

CANADA / JUDGMENT

Gorup-Paule v. Palmatier

2024 BCSC 353

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 353 Gorup-Paule v. Palmatier

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gorup-Paule v. Palmatier,

2024 BCSC 353

Date: 20240209

Docket: S230363

Registry: Victoria

Between:

Wegadesk Dana Gorup-Paule

Plaintiff

And:

Trevor Palmatier, Mitch Geller, Diving Plongeon Canada, British Columbia Diving, Boardworks Diving, Pacific Coast Diving, Aviva Insurance Canada, Crawford and Co., Government of Canada, Bank of Canada

Defendants

Before: The Honourable Justice Morley

Oral Reasons for Judgment

The Plaintiff, Appearing in Person:

W. Gorup-Paule

Counsel for the Defendants Mitch Geller, Diving Plongeon Canada, British Columbia Diving, Boardworks Diving, Pacific Coast Diving, Aviva Insurance Canada, Crawford and Co.:

S. Ip

C. Fox

Counsel for the Defendant Government of Canada:

S. Slipper

A. Barnes A/S

Counsel for the Defendant Bank of Canada:

R. Lewis

Place and Dates of Hearing:

Victoria, B.C.

January 22 - 25, 2024

Place and Date of Judgment:

Victoria, B.C.

February 9, 2024

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[1] THE COURT: These are edited oral reasons for judgment.

I. introduction

- [2] In Victoria Registry Action No. 230363 (the "Present Action"), Wegadesk Gorup-Paule sues the defendants primarily for harm and damages caused to him as a result of alleged sexual abuse by the defendant Trevor Palmatier. He says the defendants Mitch Geller, Diving Plongeon Canada, British Columbia Diving, Boardworks Diving, and Pacific Coast Diving (collectively, the "Diving Defendants") either knew or ought to have known about the abuse and, at least implicitly, says the corporate defendants are vicariously liable for it. The action also names Aviva Insurance Canada ("Aviva"), the liability insurer for the Diving Defendants and Crawford and Co., its independent adjuster (collectively, the "Insurance Defendants"), the "Government of Canada" and the Bank of Canada (collectively, the "Federal Defendants").
- [3] In this summary trial application, all defendants raise a fundamental issue with the Present Action, which must be addressed before it can be considered on its merits. The Present Action covers very similar ground to that covered by an earlier one brought by Mr. Gorup-Paule in 2020, British Columbia Victoria Registry Action No. S202598 (the "Previous Action"). The Previous Action was settled in February 2021 and Mr. Gorup-Paule signed a release and covenant not to sue (the "Settlement Agreement"). In return for signing the Settlement Agreement - which he did after he obtained independent legal advice at Aviva's expense - Mr. Gorup-Paule received \$600,000.
- [4] The general rule is that settlement of litigation must be enforced. When the parties resolve their disputes without having to go to trial, this is usually a good thing. Pragmatically, the parties and the court avoid the expense of trial. As a matter of principle, the law acknowledges that a solution worked out by adults with access to legal advice is their solution, and courts usually will respect their choice by enforcing it.
- [5] Even if a settlement turns out not be desirable from the point of view of one of the parties, even if they received (or believed they received) poor advice from counsel, and even if they later change their minds, the courts not only should, but must, enforce the bargain the parties came to, if it was pursuant to a valid contract: *Robertson v. Walwyn Stoddgell Cochran Murray Ltd.*, [1988] 4 W.W.R. 283 (B.C.C.A.) at p. 285.
- [6] However, the principle that settlement agreements must be enforced is not absolute. Like respect for freedom of contract generally, this principle is subject to exceptions where the traditional assumptions underlying that freedom do not align with reality and thereby lose their "justificatory authority": *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 59. Like any other contract, a settlement agreement obtained through duress or that is

unconscionable can be set aside by the party that was on the receiving end of the duress or unconscionability.

- [7] Mr. Gorup-Paule says that he is such a party. He says he was in poverty when he agreed to settle the Previous Action as a direct result of the abuse he suffered and that he signed the Settlement Agreement "against [his] genuine will". He says the failure of the Diving Defendants to respond to him for years after the abuse was uncovered added to what he calls his "burdens" and he says that he was in an economically and psychologically vulnerable state.
- [8] To succeed in setting aside the Settlement Agreement on that basis, Mr. Gorup-Paule must show:
- a) In the case of the doctrine of unconscionability, that the Settlement Agreement was obtained in a situation of inequality of bargaining power between him and the defendants and the outcome was improvident (i.e., it either unduly advantaged the defendants or unduly disadvantaged Mr. Gorup-Paule).
 - b) In the case of the doctrine of duress, that the Settlement Agreement was obtained through pressure that vitiated his consent, and that this pressure was illegitimate.
- [9] While the enforcement of the settlement agreement is the primary issue, it is not the only issue. The other issues I have to deal with are as follows:
- a) Should I dismiss, as either setting out no cause of action or as an abuse of process, Mr. Gorup-Paule's claim that he was physically attacked by a private investigator hired by Diving Plongeon Canada, which everyone agrees was not covered by the release of the Previous Action? Since this is a discrete, and relatively simple, issue, I will address it first.
 - b) Regardless of the validity of the Settlement Agreement, should the causes of action asserted against the Government of Canada and Bank of Canada be struck out as doomed to fail? I will discuss this second.
 - c) Should I grant the defendants' application to declare Mr. Gorup-Paule a "vexatious litigant"? I will discuss this last, after the main issue of the enforceability of the Settlement Agreement.
- [10] Before I undertake what will be a lengthy analysis, I start by acknowledging that while Mr. Gorup-Paule makes legal arguments, he also raises fundamental moral questions about how trusted institutions in Canadian society fail to address sexual abuse. These questions may go beyond what the law can address. Mr. Gorup-Paule has expressed frustration at various times that these proceedings are focused on the legal validity of the Settlement Agreement, rather than the more fundamental issues he raises. When I was first appointed to case manage this proceeding, he made it clear that he wants to use this proceeding as a vehicle to advocate for young people who have been sexually abused in sports. He told me from the outset that he wants a jury trial and wants to expose what he sees as deep institutional corruption.

- [11] I have no doubts in Mr. Gorup-Paule's sincerity or in the justice of the cause of protecting young people from sexual exploitation. While I do not have the evidence before me to get into the systemic causes of the abuse, I do have evidence that Diving Plongeon Canada acted in a callous way to Mr. Gorup-Paule when he revealed the abuse by "ghosting" him for years after he made a credible allegation of sexual abuse by one of their coaches. His view that the Diving Defendants still have not come to terms with what he considers a toxic culture is a plausible one, although not proven before me in this application. I therefore understand his desire to have a forum in which he can prove that.
- [12] But civil litigation has inherent limits. It can sometimes be used to promote social change and awareness, but it is fundamentally about whether and how much money one person must pay someone else because of things that happened in the past. A civil action, whether it is settled or taken to trial, cannot really remedy the injustice when a child is abused by a trusted adult. Courts order money damages for pain and suffering not because it is a satisfactory solution, but because it is what it is in our power to do. Everyone in the system is painfully aware of how inadequate that is. This is an inherent limit in the civil justice system, which is part of the reason that it cannot be the sole vehicle for moral truth or social change.
- [13] Moreover, our civil justice system depends on enforceable settlements. It is primarily driven by the parties, with judges only making binding rulings when they are faced with a dispute. Participants in the civil justice system are hopefully becoming more aware of the trauma of child sexual abuse and of the challenges most people-but especially those who have experienced that trauma-have in accessing its processes. But the civil justice system has always considered that the way to respect the agency of those who have been victimized is to give them control over what they will accept not to go to trial. It also recognizes that in practice most people who have suffered loss and harm want settlements and these would not be possible if those who are sued could not buy litigation peace as a result.
- [14] To be sure, the law should never ignore the human realities it deals with. Society has become more aware of the way trauma and lack of economic resources affect the ability to make genuine choices. The law addresses this, like everything else, through legal doctrines-in this case the doctrines of duress and unconscionability. But as I hope will become clear in the course of my analysis of these doctrines, these are themselves informed by what our society has learned about trauma and systemic disadvantage, as well as by the practicalities of litigation and the need to respect the informed choices adults make, including about the consequences of acts done to them when they were unable to make those choices.

II. Background

- [15] Mr. Gorup-Paule began diving when he was ten years old, in 1997. His mother noticed him doing flips on the trampoline and got him involved in diving. He took to it.

- [16] By 2000, he participated in the B.C. Games and was already spoken of in the media as a potential future Olympic competitor. In October 2004, he won the bronze medal in the 10-metre platform at the World Junior Championships. This was a few points behind Matthew Mitcham, a gold medal winner at the 2008 Beijing Olympic Games.
- [17] Both Mr. Gorup-Paule and another diver who testified in this application, J.E., spoke about how all-consuming elite diving is for a young person. By adolescence, Mr. Gorup-Paule was practising six hours, six days per week. Diving at that level created a tight knit group. The other divers acted as his social circle, while coaches had a parental role. Mr. Gorup-Paule was put forward by the Diving Defendants as a role model for Indigenous youth and a potential star.
- [18] Despite his long-proclaimed goal of competing in the 2008 Beijing Olympics, Mr. Gorup-Paule ended his diving career in 2007. He says this was a direct result of abuse by the defendant Trevor Palmatier, his coach, which he says drove him into substance abuse, culminating in a drunk driving accident shortly before the trials for the 2008 Olympics.
- [19] On March 9, 2013, Mr. Gorup-Paule emailed then-President of Diving Plongeon Canada, Kelly Stark-Anderson. He wrote, "Trevor Palmatier sexually molested me while I was rooming with him at a Senior National Diving Competition in Quebec City. I was 17 years old at the time." He informed Ms. Stark-Anderson that he was going to give a statement to the police and asked that DPC take immediate action because he was concerned Mr. Palmatier "may try to get one last experience with a poor young child".
- [20] Mr. Palmatier has been criminally convicted of sexual assault against Mr. E. and has not defended this lawsuit. The Diving Defendants have never challenged that the abuse happened. And Mr. Gorup-Paule has testified to it. For the purposes of this application I will proceed on the assumption that Mr. Gorup-Paule will succeed in demonstrating that Mr. Palmatier abused him and that, once he disclosed the abuse, the Diving Defendants knew that these acts very likely occurred and that they were potentially liable.
- [21] Ms. Stark-Anderson forwarded the email disclosing Mr. Palmatier's abuse of Mr. Gorup-Paule to Penny Joyce, the Chief Operating Officer of Diving Plongeon Canada ("DPC"). She brought the matter to the attention of their insurer, Aviva.
- [22] Neither she nor anyone else from DPC reached out to Mr. Gorup-Paule or responded in any way. He was "ghosted".
- [23] Two-and-a-half years later, on November 10, 2015, Mr. Gorup-Paule wrote to Ms. Joyce:
- Good Day to you Penny:
- I am writing today to remind you that Diving Canada's problems with [pedophiles is] unfortunately far from finished.

After learning about Trevor [Palmatier] being caught in 1996 and then his protection from DPC it became evident to me that your organization is not capable to handle matters like this in a responsible and adequate manner.

The selfishness of your [organization's] state of mind is brilliantly exposed by your removing Trevor from causing YOU further headaches but neither [J.E.] nor I have heard from you.

I was lied to by Mitch [Geller] as a kid. He told me Trevor is a great coach so I trusted him and was brutally raped for years by him.

HOW HAVE WE NOT HEARD FROM YOU?!?

Are you really that abusive? The connection between abuser and victim doesn't end when the physical abuse stops...you still have lots of repair.

[24] Neither Ms. Joyce nor anyone else from Diving Plongeon Canada responded at all to this message.

[25] Mr. E. confirmed that Diving Plongeon Canada also refused to communicate with him about what had happened.

[26] Six months later, on February 18, 2016, Mr. Gorup-Paule tried writing to the general inquiries email address for DPC. He stated the following:

Hello Diving Canada,

Wegadesk D. Gorup-Paule here touching base to open communication regarding resolution of the sexual abuse that was inflicted upon me as an athlete under Trevor Palmatier. I have had several law firms contact me to represent a civil case in my name against Diving Canada.

It is my hope that Diving Canada will acknowledge the sever[e] effects sexual abuse has had on me and work WITH me to resolve them.

Please understand that continuing to re-live these traumatic events retards my healing process and the longer I must fight for Justice, the longer it will take to move past these events and forward with my life.

I look forward to hearing from you and can be contacted at [Mr. Gorup-Paule's phone number.]

Thank you,

Wegadesk.

[27] Once again no response was forthcoming to this communication, at least not for the next three-and-a-half years. During this time, Mr. Gorup-Paule began a public campaign on Facebook regarding what he saw as DPC's failures. He also apparently continued to send emails and leave voice messages for Ms. Joyce and Mr. Geller.

- [28] I find DPC's lack of any response to Mr. Gorup-Paule for over six years after he provided them with a credible allegation of sexual abuse by a prominent coach to be shockingly callous and, as Ms. Ip conceded, it exacerbated the harm done by Mr. Palmatier. Elite sport is analogous to a tight-knit religious community in the level of commitment it expects from its participants and the extent to which it becomes the individual's social network. By reacting to Mr. Gorup-Paule's allegations by refusing to communicate with him, DPC exacerbated the damage caused by Mr. Palmatier.
- [29] Finally, on October 29, 2019, Ms. Joyce sent Mr. Gorup-Paule a lengthy email. In the email, she acknowledged that the Trevor Palmatier case had been difficult for him, set out the processes the organization had now set up. Mr. Gorup-Paule responded positively the next day and proposed a meeting in Victoria. Two days later, Ms. Joyce agreed to a face-to-face meeting.
- [30] It is not entirely clear what caused the change of heart on the part of DPC. Mr. Gorup-Paule attributes it to a public campaign he was conducting on Facebook. There is corroborating evidence of this from Ms. Joyce's affidavit. DPC was clearly aware of Mr. Gorup-Paule's Facebook posts. DPC appears also to have reviewed its policies. I can take judicial notice of the societal reckoning occurring as a result of the #MeToo movement that became a global phenomenon after the exposure of sexual abuse by Harvey Weinstein in October 2017.
- [31] DPC's motives for its change are not before me. But in any event, the fact that DPC was finally engaging with Mr. Gorup-Paule was a positive development and Mr. Gorup-Paule saw it in that light at the time.
- [32] On December 19, 2019, Ms. Joyce and DPC's President, Bernie Olanski, met with Mr. Gorup-Paule. Mr. Gorup-Paule asked for compensation in the amount of \$1.3 million at that meeting. Ms. Joyce reported this to DPC's Board and to Aviva as their insurer.
- [33] Aviva appointed the defendant Crawford & Company (Canada) Inc. ("Crawford") to act as the adjusters investigating Mr. Gorup-Paule's claim. Mr. Gorup-Paule met twice with adjusters employed by Crawford, but they were unable to agree on a compensation amount.
- [34] On April 24, 2020, Aviva appointed Bruno De Vita, Q.C. [now K.C.], to act as counsel for DPC in relation to Mr. Gorup-Paule's claim. Mr. De Vita and Jennifer Tims, an adjuster with Crawford, met with Mr. Gorup-Paule on May 28 of that year. In that meeting, Mr. Gorup-Paule had increased his demand for compensation to \$46 million. Mr. De Vita urged Mr. Gorup-Paule to seek legal counsel, but Mr. Gorup-Paule stated that he wanted to be self-represented.
- [35] Mr. Gorup-Paule testified that despite their disagreements he had a good rapport with Mr. De Vita and has never suggested that Mr. De Vita acted dishonestly or in any way that could be considered unethical. I find that Mr. De Vita was clear throughout the process that he was representing the Diving Defendants, that he could not represent Mr. Gorup-Paule's interests or give him any kind of legal advice and appropriately encouraged him to consider legal

representation, while at the same time negotiating with him as long as he decided to represent himself. He conducted these negotiations in a good faith and collaborative way, always clear that he was representing interests opposed to those of Mr. Gorup-Paule.

- [36] On June 16, 2020, Mr. De Vita emailed Mr. Gorup-Paule expressing both his client's desire to move toward resolution and his view that \$46 million was well in excess of what a court would award for the claim. He stated that he and his client considered that it would advance the process if Mr. Gorup-Paule filed a notice of civil claim. Mr. De Vita also stated that his client preferred that the dispute not play out in social media and asked Mr. Gorup-Paule to stop posting about it.
- [37] Mr. Gorup-Paule responded the same day. He expressed preference to resolve matters without going to court and did not agree to stop his public campaign. The parties briefly pursued mediation but it did not come to anything. Mr. Gorup-Paule emphasized his lack of resources and his belief that DPC and/or Aviva had an obligation to provide for his needs.
- [38] At this point, I should summarize my understanding of the evidence of Mr. Gorup-Paule's economic situation. He testified that prior to the Covid pandemic, he worked at poker clubs dealing cards and earned tips. He had faced criminal charges for allegedly trafficking in cannabis, which were ultimately stayed in 2019. His income was disrupted by the pandemic. At the time of the negotiations with Crawford and then with Mr. De Vita, he was living at a friend's house "couch surfing" and had no regular income. Mr. Gorup-Paule mentioned to Mr. De Vita that he did not have a cell phone. In July 2020, Aviva advanced an interim payment of \$2,500 to Mr. Gorup-Paule.
- [39] On August 20, 2020, Mr. Gorup-Paule filed the Previous Action. Mr. De Vita filed a response to civil claim on behalf of the Diving Defendants (with the exception of Mr. Geller, who was not named in the Previous Action) and the Insurance Defendants. Mr. Gorup-Paule brought what appears to be an interlocutory application, including a requested order for immediate payment of over \$47 million in the fall of 2021, which was adjourned by Justice Crerar on October 9, 2020, with the direction that before it could be heard, it would have to be redone and refiled in the proper form and reviewed and certified by a lawyer.
- [40] On December 5, 2020, Mr. Gorup-Paule emailed Mr. De Vita referring to a recent conversation with him as "very productive". He referred to a settlement apparently reached with Mr. E. and said, "Taking up a judge's time, especially during this pandemic is something I'd like to avoid". He asked Mr. De Vita to "provide me with a reasonable offer".
- [41] On January 28, 2021, Mr. De Vita responded with an email setting out an offer of settlement. The proposal was that, in return for \$500,000, Mr. Gorup-Paule would release the defendants in the Previous Action, execute a consent dismissal order on a without-prejudice basis and provide confirmation of independent legal advice. Aviva would pay for independent legal advice up to \$2,500 plus PST and GST. Mr. De Vita said that based on the facts as currently known to the defendants and on his review of the law, he believed the offer to be fair and reasonable.

- [42] Mr. Gorup-Paule emailed back saying he appreciated Mr. De Vita's "hard work" and considered this a "milestone moment" in the case. He said he intended to speak with a lawyer and asked for a phone call, presumably after doing so.
- [43] Mr. Gorup-Paule received independent legal advice from Timothy Summers at Crease Harman LLP in Victoria on February 16, 2021. I advised Mr. Gorup-Paule that he did not need to say anything about what Mr. Summers told him, but that if he did he would be waiving solicitor-client privilege. He decided to testify that Mr. Summers told him the deal on offer was a good one, and that he could not expect to do better at trial, at least after a contingency fee was deducted. Mr. Summers complimented Mr. Gorup-Paule on his skill as a negotiator.
- [44] A call occurred on February 18, 2021. The upshot was that the parties agreed to settle for \$600,000. Mr. De Vita recalls this number as a "counter-offer" from Mr. Gorup-Paule. Mr. Gorup-Paule says he asked what Mr. De Vita's "next number" would be, was told \$600,000, and then agreed. Differences of this kind are typical in memories of phone calls. Nothing turns on it. I find that the parties agreed in principle to settle Mr. Gorup-Paule's claim for \$600,000 plus the cost of the independent legal advice.
- [45] On February 25, 2021, Mr. Gorup-Paule executed the Settlement Agreement. I will talk about its contents later, but it is common ground that it released all the defendants in this action, contained a covenant not to sue them and committed Mr. Gorup-Paule to execute a consent dismissal order in the Previous Action.
- [46] Mr. Gorup-Paule obtained the settlement monies at the beginning of March 2021.
- [47] There was a problem in the form of the original consent dismissal order that was flagged by the Victoria Registry. As a result, Mr. De Vita sent Mr. Gorup-Paule a new version of the consent dismissal order. Mr. Gorup-Paule balked at signing it and asked for a meeting in person in Vancouver with Mr. De Vita. The meeting took place. Mr. De Vita said that Mr. Gorup-Paule was required to sign the consent dismissal order as a result of the Settlement Agreement. Mr. Gorup-Paule said a prayer and then signed the consent dismissal order. It was an emotional moment, and he cried in front of Mr. De Vita.
- [48] On April 7, 2021, Mr. Gorup-Paule filed an affidavit in the Previous Action. In an email enclosing an unfiled version of this affidavit to Mr. De Vita, Mr. Gorup-Paule said the purpose of the affidavit was so "the conclusion of the civil matter is complete". It was not in support of any particular relief from the court. However, it does state his view at the time that "settlement documents which I signed were found to be defective and unacceptable by the courts", a view he attributed to divine intervention. The affidavit says it is "to allow a judge to know the circumstances of the situation which caused me to agree and sign off on settlement".

- [49] The affidavit is not a conventional court document and would not be admissible evidence in any proceeding. It refers to various forms of duress and asks that systemic remedies be pursued against the Diving Defendants. It disclaims seeking further money, although it says Mr. Gorup-Paule was shortchanged in the settlement. An addendum refers to Mr. Gorup-Paule's conversation with Mr. De Vita, and says some contradictory things about that conversation. The affidavit can certainly be interpreted as a protest, although not one that clearly calls for rescinding the settlement agreement.
- [50] This action was filed August 20, 2023. I was appointed as case management judge, and ordered that this application be heard before any further proceedings because of the fundamental importance of determining whether this is relitigation of an action dismissed under a valid settlement agreement.
- [51] At the beginning of the hearing, Mr. Gorup-Paule conceded that, with the exception of a claim of assault and battery on January 27, 2023 by an individual hired by DPC, the Present Action is essentially the same as the Previous Action. It follows that the bulk of the Present Action could only proceed to the merits if the Settlement Agreement is set aside.
- [52] In the course of the hearing, I raised the issue of whether I have jurisdiction to come to a substantive conclusion on the voidability of the Settlement Agreement or if that must be addressed in an application in the Previous Action to set aside the consent dismissal order. I made an interlocutory ruling that I had jurisdiction and all sides agree it is in the interests of justice for me to come to a substantive decision.
- [53] Having set out the background, I will now address the legal issues necessary to determine these applications.

III. Should Mr. Gorup-Paule's claim that he was physically attacked by a man hired by Diving Plongeon Canada be dismissed?

- [54] At para. 20 of the Notice of Civil Claim in the Present Action, Mr. Gorup-Paule pleads as follows:

Days before filing of this document, on January 27, 2023, the Plaintiff was assaulted by a DIVING PLONGEON CANADA hired man [whose] actions impersonated an officer in force; chasing the Plaintiff and violently tackling him from behind a wall. The Plaintiff was never aggressive and the incident was captured on video by the Plaintiff's mother and has been delivered to Police.

- [55] The Diving Defendants, which of course includes DPC, seek a dismissal of all claims under Rule 9-5 and striking out under Rule 9-7(1). In oral argument, counsel for the Diving Defendants stated that this would include para. 20.

- [56] The Diving and Insurance Defendants included in the Application Record an affidavit of Gino Pagliericci, who deposes that he believes he was the individual referred to and confirms he was hired by DPC to serve a "Notice of Prohibition of Entry to Premises" on Mr. Gorup-Paule because they (correctly) expected him to protest at the 2023 Winter Senior National Diving Championships at the Commonwealth Pool in Saanich. Ms. Joyce also provided evidence of hiring Mr. Pagliericci, and her reasons for doing so.
- [57] It appears DPC hired Mr. Pagliericci because they were concerned that Mr. Gorup-Paule would leaflet a diving event at the Saanich Commonwealth Pool, that Mr. Pagliericci confronted Mr. Gorup-Paule while he was trying to do that, and that Mr. Pagliericci used some degree of force to escort Mr. Gorup-Paule out of the Saanich Commonwealth Pool. Mr. Pagliericci says it was minimal. Ms. Joyce says DPC had a rental agreement with the Saanich Commonwealth Pool and had the right to provide Mr. Gorup-Paule with a trespass notice.
- [58] Mr. Gorup-Paule says his mother, Souie (also known as Susan) Gorup, has video evidence of the interaction, which suggests a violent attack by Mr. Pagliericci.
- [59] It is obvious to me that there are issues of credibility in relation to Mr. Pagliericci's, Ms. Joyce's and Mr. Gorup-Paule's respective accounts that cannot suitably be addressed by summary trial. Ms. Gorup is probably a necessary witness as well. There are legal issues with respect to the authority of Mr. Pagliericci to act as he did which would have to be addressed in a trial or summary trial of this matter. None of this should occur before Mr. Gorup-Paule has had an opportunity for documentary and oral discovery.
- [60] I reject the Diving Defendants' contention that para. 20 of the Notice of Civil Claim does not disclose a cause of action. Assuming the allegations are true, as I am required to do under Rule 9-7(1)(a), they would set out a cause of action in battery and possibly false arrest, false imprisonment or assault. If any of these torts are made out, then DPC has essentially admitted that it would be vicariously liable.
- [61] These allegations are clearly not covered by the Settlement Agreement and cannot be relitigation since the events occurred after the Previous Action was dismissed by consent.
- [62] To be clear, I am not finding that Mr. Gorup-Paule has made out these torts or that DPC does not have valid legal defences. That has to be for another day. I agree with counsel for the Diving Defendants that references to the Criminal Code are unnecessary since this is a civil proceeding and I will strike those references. But Mr. Gorup-Paule's claim under para. 20 can proceed. It follows that the action cannot be dismissed in its entirety against DPC.

IV. Did Mr. Gorup-Paule plead a valid cause of action against the Federal Defendants?

- [63] Mr. Gorup-Paule names the "Government of Canada" as a defendant. This is clearly a reference to His Majesty the King in Right of Canada (the "Federal Crown").

- [64] As a preliminary point, s. 23(1) of the Crown Liability and Proceedings Act says proceedings against the Federal Crown "may be taken in the name of the Attorney General of Canada". Because the Crown Liability and Proceedings Act is the source of the right to implead the Federal Crown in court, this "may" really means "must": see *Adbusters Media Foundation v. Canadian Broadcasting Corporation*, 2008 BCSC 71 at para. 51-52. I therefore will order that the "Attorney General of Canada" be substituted for the "Government of Canada" in all pleadings. This has no substantive effect on any remedies, however.
- [65] More importantly, tort liability of the Crown in right of the federal government is vicarious. Subject to irrelevant exceptions, it must be brought in relation to the acts or omissions of a Crown servant or agent: *Crown Liability and Proceedings Act*, s. 3(b)(i). While it may not be strictly necessary to name the precise individual, sufficient material facts must be set out so that the acts or omissions of a Crown servant or agent can be identified before a cause of action in tort can be maintained against the Federal Crown.
- [66] The Bank of Canada is a "body corporate" under the *Bank of Canada Act*. It has no powers other than those granted under that Act. For present purposes, it is a sufficient simplification to say it is limited to conducting monetary policy.
- [67] There is no reference to any act of an agent or employee of either the Federal Crown or the Bank of Canada in Part 1 of Mr. Gorup-Paule's Notice of Civil Claim. The closest to that are two paragraphs that mention Marlena McMurtry, incorrectly identifying her as the lawyer for the "Government of Canada" in the Previous Action. In fact, she was counsel for the Bank of Canada. In any event, the only allegation is that she filed a response to civil claim, which Mr. Gorup-Paule says expressed to him "I am going to shut down your case and sue you for trying to sue us". The best I can do to interpret this is that she pleaded that the claim against the Bank of Canada should be dismissed with costs. There is another comment on Ms. McMurtry's alleged litigation conduct, but it is complimentary.
- [68] There is no possible amendment that could make this a valid cause of action against the Federal Defendants.
- [69] There is an additional brief reference to the Federal Defendants in the Notice of Civil Claim is at para. 12 of the "Legal Basis" section, as follows:
- The Government of Canada has sent \$3.4 Billion Canadian currency, issued by the Bank of Canada, to Ukraine in 2022 alone and Aviva Insurance LLC profited over \$4 billion in 2016.
- [70] The Notice of Civil Claim makes no attempt to link this alleged fact about spending in Ukraine since 2022 to the specific injuries of Mr. Gorup-Paule that are the basis of either proceeding against the Diving Defendants and Insurance Defendants.
- [71] Any cause of action in tort against the Federal Defendants based on this paragraph is bound to fail. I note that the Supreme Court of Canada struck, as demonstrating no cause of action, a far more particularized claim that cruise missile testing in the 1980s increased the risk of loss of "life" and "security of the person" for Canadians on the basis that any causal nexus

based on international relations between states in their foreign policy was far too speculative for a case in a domestic court: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. These are not issues that courts decide.

- [72] Finally, also in the Legal Basis, there is a conclusory statement that "this case involves severe and compounding torts coming from defendants abusing public trust associated with the name 'GOVERNMENT OF CANADA'". This is an assertion, not a concise statement of material facts that could possibly give rise to a cause of action.
- [73] While I accept that pleadings should be read generously at this stage, there is nothing here that could possibly be the basis of a tort by a servant or agent of either the Federal Crown or the Bank of Canada against Mr. Gorup-Paule. The absence of any statement of any specific acts or omissions that could have caused specific harm to Mr. Gorup-Paule is a radical defect that cannot be addressed through an amendment.
- [74] While the focus must be on the Notice of Civil Claim, Mr. Gorup-Paule's Application Response to the Federal Defendants does not assist. He makes the undeniable point that the Federal Crown is bound by the Charter of Rights and Freedoms and must respect the aboriginal and treaty rights of the aboriginal peoples of Canada under s. 35 of the Constitution Act, 1982. He is correct that under s. 24(1) of the Charter, a person whose rights under the Charter are violated may obtain damages, including against the Federal Crown, when awarding damages is "just and appropriate". He is also correct that the Federal Crown, at least, is bound by the Canadian Bill of Rights.
- [75] However, these undeniable legal principles are not themselves material facts of acts or omissions that at least arguably give rise to legal liability. Mr. Gorup-Paule has identified acts by Mr. Palmatier that would clearly constitute the tort of battery and would give rise to civil liability both on his part and his employers, if they occurred within the scope of his employment. He has also identified conduct by the Diving Defendants that, if sustained, could be considered negligence. But neither the Federal Crown nor the Bank of Canada were Mr. Palmatier's employer, and I have no material facts pleaded before me that could give rise to some other theory of vicarious liability.
- [76] The mere fact that the Federal Crown funded the diving program that led to Mr. Gorup-Paule's abuse is not sufficient for vicarious liability: *Reference re Broome v. Prince Edward Island*, 2010 SCC 11 at para. 45.
- [77] In oral argument, Mr. Gorup-Paule identified a possible theory of liability on the part of the Federal Crown, namely that its system for funding sports organizations incentivizes those organizations in protecting high-performing employees who may have either engaged in or covered up sexual abuse. I understand that there is academic support for this proposition and it is definitely something the Federal Crown should consider in devising its policies for funding amateur and professional sport. However, it is not pleaded and was not mentioned in the Application Response and therefore the Federal Crown does not have fair notice of whether it would set out a cause of action. It definitely would not be the basis for a cause of

action against the Bank of Canada, which only engages in monetary policy and therefore does not determine funding formulas for sport.

[78] I would therefore dismiss the action as against the Federal Defendants and all the paragraphs that reference them are among those I order struck, even without regard to the Settlement Agreement, under which both Federal Defendants are releasees.

V. Is the settlement agreement enforceable?

[79] The central question on this application is whether the February 25, 2021 Settlement Agreement, presaged by Mr. Gorup-Paule's phone call with Mr. De Vita a week earlier, can be set aside.

[80] There is no question that Mr. Gorup-Paule signed the Settlement Agreement or that, on its own terms, it would bar the bulk of the Present Action. Ms. Gorup witnessed the signature.

[81] The ".doc" version sent to him identified "[J.E.]" as the signatory at one place, although "Wegadesk Gorup-Paule" is identified at the signature line. This does not matter. Mr. E.'s name is crossed out and this is initialled by Mr. Gorup-Paule and Ms. Gorup. There is therefore no formal deficiency in the document, and if it is to be found to be unenforceable, it would have to be for a substantive reason, such as duress or unconscionability.

[82] The Settlement Agreement is clear that the consideration to Mr. Gorup-Paule is \$602,268 (i.e., \$600,000 plus the cost of independent legal advice) in return for various clauses that can be summarized as:

- a) a release clause,
- b) a non-admission of liability clause,
- c) a representation that the settlement amount is accepted voluntarily,
- d) a representation by Mr. Gorup-Paule that a change in knowledge of the facts will not permit termination or rescission (a "non-rescission for mistake clause"),
- e) a covenant not to sue clause,
- f) an "other claim" clause,
- g) a representation that Mr. Gorup-Paule had not assigned his claim,
- h) a representation that Mr. Gorup-Paule obtained independent legal advice,
- i) an agreement to dismiss the Previous Action, and
- j) a clause providing for confidentiality of the terms of the settlement.

[83] The definition of "releasees" in the Settlement Agreement names all the defendants other than Mr. Geller. This exception does not matter because the release clause and the covenant not to sue extend to the officers, directors and employees of the releasees, and it is agreed that Mr. Geller is either an officer or director of DPC or was at the material time. It is thus

clear that Mr. Gorup-Paule agreed to release the defendants from any claims arising out of his abuse and agreed not to sue them for it in the future in return for \$600,000 plus reimbursement for independent legal advice.

- [84] The issue is thus whether Mr. Gorup-Paule can "void" or "rescind" the Settlement Agreement because of something wrong with the relationship between himself and the defendants when it was agreed to that negates the "justificatory" force of his agreement.
- [85] Contract law has two doctrines that are potentially applicable here: unconscionability and duress. Mr. Gorup-Paule explicitly raised duress in his Notice of Civil Claim, but in order to establish that the bulk of the Present Action should be struck without the possibility of amendment, it will be necessary to consider both doctrines.
- [86] The historical reason why there are two doctrines is that until the last part of the 19th century, the courts in England and in jurisdictions like British Columbia based on English law were divided between courts of common law and courts of equity, each with different processes and substantive law. "Duress" was the doctrine by which contracts could be avoided in common law courts, while "unconscionability" was the doctrine by which contracts could be avoided in courts of equity. The courts of common law and courts of equity were merged a century and a half ago, so it may not seem like it makes much sense to have two different doctrines any more.
- [87] But there is still an important difference. Under the doctrine of "unconscionability", even if there is a problem with the process by which the contract was negotiated (i.e., an inequality of bargaining power), the court must still look at the substance of the agreement to determine whether it is "improvident" before giving the party challenging it the right to cancel it. By contrast, a party that establishes "duress" may set aside an agreement even if it is, in substance, a fair bargain. In the classic case of duress-a gun to the head-a party that agreed to buy or sell something could set aside the agreement even if the price was fair. By contrast, in a case of unconscionability, the party challenging the bargain must establish both unequal bargaining power and a bargain that unduly disadvantages them or advantages the other side.
- [88] Both for historical reasons and because of this consequence of a finding of duress, it is harder to establish duress than unconscionability. The relationship between the parties may be one of unequal bargaining power without it also being duress, although if there is duress, there will definitely be unequal bargaining power. I propose to address unconscionability first and then, if I find that the parties here had unequal bargaining power, but the substance of the bargain was not "improvident", address duress.

A. Is the Settlement Agreement Unconscionable?

- [89] In the 2020 Uber case, the Supreme Court of Canada set out an updated test for unconscionability. This has made it easier for parties that claim to have been the weaker party in an agreement or contract to set that agreement aside, compared with the previous law.
- [90] The issue in Uber was whether an arbitration clause in the contracts between Uber Technologies Inc. and its drivers should be set aside for unconscionability. The arbitration clause required Canadian drivers to resolve any disputes they had with Uber through arbitration in the Netherlands, which made it impractical for drivers to actually bring claims against Uber, even if it violated their contracts or the law. In the face of an application to certify a class action on behalf of drivers for failing to pay them in accordance with Ontario employment standards law, Uber argued that the drivers had signed a contract and that prevented them from suing in court. A majority of the Supreme Court of Canada held that the arbitration clause could be cancelled by the drivers because it was negotiated in conditions of unequal bargaining power and it unduly advantaged Uber and disadvantaged the drivers (in other words, it was "improvident").
- [91] Justices Abella and Rowe wrote the majority judgment. They said unconscionability allows the setting aside of any contract with the combination of (a) inequality of bargaining power and (b) improvidence: at para. 54. At para. 80, they specifically rejected the following propositions found in earlier cases such as *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437 and *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, and accepted in *British Columbia* (see *Manak v Workers' Compensation Board of British Columbia*, 2018 BCSC 182 at para. 91):
- a) that unconscionable bargains must be "grossly unfair",
 - b) that independent legal advice would necessarily defeat an argument for unconscionability,
 - c) that the imbalance in bargaining power must be caused by cognitive factors such as ignorance, illiteracy, not understanding the language of the bargain, or a cognitive disability,
 - d) that it is necessary that the stronger party knowingly take advantage of vulnerability.
- [92] Instead, there are two elements to a claim of unconscionability:
- a) inequality of bargaining power;
 - b) an improvident bargain.
- [93] If these two elements are satisfied, then the contract may, subject to other equitable defences, be set aside by the weaker party.
1. Was there Unequal Bargaining Power?

- [94] Unequal bargaining power exists when one party cannot adequately protect their interests in the contracting process: Uber at para. 66. "Process" here should be distinguished from the "substance" of the bargain, which is addressed at the improvidence stage. The contrast is to an idealized situation in which two parties with equal power reach an agreement that can therefore be presumed to be of benefit to both of them once the knowing acceptance of risk in return for expected reward is taken into account.
- [95] The Supreme Court of Canada made clear that while inequality of understanding of the bargaining is one possible source of inequality of bargaining power, it is equally possible that a bargain will be thoroughly understood on both sides, but that one party will not be able to freely enter into it because of a condition of necessity. Necessity can arise where there is "financial desperation" on one side or where there is a special relationship in which trust and confidence has been reposed in the other party: Uber at para. 70.
- [96] In other words, the relevant inequality can be one of understanding, but it can also be economic or emotional. A party who is economically unequal may understand the unconscionable bargain perfectly. In Uber itself, which was a class certification, presumably some of the drivers understood that they had no real prospect of legal redress against Uber under the contract and signed anyway because the economic consequences of not doing so were worse.
- [97] I agree with the defendants that Mr. Gorup-Paule understood what he was getting into for all practical purposes as well as the defendants did. This is therefore not a case of cognitive asymmetry. However, it is a case where both financial desperation and the social-emotional relationship between the parties created inequality of bargaining power.
- [98] There is simply no comparison between the resources available to Mr. Gorup-Paule to cover his needs and bargain by comparison with those available to the Defendants. Mr. Gorup-Paule had no source of income and was living in a friend's home. He had devoted a decade of his life to diving, which undermined his employability in other fields. I accept that he no longer trusted the Diving Defendants by the time he negotiated with them, but he remained emotionally vulnerable to them, both because of his intense involvement in diving and abuse, but also because of DPC's callous "ghosting" of him between 2013 and 2019.
- [99] The Diving and Insurance Defendants say, at para. 130 of their submission, that "it has been expressly held that a settling party's being in need of financial relief, even if 'desperate', is not sufficient to establish an inequality of bargaining power" (emphasis in the original) and cite Canada v. Bezan Cattle Corporation, 2021 FC 397 in this regard. With respect, I do not agree that the Bezan Cattle Corporation case holds this. As I read Justice Little's analysis, he decided the settlement agreement could be enforced on summary judgment because the bargain was not improvident, and did not address whether there was inequality of bargaining power.

[100] In Uber at para. 70, Justices Abella and Rowe make it clear that financial desperation is a basis to establish inequality of bargaining power:

Other situations of dependence [than rescue at sea] also fit this mould [of a necessity leading to inequality of bargaining power], including those where a party is vulnerable due to financial desperation

[101] They are very clear that unconscionable bargains are sometimes in the informed rational self-interest of the weaker party. A ship captain about to go under will rationally offer any amount of money for rescue-and would do the same with the best advice, legal or otherwise, they could get on the ship radio. It will often be "rational" for a weak party to take a bad deal; that does not mean it is "conscionable" for the stronger party to insist on it.

[102] On any reasonable comparison, the inequality of bargaining power between Mr. Gorup-Paule and the Diving and Insurance Defendants was greater than that between Uber and its drivers. Even drivers who were in the same financial straits as Mr. Gorup-Paule could try to find work elsewhere. Mr. Gorup-Paule could only negotiate compensation with the Diving and Insurance Defendants.

[103] I find therefore that Mr. Gorup-Paule meets the first, process-oriented part of the unconscionability test in this case: the situation in which the parties was one of unequal bargaining power.

2. Was the Settlement Agreement "Improvident"?

[104] However, not all contracts between parties with unequal bargaining power will be unconscionable. If that were the rule, then weaker parties could never negotiate binding agreements, however favourable to them. This would perversely put them in a worse position than if equity never intervened at all. As a result, even if one party is stronger than the other, the agreement can only be set aside if it is "improvident" from the perspective of the weaker party.

[105] In the classic example, the desperate sea captain can agree to an enforceable contract to pay the rescuing ship for its expenses and a reasonable return. The desperation creates an inequality of bargaining power, but that will not mean a bargain on substantively reasonable terms is impermissible.

[106] A bargain is "improvident" if it unduly advantages the stronger party or unduly disadvantages the more vulnerable: Uber at para. 74. This is measured at the time the agreement is entered into. The determination of whether there has been "undue" advantage or disadvantage has to be contextual. But if it is not to be entirely subjective, the question of whether an advantage or disadvantage is "undue" must always be considered in comparison to some baseline. In para. 75 of Uber, the Supreme Court of Canada give, as baselines, the "market price, the commercial setting or the positions of the parties". A "significant departure" from the market price would suggest improvidence.

- [107] The fact that the benchmark for improvidence for a contract is the market price is not that the market price is necessarily "fair" in some larger, social sense. For example, in Canadian society, there is a widespread consensus that sick people should not pay market price for health services. But fulfilling this requires public action. The private law cannot subsidize or tax, and has always taken the view that it just does justice between the parties. It is inherent in private law that it cannot accomplish redistribution between groups in society. The point of the unconscionability doctrine is to ensure that the stronger do not push the weaker in individual transactions, recognizing that broader questions of social justice will have to be addressed in other ways.
- [108] I was unable to find any post-Uber case law of the specific context of settlement of civil litigation. There is no "market price" for settlement of sexual abuse torts. But the analogous concept in the context of litigation is the range of outcomes that would plausibly have occurred if the case had gone to trial. This must be based on the information the parties had at the time they agreed to the settlement.
- [109] Two factors are clearly relevant: first, the probability that liability would be established if the matter went to trial, and second, the likely range of damages if liability was established. Of course, these will always be ranges, rather than points, right up to the moment that a judgment is announced. So long as a settlement is within the reasonable range, taking both of these factors into account, it will not be improvident.
- [110] Just as the private law of contract generally cannot address whether the market price is fair, for the same reason the assessment of settlement contracts by plaintiffs cannot address whether damage awards are what they should be. Indeed, it is important not to evaluate things from the current perspective, but from the point-of-view of the range at the time the settlement was entered into.
- [111] The fact that the parties will save the delay and expense of the civil process is a factor in their decision to settle, but has to be handled carefully in an unconscionability analysis. By settling early for an amount likely to be found at trial, discounted by the probability of liability, the parties share the benefit of the avoided cost and delay of the civil process and the trial. If one party has more bargaining power, then it also has the potential to get a disproportionate share of this benefit. Indeed, the point of unequal bargaining power is that it can put the weaker party in a position where its options are all bad: if that party goes to trial, it will be worse off than if it accepts a settlement well below what it would most likely get at trial (see Uber at paras. 76-77). Since both parties benefit from earlier and cheaper resolution, it is not necessarily fair to take these benefits into account in assessing the providence of the bargain.
- [112] On the other hand, if there is an early settlement, the range of reasonable settlement values will inherently be wider than later in the civil litigation process, because there will be less shared information on which the probability of liability and the amount of damages can be assessed.

- [113] A similar caution applies to another advantage of settlement from the perspective of personal injury plaintiffs, namely the ability to avoid reliving the trauma in testimony. This is of course particularly important in the context of sexual abuse plaintiffs. However, if this benefit is weighed too heavily in assessing the providence of the bargain, it has the potential to inscribe into the second stage of the unconscionability test the inequality of bargaining power at the first stage.
- [114] As a result, a provident bargain is one that does not "significantly depart" from the range of what reasonable persons in possession of the information commonly known to the parties would expect a court to award if the matter went to trial, discounted by the probability that no liability would be found against the settling defendant, again based on that common knowledge.
- [115] If that hypothetically informed person would assess the probability of liability as between 50% and 100% and the range of damages between \$100,000 and \$200,000, then a provident settlement would have to be between \$50,000 (representing the low end of the liability and damages assessment) and \$200,000 (representing the high end of both).
- [116] A court assessing a settlement bargain for improvidence must not act as if it is actually assessing liability and damages after a trial. First of all, a judge in the position I am in here does not have the evidence and argument that would occur after a full discovery process and a trial-and indeed the advantage of settlement is that the expense and delay necessarily involved in such a process. As a result, a settlement will not be found unless it departs significantly from the range. Second, by aggressively coming to a firm conclusion of how the case would unfold, the trial judge would be usurping the role of the parties to a bargain. Thus, the liability and damage range should take into account the uncertainties.
- [117] I will start by analyzing liability.
- [118] Mr. Gorup-Paule had no plausible case against the Insurance Defendants or the Federal Defendants. It is not possible for a plaintiff injured by a person (including a corporate person) with liability insurance to sue that insurer directly. There is also no sensible case against the adjusters. I have already found that Mr. Gorup-Paule did not have a case against the Federal Defendants.
- [119] However, on the information the defendants had, liability was almost certain against Mr. Palmatier and was extremely high against DPC as his employer. His allegation was specific and credible and Mr. Palmatier was criminally convicted for sexual assault against Mr. E. To be sure, the law of when an assault committed by an employee is within the scope of employment is complex: *Bazley v. Curry*, [1999] 2 S.C.R. 554 (where employee expected to act as a parent, vicarious liability found); *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 (where employee of Boys and Girls Club gained opportunity to know victim through employment, vicarious liability not found); *B. (E.) v. Order of the Oblates of Mary Immaculate* (British Columbia), 2005 SCC 60 (no vicarious liability for assault by baker); *H. (S.G.) v. Gorsline*, 2004 ABCA 186 (no vicarious liability for assault by teacher); *B. (A.) v. D. (C.)*, 2011 BCS 775

(no vicarious liability for assault by teacher); John Doe v. Avalon East School Board, 2004 NLSCTD 239 (vicarious liability for assault by teacher if school requires student to be alone); H.N. v. School District No. 61 (Greater Victoria), 2024 BCSC 128 (no vicarious liability for teacher).

- [120] In my view, however, vicarious liability would be very likely for abuse that occurred when rooming with a coach at a competition when this situation was contemplated by DPC. Although the evidence was still sketchy at the point of settlement, Mr. Gorup-Paule had some basis for attributing negligence to DPC, which would lead to liability even if vicarious liability was not found. DPC's response after the abuse was disclosed would very likely be found to be independently actionable and to add to the damages. The probability of Mr. Gorup-Paule establishing liability was therefore very high and would not be likely to give rise to any significant discount. At the same time, a settlement somewhat lower than the range of damages to account for this uncertainty would not be improvident.
- [121] The amount of damages Mr. Gorup-Paule would be awarded at trial, by contrast, was extremely uncertain at the time the settlement occurred, and would have to be assessed over a fairly wide range, and so "provident" settlement amounts would also be over a wide range. Damage awards for sexual assault, especially of children and young people, have been increasing as a result of increased social awareness of the long-term effects of the trauma.
- [122] Mr. Gorup-Paule put forward some "compensation formulas" both as a basis of bargaining and to the court. But because these were not based on how lawyers or courts analyze damage awards, they cannot be given weight in determining whether the bargain was improvident. Mr. Gorup-Paule based his compensation formulas on what he sees as appropriate payment for his work diving. A court would award damages based on a combination of a non-pecuniary award and pecuniary heads of damages based on assessing the difference between what the plaintiff's financial situation would have been if the tort had never happened and what it in fact is.
- [123] Mr. Gorup-Paule would have a very good case for damages. A court would divide these up into non-pecuniary damages, past earning loss, loss of future earning capacity and costs of future care, and award him the total.
- [124] A major focus of fact finding at a trial would be the impact of the abuse on Mr. Gorup-Paule. Before me, he said that the sexual abuse, in addition to cutting short his diving career, drove him to problems with alcohol.
- [125] In the unanimous judgment of R. v. Friesen, 2020 SCC 9 at para. 81, the Supreme Court of Canada recognized that child sexual assault has inherent potential to cause harm into adult years:

Sexual violence against children also causes several forms of long-term harm that manifest themselves during the victim's adult years. First, children who are victims of sexual violence may have difficulty forming a loving, caring relationship with another adult as a result of the sexual violence. Second, children may be more prone to engage in sexual violence against children themselves when they reach adulthood. Third, children are more likely to struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self-harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults.

[126] Chief Justice Hinkson took note of these harms in the civil context in *C.M.A. v. Blais*, 2022 BCSC 214, while also saying that plaintiffs will have to demonstrate the existence of specific adult harms through evidence: paras. 77-78.

[127] It is important that I evaluate the settlement bargain on the information available to the parties at the time. Not surprisingly, there were no expert reports delineating the effect on Mr. Gorup-Paule. There was no discovery of documents or examinations for discovery or cross-examination.

[128] The first head of damages would be "non-pecuniary damages". These are for pain and suffering and loss of the amenities of life, as opposed to for the loss of income or property. As I have already mentioned, it is universally accepted that money is not a sufficient substitute for these kinds of harms. As Justice Dickson of the Supreme Court of Canada put it in 1978:

There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution: *Andrews v. Grand & Toy* at pp. 260-261.

[129] I therefore have to look at other cases to see how they have tried to do the impossible, namely value the pain and suffering caused by sexual abuse in dollars and cents.

[130] Non-pecuniary damages are assessed based on the effect of the sexual batteries on the victim, not on how serious those batteries were in the sense relevant to criminal sentencing: *D.M. v. R.L.*, 2014 BCSC 1061 at para. 68. While there is a cap on non-pecuniary damages in other personal injury cases, this cap does not apply to sexual battery cases: *S.Y. v. F.G.C.* (1996), 26 BCLR (3d) 155 (C.A). However, Madam Justice Brown set a range of \$150,000 to \$265,000 in 2014 dollars (see *D.M.* at para. 72) and this has continued to be accepted: *C.M.A.* at para. 129 and *C.L.H. v K.A.G.*, 2022 BCSC 994 at para. 341. Translated into 2021 dollars, that range would be \$175,000 to \$310,000.

[131] The lower end of this range would be inappropriate here because a trial judge would necessarily have to take into account the multigenerational effects of the systemic sexual abuse in Indian Residential Schools on Mr. Gorup-Paule, who testified that his father

attended residential school and died as a result of substance abuse before Mr. Gorup-Paule was born. There was also the aggravating factor of the response by DPC to the disclosure of the abuse, which would require a higher non-pecuniary damage award. But since the Previous Action was settled early, I cannot say that an informed observer in the position of the defendants would have had information that could narrow the range to a much higher degree. In particular, it did not have Mr. Gorup-Paule's discovery evidence or any expert evidence on the psychological effects of the abuse on him.

- [132] For the purposes of evaluating the "improvidence" of the settlement amount, a non-pecuniary range between \$200,000 and \$300,000 would be appropriate.
- [133] The other heads of damages in personal injury cases are considered "pecuniary" and therefore are in principle the kind of thing that can be compensated for in money. However, in practice, they are often harder to evaluate than non-pecuniary damages. Childhood sexual abuse often causes problems that lead the victims to lose opportunities (past income loss and loss of future income capacity). They also lead to requirements for past and future care, which can be costly. For past heads of damages, it is necessary to compare the actual situation in the past after the abuse with a hypothetical situation if the abuse had not happened. For the future, it is necessary both to establish scenarios given what did happen and scenarios of what would have happened. For the past, if a party establishes something occurred on a balance of probabilities, that is the baseline, but for hypothetical and future scenarios, these must be established as "real and substantial possibilities" and then "contingencies" are applied depending on their relative likelihood: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64.
- [134] The defendants did not have any meaningful information about the costs of past and future care at the time of the settlement, but these would be unlikely to be a very significant part of an award. Cost of future care damages in sexual battery cases are in the range of \$5,000 to \$20,000 in 2021 dollars. There was no information before the parties or evidence before me that would delimit where Mr. Gorup-Paule would be in this range.
- [135] The much more important source of pecuniary damages would be the loss of past income and capacity to make future income as a result of the abuse. The defendants were aware that Mr. Gorup-Paule had a higher-than-average loss of past income and loss of future income capacity than many sexual battery plaintiffs. He would likely have been able to establish that there was a causal connection between the abuse and his loss of his diving career.
- [136] It is much harder to say what the financial consequences would have been had his diving career continued. He might well have been part of the Canadian team at the 2008 Olympics, and it is at least possible that he would have done very well there. Even if he had just had a fulfilling diving career, this would have given him confidence and contacts in later life. I note, though, that the information available at the time of settlement would not establish a very precise figure.

- [137] Whatever the contingency for a lucrative diving career, this would only be part of the pecuniary loss, although it might be the largest part. Amateur sports organizations certainly claim that being a successful athlete is good for success in later life, and it follows that a career cut short by a traumatic event will often have negative financial consequences even if we assume the plaintiff would not have earned money as an athlete.
- [138] It would be foolhardy to try to come to a precise figure for reasonable pecuniary damages. What I can find, however, is that the bottom of the range of reasonable damage awards for past and future income loss would be below \$400,000 in 2021 dollars. There were very few cases that exceeded that figure when the settlement was made. The only one that I am aware of is *D.K.B. v. British Columbia*, 2011 BCSC 418, in which the court found that the plaintiff lost the opportunity to be drafted by an NHL team as a result of the abuse and awarded only a 10% contingency for the possibility that he would not have had at least a three year professional hockey career. In that case, total damages related to loss of income were \$467,000.
- [139] On the information before the parties at the time of the settlement, it would not be likely that Mr. Gorup-Paule would get an award that high, let alone higher. Diving, unlike hockey, is essentially an amateur sport. I accept that medallists can sometimes translate their success into sponsorships and celebrity. But the uncertainties are much greater than in the case of *D.K.B.* who, the court found, would have been signed with the Toronto Maple Leafs if he had not been abused.
- [140] I heard evidence that Mr. Gorup-Paule obtained a score close to that of Matthew Mitcham, who obtained a gold medal at the Beijing Olympics. I completely understand Mr. Gorup-Paule's point that he was denied that chance. That being said, it would hardly be safe to conclude that he would be able to establish pecuniary damages based on this possibility and, if he did, there would inevitably be a substantial contingency involved.
- [141] Recognizing the dangers of trying to do a damages analysis on a chambers record, I am not going to try to come up with a precise range of damages in the event Mr. Gorup-Paule had gone to trial. I am satisfied, however, that \$600,000 was not a "substantial departure" from the "range" that he would have received.
- [142] As a result, the Settlement Agreement, although reached in a situation of inequality of bargaining power, was not "improvident" and therefore not "unconscionable". It cannot be set aside on that basis.

B. Was the Settlement Agreement Obtained Through Duress?

- [143] The continuing important difference between duress and unconscionability is that while it is harder to establish that the bargaining process was tainted by duress than by inequality of bargaining power, once duress has been established, the court does not look at the substance of the bargain. That is because duress negates consent, which means there is no contract, unless the party subject to duress chooses to ratify the contract after the duress

has passed. As a result, if Mr. Gorup-Paule were able to show duress, he could set aside the Settlement Agreement, regardless of how substantively fair the bargain may be. Duress is just about the process by which agreement is reached, while unconscionability considers both the process and the substance. But it will be harder for him to do so.

1. The Test for Duress

[144] Duress, including "economic duress", is a coercion of the will that vitiates consent: *Pao On v. Lau Yiu*, [1979] All E.R. 65 (P.C) at p. 78, adopted in *Byle v. Byle* (1990), 65 D.L.R. (4th) 641 (B.C.C.A.) and by both Justice D. Smith in dissent and Justice K. Smith for the majority in *Bell v. Levy*, 2011 BCCA 417 at paras. 51 and 71. Commercial pressure is not enough. Rather, the pressure (a) must be such as to amount to compulsion and (b) must be illegitimate: *Universe Tankships of Monrovia v. International Transport Workers' Federation*, [1982] 2 All E.R. 67 (H.L) at p. 88.

[145] The following factors can be considered in determining whether there has been compulsion:

- a) Whether the person alleged to be coerced protested;
- b) Whether the person had an alternative course open to them, such as an adequate legal remedy;
- c) Whether the person received independent advice;
- d) Whether the person took steps to cancel ("avoid") the contract as soon as the duress ceased.

[146] These factors are just evidence of the true issue, which is whether there was compulsion, and are not themselves a set of necessary conditions that have to be met in every case: *Bell* at para. 71.

[147] In this case, Mr. Gorup-Paule received independent advice. He at least arguably "protested" the Settlement Agreement when he filed the final affidavit, and I would take that, and the Present Action, as steps to cancel the contract.

[148] More importantly, in my view, he had an "alternative course" of not settling and instead pursuing the Previous Action to trial. I understand that he believes that this was not a tenable option in light of his economic situation. But this is where the difference between the legal doctrine of duress and unconscionability matters a great deal. Courts will not view the prospect of having to pursue litigation in the face of difficult economic circumstances as compulsion.

[149] A "threat" either to sue or to defend a lawsuit is not considered compulsion: *Coughlin v. Lopehandia*, 2022 BCSC 1873. If it were otherwise, then it would never be possible for a litigant in dire financial straits to settle, since, as I have noted, the substantive equity of the bargain does not matter in duress.

- [150] Even if I could conclude that Mr. Gorup-Paule was compelled in the sense that he had no alternative course of action, I would still need to find that the Diving and Insurance Defendants used illegitimate pressure in the bargaining process. This is distinct from whether they or some of them engaged in illegitimate tactics before the bargaining process began, which will often be the case when there is a substantial tort settlement.
- [151] While I accept that Mr. Gorup-Paule often found the process of having his claim assessed by adjusters and of negotiating with Mr. De Vita frustrating - and quite possibly traumatizing - neither the adjusters nor Mr. De Vita did anything wrong. The adjusters met with him and asked for the ability to share information with the insured. As I think Mr. Gorup-Paule must acknowledge, Mr. De Vita was a "straight shooter" with him and acted in a professional and courteous way throughout. Although duress is not made out by dishonesty, there was nothing like that here.
- [152] When Mr. Gorup-Paule asked Mr. De Vita to make a good faith offer, he obtained instructions and did so. Mr. Gorup-Paule then negotiated him up by \$100,000, whether directly by a counter-offer or in the fashion Mr. Gorup-Paule recalls. When Mr. De Vita said - after the Settlement Agreement was signed and Mr. Gorup-Paule had received the settlement funds-that Mr. Gorup-Paule had to sign the consent dismissal order, he was just telling the truth.
- [153] I recognize that the process of pursuing personal injury claims, especially sexual abuse claims, is usually difficult and often traumatizing. But to establish duress, unlike unequal bargaining power, requires more than just showing an unequal objective situation. It requires showing pressure that both amounts to compulsion and that is illegitimate. Neither have been shown here.

VI. Other arguments made by the plaintiff

- [154] I will briefly address some arguments made by Mr. Gorup-Paule. I find they have no merit, and will try to explain why.
- [155] Mr. Gorup-Paule raised s. 35 of the Constitution Act, 1982, which affirms the "treaty and aboriginal rights" of the Aboriginal peoples of Canada and referred to the Delgamuukw decision. Mr. Gorup-Paule is registered under the Indian Act and I have expressed my view that a court considering his damages from sexual abuse would have to take into account the multi-generational effects of the legacy of colonialism in general and the Indian Residential Schools in particular. However, Aboriginal and treaty rights are collective rights that must be litigated by those authorized to do so by an Indigenous collective. There is no evidence that Mr. Gorup-Paule has been so authorized.

- [156] I do not think either s. 25 of the Charter or the Royal Proclamation of 1763 add to this basic point. Section 25 is a non-abrogation clause in the Charter. It says that the guarantees of rights and freedoms under the Charter shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada including [] (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.
- [157] Since none of the defendants are asserting any rights or freedoms under the Charter, s. 25 is not relevant. It would not be appropriate of me therefore to consider the scope of "other rights or freedoms that pertain to the aboriginal peoples of Canada".
- [158] Mr. Gorup-Paule raises the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), but does not point to a specific provision or how it assists his arguments about the Settlement Agreement. UNDRIP was adopted by the General Assembly of the United Nations on September 13, 2007. It is not itself a binding instrument of international law, although it is evidence of the *opinio juris* necessary to find a norm of customary international law.
- [159] Domestically, there is both federal and British Columbia legislation that requires reference to UNDRIP in the construction of statutes and for other purposes. No legal argument has been advanced to me of the effect of this legislation on these claims.
- [160] I accept that UNDRIP refers not just to Indigenous peoples, but also to Indigenous individuals. Article 7(1) guarantees Indigenous individuals the "rights to life, physical and mental integrity, liberty and security of person". Obviously, sexual abuse is a violation of physical and mental integrity. There is at least arguably a customary international law norm that states must protect Indigenous individuals from sexual abuse. However, I have no argument before me that Canada's obligations under the customary international law reflected in UNDRIP are not met by providing the same civil remedies as anyone else when sexual abuse occurs and the same power to compromise those civil remedies in return for a settlement, at least if the settlement is not unconscionable or obtained through duress.
- [161] Mr. Gorup-Paule refers to ss. 2, 7, 12, 24 and 32 of the Charter of Rights and Freedoms. Of these, section 32 explains why the others do not need to be engaged with here. It says:
- 32 (1) This Charter applies
- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

- [162] What that means is that Charter rights and freedoms can be invoked in legal challenges to laws (as ultimately attributable either to Parliament or to the provincial legislature) or to the acts and omissions of the executive government, federal or provincial. Mr. Gorup-Paule is not challenging a law. And the Diving Defendants and the Insurance Defendants are not part of the executive government. While the Federal Crown and the Bank of Canada are part of the "government of Canada" under s. 32(1)(a), as I have already explained, there is nothing in the Notice of Civil Claim that connects either to the misdeeds of Mr. Palmatier.
- [163] There is no question that "security of the person" and "liberty" as protected by s. 7 of the Charter includes sexual and bodily integrity, precisely what is damaged by sexual abuse. But the common law of battery, not the Charter, provides remedies when a private person, as opposed to the government, is either directly or vicariously responsible for denying someone that integrity. The same point can be made in relation to the fundamental freedoms guaranteed by s. 2, the prohibition on cruel and unusual treatment under s. 12 and equality rights under s. 15. In each case, these guarantee values that are offended by people who either engage in or fail to prevent sexual abuse. But if those persons are private persons, then the remedy is not under s. 24 of the Charter, but under the common law.
- [164] Mr. Gorup-Paule refers to the Preamble to the 1960 Canadian Bill of Rights, S.C. 1960, c. 44. The provisions of the Canadian Bill of Rights only apply to the Federal Defendants, and the preamble does not itself create any enacted law. I understand Mr. Gorup-Paule is referring to the preamble in support of the fundamental principle of the dignity and worth of the human person. I agree that this is a fundamental value our legal system aspires to. Tort law manifests this aspiration in part by providing for damages when a person is abused by another. Settlement agreements can manifest this value, since they allow persons to exercise the "dignity" of making decisions for themselves. This is consistent with enforcing bargains that are made in conditions of unequal bargaining power, but are substantively "provident".
- [165] Mr. Gorup-Paule has made much of s. 3(3)(c) of the Canada Not-for-Profit Corporations Act, S.C. 2009, c. 23, which provides that corporations incorporated under that Act "shall not carry on the business of a company or society to which the Insurance Companies Act applies." This is not a ban on Canada Not-For-Profit Corporations Act corporations obtaining insurance or cooperating with their liability insurer when claims are made against them. Being insured is not carrying on an insurance business. Parliament cannot possibly have wanted to prevent entities like DPC from obtaining liability insurance-which would be bad for them, but also bad for persons who are injured because of them.
- [166] One aspect of liability insurance is that the insurer has a "duty to defend" when a claim within coverage is made against the insured. That includes appointing a lawyer-in this case, Mr. De Vita-to represent the insured (i.e. the Diving Defendants) in the litigation. This is not a conflict of interest. Rather, it is part of what the insurance premiums pay for.

[167] Mr. Gorup-Paule frequently refers to the Criminal Code. This is perhaps common among self-represented plaintiffs in civil litigation, but the Criminal Code is about criminal liability, not civil liability.

VII. The Defendants' Application to declare Mr. Gorup-Paule a Vexatious Litigant

[168] The Diving and Insurance defendants make an application under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, requesting an order that a legal proceeding must not, without leave of the court, be instituted by Mr. Gorup-Paule in any court. These orders are often called "vexatious litigant orders".

[169] Under s. 18, the court may only make such an order if satisfied that the person "has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons".

[170] In other words, there are two pre-requisites for vexatious litigant orders:

- a) The person must have instituted vexatious legal proceedings in this court or in the provincial court, and
- b) The person must have done so "habitually, persistently and without reasonable grounds".

[171] The Diving and Insurance defendants concede that the Previous Action was not vexatious- indeed, they settled it for just over \$600,000-but they argue that this one is.

[172] I disagree. I have found that para. 20 of the Notice of Civil Claim sets out a real cause of action that needs to be addressed. I have not accepted Mr. Gorup-Paule's arguments for setting aside the settlement agreement, but I do not think they are vexatious. I agreed with Mr. Gorup-Paule that the situation was one of unequal bargaining power. On analysis, the bargain was substantively provident, but a proceeding is not vexatious because it is ultimately unsuccessful.

[173] Even if I were to find this proceeding to be vexatious, an order under s. 18 of the Supreme Court Act is not available because that requires the person who is the subject of it to engage in such proceedings either "habitually" or "persistently". In *Lindsay v. Canada (Attorney General)*, 2005 BCCA 594 upheld a decision not to issue a s. 18 order against "David-Kevin: Lindsay", an individual who the court described as "fixated on the idea that the Income Tax Act is unconstitutional" and who purported to act as "agent" to individuals across Canada who refused to file tax returns based on this belief, despite the fact that it has been repeatedly rejected by courts. While the trial judge found Mr. Lindsay's litigation conduct to be "vexatious", he said it was neither habitual nor persistent.

[174] The Court of Appeal upheld the trial judge's dismissal of the application and commented that the word "habitual" has no special meaning in s. 18 of the Supreme Court Act: *Lindsay* at para. 27. To be sure, in the *Lindsay* case, the Court of Appeal observed that Mr. Lindsay

had "taken himself so close to the line that any further litigious behaviour of a vexatious nature will put the matter beyond doubt and an order should be issued". But Mr. Lindsay, unlike Mr. Gorup-Paule, had a record of multiple vexatious proceedings. In my view, it would be giving "habitual" (and for that matter "persistent") a strained meaning to make that finding in the case of a single proceeding. It would also ignore the Legislature's choice of the plural "proceedings".

[175] I accept that some of Mr. Gorup-Paule's arguments had the indicia of "pseudo-law". For better or for worse, we live in a time when people can access both correct legal information and unorthodox legal theorizing on the Internet and will sometimes deploy both in support of claims and defences. The courts need to distinguish this from organized campaigns of "pseudo-law" groups, to which we have to respond vigorously. While not all of Mr. Gorup-Paule's arguments were legally valid, he raised important issues.

[176] Since the Diving and Insurance Defendants have not satisfied me that Mr. Gorup-Paule has habitually, persistently and without reasonable grounds instituted vexatious legal proceedings, I dismiss their application under s. 18 of the Supreme Court Act.

VIII. Costs

[177] After reading an oral version of this judgment, I asked for submissions as to costs. The Diving and Insurance Defendants are not seeking an order as to costs of this application in any event of the cause, and so their costs shall be in the cause. The Federal Defendants each sought costs assessed at \$500. Since I will make a final order with respect to them and since they were successful on the merits, I will make that order.

IX. Conclusion and Order

[178] While Mr. Gorup-Paule may pursue his claim under para. 20 of Part 1 of his Notice of Civil Claim, the core of his claim in the Present Action is exactly what he settled in the Previous Action. And while I accept he was in a position of inequality of bargaining power, he played that position effectively enough that the amount he obtained cannot be considered "improvident".

[179] Mr. Gorup-Paule is charismatic and sincere. He clearly has found some meaning in struggling on behalf of youth and former youth who have experienced or are at risk of experiencing sexual abuse in sport. This is a good cause. Nothing I have said today means he cannot pursue that cause effectively and responsibly. But a civil action for the injuries Mr. Palmatier has done to him is something he has already freely settled, and so he must find some other path.

[180] I therefore make the following orders:

- a) An order that the "Attorney General of Canada" be substituted for the "Government of Canada" as a party to this proceeding;

- b) An order that the action is dismissed as against all the defendants other than Diving Plongeon Canada;
- c) An order that all paragraphs of the Notice of Civil Claim be struck, except para. 20 of Part 1 and para. 5 of Part 3;
- d) An order that the Plaintiff has leave to amend Part 2 of his Notice of Civil Claim to seek special and general damages;
- e) An order that the application of the Diving Defendants and Insurance Defendants for an order under s. 18 of the Supreme Court Act is dismissed;
- f) An order that Mr. Gorup-Paule shall pay the Attorney General of Canada's costs of this application, assessed at \$500;
- g) An order that Mr. Gorup-Paule shall pay the Bank of Canada's costs of this application, assessed at \$500;
- h) An order that the costs of the remaining Defendants on this application shall be costs in the cause.

"J. G. Morley, J."

The Honourable Justice Morley

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