difficult to see how this could be based on anything other than the mere fact that it was a residential school. Counsel also contended that such wide-ranging vicarious liability was not what was foreseen by the Supreme Court of Canada decisions. With respect, I disagree with the defence position and prefer plaintiff's counsel's analysis and argument on this issue.

[122] Plaintiff's counsel submitted that the key to the determination of this issue is whether the operational characteristics of Christie, as an enterprise, created and materially enhanced the risk of the sexual assaults perpetrated by Saxey upon the plaintiff. He carefully and thoroughly reviewed the evidence of the operational characteristics of Christie under several headings, which he summarised, in argument, as follows:

- a) The children were separated from their families and held in custody all day and every day. Brothers were separated from sisters; older siblings were separated from younger siblings. Christie was geographically isolated, enhancing its closed institutional character and exacerbating the severance of relations with parents and extended family.
- b) Christie was chronically overcrowded and understaffed. The number of children held in custody exceeded the capacity of the supervisory staff to effectively supervise.

- c) Adult employees of Christie, including Saxey, lived within the closed boundaries of the school, facilitating unrestricted and unsupervised access to the children for prolonged periods of time. There was no effective mechanism to prevent sexually predatory behaviour. Employees of Christie, including Saxey, were permitted to form casual acquaintances with the children.
- d) The children were conditioned under a regime of education, religion and discipline to demonstrate respect and obedience toward all of the adult employees of Christie, including Saxey. The institutional character of Christie was such that Saxey was explicitly or implicitly clothed with power and authority over the resident children.

[123] Plaintiff's counsel referred to the testimony of Dr. Janke, an expert in the theory and practice of sexual offender treatment, who testified that there are identifiable environmental factors that enhance the likelihood of sexual offences occurring. He said, in cross-examination:

Q I notice that you have some involvement in the treatment of sexual offenders?

A That's correct. I have had extensive involvement in the treatment of sexual offenders.

Q And I'm just looking at your c.v. that can be found in Exhibit 10, tab 9 A.

A Yes.

Q And as you look through the c.v. for things relating to the treatment of sexual offenders the first one I see is under the heading of committees, fourth one down, working group sexual offenders treatment programs. I wonder if perhaps you can elaborate a little bit on what that is?

A The forensic psychiatry services at that time wanted to have standardized or to set standards for the treatment of sexual offenders. In both -- because at that time we were with the adult services as well, it would be it would apply to both adult and youth services. Because of my at that time very intense involvement with the sexual offender treatment program of youth forensic psychiatric services, I was a member of that committee. We had at that time a well established sexual offender treatment program that had some written protocols but certainly had a very clear understanding of what was expected. And so that was part of my contribution, was to help clarify that and in fact provide it to the adult services at that time.

Q Okay. Doctor I'm not going to go through all of these items relating to your qualifications in sexual offender treatment programs. But I take it from looking at the c.v. it's an area in which you feel amply qualified to give evidence?

A Yes.

Q And part of your professional work involves day-to-day treatment of sexual offenders?

A Less so now although I do have some ongoing -- I do have some patients in my private practice who have had a past history of sexual offending. I now am involved in more the assessment role in the in-patient assessment unit but in my participation in other committees I do have a role in ongoing treatment issues and I have consulted.

Q Does any of your learning or any of your professional work in sexual offender treatment programs entail teaching sex offenders how to minimize the risk of re-offending?

A That would be the primary thrust of the treatment.

Q And is there a body of scientific knowledge that you possess that outlines specific types of social or domestic situations that recovering sex offenders (ought) to avoid?

A Yes.

Q And are there identifiable environmental factors meaning social and domestic that enhance the likelihood of sexual offences occurring?

A Yes.

Q What are those?

A That would be the sex offender not only having access to potential victims but being put in a position of power and authority over the individuals and having the unsupervised opportunities to be with the victims.

[124] Plaintiff's counsel then presented Dr. Janke with the following list of Christie's operational characteristics, established by the evidence:

1. staff and students lived at Christie 24 hours per day, 7 days per week;
2. Christie was accessible only by boat, only in good weather, and with no docking facilities;
3. children were separated from their parents for 3 to 9 month periods, year after year;
4. older siblings were separated from younger siblings;
5. sisters were separated from brothers;
6. Christie was staffed by 16 to 20 adult employees and populated by 145 to 158 children;
7. Christie had only four disciplinarians/supervisors (approximately 35 to 40 children each);
8. approximately 80% of the children were aged 12 years or younger;
9. discipline was enforced by fear of corporal punishment;
10. staff were entitled to form casual acquaintances with the children;
11. children performed domestic chores alongside domestic staff such as cooks or laundry staff; and

[12] children were told that they had to respect the adult staff and do what they were asked to do by the adult staff.

[125] Dr. Janke then testified, as follows:

Q Doctor, looking at those factors collectively would you say that they materially enhance the possibility of sexual abuse?

A As outlined in the assumptions, yes, I would say that that was an environment in which sexual abuse could easily occur.

[126] Keeping in mind the evidence of the link between fear and obedience at Christie, and that children were told to show respect to the adult staff members and do what the staff asked them to do, Dr. Janke gave the following important evidence about factors 9-12, which stood out in his mind as being particularly risky. On factor 9, he testified, as follows:

Q And are there any of those factors individually that stand out in your mind as particularly risky?

A Point nine, discipline enforced by fear of corporal punishment is a powerful motivator, would give a potential abuser an easy tool to intimidate a potential victim...

[127] In re-examination, Dr. Janke testified:

Q Okay. And number nine, the discipline enforced by way of corporal punishment, if I said that this would be normally done only by a child care supervisor and not any of the other adults, would that make a difference?

A Only slightly so, because I would expect a child in that setting to generalize that fear to all the adults that were dealing with him.

[128] Regarding factors 10, 11 and 12, Dr. Janke testified:

Q And are there any of those factors individually that stand out in your mind as particularly risky?

A ...The staff entitled to [form] casual acquaintances with children is in one sense a two-edged sword, obviously it allows someone to befriend a potential victim and no one to think there's anything unusual about it, but it also potentially allows the child or victim to have someone they felt they could confide in. So that's a two-way street.

Children perform, number 11, again it allows children to be in relatively unsupervised situations with people who would not necessarily be expected to meet the same standards as teaching staff.

Number 12 is one that is ubiquitous to adult child offender situations, where there's -- in almost all circumstances the child had a sense they should respect and obey adults.

[129] In re-examination, Dr. Janke testified:

Q But if the alleged abuser was, as in Mr. Saxey's case and I'll put these assumptions to you, doctor, that he was a baker at the school, he had no positional authority over the children, Mr. Saxey had children and grandchildren at the school, [E.B.] had numerous family members at the school, and there were no children working in the bakery with Mr. Saxey, what - how would this change?

A The fact that there were no children working in the bakery would eliminate even a perceived position of authority, it would remain my opinion that children in that setting would perceive adults as having authority. The presence of family members of [E.B.] there clearly reduces the isolation and gives him the opportunity to disclose to someone. It doesn't mean the abuse wouldn't happen, but it certainly reduces it. The fact that Mr. Saxey had other relatives there would play a role only in, well it would play two possible roles, one, reducing his opportunity to be unsupervised with a child from the school and, two, he would have access to other potential victims in a much more intimate setting where he would have more power and control.

[130] With respect to Dr. Janke's evidence that the presence of family members of the plaintiff clearly reduced the isolation and gave the plaintiff the opportunity to disclose to someone, it overlooks, as plaintiff's counsel pointed out in his submission, three of the institutional features of Christie: that children were separated from their parents for three to nine month periods, year after year; that older siblings were separated from younger siblings; and, sisters separated from brothers. As plaintiff's counsel also pointed out, within the highly regimented environment of Christie, the plaintiff's relatives did not treat him like a relative. The plaintiff testified on this point, as follows:

Q Did they treat you like a grandchild?

A Back in our homeland they did. There was a big difference from being residential and back at our home because there were, I don't know, more free to communicate with them.

Q Where was it more free?

A At home.

[131] I conclude that the evidence regarding the operational characteristics of Christie, as well as Dr. Janke's opinion based upon that evidence, satisfies the principles to be followed in finding vicarious liability as set out by McLachlin J. in *Children's Foundation*, supra. In my opinion, the evidence establishes "a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom". This being so, I find the Oblates vicariously liable to the plaintiff for the injuries he sustained as a result of the sexual assaults upon him by Saxey.

Issue 2 (ii)

[132] Having concluded that the Oblates are vicariously liable to the plaintiff, I do not consider it necessary for me to go on and decide whether the Oblates are liable in negligence.

Issue 2 (iii)

What specific injuries has the plaintiff suffered as a result of the sexual assaults?

Answer: Interpersonal difficulties, anxiety, symptoms of PTSD, depression and alcohol abuse.

The Parties' Positions

- [133] Counsel for the plaintiff submitted that the plaintiff suffers, or has suffered, from a number of psychological problems attributable to the sexual assaults. These include: bedwetting; interpersonal difficulties; sex-related difficulties; anxiety; symptoms of PTSD, including flashbacks, nightmares and intrusive thoughts; depression, including suicidal thoughts, loss of appetite and lack of sleep; and alcohol abuse. Counsel also submitted that the sexual assaults effected the plaintiff's level of academic achievement and contributed to his alcohol abuse, which in turn effected his earning capacity.
- [134] With the exception of sex-related difficulties, counsel for the Oblates did not dispute that the plaintiff suffers, or has suffered from these psychological injuries. Counsel for the Oblates did submit, however, that the Oblates are not liable for these injuries. Instead, counsel pointed to a myriad of traumatic life circumstances suffered by the plaintiff since his attendance at Christie. In addition, counsel emphasised a number of factors that put the plaintiff at significant risk for developing an alcohol addiction in any event.

The Plaintiff's Evidence

- [135] The plaintiff testified extensively about the effects of the sexual assaults while he was still a student at Christie. He testified that he felt scared and threatened by Saxey. He felt violated and ashamed. He began his life-long problem with anxiety at this time. He was too frightened to tell his siblings or other relatives at Christie, or any of the staff members about the sexual assaults.
- [136] The plaintiff testified that as a child the sexual assaults caused him to withdraw from the other students. He also testified that the abuse caused sleeplessness and nightmares. He was frightened at night and would put his head under his pillow and cry himself to sleep. He began to disregard his personal hygiene. He lost his appetite. He had difficulty concentrating in school and his grades suffered as a result. He testified that he was physically punished, though did not give specifics, and was verbally chastised by his teachers as a result of his poor grades.
- [137] The plaintiff also gave evidence concerning his bedwetting problem while at Christie. The plaintiff testified that he was ridiculed by the other children as a result of his bedwetting, and that he tried to cover it up by staying in bed after the other boys left the dormitory so he did not have to change his sheets in their presence. The teasing was exacerbated by the fact that the plaintiff had begun to disregard his personal hygiene, and sometimes smelled of urine as a result. He was frightened to tell anyone about his bedwetting and felt ashamed.

He also testified, in cross-examination, that he was strapped for wetting the bed.

[138] The plaintiff testified about traumatic events at Christie apart from the sexual assaults, partly set out above. In particular, the plaintiff testified that often the teaching staff was quite strict and would, for example, hit the children with a ruler if their nails did not pass morning inspection. He also testified about one experience where a nun required him to stand in the corner of his classroom for the duration of the class. He had wet the bed and not bathed, and the nun chastised him for being "stinky". He testified that his classmates knew why he was being punished.

[139] The plaintiff left Christie in June of 1965. In September he attended grade nine at a school in Mission, British Columbia. He had trouble concentrating, his grades were poor and he did not enjoy school. He left school in December 1965 and did not return.

[140] After leaving school in 1965, the plaintiff's life can largely be described as tumultuous. His unfortunate work history is plagued by alcohol-related problems, frequent periods of unemployment, and job-related injuries. His personal life was also tumultuous, and he was convicted of several criminal offences.

[141] After leaving school in 1965, the plaintiff obtained a job at the Zeballos mine. He testified that for the first time, alcohol started to become a problem. He testified that his early use of alcohol was intended to alleviate the pain stemming from his sexual assaults. In chief, the plaintiff explained his early use of alcohol as follows:

Q Why were you drinking?

A Because of the sexual abuse that happened and because I made the money and I was able to afford the booze, and I thought the booze would drown out the thoughts of that sexual abuse that happened to me when I was younger.

Approximately six months after starting his employment, he was dismissed because of alcohol abuse.

[142] The plaintiff began work with Northern Hemlock Logging ("Northern Hemlock") in Zeballos in April 1966. He was dismissed from this position approximately one year later, in 1967, because he was missing days due to drinking, or attending work while intoxicated or while hung over. He testified that during this time he was having difficulty coping with memories of the abuse, and suffering from nightmares.

[143] After being dismissed from Northern Hemlock, the plaintiff was convicted of the first of several criminal offences, most of them alcohol related. He was sentenced to 30 days imprisonment for the theft of a bottle of wine. The plaintiff described the circumstances of the offence as follows:

Q Can you elaborate on how the offence occurred and what your circumstances were at the time?

A I was drinking prior to that offence and ran out of money, ran out of booze, and I wanted to drink more, and I knew where the bootlegger was hiding and I went to his place and that's when I got that wine. And the bottle of wine, I stuffed it in my coat and I ran.

[144] The plaintiff served 20 days in Oakalla prison, and returned to Zeballos. He was unemployed for approximately three months, before returning to work with Northern Hemlock for approximately one and a half to two months in 1967. He was again terminated in late 1967.

[145] After being terminated from Northern Hemlock, the plaintiff testified that he was once again incarcerated for an alcohol-related offence. He described the circumstances, in chief, as follows:

Q Can you explain the circumstances behind that charge?

A I stole a boat at the time.

Q Can you give us more detail then that?

A I was living in Queens Cove with my sister and brother-in-law, and we went in into Zeballos and I started drinking in Zeballos, and my brother-in-law and my sister left me behind, they went back out to Queens Cove, and I was drunk, and I wanted to go back with them, but they had already taken off, so I went down to the boat, where the boats were, and I stole a boat from there to get out -- back out to Queens Cove, and I was pretty intoxicated at the time, I don't know, but I did manage to get out to Queens Cove with that boat.

The plaintiff was sentenced to six months, and served four months in secured custody. He was released in early 1968.

[146] The plaintiff commenced work in April of 1968 with Butler Bros. Logging ("Butler Bros.") in Grant Bay. In chief, he described the period between being released from prison and commencing work with Butler Bros. as follows:

Q Does that take us to April 1968 or were there other events in your life?

A I was drinking a lot in that period of time, and I was out of work, I didn't go to work, and I was going between Queens Cove and Zeballos, between those two.

Q Why were you not working?

A Well, alcohol was getting the best of me.

Q How were you coping with the abuse at that time?

A That was -- it was difficult, because you know, those nightmares hadn't left me, and when those nightmares came, bring on the sexual abuse that happened to me and I couldn't -- I couldn't cope with it, and I thought alcohol would take that away, but it seemed I drank heavier and heavier. Instead of drinking beer I was drinking whiskey and wine and I was mixing them because I wanted to so much get rid of that nightmare that was happening, and thinking about that sexual abuse. I didn't know how else to deal with it.

Q Were you drinking every day at this time?

A Pretty much, yeah (drinking).

[147] The plaintiff worked for Butler Bros. from April 18 to 24, 1968, and from June 20 to July 24, 1968. He testified that he could not remember why he ceased working from April 24 to June 20, 1968. He testified that he ceased working on July 24 because "I was drinking and I got fired".

[148] The evidence from Butler Bros. indicates that the plaintiff was a satisfactory worker, but that he "leaves his job for no reason". It was plaintiff's counsel's submission, which I accept, that the use of the word "leaves" rather than "left", combined with the plaintiff's testimony supports the inference that the plaintiff failed to attend work due to his alcohol problem on more than one occasion, likely accounting for the period of interrupted employment from April 24 to June 20, 1968.

[149] The plaintiff was unemployed from July 1968 to October 16, 1968, when he was hired by MacMillan Bloedel in Port Alberni. The plaintiff was terminated, according to MacMillan Bloedel records, "for cause" because he was "A.W.O.L. - Unable to Locate" on November 8, 1968. The plaintiff described the circumstances of his termination, as follows:

Q [E.B.], tab 97 Exhibit 4, MacMillan Bloedel records, say that your employment with MacMillan Bloedel was terminated November 8th, 1968, and the notation in those records is A W O L - unable to locate. Does that assist you in remembering how your employment with MacMillan Bloedel came to an end?

A Yeah. I started drinking, and I had missed three days and I got scared to report back to work, and so I left Port Alberni completely and I went back to Zeballos, and I never notified the company where I was.

[150] After leaving MacMillan Bloedel, the plaintiff testified that he lived between Zeballos and Queens Cove and was unemployed for the balance of 1968. He returned to work for Northern Hemlock in Zeballos in January 1969 and worked steadily until mid-May 1969. He testified that during this period he continued to suffer from nightmares, and continued to drink.

[151] On May 14, 1969 the plaintiff was involved in a serious accident during the course of his employment. He was struck on the head by a falling rock during a landslide, and suffered from a linear skull fracture, as well as other broken bones and lacerations. Following the accident, he suffered from arthritis in his neck and lower back, causing him chronic pain, which has increased in intensity over the years. The plaintiff also testified that he had headaches and memory problems after the accident.

[152] The plaintiff continued drinking after the accident. He testified, in chief, as follows:

Q ...So can you remember what you did between August -- the end of August, 1969 and January 1970?

A Well, I started drinking again, even though the doctor advised me not to drink alcohol, because of that serious head injury I had. But I know I went back drinking alcohol, and I was drinking hard liquor and having had gone through that experience, that seemed to -- it made it worse, because that sexual abuse that had happened to me, it had a really horrifying effect, because those nightmares, they were there, and they seemed to -- seemed to like they were coming back more often, and they were like just about every night they were coming back. So I was drinking and I drank a lot, and I didn't know -- I didn't know what to do to make myself -- I didn't know how to handle it. And I got -- I got in trouble because of my drinking.

[153] The plaintiff returned to Northern Hemlock on July 12, 1969, less than two months after the accident. He was terminated after approximately three months. When asked to describe why he was terminated, the plaintiff replied, in chief:

Q Tell us the story about how you lost your job in October 1969?

A Well, I was drinking pretty heavy, and I was missing days there too, and I used to always be scared to see that, see the supervisor, fear of what he would be saying to me and fear of him -- hearing him say, you know, you're fired, you know. And I couldn't -- I couldn't bring myself do that, so I drank and drank, and my drinking got really heavy, and those nightmares, the sexual abuse, the accident and all that, that was a lot to be carrying around on my shoulders. It was a heavy burden, I had nobody to turn to, I was scared to get help.

Q [E.B.], what actually happened on the day you got fired, can you recall the events?

A The boss came to me and told me I was fired, told me to pick up my cheque.

Q Did he give you a reason?

A Yeah. He told me that I was drinking too much and I was missing days.

[154] The plaintiff testified that after being terminated in October 1969 he continued to drink heavily. He was then incarcerated on January 6, 1970 for breaking and entering a bar. He testified that he was intoxicated during the offence, and that he committed the offence to steal more alcohol.

[155] After being released in May 1971, the plaintiff began work with Frank Beban Logging, near Queens Cove. He worked for approximately two months, before being terminated for missing work due to alcohol abuse.

[156] The plaintiff met his future wife, S.B., in the fall of 1971. He began living with her in Kyuquot, British Columbia.

[157] The plaintiff began work with P.A.L. Logging in the spring of 1972, but was terminated six weeks later after beginning to drink heavily when S.B. left for Vancouver. He testified, in chief, as follows:

Q How did that job come to an end?

A [S.B.], my wife, took off and she came to Vancouver, and I was left alone and I was upset, the relationship broken up and I drank after, I didn't go back to work with Sharbo, I left and went back drinking. I thought things were going to be working out because I had a job, that my relationship would be better. When I went back drinking, I drank heavy, and I was having nightmares were coming back, I was being upset, the sexual abuse and what happened were having an impact on me.

[158] The plaintiff then moved back to Zeballos and was hired on with Tahsis Company. S.B. returned from Vancouver to Zeballos, and she and the plaintiff began to drink heavily. As a consequence, the plaintiff lost his job, which he had occupied for four to six weeks, due to missed days.

[159] However, when the couple moved back to Kyuquot in the fall of 1972, the plaintiff began a stable, 14 month period of employment with Kyuquot Freight. The plaintiff described his relationship with his employer as very supportive. He testified that during this period his relationship with S.B. was stable, that the nightmares he had been suffering from subsided and that having a "good friend" in his boss helped him cope with his problems. The plaintiff testified that during his employment with Kyuquot Freight, his alcohol abuse declined. He continued to drink, but described it, in chief, as "social drinking".

[160] Unfortunately, this period of stability was brought to an end by the death of the plaintiff's mother due to alcohol related causes in 1973. While the plaintiff continued to work at Kyuquot Freight for several months after his mother's death, he subsequently quit and returned to Zeballos. He testified that everything that happened in his life up to that point, including the loss of his mother, the 1969 accident and the sexual abuse, "was piling up so much". The plaintiff fell back into a period of alcohol abuse, culminating with a sentence of two months imprisonment on November 3, 1973 for stealing an ambulance in order to get home after a night of drinking.

[161] Following his incarceration, the plaintiff continued his downward spiral of alcohol abuse. He testified that he was employed at several positions in various places between early 1974 and 1976, all of which he was terminated from due to his alcohol abuse.

[162] During this period his personal life was equally as tumultuous. The plaintiff testified that when he and S.B. lived together in Gold River in 1974, they were having a relationship "break down" due to communication problems concerning sexuality and other issues. The plaintiff testified:

Q Do you have any memory of as to how you were coping with the abuse during the time you were living in Gold River in that apartment?

A No, I -- it became difficult because our relationship, we were having a break down in our relationship and I used to think that because [S.B.] wasn't communicating with me and letting me know -- or if we couldn't talk about our sexuality and how it was in our relationship. It's so difficult. Even for me to approach [S.B.] on the subject, I was scared and I felt like I was at fault because I felt like, you know, it was my fault for not satisfying her.

[163] Despite these problems, the plaintiff and S.B. married on February 22, 1976. He was unemployed and drinking heavily at the time. Shortly after the marriage the plaintiff and S.B. moved back to Zeballos, and he was rehired by Tahsis Company. The couple had their first child in September 1976. Shortly after their child was born, the plaintiff was terminated from his employment with Tahsis Company due to alcohol abuse. The plaintiff and his family subsequently went on social assistance, and he remained unemployed for all of 1977. Sometime that year, the plaintiff separated from S.B. and began living on the streets in Nanaimo. While on the streets he was attacked and struck on the head with a baseball bat.

[164] On December 28, 1977 the plaintiff was remanded into custody on a charge of the sexual interference with the nine year old daughter of S.B.'s first marriage. As a term of his release, he attended an alcohol treatment program on the Christie grounds. The plaintiff testified that his return to Christie was "horrifying", and that he brought alcohol with him to the treatment centre to "forget all the sexual abuse, the abuse that happened in that school". His second child was born in April of 1978 while he was at the treatment program. The program was not successful, and he continued to drink after his release.

[165] The plaintiff was sentenced, on appeal, to two years less-a-day, and incarcerated from November 24, 1978 to April 1980. During this time he initially continued to work with Frank Beban Logging, a job he had obtained in Spring 1978, though was returned to Snowdon correctional facility to serve the remainder of his sentence in closed custody after being terminated for drinking while at the logging camp. The plaintiff testified, as follows:

Q What was your emotional health like at the time that you were released from prison?

A It was unstable. It was hard to cope with. When I was getting out, when I was getting released, I was talking about going, getting drunk and I was saying well, probably -- you know, I'll probably end up in the drunk tank. And that didn't happen. I had to live with what I was carrying. It was hard to cope with, hard to talk about. I had nobody to confide with and I wanted to but I was too scared to touch on the subject, my life and all the happenings that have happened.

- [166] Following his release from prison, the plaintiff remained unemployed. Between his release and the first half of 1983, he was incarcerated twice. He testified that during this period he was drinking heavily.
- [167] On May 30, 1983 the plaintiff testified that he was drinking with some strangers in Victoria who beat him unconscious and stole his money. He suffered from multiple soft tissue injuries to the face and scalp, as well as a fractured rib.
- [168] The plaintiff testified that the effect of the beating was "like snapping me awake. Like when you put on a light bulb". He continued to drink for approximately three or four months before entering a six-week alcohol treatment program in Courtenay. From that time, however, he has largely maintained sobriety.
- [169] It is clear, on the plaintiff's testimony, that there is a long history of alcohol abuse in his family. Both the plaintiff's mother and father died of alcohol-related causes. He testified that of his eight siblings who survived to adulthood, three sisters and one brother have also died of alcohol-related causes. His remaining sister and three brothers are alcohol abusers, though only one was not sober at the time of his testimony.
- [170] The plaintiff testified that after attending the treatment program, he started to make efforts to confront his problems related to the sexual abuse. He began taking upgrading courses, though he remained unemployed throughout 1984 and into 1985.
- [171] The plaintiff's third child was born in February of 1985. He testified that at the time of her birth, his relationship with S.B. "had split up, for a short period of time." However, sometime between February and June of 1985, the plaintiff and S.B. reconciled, and he again lived with her and the three children.
- [172] The plaintiff began a full-time welder program in June 1985. He completed the program on November 9, 1987.
- [173] Upon finishing the program, the plaintiff did not return to the work force, but took several life skills courses, as well as a course in mathematics, throughout the late 1987 to mid-1989 period.

[174] The plaintiff described the state of his marriage in 1988 as follows:

Q Were you with your wife [S.B.] when you were taking these courses?

A Yes, I was.

Q What was your relationship with her like at this time?

A Even though we lived together, we weren't -- we weren't really friends. It's like, you know, she lived in one room and I lived in another room sort of thing. There was very little communication...

[175] In June of 1989, the plaintiff was elected to a two-year term as a Band councillor in Campbell River. He also began work as a taxi driver in Campbell River on a full-time basis, attending to his Band responsibilities in his spare time.

[176] The plaintiff testified about his relationship with S.B. at this time. He testified, "we were living together but there was hardly any communication between us". The plaintiff was cross-examined, as follows:

Q There were also problems with -- between you and [S.B] and you've set this out in this letter where [S.B] would tell people that you and she were not having any intimate relationship and that was not true; is that correct she would tell people that she was not sleeping with you?

A Yes.

Q And that was not true?

A That was true.

Q But when she was saying it that was not true, you two were living together; is that correct?

A We lived together but didn't sleep together.

[177] Following the end of his Band councillor term in 1991, the plaintiff quit his job and returned to Zeballos with S.B. and his children. He described the motivation for his decision as follows:

Q Why were you not working?

A I was trying to spend time to piece my life together, and I was hoping to have a good family life with my wife and children on a reserve. Trying to piece my life together was a tough struggle...

[178] However, the plaintiff testified that his oldest daughter subsequently ran away from home to live in Vancouver. Shortly thereafter, S.B. also left for Vancouver with the other children. The plaintiff testified that he blamed himself for his separation from his wife. He also testified that during this period the sexual abuse effected his social life in the sense that it made him "anti-social", and that he did not like being around other people.

[179] As to his state of mind during this period, the plaintiff testified that he was very depressed, and that he felt powerless and hopeless. The plaintiff testified that during his time in Zeballos the depression that has plagued his life escalated significantly. He testified that he was depressed "pretty well" every day, to varying degrees. He also had suicidal thoughts. He kept a rifle and a single bullet beside his bed on a shelf.

[180] With regards to his depression generally, the plaintiff testified that throughout his adult life he was "always depressed" and experienced weekly episodes of depression. During those episodes he did not eat or sleep, and he tended to drink. He described his depressive episodes, as follows:

Q [E.B.], you've expressed how you felt on those days you were depressed. How did it affect your behaviour on those days?

A Some days it was difficult. It was hard to cope with life, it was hard to cope with society. Like, you know, like a real raging bull, you know, it's coming at you really fast, you know.

[181] The plaintiff remained in Zeballos until mid-1992, during which time he was unemployed. He testified, in chief, as follows:

Q [E.B.], when I asked you earlier why you weren't working, you said you were trying to piece your life together and it was a struggle. What were you struggling against?

A Well, the marriage being abandoned, children being taken away. The sexual abuse that happened, my new beginning, trying to begin a new life in sobriety.

Q You mentioned the sexual abuse, what sort of symptoms were you having in 1991 when you were living in Zeballos, 1991 and 1992?

A I was having -- I was depressed and there was, you know, nightmares that I had that would start to come back again. They were coming back more.

[182] In the fall of 1992, S.B. returned to Zeballos and the couple briefly reconciled. The plaintiff then moved to Vancouver and took up residence with his wife and children. He attended another life skills course in early 1993. He described the course as follows:

Q Do you remember what you learned at the course?

A Yeah, this life skill course that I took covered a lot of ground. It dealt with drug and alcohol, sexual abuse, counselling, a lot of that.

Q Why did you take the course?

A Because I was spending time piecing my life together to cope with all that had happened, trying to find ways how I could deal with it, finding ways -- what I can do about it.

Q Do about what?

A The sexual abuse.

Q Was the sexual abuse a bigger issue for you at this time than at previous times?

A Yes, it was.

Q Why is that?

A Because I really wanted to do something about it and because there was -- there was a lot of other cases that were starting, that started up. I was reading in the newspapers.

Q Apart from that, why was it a bigger issue for you?

A Well, it's -- I had to find some way to deal with it so I could piece my life together.

[183] During this period the plaintiff continued to be plagued by depression. The plaintiff testified about a severe bout of depression in early 1993, soon after his move to Vancouver. He admitted suicidal thoughts to his family doctor and was prescribed antidepressant medication. He testified that he spoke to his family doctor regarding the relationship between his depression and the sexual abuse he experienced at Christie.

[184] After the 1993 course, the plaintiff enrolled in the Native Education Centre in Vancouver. He took several courses. During 1994 the plaintiff again experienced some problems with his personal life, including abuse his grandchildren were suffering. He testified, in cross-examination, that seeing what his grandchildren were going through brought back memories of his own abuse.

[185] During this period, the plaintiff testified that he again experienced depression and had suicidal thoughts. With regard to his mental health at this time, he testified, as follows:

Q Do you recall thinking of suicide in 1993, two years before you fell off the log?

A I was, yes.

Q What do you remember about that?

A Because I remember, I always thought of it like way back in the '70s, '80s when I was living alone in Zeballos and I told you about that gun that I had and that one bullet that I had. I always thought of that. And I always - I was always depressed. Other times, especially times like this here when I was living here in Vancouver, I was going through a lot of depression. Even when I was - even when I was trying to upgrade my education here I was going through that, I went through a lot of depression because of my relationship being in turmoil and having to see, you know, my grandchildren going through all that abuse and neglect.

He also testified that while in Vancouver sometime after March 1995, he swallowed approximately six Tylenol 3 tablets in an attempt at suicide.

[186] The plaintiff withdrew from the Native Basic Education program at the Native Education Centre in 1995 and returned to the logging industry in March of that year.

[187] On March 15, 1995 the plaintiff fell from a log while crossing a stream and was knocked unconscious (the "1995 Accident"). The plaintiff testified that he has not worked since the 1995 Accident.

[188] While they are still married, the plaintiff is no longer in a relationship with S.B. He testified that his marriage was abandoned in 1991, though he briefly reconciled with S.B. several times.

[189] In addition to the psychological problems outlined above, the plaintiff testified that he suffers, or has suffered, from a number of other psychological problems, including: symptoms of Post-Traumatic Stress Disorder ("PTSD"), including nightmares and flashbacks; sex-related difficulties; and anxiety. He testified that many of these symptoms first appeared at the time of the abuse and have continued to plague him throughout his adult life.

[190] The plaintiff testified that thoughts of the abuse are with him every day of his life. He testified that at times the thoughts are visual flashbacks of the sexual abuse that happened to him at Christie. He also testified that after the sexual assaults began, he had a recurring nightmare involving a big, slimy ball. The plaintiff described this nightmare as follows:

Q And then can you describe how the nightmares after the sexual abuse differed?

A This other one is nightmares that I was having was repeating itself over and over. There was a like a big ball rolling in your head up my back, you know, in the back of me all the time, this big ball that was rolling up my back, it was like a slimy feeling and it was like a real big slime ball anyway, that was rolling up my back, and it would come up here all the time like I was really horrified by that feeling that I got from it. I don't know, I don't know how to really explain that feeling that I got from it. The effect of it was I couldn't bring myself to tell anybody about it and that nightmare that I was having at that time. It was -- I don't know, it's so -- I didn't I just didn't like that feeling.

[191] In cross-examination, the plaintiff agreed that he frequently had nightmares until his twenties, and thereafter "these nightmares were still there but not constant." He testified that he continued to experience the recurrent nightmares until his counselling sessions with Ms. Shaler in 1995-1996, though he continues to experience other sleep disturbances.

[192] The plaintiff also testified that sex evokes within him "a lot of hurt, a lot of shame, anxiety, a lot of worry." He testified that the abuse generally affected his ability to perform sexually and to satisfy S.B. However, beyond this the plaintiff had some difficulty articulating the specifics of his sex-related difficulties at trial.

[193] In particular, the plaintiff testified that he had difficulty talking about his sex-related difficulties in a group situation, and that:

Q [E.B.], can you explain in detail how the abuse affects your sexual functioning?

A It's hard for me to really explain about my performance and my sexuality because to me, you know, it's been so shameful all my life, I can't -- you know, I can't really think or even try to think about it.

He did testify, however, that he felt more comfortable talking about his difficulties one-on-one, and that he did discuss the effects of the sexual abuse on his sexual functioning with Dr. Riar and Dr. L. Krywaniuk, a neuropsychologist he has seen and who testified on his behalf. Dr. Riar took notes during a telephone conversation concerning the plaintiff's specific sexual problems, including an inability to sustain an erection, premature ejaculation and his feelings that he was unable to satisfy a woman.

[194] The plaintiff also testified that he experiences anxiety attacks commencing "right from the abuse". He described these attacks as follows:

Q Can you describe in your own words the anxious feeling?

A Yes, I get it down below my belly button and that flares up, it comes up my body and it's like washes over me and I get dry mouth, I get weak, shaky.

The plaintiff testified that the anxiety usually comes on quickly, in a matter of seconds, though in more recent years he has developed an improved ability to gauge when an anxiety attack is going to happen.

[195] The plaintiff has a current prescription for Clonazepam, prescribed to him for anxiety attacks. He testified that he takes his prescription every day. The plaintiff testified that the pills settle down the anxiety, but they also make him drowsy. Notwithstanding persistent suggestions to the plaintiff in cross-examination that the purpose of his Clonazepam prescription is to help him sleep, the plaintiff testified that the prescription is to assist his anxiety and to help him relax.

The Experts' Evidence

[196] Several experts testified about the plaintiff's psychological problems. Dr. Riar first met with the plaintiff on January 26, 2000, and subsequently spoke with him on the phone on two occasions. Dr. Riar prepared a report based on these contacts, which stated, *inter alia*, as follows:

In my opinion, [E.B.] has serious problems including substance abuse which has been in remission for many years, sex-related difficulties, anxiety and symptoms strongly suggestive of Post-Traumatic Stress Disorder, episodes of depression, interpersonal difficulties, and various physical and cognitive problems. I feel that some of his difficulties including symptoms suggestive of PTSD, that is flashbacks, nightmares, intrusive thoughts, strange experiences etc., as well as his sex-related problems including acting out against young girls are most likely sequelae of the sexual abuse he suffered during his childhood. His other problems such as substance abuse could be a combination of a genetic predisposition, other social or emotional experiences, and sexual abuse. His interpersonal problems may also be due to a combination of lack of social skills and the sexual abuse. The reason for his anxiety and depression also may be a combination of various other factors including the sexual abuse. In other words, if he had not suffered the sexual abuse at the hands of the perpetrator from the school he would not have

experienced the symptoms suggestive of Post-Traumatic Stress Disorder and most likely would not have suffered any sex-related problems.

Although it is difficult to determine whether he still would have had a severe substance abuse problem had he not been sexually abused, certainly the experience of abuse made his problem worse as he used various substances including drinking in order to cope with the sequelae of the abuse.

The symptoms of anxiety and depression also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly.

I also feel that his interpersonal relationships and social functioning were impacted by the effects of the sexual abuse in addition to other factors. His sex-related problems, sense of inadequacy in the company of women, and acting out against young girls are examples of his malfunctioning.

[197] With regards to the plaintiff's alcohol abuse, Dr. Riar testified, in chief, that substance abuse problems are quite common in individuals that have been abused:

Q I direct you to the bottom of page 10, please, doctor. That paragraph reads "Although it is difficult to determine whether he still would have had a severe substance abuse problems had he not been sexually abused, certainly the experience of abuse made his problem worse, as he used various substances including drinking in order to cope with the sequelae of the abuse." I would like to focus, doctor, on your words, "certainly the experience of abuse made his problem worse." What did you mean by that?

A Can I expand a bit more, your honour? Substance abuse problem is as quite common in individuals who are abused, but that doesn't mean that the abuse is directly responsible for the substance abuse as such, and it is very hard retrospectively going and teasing out what caused what, but what I'm saying, that there has been anxiety and other associated symptoms related to his abuse which cause lots of fear and anxiety at times, and people self-medicate themselves with alcohol and other drugs to forget about those things. So -- and why I'm saying this, because there are family history of alcoholism very severe, so even if he had not had the sexual abuse, there were high chances of him having substance abuse. Having said that, I think the combination of sexual abuse and his genetic vulnerability made things worse for a period of time.

[198] In cross-examination, Dr. Riar testified, as follows:

Q Doctor, do you agree with me that a child that's born in a family that is, well, the whole family there's not one child except Raymond who died a infant, they're all alcoholic, so the chances of him being an alcoholic were almost sure, isn't that correct?

A Oh, yeah. I mean looking at what kind of family he came from and genetic and environmental and social, I mean he is at high risk for having that kind of problem.

Q It's more than high risk, he would have been an alcoholic; isn't that correct?

A I would say so, but I mean I have known families where everybody is an alcoholic, but a single person is not.

Q Chances are rare?

A Chances are very high, but a hundred percent, (you) can't say 100 percent.

Q No. Nothing in life is 100 percent.

A That's right.

Q But a good possibility?

A Yeah. There's a high chance.

[199] Dr. Riar told the court that the plaintiff does not suffer from full-fledged PTSD, but rather that he exhibits symptoms characteristic of the disorder. In describing the relationship generally between PTSD and sexual abuse, Dr. Riar told the court that the symptoms may manifest close in temporal proximity to the triggering event and decrease over time. He also told the court that another event in a person's life unrelated to the initial traumatic experience, such as "hearing about the abuse or they abuse, their children get abused" can trigger symptoms that may have lain dormant.

[200] Dr. Riar told the court that the plaintiff exhibited symptoms of PTSD while at Christie, such as his nightmares, feelings of horror and visions of Saxey's face. He also told the court that these symptoms re-appeared with some intensity following the plaintiff seeing a newspaper article about sexual abuse at Christie.

[201] Dr. Riar was also questioned, in cross-examination, about the effects of the plaintiff's traumatic life experiences on his other psychological problems. In particular, Dr. Riar was asked about the plaintiff's marital problems, the abuse of his grandchildren and the 1995 Accident, all in the mid-1990s, and their contribution to his depression and anxiety. Dr. Riar agreed that these factors contributed to the plaintiff's anxiety and depression, but, on re-direct, stated that there are many causes of these illnesses, and ultimately that the plaintiff is "a very insecure person who was abused."

[202] The plaintiff also called Dr. L. Krywaniuk, a neuropsychologist, to testify, inter alia, about the plaintiff's psychological problems. Dr. Krywaniuk first saw the plaintiff in 1996 at the request of Human Resources Canada. He saw the plaintiff several times after that initial meeting, most recently in January of 2000 at the request of plaintiff's counsel. Dr. Krywaniuk prepared a report, dated June 19, 2000, updating his initial neuropsychological assessment of the plaintiff.

[203] Dr. Krywaniuk's report states, inter alia, as follows:

The professional literature in the area of sexual abuse indicates that there are long-term implications from childhood sexual abuse. This includes such factors as increased psychiatric difficulties, increased level of substance abuse, reduced levels of employment, higher divorce

rates, poorer interpersonal relationships, reduced educational levels and a variety of other effects. [E.B.] shows a number of these features, even when socio-cultural and other factors are accounted for. He shows the typical levels of anxiety and interpersonal distrust associated with psychological abuse and I understand that he has had difficulties in relationships and sexual functioning. He also went through a period of alcohol abuse although he subsequently was able to quit drinking. His work record has been relatively good, despite his difficulties, although he has not worked since about 1995, after his most recent head injury. He also showed features of post-traumatic stress disorder and there is concern that he is compensating for some of his memory deficits through confabulation. His abuse probably has had the effect of reducing his level of academic achievement and possibly affecting cognitive functions as well, at least to a mild degree. It may be that some of his substance abuse was of the "self-medication" type, where alcohol is used to reduce levels of anxiety or distress...

In a general sense, the effects of the abuse are likely to have made [E.B.] more vulnerable to other factors in our society which result in dysfunction and that has ultimately created difficulties in the area of personal and emotional adjustment. This, in turn, has reduced his level of achievement, affected personal relationships and resulted in a less satisfactory life than he might otherwise have had...

...In a general sense, however, it appears clear to me that [E.B.'s] life was compromised significantly by the sexual abuse he experienced during the stay at the residential school.

[204] In chief, Dr. Krywaniuk testified that he had been retained to assist in determining the interplay between the effects of the plaintiff's head injuries on his neurocognitive deficits and the effects of the plaintiff's past psychological injuries stemming from the sexual assaults. On this point, he testified that the plaintiff's neuropsychological impairments as a result of his head injuries, and the resulting emotional consequences, combined with the pre-existing emotional consequences of the sexual assaults. This interaction ultimately made it more difficult for the plaintiff to adjust to his various difficulties. He explained, in chief, as follows:

Q In the second paragraph you then refer to the pre-existing emotional difficulties and cause the maladjustment to be more severe. Now, in light of the term that you used in the previous sentence emotional consequences can you expand what you're referring to here?

A Well, if there is already an existing difficulty or existing maladjustment then an additional stressor in the form of an injury or emotional consequences will build on top of that and they will interact to form probably something that is more than just the simple addition of the two things.

Q What do you mean by the maladjustment?

A Well, the effects we were talking about or that I mentioned earlier as potentially the result of the sexual abuse to do with the anxiety perhaps the suspiciousness the difficulty forming relationships or trusting people, and those kind of things would represent a level of emotional maladjustment. They are in response to some trauma that he had experienced. So that provides a

certain vulnerability in his personality or his character or is an adjustment. Then when you -- when he sustained other injuries, for example, neuropsychological injury or a brain injury then he is less capable of dealing with them so there is that cumulative factor the addition of one thing and another thing about but the two things are not simply additive that tend to interact with each other to form something that is a bit more serious than any one of them on its own. I think perhaps to illustrate that a little bit, using a rather graphic example perhaps that's not completely appropriate, but if you lose one arm in an accident that will give you a certain level of difficulty, but if you lose both of them the problems that you have are not simply the addition of each single event, so that the interactive effect causes a problem that is bigger than simply the addition of the two individual conditions.

[205] As noted, Dr. Janke, for the defence, first met with the plaintiff in 1996, after which he prepared what he described as "a preliminary report" on November 4th of that year. He again met with the plaintiff in 1997, and prepared a report dated November 27, 1997.

[206] Dr. Janke's 1996 report concluded, as follows:

At the present time I think it would be appropriate to consider the sexual abuse as contributing somewhat to [E.B.'s] alcoholism and possibly somewhat to his difficulties in intimate personal relationships. I am not prepared at this time, though, to attribute even the majority of his problems to the sexual abuse as there were clearly other factors that need to be considered and I would like to view other documentation relating to his early childhood experiences and possibly other records before providing a definitive opinion as to the extent of the effect of the sexual abuse on his functioning.

[207] Dr. Janke's 1997 report concluded that his opinion remained largely unchanged. The report states:

Much of [E.B.'s] disruption in his personal life can be related to the substance abuse of his wife and the subsequent effect on the functioning of his children....It is clear that the abuse that [E.B.] experienced has had an affect on his functioning and his sense of self-esteem....It is not clear how the abuse experience has affected [E.B.'s] work history as this appears to have been more influenced by his various injuries and illnesses rather than psychological factors...

[208] Much of Dr. Janke's testimony concerning the plaintiff's injuries focused on the possible contribution of the sexual assaults to the plaintiff's substance abuse. On this issue, Dr. Janke testified as follows, in chief:

Q May I please ask you to turn to page seven of your report and in that report you have said that at the present time I think it would be appropriate to consider the sexual abuse as contributing somewhat to [E.B.'s] alcoholism. And has that opinion of yours changed now or is it the same?

A I don't know that -- I wouldn't say that it's changed. I think that I'm not prepared and I don't know of any of my colleagues who would be prepared to say that sexual abuse has no influence on substance abuse. But I think what I would say is my -- in my mind the contribution of sexual abuse to later substance abuse is lessened and this is a general sense and it would apply to [E.B.] as well, the other factors may play at least or a more important role.

[209] In cross-examination, Dr. Janke testified, as follows:

Q Doctor, just to touch on this point you were just testifying about, would you agree that factors in [E.B.'s] life, genetics, environment other than the sexual abuse have at least an equal and possibly a greater effect upon causing his alcoholism?

A Yes, yes. That's what I was trying to say, yes.

[210] In my view, on the whole of the evidence, the plaintiff has proven to the requisite standard that he suffers, or has suffered from a number of specific psychological problems, including: bedwetting; interpersonal difficulties; anxiety; symptoms of PTSD, including flashbacks, nightmares and intrusive thoughts; depression, including suicidal thoughts, loss of appetite and lack of sleep; and alcohol abuse.

[211] The plaintiff testified at length about these problems, testimony which I have no doubt is truthful. The plaintiff's testimony about his problems is largely consistent with what he told the experts. Based on these reports, as well as the plaintiff's behaviour during the various interviews, the experts were indeed satisfied that, for the most part, the plaintiff suffered, or continues to suffer, from these problems.

[212] In addition, counsel for the Oblates did not submit that the plaintiff has failed to prove that he indeed suffers from the various psychological problems outlined. For example, counsel for the Oblates did not dispute that the plaintiff suffers from alcohol abuse, that he wet the bed, and that he has symptoms of PTSD. Counsel for the Oblates also submitted, in argument, that "the evidence supports that the Plaintiff has had ongoing problems with depression". Counsel for the Oblates, of course, disputes that these psychological problems are the result of the sexual assaults.

[213] With regard to proven psychological problems suffered by the plaintiff, there is one exception, however. Counsel for the Oblates submitted that the plaintiff has failed to establish that he indeed suffers from sex-related difficulties. Counsel submitted that the only expert the plaintiff complained to was Dr. Riar, and that there is nothing in the clinical records to indicate that he complained of his sex-related difficulties to his family physician. Counsel for the Oblates also points to the portion of Dr. Janke's 1997 report which states:

His sexual functioning may have been somewhat affected by the sexual abuse but typically one sees a failure to engage in adult heterosexual relationships when an individual has been abused by a male at a young age. This has not been the case with [E.B.] and certainly at the time of my most recent contact with him he indicated that his sexual functioning was quite good despite his reported high level of symptomatology that would appear to be related to the abuse.

- [214] In my view, the fact that the plaintiff did not complain to his family physician or to Dr. Janke does not inexorably lead to the conclusion that he has failed to prove that he suffers from sex-related difficulties. In addition, the fact that Dr. Janke believed that the plaintiff's sexual functioning was quite good at the time of their meeting does not mean that the plaintiff did not at one time, or in fact may still, suffer from sex-related difficulties. The qualification in Dr. Janke's 1997 report simply lays out certain common sexual dysfunction features resulting from male-perpetrated sexual abuse on young boys. It does not, however, definitively state that the plaintiff's particular manifestation of sex-related difficulties are impossible, nor can I draw such a conclusion based on the evidence before me.
- [215] However, on the whole of the evidence, I am not satisfied that the plaintiff has proven, on a balance of probabilities, that he indeed suffers from sex-related difficulties. While the plaintiff testified that sex evokes within him "a lot of hurt, a lot of shame, anxiety, a lot of worry", as well as about his belief that he was unable to satisfy S.B. sexually, he had difficulty discussing the specifics of his sex-related difficulties at trial. The plaintiff testified that he had difficulty speaking of the matter outside of a one-on-one relationship, but that he did discuss the effects of the sexual abuse on his sexual functioning with Dr. Riar and Dr. Krywaniuk. However, in my view, the plaintiff's very scant evidence on this issue at trial is insufficient to prove, to the requisite standard, that he indeed suffers, or has suffered from sex-related difficulties.
- [216] Of course, my finding that the plaintiff has proven that he suffers from the various psychological problems, save sex-related difficulties, does not necessarily mean that the Oblates are liable for these problems, or for any damages suffered as a result of them. Having accepted that the sexual assaults occurred and that the Oblates are liable for the assaults, and that the plaintiff suffers from a number of psychological problems, I now must determine which, if any, of the problems have been suffered by the plaintiff as a result of the sexual abuse inflicted upon him by Saxey.
- [217] The general test for causation is the "but for" test, which requires a plaintiff to demonstrate that but for the defendant's wrongdoing he or she would not have suffered from the injury. However, historical sexual assault cases pose particular causation challenges. As Brenner C.J. noted in *Blackwater v. Plint*, *supra*, at para. 365:

In cases of historical sexual assault, the plaintiff is likely to be claiming for chronic injuries, often psychological in nature. It is not uncommon for the life history of a victim of a historical sexual assault to include numerous stressful, unpleasant experiences unrelated to the sexual assault. Individuals, such as the plaintiffs in these matters, come before the courts with diagnoses of post-

traumatic stress disorder, depression, substance abuse and other psychological conditions. Unravelling the question of causation in these cases arising as they do from torts committed so long ago is a daunting task.

[218] In cases such as these it is very difficult, if not impossible, to separate the psychological problems attributable to sexual assault from other traumatic life experiences experienced by the plaintiff. This is particularly relevant in determining what a plaintiff's position would have been, both before and after the sexual assaults occurred, irrespective of a defendant's wrongdoing.

[219] However, a defendant is not excused from liability merely because other causal factors for which he or she is not responsible also helped produce the harm. In the Supreme Court of Canada's leading case on causation, *Athey v. Leonati*, [1996] 3 S.C.R. 458, Major J. noted at para. 17:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring.... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[emphasis in original]

The Court held that a defendant is liable not only for injuries caused, but also for injuries materially contributed to, provided that the contribution is more than de minimus, by his or her wrongdoing.

[220] Brenner C.J. was faced with issues of causation similar to this case in *Blackwater v. Plint*, *supra*. In assessing the liability of the defendants Canada and the United Church for sexual assaults in a historical, residential school context, and with a view to the presence of other psychologically traumatic circumstances in the plaintiffs' lives, Brenner C.J. stated at paras. 370-372, as follows:

In *Athey*, after he set out the "General Principles" at paragraphs 13-20 of his reasons, Major J. applied them to the facts of that case. His formulation at para 41 of the ramifications of these "General Principles" can be adapted here where the plaintiffs allege psychological injury arising from sexual assaults in the presence of other psychologically traumatic circumstances in their lives:

- (1) If the psychological injury would have occurred at the same time, without the injuries sustained in the sexual assault, then causation is not proven;

- (2) If it was necessary to have both the sexual assaults and the other life circumstances for the psychological injury to occur, then causation is proven since the psychological injury would not have occurred but for the sexual assaults;
- (3) If the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on a balance of probabilities, whether the defendant's sexual assault(s) materially contributed to the psychological injury.

How are the Athey principles to be applied in the case at bar? The desired approach would be to first identify the separate psychological injuries proven by the plaintiff. Then, for each one, the three questions set out above could be posed to determine whether the plaintiff has proven on the balance of probabilities that each particular psychological injury was caused by the proven sexual assault; i.e. that liability for that injury has been established.

This approach is seen in *V.(J.L.) v. H.(P.)* (1997), 31 B.C.L.R. (3d) 155 (S.C.) where Stromberg-Stein J. found separate and distinct psychological injuries in a sexual assault case: borderline personality disorder and post-traumatic stress disorder. She found the former to have been caused by the sexual assault but the latter to have been a distinct injury caused by a different event. She assessed damages accordingly.

[emphasis in original]

- [221] Phrased slightly differently, and applied to this case, the three principles are as follows: first, if the plaintiff's psychological injuries would have existed regardless of the sexual assaults, the Oblates are not liable; second, if both the sexual assaults and other traumatic life circumstances in combination were necessary for the injuries to occur, the Oblates are liable; third, if either the sexual assaults or life circumstances alone could have caused the injuries, then I must determine on a balance of probabilities whether the sexual assaults materially contributed, beyond de minimus, to the psychological injuries. If the sexual assaults did materially contribute to the injuries then the Oblates are liable.
- [222] Therefore, in determining whether the Oblates caused, and are therefore liable for, the various psychological problems suffered by the plaintiff, the correct approach is to evaluate each individual problem that I have determined the plaintiff has proven in accordance with the above principles.
- [223] Before turning to the evidence, however, counsel for the Oblates made submissions concerning the weight that I should attribute to the various experts' opinions in determining whether the sexual assaults caused or materially contributed to the various psychological injuries. In particular, counsel pointed to differences between what the plaintiff told Dr. Riar and Dr. Janke about the manner of the sexual assaults, as well as about his life circumstances, upon which they made their determinations concerning causation, and the evidence he gave at trial. Counsel also submitted that Dr. Krywaniuk

focused on the relationship between the plaintiff's neuropsychological problems and his head injuries rather than on his psychological problems, and that he was an advocate for the plaintiff rather than an impartial assessor. Accordingly, counsel submitted that some weight can be given to Dr. Riar and Dr. Janke's evidence, provided that the facts they relied upon have been proven, but that no weight should be accorded to Dr. Krywaniuk's evidence.

[224] Dealing briefly with this issue, I have already concluded that the plaintiff's evidence is reliable concerning the manner and frequency of the assaults. Therefore, in my view, there is no reason for me to reduce the weight of Dr. Riar and Dr. Janke's evidence.

[225] With regard to Dr. Krywaniuk, I do not accept counsel for the Oblates' submission that I should accord his evidence no weight on this issue. However, because Dr. Krywaniuk's focus was on the effects of the plaintiff's head injuries on his neuropsychological deficits, it is my view that his evidence should be accorded less weight than the evidence of Dr. Riar and Dr. Janke. Though Dr. Krywaniuk explored the plaintiff's psychological problems and their relationship to the sexual assaults to some extent, I accept counsel for the Oblates' submission that he largely left the task of a detailed psychological assessment of the plaintiff to Dr. Riar and Dr. Janke. I am also concerned that Dr. Krywaniuk was being something less than an impartial assessor, as argued by counsel for the Oblates, discussed in detail later in these reasons.

[226] I now turn to an assessment of the Oblates' liability for each injury suffered by the plaintiff as a result of the sexual assaults.

Bedwetting

[227] Although the plaintiff originally seemed to say that he had started to wet the bed only after the sexual assaults, the following questions were put to him, in chief:

Q Sorry, [E.B.], you wet the bed prior to the abuse, you said that in your evidence?

A Yes.

Q Did you stop bed-wetting prior to the abuse?

A No, I didn't, no.

Q So you wet the bed prior to the abuse right up to the time of the abuse?

A Yeah.

Q For how many years did you continue to wet the bed?

A Right up until I was turning 15.

- [228] In plaintiff's counsel's own submission, the plaintiff's evidence on the commencement and continuation of his bedwetting problem is "confusing". As a result, plaintiff's counsel submitted that, although the plaintiff's testimony lacks clarity on this point, the sexual abuse brought about a change in the regularity and frequency of the plaintiff's bedwetting problem.
- [229] However, the plaintiff's evidence does not, in counsel for the Oblates' submission, support the argument that what the plaintiff was trying to say, but did not say, was that he had a problem with bedwetting prior to the sexual assaults, which was then made worse by the fact of the assaults. Rather, the plaintiff's evidence simply establishes that he wet the bed before attending Christie, and he continued to do so while at Christie until the problem resolved itself when he was 15 years old.
- [230] I accept counsel for the Oblates' submission on this point. In my view, the evidence does not establish that the plaintiff's bedwetting increased in regularity or frequency with the commencement of the assaults. All that can be gleaned from the plaintiff's testimony is that he wet the bed prior to being sexually abused, and that he continued to wet the bed until approximately age 15. In these circumstances, and particularly because the plaintiff wet the bed prior to attending Christie, I find that the plaintiff has not proven that he would not have wet the bed regardless of the sexual assaults, or that the sexual assaults materially contributed to his bedwetting problem. Accordingly, I find that the Oblates are not liable for the plaintiff's bedwetting.

Interpersonal Difficulties

- [231] The plaintiff alleges that the sexual abuse he experienced has compromised his ability to sustain relationships, including his marriage. He testified that the abuse caused him to withdraw as a child, and that he was not interested in playing with other children. He also testified that he has difficulty trusting people because of the abuse.
- [232] In his report, Dr. Riar concluded that the plaintiff's "interpersonal problems" could be attributed to "a combination of lack of social skills and the sexual abuse." Similarly, Dr. Janke's 1996 report states that it would be appropriate to consider the sexual abuse as a contributing factor to the plaintiff's "difficulties in intimate personal relationships".
- [233] With regard to the plaintiff's interpersonal problems, counsel for the Oblates primarily focused on the plaintiff's marital problems. Counsel submitted that a myriad of other factors in fact caused the plaintiff's marriage breakdown, and that the plaintiff has failed to prove that absent the sexual assaults, his marriage would not have failed.
- [234] Counsel for the Oblates submitted that, though the plaintiff blamed his marriage breakdown on the sexual assaults during his direct examination, his evidence was different under cross-examination. Counsel submitted that during cross-examination, the plaintiff described multiple reasons for the failure of his marriage, including: communication problems; disagreements about their children; S.B.'s alcohol problem; his feelings that S.B.

did not support his efforts to stabilise his life; and issues S.B. had relating to her own abuse. In addition, counsel for the Oblates submitted that, in Dr. Janke's opinion, much of the disruption in the plaintiff's personal life can be related to the substance abuse of S.B. and the subsequent affect on the functioning of his children.

- [235] With respect, I think that counsel for the Oblates' submission that the plaintiff has failed to prove that but for the sexual abuse his marriage would not have failed is misguided. Rather, as plaintiff's counsel submitted, a failed marriage, "is a perfect example of the type of circumstances in which the 'but for' test of causation is unworkable". As already noted, the appropriate test, as set out in *Blackwater v. Plint*, supra, is not the simple but for test, but rather whether the sexual assaults either in combination with other life circumstances caused the plaintiff's interpersonal difficulties, or whether the sexual assaults materially contributed to the interpersonal difficulties. In my view, the fact that there are numerous other factors cited by the plaintiff with regard to his marriage breakdown does not relieve the Oblates of liability. In my opinion, the plaintiff has proven that the abuse has indeed materially contributed to his general difficulty forming and maintaining personal relationships, both intimate and otherwise, and specifically the breakdown of his marriage.

Anxiety

- [236] The plaintiff testified that he has experienced anxiety attacks commencing "right from the abuse". He takes medication to control his anxiety. In addition, Dr. Riar's report concludes that the plaintiff's anxiety might be caused by a combination of various factors, including the sexual abuse, and notes that the plaintiff's "symptoms of anxiety...also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly".
- [237] In cross-examination, Dr. Riar testified that the plaintiff's anxiety was worse around the mid-1990s and had settled somewhat by the time he saw him in the year 2000. He agreed that a number of possible stressful factors which could have contributed to the plaintiff's anxiety in the 1990s were problems with S.B., problems with his Band, concerns about the abuse of his grandchildren, and the physical injuries he suffered in 1995.
- [238] Accordingly, counsel for the Oblates submitted that the plaintiff testified that a number of things trigger his feelings of anxiety, including his disabilities and inability to participate in activities. Counsel also emphasised Dr. Riar's evidence suggesting that a combination of factors caused the plaintiff's anxiety.
- [239] In my view, the evidence of the plaintiff and of Dr. Riar, as well as my own observations of the plaintiff's demeanour while testifying, establish that the sexual assaults caused, or at least materially contributed to the plaintiff's anxiety. I am particularly cognisant of the plaintiff's testimony that his anxiety attacks commenced right from the abuse. While there may have been other life factors which contributed to the plaintiff's anxiety, such as his marital problems and physical injuries, I do not think that I can conclude, on the evidence, that these factors alone have caused the plaintiff's anxiety.

Symptoms of PTSD

[240] PTSD is a psychological disorder characterised by a specific set of symptoms which manifest following a traumatic life event. Such symptoms may include nightmares, flashbacks and intrusive thoughts. The plaintiff testified about various symptoms of PTSD, both immediately after the abuse began and in the following years.

[241] As noted, the plaintiff testified that immediately after the first episode of sexual abuse, he had a recurring nightmare involving a big, slimy ball. The plaintiff testified further that the abuse immediately effected his sleep as a child:

Q Did the abuse have any effect upon your sleeping quite apart from the rolling ball nightmare?

A Yeah, yes.

Q What is that?

A It was, I don't know, it was hard to go to sleep, it was like flashbacks and along with the nightmares that were coming to me and you were sleeping in the dark would even make it worse for me. But yet at the same time you know, you would be so scared I used to put my head under the pillow and cry myself to sleep.

[242] The plaintiff also testified that he continues to experience sleep disturbances, that thoughts of the abuse plague him every day and that at times he visualises the assaults.

[243] Dr. Riar's report expresses his opinion that the plaintiff's PTSD symptoms are, "likely sequelae of the sexual abuse he suffered during childhood". Dr. Riar's report stated further that:

In other words, if he had not suffered from the sexual abuse at the hands of the perpetrator at the school he would not have experienced the symptoms suggestive of Post-Traumatic Stress Disorder...

In Dr. Riar's opinion, the plaintiff had symptoms suggestive of PTSD both during his attendance at Christie, and in the years prior to his 1969 accident.

[244] Counsel for the Oblates submitted that the plaintiff has not proven that he suffers from PTSD as a result of the sexual abuse. Counsel emphasised that although the plaintiff's experts agreed that the plaintiff has some symptoms suggestive of PTSD, he did not satisfy the criteria for a diagnosis for PTSD in relation to the sexual assaults. Counsel also submitted that the plaintiff has undergone numerous traumatic experiences in his lifetime that could cause PTSD. These include, inter alia, being sent off to school without any explanation, and the 1969 landslide accident. Counsel submitted that, given only these incidents, any PTSD symptoms can be accounted for notwithstanding the abuse by Saxey.

[245] With respect to counsel's submission that the plaintiff does not fit the diagnostic criteria for PTSD, and instead at most can be said to have symptoms, I think that Williamson J.'s comments in *Aleck v. Clarke*, 2001 BCSC 1177, a historical sexual assault residential school case decided in August of this year, and discussed below, provides a full answer at para. 277-278:

... I venture to suggest it would be commonplace for any reasonably informed trier of fact, having heard the evidence in this trial, to conclude that there would be significant psychological problems resulting from repeated sexual assaults upon children over a lengthy period of time by figures of authority in circumstances where the children are in effect held captive away from their families or extended families. I venture further to suggest that whether the psychological status of a particular plaintiff meets the precise criteria for a particular diagnosis as set out in the DSM-IV usually will have little impact upon an assessment of damages.

The question, rather, is has the psychological impact of the sexual assaults upon these plaintiffs significantly interfered with the quality of their lives? If the answer be yes, they are entitled to be compensated. This is so whether they suffer from rigidly described medically defined post-traumatic stress syndrome, a personality disorder, depression, or none of the above.

[emphasis mine]

[246] In any event, I cannot accept counsel for the Oblates' submission that the plaintiff has experienced numerous traumatic life experiences that may have caused the symptoms of PTSD independent of the sexual assault. In my view, on the evidence, the plaintiff began exhibiting symptoms of PTSD almost immediately after the sexual assaults began. I consider that this fact alone is sufficient to hold the Oblates liable for this injury. In addition, I am satisfied that the plaintiff continued to exhibit symptoms of PTSD long after the assaults. While the 1969 landslide in particular may have contributed to these symptoms, I cannot conclude, particularly given my finding that the plaintiff suffered from symptoms of PTSD prior to 1969, that the accident alone caused the PTSD symptoms. Instead, I am satisfied that the plaintiff would not have suffered from symptoms of PTSD in the absence of the sexual assaults.

Depression

[247] The plaintiff gave extensive evidence concerning his depression, and the relationship of his depression to the sexual assaults. He testified that throughout his adult life he was "always depressed", though his depression intensified during certain periods of his life. The plaintiff testified that on days when he was depressed he did not eat, did not sleep, and he tended to drink alcohol. He also testified about suicidal thoughts, and one suicide attempt.

- [248] Dr. Riar's report notes that the plaintiff's "symptoms of...depression also fluctuated in intensity whenever he had to deal with the sexual abuse directly or indirectly". Though Dr. Riar testified that, "it's never one thing in depression", his report concludes that the plaintiff's depression may be caused by a combination of various factors, including the sexual abuse.
- [249] Counsel for the Oblates submitted that the plaintiff was depressed due to a number of other factors in his life. Counsel submitted that while the evidence supports that the plaintiff has had ongoing problems with depression, the most serious incidents were after 1991. Accordingly, counsel submitted that, "there are no causal connections between any depression or suicide attempts after 1991" and the sexual assaults.
- [250] Interestingly, counsel for the Oblates did not submit that the plaintiff's pre-1991 depression was not caused by the sexual assaults. Rather, counsel focused on the relationship between the post-1991 incidents of depression and the other traumatic life events of the plaintiff. It must be recalled, however, that in order to demonstrate causation the plaintiff need not prove that the sexual assaults alone caused his depression. Instead, on the principles above, he need only prove that the sexual assaults materially contributed to his depression beyond de minimus. Regardless of the numerous life circumstances of the plaintiff both pre and post-1991, I am satisfied, on the evidence, that the sexual assaults did indeed materially contribute to the plaintiff's depression.

Alcohol Abuse

- [251] The plaintiff testified that he has struggled with alcohol abuse from a very early age. As noted, each member of the plaintiff's family suffered from, or continues to suffer from an alcohol abuse problem. Notwithstanding this background, the plaintiff maintains that his alcohol abuse was caused or materially contributed to by the sexual assaults he suffered at the hands of Saxey.
- [252] As also noted, Dr. Riar gave evidence that due to the plaintiff's genetics and his environment, the plaintiff was at a high risk to become an alcoholic. Dr. Janke also testified that the sexual abuse alone did not cause the plaintiff's alcohol problem. Counsel for the Oblates therefore submitted that the sexual abuse was, "only a minor factor, not causative of the Plaintiff's alcoholism." Counsel did not maintain, however, that the contribution of the sexual assaults to the plaintiff's alcohol abuse was de minimus.
- [253] At this stage, the Oblates can only escape liability if they can demonstrate that the plaintiff would have become an alcoholic regardless of the sexual assaults. I am not prepared to make such a finding. High risk is insufficient to prove that the plaintiff would indeed have inevitably become an alcoholic. Instead, I rely on the evidence of Dr. Riar and Dr. Janke, who concluded that, though the sexual assaults may not, in and of themselves, have caused the plaintiff's alcohol abuse, they did indeed contribute.

[254] In addition, the evidence demonstrates that the plaintiff used alcohol at least partly as a form of self-medication in an attempt to forget about the sexual abuse. Thus, I am certain that that even though it was highly likely that the plaintiff would have become an alcoholic, the sexual assaults materially contributed to the plaintiff's alcohol abuse.

[255] Therefore, I find that the psychological injuries suffered by the plaintiff as a result of the sexual assaults upon him by Saxey are interpersonal difficulties, anxiety, symptoms of PTSD, depression and alcohol abuse.

Issue 2(iv)

What compensation is the plaintiff entitled to?

Answer: \$150,000 in general damages, which includes \$25,000 for aggravated damages; \$80,000 for loss of past earning capacity; and \$3,400 for future care costs.

[256] Being satisfied that the Oblates are liable for a number of specific psychological injuries, I must now determine the quantum of damages the plaintiff is entitled to.

The Parties' Positions

[257] The plaintiff claims compensation under a number of heads of damage, including general damages. In addition, counsel for the plaintiff submitted that the damages suffered as a result of the sexual assaults, particularly the material contribution of the assaults to the plaintiff's alcohol abuse, resulted in a significant amount of lost past earning capacity. Counsel also submitted that the psychological effects of the sexual assaults render the plaintiff unemployable in the future.

[258] Counsel for the Oblates submitted that in assessing damages, the court must not place the plaintiff in a position better than he would have been in had the sexual assaults not occurred. Counsel submitted that a number of factors must be taken into account which warrant a reduction under the various heads of damage. These factors include the traumatic life experiences suffered by the plaintiff following the sexual assaults, the plaintiff's non-tortious physical injuries, as well as the plaintiff's predisposition to alcohol abuse.

Decision

[259] In *Blackwater v. Plint*, supra, Brenner C.J. addressed the problem of pre-existing conditions in questions of causation, and their treatment via the "thin skull" and "crumbling skull" doctrines, at paras. 381-385:

Athey also addresses the relevance of pre-existing conditions. In British Columbia the "thin skull" and "crumbling skull" principles have traditionally addressed the issue of a pre-existing condition. Although the two principles are related, they differ in terms of the assessment of damages.

In a thin skull case, a plaintiff will recover full damages for the injuries suffered. In a crumbling skull case, a reduction in the quantum of damages will be made to account for the plaintiff's pre-existing condition...

...

Significantly, the discussion in *Athey* avoids this "thin skull/crumbling skull" terminology. Major J. outlined the principles at paras. 34-35:

The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[260] These principles were also applied in *Whitfield v. Calhoun* (1999), 242 A.R. 201 (Q.B.), a case cited in *Blackwater v. Plint*, *supra*. In *Whitfield* the plaintiff had been diagnosed with adjustment resistance to adolescence, a pre-existing personality condition, prior to a motor vehicle accident. The condition lay dormant until after the accident. In considering the affect of the plaintiff's pre-existing condition on damages, Paperny J. (as she then was) said at paras. 118-119:

I am satisfied that the facts of this case are beyond the application of the thin skull rule. Mr. Whitfield suffers from more than an emotional thin skull. His personality suggests that, at some point in the future, the daily stresses of life would have caused him to suffer some of the emotional and psychological problems similar to those suffered following the accident. It must be recognized that Mr. Whitfield's pre-existing personality traits are inherent to his "original position". There was always a measurable risk that Mr. Whitfield would have suffered emotional and psychological manifestations in the future.

In awarding damages to Mr. Whitfield, there must be a recognition that his pre-existing, inherent personality traits created measurable risk and shortcomings which are inherent to his original position. ... The manifestations of his behaviour are related to the accident, however they are also a result of his personality traits. Therefore, although his current problems are causally related to the accident, a reduction in damages is appropriate.

[261] Unlike in *Blackwater v. Plint*, supra, the Oblates did not allege that the plaintiff's life experiences, either with his family in Queens Cove, or at Christie prior to the assaults created measurable risks and shortcomings inherent to his original position. Nor did they submit, as in *Whitfield v. Calhoun*, supra, that the plaintiff suffered from a pre-existing condition prior to his attendance at Christie. They did submit, however, that the plaintiff's original position was compromised by his predisposition to alcohol abuse. Therefore, in light of the principles set out in *Athey v. Leonati*, supra, I must determine if the plaintiff had a measurable risk that his predisposition to alcohol abuse would have detrimentally effected him in the future, regardless of the Oblates wrongdoing. If I do find this, I must reduce the overall awards under the various heads of damage accordingly.

[262] I must also be cognisant of the other factors submitted by counsel for the Oblates as warranting a reduction in damages. These include the numerous traumatic life circumstances of the plaintiff, as well as the various physical injuries suffered throughout his life.

General Damages

[263] Counsel for the plaintiff submitted that the plaintiff is entitled to damages in a range between \$165,00 and \$185,000. He submitted a number of authorities in support of this claim.

[264] *Y.(S.) v. C. (F.G.)* (1997), 26 B.C.L.R. (3d) 155 (C.A.) is a leading British Columbia case on damages in sexual assault cases. In this case a stepfather inflicted numerous incidents of sexual abuse over a seven year period on his stepdaughter. Overturning a jury award of \$350,000, Macfarlane J.A. awarded the plaintiff \$250,000 for general and aggravated damages.

[265] Macfarlane J.A. also discussed the role of aggravated damages in sexual assault cases. He held, at para. 36, that aggravated damages are not a separate head of damages. Rather, aggravating factors are to be considered in assessing general damages. Aggravating factors, set out in paragraphs 57 to 59, may include: the nature, duration, number and frequency of the assaults; the age of the plaintiff; the degree of violence and coercion; the relationship between the plaintiff and the defendant, particularly where the defendant is in a position of trust and authority; the defendant's lack of remorse; and the physical pain and mental suffering associated with the sexual abuse.

[266] In *A.B. v. T.S.*, 2000 BCSC 976, Cole J. held at para. 40 that, "[a]lthough cases that pre-date *Y. (S.) v. C.(F.G.)* are of some interest, the goal post, in my view, has clearly been shifted and the Court of Appeal has indicated that higher awards are required in these type of cases".

[267] In *A.B. v. T.S.*, *supra*, the nature of the abuse, perpetrated on a young girl by a family friend, was summarised by Cole J., at para. 28:

Here there was no violence. There was, however, a very close relationship between the defendant and the plaintiff, as the defendant was the closest male figure in A.B.'s life. The abuse in this case took place over a period of approximately nine years-from infancy to early adolescence. Finally, the specific nature of the abuse, although it did not include intercourse, it did involve fondling of her genitals and digital penetration of her vagina and anus, along with oral sex. This conduct, albeit not the most severe, is serious.

At paragraph 41, Cole J. held:

I am satisfied that the plaintiff has suffered significant harm and, as a result, has difficulties in maintaining long-term relationships with men and engaging in certain activities without having flashbacks. The conduct of the defendant was predatory, prolonged and serious. I am satisfied that an award of \$165,000, including aggravated damages, is appropriate.

[268] In *W.M.Y. v. Scott*, 2000 BCSC 1294, the plaintiff was sexually assaulted by his soccer coach about 15 times over three years, beginning when he was 9 years old. The nature of the abuse on each occasion involved the defendant placing his penis in the area of the plaintiff's anus and moving slowly. The defendant never ejaculated. A psychologist gave his expert opinion that the plaintiff did not, "meet the full criteria for a Post-Traumatic Stress Disorder, but he is still left with some personality difficulties that have yet to be fully improved", such as self-esteem and relationship problems. The expert also concluded that the plaintiff's substance abuse difficulties were partly related to the sexual abuse. Hutchinson J. awarded \$110,000 in general and aggravated damages.

[269] In *T.S. v. J.W.P.*, [1999] B.C.J. No. 709 (S.C.) the plaintiff was sexually assaulted by a neighbour between thirty and fifty times when he was eleven and twelve years old. The factual context of the assaults was described by Quijano J., at para. 5, as follows:

The sexual assaults took place over a period of about 1-1/2 years, during 1982 and 1983, at the defendant's home, on his boat and, on one occasion, at the plaintiff's home. There were between thirty and fifty sexual assaults on the plaintiff during that period. Generally, the plaintiff would be undressed by the defendant, the defendant would take the plaintiff's penis into his mouth for as much as ten minutes at a time and then would use his tongue on or in the anus of the plaintiff for another five to ten minutes at a time. There was no penetration. The defendant also, during the same period of time, kissed the plaintiff on the lips and fondled his genitals inside his clothing on numerous occasions. The incidents of kissing and fondling are in addition to the thirty to fifty sexual assaults which took place while the plaintiff was naked.

[270] Quijano J. found that the sexual assaults caused psychological damages, including effecting the plaintiff's self-esteem and self-worth. In awarding general damages, including aggravated damages, at para. 29, Quijano J. stated:

This is a claim that is neither at the higher nor the lower end of the range, but rather is one somewhere towards the upper middle of the range of damages, given the nature of the assaults and the impact on the plaintiff. I conclude that an award of general damages, which includes aggravated damages, in the amount of \$130,000 is appropriate.

[271] In *T.(K.A.) v. B.(J.H.)* (1999), 51 B.C.L.R. (3d) 259 (S.C.), two plaintiffs were sexually abused by their stepfather between 1965 and 1974, commencing when they were aged 5 and 8 years respectively. At paras. 50-52, Brenner J. found both plaintiffs to be suffering from a lengthy list of serious effects from the abuse, including, inter alia, depression, substance abuse, sexual problems and contemplation of suicide. He assessed non-pecuniary and aggravated damages for each plaintiff at \$185,000.

[272] Returning to *Y.(S.) v. C.(F.G.)*, supra, in determining the usefulness of other decisions in awards for sexual assault, Macfarlane J.A. stated, at para. 56:

Comparison with the awards made in similar cases is helpful in maintaining consistency, and therefore giving fair and equivalent treatment to all victims. But the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.

[273] In my view, the authorities establish that the plaintiff's claim for general damages, including aggravated damages, in a range between \$165,000 and \$185,000, is generally appropriate. However, as counsel for the Oblates submitted, this case is complicated by the evidence of the plaintiff's predisposition to alcohol abuse, as well as by the numerous physical injuries the plaintiff sustained unrelated to the defendant's liability. It is at this stage that I must determine whether, in the words of *Whitfield v. Calhoun*, supra, the plaintiff's genetic and environmental factors created, "measurable risks and shortcomings which are inherent to his original position", and, if so, reduce the plaintiff's damages accordingly.

[274] At the first phase of the trial in *Blackwater v. Plint*, supra, Brenner C.J. found the defendants the United Church of Canada and Canada vicariously liable for the sexual assaults of several students by a dormitory supervisor: see *W.R.B. v. Plint*, supra. In the second phase of the trial, his Lordship went on to make damage assessments. Assessment of quantum was complicated by pre and post-residential school traumas suffered by the various plaintiffs, as well as by evidence suggesting that several of the plaintiffs were pre-disposed to alcohol abuse. A number of the plaintiffs who attended the Alberni Indian residential school ("AIRS") were sexually assaulted by their dormitory supervisor.

[275] Plaintiff F.L. Barney's assaults included multiple instances of violent anal rape and forced oral sex. He suffered from a number of psychological problems caused by the abuse, including, inter alia, a personality disorder which caused him to have problems maintaining interpersonal relationships, difficulties in managing his anger and impulses, coupled with an impaired self-esteem and difficulties in formulating an identity. Brenner C.J. concluded, at para. 507, that the sexual assaults were, "at least a material contributing cause" of the plaintiff's personality disorder.

[276] However, F.L. Barney's life was also plagued by a number of pre and post-assault traumatic life experiences, including a violent household prior to attending AIRS, as well as the ordeal of attending AIRS in itself. Brenner C.J. also found that a number of factors would have likely been present in the plaintiff's life had he not been sexually assaulted, including, inter alia, the plaintiff's abuse of marijuana and alcohol, and his tendency to use violence. However, regardless of these factors, Brenner C.J. held the following, at paras. 532 and 533:

The assaults Mr. Barney suffered at the hands of Plint did represent an egregious breach of trust by a person who occupied the role of a parent. The anal and oral rapes were extremely violent and brutal and were accompanied by threats. Not surprisingly they caused Mr. Barney physical and emotional pain. They occurred after he had been removed from his home community and transported to AIRS.

I would award Mr. Barney \$125,000 in non-pecuniary and \$20,000 in aggravated damages. Because aggravated damages are compensatory in nature, both will be assessed against the Church and Canada.

[277] The sexual assaults of another plaintiff, R.F., numbering approximately 16, included forced oral sex, mutual masturbation and the defendant placing his penis between the plaintiff's legs and simulating intercourse. Though R.F. abused alcohol, he did not link this abuse to the sexual assaults. R.F. did not suffer from any major forms of psychiatric disorder, such as PTSD or anxiety, at the time of trial. Brenner C.J. also found that if R.F. was at any time properly diagnosable with a psychiatric condition, it was relatively mild. However, he found, at para. 599, that it was "likely that these assaults were a material contributor to the periodic bouts of depression that Mr. R.F. has grappled with in his life", and awarded R.F. non-pecuniary and aggravated damages in the amount of \$85,000.

[278] Plaintiff M.W.(1) was sexually assaulted numerous times while at AIRS. The assaults included forced masturbation, oral sex and anal rape. M.W.(1) experienced a number of early traumatic life experiences, including physical abuse by his mother before attending AIRS. He also had a family history of alcohol abuse. M.W.(1) was found to suffer from a number of psychological problems, including a tendency to use violence and abuse alcohol.

[279] Brenner C.J. found that M.W.(1)'s life circumstances, both before and after the assaults, were significant in assessing whether M.W.(1)'s later psychological problems would have occurred in any event. In light of these circumstances, he held that M.W.(1)'s abuse of alcohol and tendency to resort to violence were unrelated to the sexual assaults. However, he held, at paras. 854-855:

While I cannot accept that all of Mr. M.W.(1)'s life difficulties were caused by his attendance at AIRS, it is nonetheless the fact that as a vulnerable child he was forced by Plint to engage in oral sex and was anally raped likely more than the two occasions he described. The severity of that abuse and the circumstances in which it occurred are to be taken into account in assessing an appropriate damage award.

I conclude that an appropriate award for non-pecuniary and aggravated damages in Mr. M.W. (1)'s case would be \$125,000.00.

[280] Williamson J. was also faced with questions of quantum for the injuries suffered by the plaintiffs as a result of historical sexual assault at St. George's, an Indian residential school, in *Aleck v. Clarke*, supra. Prior to trial, the defendants, the Anglican Church and Canada, and the plaintiffs, four former students of St. George's, agreed on the issues of liability for the acts of Derek Clarke, a dormitory supervisor. Williamson J. reviewed the evidence on the plaintiffs' psychological problems and pre and post-St. George's circumstances, and made quantum determinations for each of the plaintiffs.

[281] Williamson J. found that prior to his attendance at St. George's, plaintiff E.A.J. had a reasonably good childhood. However, upon attending St. George's he was sexually assaulted over a number of years. The assaults included forced mutual masturbation and anal rape. E.A.J. suffered from interpersonal and sexual problems, as well as emotional problems, including an inability to control anger. He was also diagnosed as suffering from PTSD, and abused drugs and alcohol in an attempt to distance himself from his problems. Williamson J. found, at para. 309, the sexual assaults to be, "a significant factor in E.A.J.'s later abuse of alcohol", particularly because E.A.J. used alcohol in a self-medicative fashion to forget about the assaults. Williamson J. also found, at para. 314, the sexual assaults to be, "the major cause of [E.A.J.'s] current psychological problems." He awarded E.A.J. \$150,000 in non-pecuniary damages.

[282] The plaintiff T.W.N. Aleck was repeatedly sexually assaulted for 4 years, starting at age 9. The assaults consisted of forced mutual masturbation, anal rape, and occasional instances of oral sex. Though Mr. Aleck's family life was found by Williamson J. to be overall happy, his Lordship found, at para. 319, that there, "was a chaotic aspect to his pre-St. George's life which put him at risk." Both of Mr. Aleck's parents had alcohol problems. Following the sexual assaults, Mr. Aleck also abused alcohol. Mr. Aleck suffered from a number of psychological injuries, including problems with sexual relationships and with his family. He was diagnosed, inter alia, with a major depressive disorder in remission and symptoms of PTSD. Williamson J. found, at para. 327, the sexual assaults to be, "the primary cause of

[Mr. Aleck's] problems", and awarded him \$140,000 in non-pecuniary damages.

[283] The sexual abuse of plaintiff E.R.M. began when he was around nine years old and continued two or three times weekly for four years. The assaults included fondling, forced oral sex and anal rape. Though prior to attending St. George's E.R.M. had a stable family life, members of his family had problems with alcohol, and E.R.M. himself developed a serious drinking problem while at St. George's. E.R.M. suffered from a number of other psychological problems, including problems relating to his children and his wife, erosion of his self-esteem and depression, including suicide attempts.

[284] Williamson J. found, at para. 336, the sexual assaults to be, "the prime cause of [E.R.M.'s] difficulties." Williamson J. also emphasised E.R.M.'s psychologist's findings, at para. 333, that though E.R.M. was at an increased risk for alcohol abuse, his drinking problem began, "at the height of the sexual assaults" and he used alcohol to distance himself from painful feelings. In awarding E.R.M. \$140,000 in non-pecuniary damages, Williamson J. stated that he was "satisfied that it is the sexual assaults, including their nature, frequency, duration and circumstances, that are the prime cause of [E.R.M.]'s difficulties."

[285] The assaults started on the plaintiff G.B.S. when he was in grade four, and continued for one and a half years. While Clarke began by fondling G.B.S., the assaults progressed to anal rape, and continued approximately 1 or 2 times monthly. While G.B.S. had little memory of his pre-St. George's life, he did recall that his mother drank excessively on some occasions. G.B.S. himself began drinking in grade 8, and testified that he did so to "blank out the assaults". G.B.S. suffered from a number of psychological problems, including damage to his self-esteem and self-respect. Williamson J. awarded G.B.S. \$130,000 in non-pecuniary damages.

[286] Williamson J. also augmented each plaintiff's compensatory damages award by \$25,000 to account for aggravating factors. He noted, at paras. 344 and 347, as follows:

All of the plaintiffs in this case were under the control of the defendants or their agents at the time of the assaults. The defendants were in a position of authority and trust over the plaintiffs. The plaintiffs were children. They were, in effect, helpless at the time, cut off from their extended families and even from siblings also resident in the school.

...

I conclude the sheer horror of what happened to these children, and in particular the fact that for all of them the assaults continued over a period of time that must of seemed exceedingly long to children, warrants an award of aggravated damages.

[287] The appropriate measure of damages is the difference between the plaintiff's original position, namely the position the plaintiff would have been in had the sexual assaults never occurred, and the position he is currently in. Counsel for the Oblates submitted that the plaintiff's alcohol abuse, interpersonal difficulties and "emotional problems", which I take to mean the plaintiff's depression and anxiety, "have not been proven to be causally linked"

to the sexual assaults. On this basis, counsel submitted that the evidence concerning these various factors establishes that there is very little, if any, difference between the plaintiff's original and current positions.

- [288] With respect, I disagree. While it is clear that the plaintiff suffered from numerous traumatic life experiences after leaving Christie, in my view, these experiences are inextricably tied to the sexual assaults he suffered at Christie.
- [289] First, with regard to the plaintiff's alcohol abuse, the evidence does indeed suggest that the plaintiff had measurable risks and shortcomings which were inherent to his original position, significantly increasing the likelihood that he would have been an alcohol abuser had the sexual assaults never happened. Regrettably, the plaintiff's family members have all suffered from alcohol addiction. Dr. Riar was almost sure, though not 100%, that the plaintiff would have become an alcoholic in any event.
- [290] However, regarding the relationship between the plaintiff's interpersonal difficulties, anxiety, symptoms of PTSD and depression and his predisposition to alcohol abuse, there is no evidence before me to establish that the plaintiff would not have suffered from these psychological injuries had he not developed an alcohol problem. In addition, the plaintiff connected his alcohol abuse to the sexual assaults, and it is clear that he developed a pattern of alcohol abuse at least in part to cope with his memories of the sexual abuse he suffered while at Christie. I find therefore, that there is no basis for me to reduce the quantum of general damages due to the plaintiff's predisposition to alcohol abuse.
- [291] Counsel for the Oblates also submitted that the various physical injuries suffered by the plaintiff between 1969 and 1995, including, inter alia, the injuries he sustained from the 1969 landslide and from the 1995 Accident, warrant a reduction in damages. Again, with respect, I do not agree. In my view, the evidence establishes that even had he not suffered from his various physical injuries, the plaintiff would still have suffered from the various psychological injuries outlined above. Accordingly, I find that the quantum of general damages need not be reduced on this basis.
- [292] In addition, counsel for the Oblates submitted that the plaintiff should not be entitled to aggravated damages. However, I am satisfied, on the basis of *Blackwater* and *Aleck*, supra, that the plaintiff is entitled to aggravated damages from the Oblates as a part of overall general damages, and in accordance with the aggravating factors set by the Court of Appeal in *Y.(S.) v. C.(F.G.)*, supra.
- [293] In particular, a number of the aggravating factors enunciated in *Y.(S.) v. C.(F.G.)*, supra, are present in this case. The plaintiff was sexually assaulted approximately twice weekly, starting when he was seven years old, for four years while at Christie. The assaults consisted of fondling, simulated intercourse with incidental partial anal penetration and masturbation. Saxey ejaculated on the plaintiff, who then had to clean himself. Like the factors Williamson J. emphasised in his discussion of aggravated damages in *Aleck*, supra, the plaintiff in the instant case was also separated from his family, and even from his

siblings at Christie.

[294] It is clear that the plaintiff has suffered immensely as a result of the sexual assaults. Virtually every aspect of his life has been effected. He suffers, or has suffered from numerous psychological injuries as a result of the sexual assaults. The plaintiff also used alcohol in his attempt to forget about the assaults. Accordingly, even cognisant of the plaintiff's genetic and environmental factors and their relationship to his alcohol abuse, as well as the non-tortious injuries he suffered subsequent to the sexual abuse, I assess his general damages at \$150,000, \$25,000 of which is awarded to him as aggravated damages.

[295] Before leaving this issue, the plaintiff testified that he was sexually abused once by an older student, the defendant Williams, during his time at Christie. He was approximately eight years old when the assault occurred. At trial the defendant Williams conceded that he had sexually assaulted the plaintiff. The plaintiff described that incident as follows:

Q Earlier in your evidence you mentioned that you were also abused by Matthew Williams.

A Yes.

Q Can you tell us about that?

A I was standing in the -- on the road just before -- between just about between Martin Saxey's place and the gym where the gym is and there is a road going down. I was standing there and then all of a sudden Matthew Williams came from behind me and he picked me up on his shoulders and he started packing me down the road. And as we were going down the road there was somebody standing on the porch and he yelled out to him, "at it again, eh," he said and they both started laughing. I didn't know what they were talking about: And he carried me down, went down in the bushes. And I know there was some rocks there where we were and he laid me down and he pretty well did the same thing what Martin did to me. Took my pants off, my shorts, and he stuck his penis between my legs and when he ejaculated, he finished with me, he left me there. He ran off and I was left there by myself.

[296] Plaintiff's counsel submitted that there should be no apportionment. After reviewing the authorities on the subject, he argued that the difficulty with apportionment in this case is that it is practically impossible to distinguish (a) the amount of a "global award" for all of the plaintiff's sexual assault injuries from (b) the amount of the plaintiff's sexual assault injuries arising from the assaults upon him by Saxey.

[297] Counsel contended that the best alternative is to reject the apportionment approach altogether by applying the "common sense" inference of material contribution which, he said, is justified by the temporal connection.

[298] The assault on the plaintiff by the defendant Williams took place in the context of the frequent sexual assaults by Saxey. Counsel said that ordinary common sense dictates that the psychological impact of the defendant Williams' assault upon the plaintiff would be shaped and contributed to by the context of the assaults by Saxey, both before and after.

[299] I agree with counsel's submission and find that no reduction of damages is warranted.

Loss of Past Earning Capacity

- [300] Counsel for the plaintiff submitted that the sexual abuse had an effect on the plaintiff's academic achievement, due to his inability to concentrate. Counsel further argued that the plaintiff's claim for loss of past earning capacity, "depends largely on the nexus between the plaintiff's alcohol abuse and the sexual assaults by Martin Saxey". Counsel emphasised, and I have accepted, that the plaintiff's alcohol abuse was materially contributed to by the sexual assaults, and that had he not drank so heavily the plaintiff's work history would have been much more stable.
- [301] Counsel for the Oblates, however, emphasised various factors effecting the plaintiff's original position in relation to his past earning capacity, including his predisposition to alcohol abuse, his various head injuries and his personal problems. Accordingly, counsel submitted that the Oblates should not be made to compensate the plaintiff for loss of past earning capacity, and that to do so would be to place the plaintiff in a position better than he would have been had the Oblates not been held vicariously liable.
- [302] Counsel for the plaintiff submitted a report by Mr. R. Carson, an economist, dated December 21, 2000 to assist the court in evaluating the plaintiff's lost past and future earning capacity. Mr. Carson prepared three statistical lifetime earning profiles: British Columbia males with high school diplomas; British Columbia forest workers; and British Columbia males with less than grade 9 education.
- [303] In my view, the most appropriate statistical profile is that of British Columbia forest industry workers. Indeed, this is most consistent with the plaintiff's actual career trajectory, as between 1966 and 1995 he was primarily employed as a logger. While I recognise that the sexual abuse may have indeed effected the plaintiff's concentration at school, on the evidence, I cannot conclude that he would not have become a logger had he not experienced the sexual assaults while at Christie. In particular, the plaintiff testified, in cross-examination, that he came from a family of loggers and that it was natural that he too ended up working in the industry. He also testified that there was always a job to be found in logging.
- [304] Based on the appropriate statistical profile chosen, counsel for the plaintiff submitted, in argument, that the court must, "roughly assess the percentage of the Plaintiff's earning capacity that was impaired by the sexual assaults for each five-year period." Accordingly, based on each profile, counsel for the plaintiff calculated percentage deductions to account for the effects of the sexual assaults on his earning capacity for each period.

[305] However, in my view, the plaintiff's past earning capacity from the time he entered the work force until the date of trial must be broken down and assessed in three distinct periods: 1966 to 1983; 1984 until the 1995 Accident; and from the 1995 Accident to the date of trial.

[306] Turning first to the 1966-1983 period, with regard to the causal nexus between the sexual abuse, the plaintiff's abuse of alcohol and his past earning capacity, it is abundantly clear, on the evidence, that the plaintiff's work history during that period was plagued by interruptions due to his alcohol abuse. I am satisfied that had the plaintiff not abused alcohol, he would have had a much more stable work history.

[307] I have also found, above, that the sexual abuse materially contributed to the plaintiff's use of alcohol, particularly in a self-medicative fashion. In turn, on the evidence, the plaintiff's alcohol abuse had a detrimental effect on his earning capacity. Dr. Riar's report states, as follows:

Lastly, in spite of various problems he was able to maintain some kind of employment until the mid-1990s but there were various interruptions due to his substance abuse. I feel if his substance abuse was less severe he could have functioned better. One of the factors which made his substance abuse severe is the after-effects of the sexual abuse.

[308] I have also found, however, that it was highly likely that the plaintiff would have developed an alcohol problem in any event. Accordingly, while the plaintiff's predisposition to alcohol abuse does not warrant a reduction in general damages, I think that it is most relevant to the plaintiff's claim for loss of past earning capacity.

[309] Counsel for the plaintiff submitted that the Oblates are liable for all reasonably foreseeable damages flowing from the plaintiff's alcohol abuse, including the consequences to his past and future earning capacity. However, as noted, the Oblates need not place the plaintiff in a position better than he would have been had they not been held vicariously liable. Given my finding that the plaintiff had measurable risks and shortcomings which were inherent to his original position, significantly increasing the likelihood that he would have abused alcohol had the sexual assaults never happened, the Oblates are not liable for the whole of the plaintiff's loss of past earning capacity during this period. However, the plaintiff is entitled to an award for loss of past earning capacity to recognise that though he would have likely had an alcohol abuse problem in any event, the sexual assaults materially contributed to his alcohol problem, which in turn effected his employment.

[310] In all of the circumstances, I assess the plaintiff's loss of past earning capacity for the period between 1965 and 1983 at \$80,000.

[311] With regard to the period from 1983 to the 1995 Accident, the plaintiff testified that he has maintained sobriety since late 1983. Given this fact, the linkage between the sexual assaults and the plaintiff's loss of past earning capacity from 1983 to the 1995 Accident is much less clear. While he suffered from psychological injuries caused, or materially contributed to by

the sexual assaults during this period, there is no evidence to suggest that the plaintiff was not able to work. Indeed, he was employed as a taxi driver in Campbell River for a period of time. While in Campbell River the plaintiff attended to his duties as a Band councillor in his spare time, though the evidence is unclear as to whether he received any remuneration. He also returned to the logging industry briefly in 1995.

- [312] To his credit, the plaintiff also took a number of upgrading classes, including a welder training program, which ultimately resulted in a short-term disability. However, as the plaintiff was apparently employable during this period, I make no award for loss of past earning capacity.
- [313] Regarding the period from the 1995 Accident to the date of trial, after a very brief return to the logging industry, the plaintiff suffered his most recent head injury. His medical records indicate that he suffered scalp and facial lacerations, a concussion, soft tissue damage, and that he briefly lost consciousness. He has not worked since sustaining that injury.
- [314] A number of experts saw the plaintiff following the 1995 Accident. Mr. D. Nordin, a vocational consultant for the plaintiff, saw the plaintiff in January of 2000. In a report dated July 27, 2000 Mr. Nordin concluded that it was unlikely that the plaintiff will successfully return to competitive employment due to his limited education, his physical, cognitive and emotional difficulties, and the fact that the plaintiff has had little work in the past 18 years. Mr. Nordin states in his report that he found it extremely difficult to determine the contribution, and the extent of that contribution, of the sexual assaults, the plaintiff's alcohol abuse, his limited education and his history of multiple head injuries to his employment history. However, when asked to explain this statement, he testified, in chief, as follows:

Q Mr Nordin, in your opinion is it necessary to reconcile this statement that I first read to you that is in the first full paragraph like others who assessed Mr. Billy I find it extremely difficult to determine which of these factors and to what extent contributed to his employment history. How do we reconcile that with your final statement that it's possible that with the alleviation of his emotional difficulties he could consider returning to the type of work he did in the 1990s?

A I'm not sure how to explain how I reconcile it. I guess what I'm saying that his -- all of those factors, the physical difficulties, the cognitive and the emotional all play a role in his inability to work right now. And in different ways. The physical restrictions or limitations preclude him from a certain array of jobs such as the heavy sort of logging work he would have done in the past. His cognitive limitations I think preclude him from work that's data oriented or people oriented and I think right now his emotional difficulties sort of cuts across all of those and basically precludes him from holding down any competitive job.

- [315] Dr. C. Cooke, a vocational consultant for the defence, prepared a report dated September 4, 2000. Dr. Cooke was of the opinion that the plaintiff suffered from physical, cognitive and emotional dysfunction preventing his re-entry into the work force in all but a few occupations. His report states that the plaintiff's limitations can be attributed to his work-

related injuries, as well as to his long-time alcohol abuse, and concluded that, "there is no evidence at this time to suggest that the allegations of sexual assault contributed to his work record." However, Dr. Cooke testified that he was ultimately unable to distinguish the relative contribution of the sexual assaults and the head injuries to the plaintiff's disabilities.

[316] Following their 1996 meeting, Dr. Krywaniuk concluded in his psychological and vocational report to Human Resources Development Canada that the plaintiff had suffered, "a significant level of neuropsychological damage" attributable to a number of factors, including the cumulative effect of his various head injuries. He considered the plaintiff to be, "cognitively and emotionally disabled", and found that there was strong suggestion that his disabilities also extended to the physical domain. Dr. Krywaniuk recommended that the plaintiff focus on his "emotional factors" rather than vocational upgrading, particularly if upgrading would cause the plaintiff stress. He did, however, suggest that upgrading would be appropriate if it would provide the plaintiff with feelings of satisfaction and feelings of progress.

[317] Upon receiving a request for clarification from Ms. D. Barrie, a lawyer appealing the plaintiff's denial of benefits by the Worker's Compensation Board, Dr. Krywaniuk reviewed the plaintiff's psycho-social history. He concluded in a letter dated May 20, 1997, as follows:

...it would be my opinion that most or all of [E.B.'s] neuropsychological problems are related to his head injuries. While the background experiences noted above can produce psychological effects, the impact on his neuropsychological status would be relatively minimal.

[318] Dr. Krywaniuk again saw the plaintiff, at the request of his counsel, in June of 2000. Dr. Krywaniuk administered a battery of tests, which indicated that the plaintiff showed weak verbal skills, non-verbal skills in the lower half of the average range, memory problems and a level of emotional maladjustment. His report also states that the plaintiff's potential was "subsequently reduced through his various head injuries."

[319] As outlined above, the thrust of Dr. Krywaniuk's testimony at trial, however, was that the plaintiff's head injuries, and resultant neurocognitive deficits, interacted with his fragile emotional state in a synergistic fashion. He concluded that the plaintiff's pre-existing emotional difficulties caused his maladjustment to the effects of his head injury to be more severe, making it more difficult for him to adjust to his problems.

[320] On the basis of Dr. Krywaniuk's evidence, counsel for the plaintiff submitted that the plaintiff was entitled to 100% compensation for loss of past earning capacity from the date of the 1995 Accident to trial. Counsel submitted that the plaintiff's sexual assault injuries interacted with the secondary effects of his 1995 head injury in a synergistic manner, which has resulted in his current state of total disability. On this point, counsel stressed the following passage from Dr. Krywaniuk's 1997 letter:

Quite often, the individual is able to cope, at successively reduced levels, until the "final straw" after which coping abilities are significantly compromised. It may be that [E.B.] has reached this point.

Counsel explained, in argument, that:

...the Plaintiff was functioning up to 1995 with a proverbial "thin skull" caused by the emotional sequelae of childhood sexual abuse. However, the 1995 brain injury was the straw that caused the Plaintiff's "thin skull" to collapse, resulting in a permanent loss of all income earning capacity.

[321] Counsel for the Oblates, however, submitted that the Oblates need not compensate the plaintiff for loss of past earning capacity during this period. Counsel stressed, inter alia, that the various head injuries suffered by the plaintiff have effected his work history independently of the sexual assaults. Counsel also submitted that Dr. Krywaniuk was of the opinion that the plaintiff's neuropsychological problems were largely caused by his head injuries, and that Dr. Krywaniuk was an impartial advocate for the plaintiff.

[322] The evidence of Dr. Cooke and Mr. Nordin is ultimately unhelpful in determining the effect of the interaction between the head injuries and sexual abuse on the plaintiff's employability, as they could not isolate the contribution of the plaintiff's various life factors on his employability.

[323] Dr. Krywaniuk was the only expert who gave evidence concerning this interaction. However, I am cognisant that Dr. Krywaniuk's evidence changed over time. For example, the May 20, 1997 letter written to assist the plaintiff in his Worker's Compensation Board claim attributed the plaintiff's neuropsychological problems to his head injuries, and largely downplayed the effects of the plaintiff's other life circumstances. At trial, however, Dr. Krywaniuk emphasised the effects of the sexual assaults.

[324] When asked to explain this inconsistency in cross-examination, Dr. Krywaniuk testified, as follows:

Q Doctor in your 1997 report you put the emphasis on the head injuries because it was the head injury that was being looked at as the compensable injury and in 2000 you shifted that emphasis to the sexual use abuse because you knew that was what was the compensable injury was, that's the only reason for that change in wording, isn't it?

A It's -- how should I explain it to be more clear -- I don't think one precludes the other and that's basically what I'm saying, is I think that both of those statements are true.

[325] The variations in Dr. Krywaniuk's reports suggest to me that perhaps he was being something less than an impartial assessor. After consideration, I cannot conclude that Dr. Krywaniuk's evidence on the synergistic effects of the plaintiff's 1995 head injury and the pre-existing effects of the sexual abuse is sufficient to hold the Oblates liable for the plaintiff's loss of past earning capacity from the 1995 Accident to the date of trial. Put another way, on Dr. Krywaniuk's evidence, I cannot conclude that the plaintiff has proven

on a balance of probabilities that the effects of his head injury interacted with the effects of the sexual abuse, ultimately rendering him unemployable for this period.

[326] It is my view that the 1995 head injury constituted an intervening act, independent of the Oblates' wrongdoing. The Supreme Court of Canada considered the effect of intervening factors in *Athey v. Leonati*, *supra*. Major J. stated at paras. 31 and 32, as follows:

The respondents also sought to draw an analogy with cases where an unrelated event, such as a disease or non-tortious accident occurs after the plaintiff is injured. One such case was *Jobling v. Associated Dairies Ltd.*, [1981] 2 All E.R. 752 (H.L.), in which the defendant negligently caused the plaintiff to suffer a back injury. Before the trial took place, it was discovered that the plaintiff had a condition, completely unrelated to the accident, which would have proved totally disabling in a few years. Damages were reduced accordingly. In *Penner v. Mitchell* (1978), 89 D.L.R. (3d) 343 (Alta. C.A.), damages for loss of income for 13 months were reduced because the plaintiff had a heart condition, unrelated to the accident, which would have caused her to miss three months of work in any event.

To understand these cases, and to see why they are not applicable to the present situation, one need only consider first principles. The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff's "original position". The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[emphasis mine]

[327] In my view, the injuries resulting from the 1995 Accident are unrelated to the Oblates' wrongdoing. I am satisfied that the plaintiff was employable prior to the 1995 Accident, and that the neuropsychological injuries he suffered from the 1995 Accident rendered him unemployable.

[328] Accordingly, I make no award for loss of past earning capacity from the 1995 Accident to the date of trial.

Loss of Future Earning Capacity

[329] I also make no award for loss of future earning capacity. In my view, on the evidence, the plaintiff has failed to prove, on a balance of probabilities, that his future unemployability can be attributed to anything other than the neuropsychological injuries resulting from the 1995 Accident.

Future Care Costs

[330] On this issue, Dr. Riar's report states, as follows:

Regarding the issue of treatment, I feel that [E.B.] can benefit from a supportive and cognitive-behavioural counselling approach by an experienced therapist who has dealt with these kinds of issues. This can be done either by a psychologist or a psychiatrist but psychiatrists are covered by M.S.P. and psychologists charge from \$80 to \$120 per hour. He needs to attend treatment for at least 15 to 20 sessions.

[331] It was also Dr. Riar's evidence, which I accept, that there are few psychiatrists who do this type of therapy for sexual abuse victims, and that psychologists mostly do it. He further stated that there is typically a long waiting list for a psychiatrist and it was his understanding that no psychiatrist in Nanaimo, where the plaintiff currently resides, provides such therapy.

[332] Counsel for the plaintiff submitted that the out-of-pocket costs estimated in Dr. Riar's report range between \$1,200 (15 sessions at \$80) and \$2,400 (20 sessions at \$120). Counsel also submitted that the Oblates should bear the costs of travel to Vancouver for the 15 to 20 sessions, at \$150 per trip, totalling between \$2,250 and \$3,000.

[333] Counsel for the Oblates conceded, in argument, that the future care component of damage awards in sexual abuse cases is, "extremely important so as to enable the Plaintiff to be rehabilitated and made better." Counsel submitted that travel costs may be included, but only to the extent they represent a real cost and are reasonable, and accepted the recommendations for future care that Dr. Riar set out to a maximum amount of \$2,400.

[334] In the result, I award the plaintiff \$2,400 for future counselling. However, in my view, the plaintiff's claim for \$150 per trip from Nanaimo to Vancouver is excessive and therefore unreasonable. I instead award the plaintiff a total of \$1,000 to cover his travel expenses to Vancouver.

Conclusion

[335] The plaintiff is entitled to a judgment for the following damages: \$150,000 in general damages, \$25,000 of which is awarded as aggravated damages; \$80,000 for loss of past earning capacity; and \$3,400 for future care costs. In the event that counsel are unable to agree on costs, they are at liberty to seek directions.

"B.I. Cohen, J."

The Honourable Mr. Justice B.I. Cohen

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