

CANADA / JUDGMENT

K.A.K. v. British Columbia,

2011 BCSC 1391

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1391 K.A.K. v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.K. v. British Columbia,

2011 BCSC 1391

Date: 20111018

Docket: VI05-2992

Registry: Victoria

Between:

K.A.K., K.N.K., C.K., M.K., C.N.K., M.M.K, C.G.K., K.G.K., M.A.K. By Their Litigation Guardian,
The Public Guardian and Trustee of British Columbia

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia, G.K., M.H., Jane Doe and
John Doe

Defendants

RESTRICTION ON PUBLICATION OF THE NAMES OF

THE PLAINTIFFS AND PERSONAL DEFENDANTS

Before: The Honourable Madam Justice Fisher

Reasons for Judgment

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L. Johnston, D. Baumgard

Place and Date of Trial:

Vancouver, B.C.

February 28 - March 29,

April 6, 7, 8, May 16 - 19, 2011

Place and Date of Judgment:

Vancouver, B.C.

October 18, 2011

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- [1] The plaintiffs are six[1] of eleven children born to the defendants G.K. and M.H. They seek general and future pecuniary damages from the Province of British Columbia (the Crown) for the failure of the Ministry of Child and Family Development (MCFD or the Ministry) to remove them from their parents' care when it was readily apparent that they were in need of protection. The Crown has admitted liability.
- [2] This trial concerned only an assessment of damages as against the Crown. The parents were not served with the writ and statement of claim and the Crown did not institute third party proceedings against them. At trial, the plaintiffs abandoned any claims against Jane Doe and John Doe.
- [3] MCFD removed the three oldest plaintiffs from their parents in April 1993 but returned them in August 1993 on certain conditions. The three younger plaintiffs were born between 1994 and 1996. After several years of various interventions, MCFD removed all of the children in May and June 1999. They have since resided in various placements and foster homes. On April 3, 2001, a Provincial Court judge ordered that all of the plaintiffs be placed in the continuing custody of the Ministry. The two oldest plaintiffs are now over the age of majority.

- [4] The parties agree that the basis for the Crown's liability is the Ministry's act of returning the plaintiffs K.A.K., K.N.K. and C.K. to their parents on August 8, 1993 and its failure to apprehend the plaintiffs M.K., C.N.K. and M.M.K. at their respective births. The plaintiffs say that they were all, over many years, exposed to inadequate and cramped housing, numerous moves, lack of food, inadequate medical attention, alcohol abuse by the parents, domestic violence between the parents, violence to one of the children and witnessed by the others, and numerous attendances by police. The Crown says that the evidence does not establish that the plaintiffs were exposed to abuse and neglect to the extent alleged and takes issue with the extent to which the abuse and neglect caused damage. It also says that the plaintiffs are entitled only to non-pecuniary damages.

The nature of the evidence

- [5] Due to the nature of this case, the plaintiffs faced some evidentiary challenges. There is little direct evidence about what actually happened in the home of G.K. and M.H. prior to the final apprehension of the children in June 1999.
- [6] Only three of the plaintiffs testified. K.N.K., who is the oldest of these, told the court about her memories of her life with her parents. The younger two, C.N.K. and M.M.K., were very young when they were apprehended. C.N.K. remembered little and M.M.K. nothing. Some out of court statements made by K.A.K., C.K. and M.K. that touch on how they were treated by their parents were admitted under the principled exception to the rule against hearsay. Prior statements made by K.N.K. were adduced in evidence by consent, including a transcript of an interview. K.N.K. was not cross-examined about any of these prior statements and I have not considered or relied on any of them.
- [7] Social workers who testified were able to tell the court about the nature of the complaints that the Ministry received about the family, investigations that were conducted, and the basis for decisions that were made at various times. Only some testified about their observations of the plaintiffs and the parents at various times.
- [8] The parties filed two lengthy Agreed Statements of Facts. The first provides a general chronology of events from 1988, when the mother, M.H., was first involved with the Ministry, to June 1999, when the plaintiffs were permanently apprehended. The second provides chronologies after June 1999 mainly with respect to each plaintiff. Many of the agreed facts were based on second hand information. Unless the underlying facts themselves were admitted in the Agreed Statements of Facts, second-hand information was not admitted to prove the truth of its contents.
- [9] The plaintiffs adduced 14 volumes of documents, mainly from Ministry files, in an effort to paint a picture of the K. family as profoundly dysfunctional, where the children were exposed to serious alcohol and substance abuse and domestic violence between the parents, significant neglect and in some instances, physical abuse. Much of the evidence in these documents was based on second-hand information. None of this was admitted to prove the

truth of the contents in any document unless the facts were admitted in the Agreed Statements of Facts. I have considered second-hand information only for the purpose of establishing that certain reports were made at certain times, and such evidence forms part of the circumstantial evidence in this case.

The claims

- [10] There are claims for general damages, the cost of future care, and loss of future income earning capacity.
- [11] Five of the plaintiffs have been diagnosed with alcohol-related neurodevelopmental disorders (ARND) that have affected their cognitive function and intellectual capacity. They do not claim damages arising from these disorders, but only for psychological injuries caused by the parents' neglect and abuse.
- [12] Before I review the evidence, it is important to outline the general principles of law that apply to an assessment of damages.

General principles for causation and assessment of damages

- [13] The Crown's admission of liability brings with it an admission that its negligence in failing to continue to apprehend the plaintiffs from August 1993 caused or contributed to the psychological injuries that have been proved to the requisite standard. There is evidence that the plaintiffs' neurodevelopmental disorders also contributed to these psychological injuries. Essentially, with respect to five of the plaintiffs, the Crown concedes that it was necessary to have both its failure to continue the apprehension in 1993 and the neurodevelopmental disorders to cause the psychological injuries.

- [14] As set out in *Athey v Leonati* [1996] 3 SCR 458, causation is established

where the plaintiff proves on a balance of probabilities that the defendant caused or contributed to the injury. 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 the 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.

- [15] In *Blackwater v Plint*, 2005 SCC 58, a case involving multiple causes to psychological injuries, McLachlin C.J. discussed the difference between causation as the source of the loss and the rules of damage assessment in tort, at para. 78:

The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

- [16] In short, the essential purpose of tort law is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.
- [17] It is not permissible to apportion liability between tortious and non-tortious causes, as the plaintiff would not be adequately compensated. However, where there are multiple causes of a plaintiff's injuries, the key factual question is whether the injuries are divisible or indivisible. Divisible injuries are those that can be separated so that their damages can be assessed independently. Indivisible injuries are those that cannot be separated: *Bradley v Groves*, 2010 BCCA 361 at para. 20.
- [18] If the injury is divisible, a plaintiff can recover from the defendant only the damages attributable to the injury caused or contributed to by that defendant. If the injury is indivisible, a plaintiff can recover from the defendant 100% of the damages attributable to the injury caused or contributed to by that defendant regardless of the contribution to the injury by others: *Athey* at para. 24; *Bradley v B.P.B. v M.M.B.*, 2009 BCCA 365 at para. 33; see also *E.D.G. v Hammer*, 2003 SCC 52 at para. 33.
- [19] As the court said in *Blackwater*, a plaintiff is only to be restored to his or her original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measureable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award: *Athey* at para. 35. In addition, damages caused by other wrongful acts or non-tortious causes that occur after the defendant's wrongful act must be taken into account: *Blackwater* at para. 80. This is referred to as the "crumbling skull" doctrine. It is important to note that any reduction made to take these factors into account does not reduce the damages; it simply awards the damages which the law allows: see *Blackwater* at para. 84.
- [20] Hypothetical and future events - how the plaintiff's life would have gone without the tortious injury - need not be proven on a balance of probabilities. They are given weight according to their relative likelihood, or the probability of their occurrence. A future or hypothetical possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation": *Athey* at para. 27; see also *Zacharias v Leys*, 2005 BCCA 560 at para. 16.

- [21] In addition, a tortfeasor is liable for a plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. As the court said in *Athey* at para. 34, the tortfeasor must take the victim as he finds him, and is liable even though the plaintiff's losses are more dramatic than they would be for the average person. This is known as the "thin skull rule". See also *Blackwater* at para. 79.

The issues

- [22] It is not in dispute that ARND is a pre-existing condition that would have significantly impacted each of the five plaintiff's ability to function in life. What is in dispute is the extent to which this pre-existing condition would have affected the behaviours and psychological health of these plaintiffs in any event.
- [23] The plaintiffs say that ARND caused cognitive impairment and affected their impulse control, but the neglect and abuse caused their psychological injuries. They say that these psychological injuries caused pain and suffering and will require them to incur future care costs. Three of them say that these psychological injuries have also affected their future capacity to earn income.
- [24] The Crown says these plaintiffs would have suffered from many of the same psychological injuries regardless of the neglect and abuse as a consequence of their pre-existing conditions as well as their subsequent negative experiences in the foster care system, both non-tortious causes. While it concedes that its negligence caused or contributed to the plaintiffs' psychological injuries, the Crown does not concede that causation has been proven with respect to future pecuniary losses, and says that the plaintiffs are limited to non-pecuniary damages. It also says that the plaintiffs will be eligible to receive provincially funded disability benefits and services to assist them in the future and any awards for future pecuniary losses must avoid double recovery.
- [25] Both parties say, for different reasons, that the plaintiffs' psychological injuries are divisible from the consequences of the other, non-tortious causes.
- [26] The Crown's position on causation appears to confuse the principle of causation as the source of the loss and the rules of damage assessment in tort. Once the plaintiffs have established on a balance of probabilities, under the "but for" test, that the defendants' negligence caused or contributed to their damages (here psychological injuries), then they must establish any future or hypothetical losses according to the probability of their occurrence, or relative likelihood.
- [27] The following issues arise in relation to an assessment of damages:
1. What neglect or abuse were the plaintiffs exposed to after August 1993?
 2. Are the psychological injuries claimed by the plaintiffs divisible or indivisible from non-tortious causes?

3. With respect to non-pecuniary damages, how was the psychological and emotional well-being of the plaintiffs affected by their exposure to the care of their parents during the relevant time periods?
4. With respect to future pecuniary damages:
 - Is there a real and substantial possibility that the plaintiffs will suffer losses in respect of their future care needs and future capacity to earn income as a result of their psychological injuries?
 - Would the plaintiffs have suffered these losses anyway as a result of their neurodevelopmental disabilities and/or other non-tortious causes?
 - What contingencies, if any, should be made to avoid double recovery for services or benefits that the plaintiffs maybe eligible to receive in the future?
1. The neglect and abuse by the parents

The evidence to August 1993

- [28] The oldest child, K.A.K., was born in October 1990. MCFD had some involvement with the plaintiffs' mother, M.H., before this, in 1988. In April 1991, the Ministry identified a number of risk factors in relation to M.H.'s history and offered ongoing support to the family. K.A.K. was examined by a doctor with the child protection team, who reported finding no signs of abuse. Ministry files document several reports of concerns about the family in July and August 1991, primarily about alcohol consumption and possible violence by G.K. against M.H.
- [29] The second child, K.N.K., was born in December 1991. The doctor who was involved with this birth reported concerns about M.H.'s mental capacity and ability to care for the child. Shortly after the birth, the family was evicted from their home and the Ministry lost track of them for about a month. By the end of 1991, social workers had identified a number of risk factors, which included the parents' alleged use of drugs and alcohol, physical violence with each other, limited parenting abilities, poor judgment and resistance to Ministry intervention or support.
- [30] In February and March 1992 there were reports that the parents would not accept visits from social workers and in May 1992 MCFD closed the file "due to extreme resistance". In July, K.N.K. was seen in hospital after a "near drowning". She was examined by Dr. Paul Korn, a paediatrician, who understood that the child had been in a bath tub unattended. He kept K.N.K. overnight and released her the next day, observing her to be fine. He recommended that public health go into the home to make sure safety issues were addressed. It is not known if this was ever done.
- [31] The third child, C.K., was born in January 1993. On March 28, 1993, police attended at the family home at the request of a neighbour. They observed that the parents had been drinking and appeared unable to care for their three children due to the level of alcohol

consumption. MCFD apprehended the children. The next day, foster parents observed that K.N.K. had bruises on her face. On March 31, K.N.K. and C.K. were taken to hospital. Dr. Jean Hlady examined K.N.K., who observed bruises on her neck, both sides of her face, abdomen and lower back, and opined that these were severe and non-accidental. On April 1, a friend of the parents reported serious concerns about their parenting skills. On April 5, 1993, a Provincial Court judge made an interim order that the Director retain custody of the three children. On April 13, MCFD found that the children were in need of protection due to abuse of K.N.K. and excessive alcohol use by the parents.

- [32] Between May and August 1993, the Ministry worked with the parents, who agreed to attend drug and alcohol counselling and a program called "Project Parent". On August 3, 1993, the parents signed a Letter of Expectation where they agreed to a number of conditions, including continuing with Project Parent, participating in other programs for alcohol abuse and anger management, keeping sober, and maintaining contact with the social workers. On August 8, 1993, the Ministry returned the three children to the care of the parents. They were all under the age of three.

August 1993 to June 1999

- [33] The fourth child, M.K., was born in March 1994. Between February and May 1994 MCFD received some positive reports about the parents' progress and the family service file was closed. In November 1994 there was a report of domestic violence and alcohol abuse. A social worker met with M.H. and observed that the children appeared loved and cared for.
- [34] In April 1995, the fifth child, C.N.K., was born. The day before the birth of this child, police attended at the residence sometime after 2:00 am and found the four children alone. M.H. returned while they were there. Police noted that she appeared sober but observed evidence of alcohol consumption. A social worker visited the home that day and warned M.H. that leaving children alone was not acceptable. At another home visit on April 12, 1995, the social worker saw no signs of alcohol use.
- [35] On March 7, 1996, the Ministry received an anonymous complaint setting out a number of concerns about the K. family, which included allegations that the children were witnessing violence in the home, observations of bruises on K.N.K., observations that the children were always sick with runny noses and reports of rats and mice in the home. A social worker visited the home on March 16 and noted it to be quite dirty and not very safe. At a subsequent visit in May, the worker noted that the living room looked very clean. MCFD completed a risk assessment on May 24 and concluded that the children were not in need of protection as the parents appeared willing to care for them, the home environment was much improved and the Church was involved with the family as support. However, several days later, the Ministry received a call from someone who had observed K.N.K. with a black eye, sunken eyes and hair falling out, and expressed concern about her nutrition. Social workers met with the parents and subsequently observed K.N.K. to have yellowing around her right eye. A doctor advised the social worker that he saw K.N.K. on May 29 and observed

"no gross evidence of anything".

- [36] Just over a month later, on July 2, 1996, K.N.K. was admitted to hospital as a result of an anonymous report that she may have been physically abused. Dr. Korn examined her on July 3. He testified that he observed some hair loss that he thought may have been due to a dermatological condition. He noted some marks on her face and body that were not particularly suspicious for inflicted injury but he thought the social situation was worrisome. He found K.N.K. to be sombre and could not interact with her, which he said was not his normal experience with four year old children. At this time, he was not aware that Dr. Hlady had assessed K.N.K. in 1993 with non-accidental injuries. Dr. Korn suggested that the family accept services from the Ministry and recommended that K.N.K. be brought back in three months. This follow-up never occurred.
- [37] Shortly after this, in July 1996, the sixth child, M.M.K., was born. A positive report was made after a home visit in August. The social worker observed that the residence had a fenced-in play area. K.N.K. and the baby looked healthy and all the children looked clean and were observed to be playful. In September, the social worker expressed ongoing protection concerns, apparently arising from the demands of having six children under the age of six.
- [38] In February and March 1997, the Ministry received three reports from a teacher about suspected abuse of K.N.K. The first was that K.N.K. had a bruise on her forehead and one on her left cheek. A doctor who saw K.N.K. shortly after this reported that the injuries could have occurred in many ways. An x-ray of K.N.K.'s face confirmed that there was no fracture. The doctor is also reported to have advised the social worker that the children looked unkempt but not malnourished.
- [39] The second report of suspected abuse was some days later. The teacher advised that K.N.K. had come to school with a floor burn on her left temple. In the third report in early March, the teacher advised that K.N.K. had a red mark on the back of her hand.
- [40] Valerie Dahl was the social worker who investigated these reports. She testified that she spoke to K.N.K. and her older sister K.A.K. and both denied any abuse. She also spoke to the parents, who provided explanations for the injuries. She was concerned about abuse of K.N.K. and wanted to make sure that the parents were involved in a parenting program and the children were visible in the community. She was also concerned about the impact of the home environment on the other children. She clearly recalled the children as non-verbal, demonstrating to her a lack of development or lack of stimulation. Ms. Dahl prepared a risk assessment on April 14, 1997. She determined that the concerns of physical abuse were not substantiated and the children were not then in need of protection.
- [41] In June 1997, a teacher reported seeing more bruises on K.N.K. and a social worker observed scratch marks on her neck. On September 8, the Ministry received a report that the children were hungry, dirty, smelly and not wearing underwear, the home was filthy, and the parents were seen outside at midnight apparently intoxicated, with the children. Social workers went to investigate but could not substantiate the allegations. On September 16, more

reports were received from teachers that K.A.K. and K.N.K. appeared neglected and possibly hungry. They were found with lice and K.N.K. had very large scabs on her head. A neighbour reported seeing bruises on K.N.K.'s face on October 13, 1997 and described the children as frequently looking dirty, smelling and having colds. A home visit from the social worker on October 18 revealed nothing of concern. M.H. was cooking a turkey dinner, the house was relatively tidy and the children appeared clean.

- [42] In March 1998, a seventh child, C.G.K., was born.
- [43] On August 26, 1998, the Ministry received a report stating concerns about alcohol abuse, untreated medical conditions, the children being left unattended and the parents swearing at the children. A police officer who attended the residence at 5:15 am observed G.K. and another man, both apparently intoxicated, with six children in the house. A social worker who attended noted that the house was unclean, the hallway and children's bedroom smelled strongly of urine, but there was adequate food in the kitchen. M.H. was not there but arrived a little later and appeared to have been drinking. The social worker left the children in the care of M.H. and a female neighbour. The next day the Ministry removed the children from the parents' care based on concerns of alcoholism, family violence, no family support, seven children under age eight with M.H. pregnant, the history of involvement with the Ministry, and the children having lice.
- [44] On September 3, 1998, a Provincial Court judge granted the Director interim custody of the children pending a protection hearing. The Ministry subsequently assessed all children as being at very high risk. They were placed in various foster homes. K.N.K., C.K., M.K., C.N.K. and M.M.K. were seen by Dr. Korn. With the exception of K.N.K., he found them to be generally healthy and not malnourished. Most of the children had terrible head lice. M.K. and C.N.K. had very poor dentition and C.N.K. had a bad skin condition. K.N.K. had a very deformed ear that had the appearance of cauliflower ear. Dr. Korn testified that this is the kind of injury boxers get. He was very concerned about the long term effects of this and the cause was not clear. By then he had become aware of Dr. Hlady's 1993 assessment and was worried about K.N.K.'s safety. In his consultation report, he stated that he had the "gravest concerns about this child's future, should she ever be returned to her biological family."
- [45] Injuries to K.N.K. were seen by others. Another doctor who evaluated K.N.K. in hospital observed a grotesque swelling on the upper half of her left ear and ulcers and scars on the top of her head, lesions on her right foot and lower back and multiple scars on her left forearm and leg. He described her in his report as unusually placid and withdrawn, with tears in her eyes.
- [46] Judy Gorman, a foster parent to C.N.K. and M.K. at the time, testified that C.N.K. had serious eczema, with weeping sores all over her body, and both girls had terribly rotten teeth. She said they were "pretty wild", they would write on walls and jam things down the toilet and sink. She described them as "two hellions".

- [47] In October 1998, the foster parent of K.A.K., K.N.K. and C.K. reported that their behaviour was out of control and sought assistance from the Ministry.
- [48] Sheila Zeiner, a family service social worker, prepared a plan of care that required the children to remain in care pending a parental capacity assessment. However, on November 12, 1998, the children were returned to the parents under a consent supervision order, before the assessment was done. The Ministry had by then assessed the children as being at low risk provided the parents cooperated with support services. The parents agreed to abide by a number of conditions, which included supervision by a contracted agency, Métis Family Services, attendance at counselling sessions, and homemaking assistance. Before the children were returned, the Ministry purchased bunk beds for them.
- [49] Linda Shortreid was the principal of the school that K.A.K., K.N.K. and C.K. attended in 1998 and 1999. She testified that these children appeared sad, withdrawn and non-communicative. She did not remember them as happy or playing with others or behaving like normal children of the same ages. Head lice was a serious, on-going issue that did not get resolved despite communications to the parents. Ms. Shortreid remembered seeing C.K. go through garbage cans, apparently looking for food. She said that she spoke to the father, G.K., about this at least twice and took him to the food bank.
- [50] Ms. Shortreid said that there were times when the children were not picked up and they would wait in her office. She also remembered seeing two specific injuries on K.N.K.; one to her eyeball and the other a cigarette burn. She said that K.N.K. would not tell her what happened, nor would the others. She made a number of calls to Métis Family Services but nothing really changed. She eventually contacted the Ministry.
- [51] In January 1999, Sheila Zeiner received a report that the parents were drinking and breaking the conditions of the supervision order. Métis Family Services went to the home and reported to the Ministry that the parents were sober and the children were cared for.
- [52] In March 1999, Dr. Korn learned that K.N.K. had been returned to her parents. He was so concerned that he wrote to the Ministry, expressing the view that K.N.K. was at "extreme risk". This alerted the Ministry to take steps to monitor the situation. In May, the Ministry became aware that people from K.N.K.'s school had been reporting incidents of injuries to Métis Family Services for over two months. There are at least seven documented reports of injuries observed on K.N.K. between February and May 1999.
- [53] On May 5, 1999, the Ministry assessed K.N.K. as high risk and removed her from the home.
- [54] Later in May 1999, M.H. gave birth to her eighth child. This baby tested positive for cocaine. On June 10 the Ministry received a report that M.H. was seen in Surrey late at night showing signs of intoxication. Zoe Ayre, then a team leader in the MCFD Guildford office, removed the remaining seven children from the home. Ms. Ayre testified that when she went to apprehend the children they were "remarkably calm", "they just got up and left as though it was what they did every day". She said that they actually seemed to be quite happy. She

described the kitchen as clean but bare, with no dishes. On June 17, 1999, the Director was granted custody of the newborn child pending a protection hearing and on June 21, 1999 the Director was granted interim custody of K.A.K., C.K., M.K., C.N.K., M.M.K and C.G.K. for a period of three months. Under both orders, the parents were granted reasonable, supervised access to the children.

Testimony of the plaintiffs

- [55] K.A.K., C.K. and M.K. did not testify and there is very little evidence about their experiences living with their parents. None of them revealed anything of substance to their care givers, social workers or therapists. M.M.K. testified but had no memory of her life with her parents.
- [56] Only K.N.K. and C.N.K. gave evidence about their lives when they lived with M.H. and G.K.
- [57] K.N.K. testified that she had no happy memories of growing up. She said that her mother would put salt in her food so she could not eat it and she did not remember having dinners with her family. She remembered cereal and salt and said she was always hungry. They got food mostly from the food bank.
- [58] K.N.K. slept on the floor without blankets or a pillow. She did not remember having pyjamas. She said that her mother would put her in the dryer when she was angry and the dryer became her main bedroom. She also slept in a dog house and once in an attic, which was dark and cold and itchy with pink fibreglass. She said that her brothers and sisters slept in bunk beds. They went to bed whenever they wanted. She never had a warm bath and remembered only cold showers.
- [59] K.N.K. said that she did not complain because she knew her mother would not care. She remembered going to school with bruises but did not remember how she got them. She said that her mother kicked and pushed her around basically every night "because she was always drunk" and her father would stay out of it. She described her parents as drinking Colt 45 beer every day. She also saw them inject heroin once. She said that both parents were around during the day and neither worked.
- [60] K.N.K. had a clear memory that her mother stomped on her left ear and banged her head in the shower. She has a scar on her left hand which she said was caused by her mother burning her on the stove. She has a series of large scars on her head, which she showed to the court. She did not recall how she got those. She did not remember her siblings being around when her mother abused her. She did not see her mother abuse any of her siblings. She remembered going to a church where her mother caught her sneaking doughnuts. She said her mother took her into the bathroom, tried to drown her under the tap and hit her head against the wall. She remembered going to another church where they would have dinner.

- [61] K.N.K. recalled being left alone once. She recalled the police coming to her house looking for her father, who hid under her brother's bed. She said her father was arrested and all the children were crying. She said that her father gave her hugs when they were at the church but not at home. She loved her father because he never hit her or abused her.
- [62] K.N.K. said that she did not have friends and was not allowed to associate with anyone outside the home. She had no memories of a favourite toy or having a television.
- [63] C.N.K. testified that she had one nice memory of her life with her parents, which was going to Playland. She had bad memories of all the children being lined up and hit with a belt by her parents before they went out so they would not act out. She said that it did not really hurt but she was scared waiting in line. She also said that when her sister K.N.K. was bad her mother would make K.N.K. eat feces from her baby brother's diaper and once K.N.K. had to stand on her head against a wall.
- [64] C.N.K. remembered her father hitting the door with a log to get inside and her mother hitting him over the head with a glass vase. She did not remember her mother drinking but said that her father drank beer from a can with mountains on it. She remembered hiding with her sisters when a policeman knocked the door down and her father fought with him.
- [65] C.N.K. said that they did not sit down as a family to have dinner. She remembered all the children eating Cheerios for dinner. She did not remember anybody cooking and she did not remember breakfast. She had no memory of anyone tucking her in, reading her stories or watching television. They went to bed whenever they wanted. She slept in a bunk bed with others in the same room but she did not know who. She said that no children came over and she did not go outside.

Observations of the plaintiffs after apprehension

- [66] On May 5, 1999, K.N.K. was placed in the home of Velma and Doug Taylor. She was seven years old. She was examined again by Dr. Korn, who documented multiple, repeated facial injuries, the deformed left ear, a chipped tooth, patches of alopecia (hair loss) and evidence of past multiple injuries on the neck, chest, shoulder and back. In his consultation report of May 5, 1999 he stated: "it is unusual for a child to sustain repeated multiple facial injuries. This is suspicious of non-accidental injury." He again reiterated his "gravest concerns" about K.N.K.'s safety in the parents' home.
- [67] K.N.K. was also assessed by Dr. Mary Korpach, a psychologist. She based much of her assessment on information from Velma Taylor and Ministry workers but she also interviewed K.N.K. Dr. Korpach described K.N.K. as "rather guarded and quiet" and presenting as "reserved, avoidant and constricted", disclosing very little information. When she asked questions related to her life at home, K.N.K. hid beneath the clinic sofa. She observed multiple scars on K.N.K.'s face, head and neck. She was of the view that K.N.K. needed a stable placement that offered protection, monitoring, structure and warm empathy from a primary caregiver and she thought the Taylor home was providing that. She

was also of the view that K.N.K. needed play therapy to help her communicate and develop appropriate relationships.

- [68] Velma Taylor testified that K.N.K. had "full grown adult lice" in her hair, a lot of marks or scars all over her head, a cauliflower ear and a burn mark on her forearm. She also noticed tiny scratch marks all over her body. At the beginning, Ms. Taylor found K.N.K. sleeping on the floor with no blanket, even after she had been put to bed.
- [69] Ms. Taylor said that K.N.K. seemed happy and pretty easy going when she first arrived, but did not stay that way. She said that K.N.K. would have moments when she was "dark"; she would shut down, stare at the floor and not communicate. She described K.N.K. as passive-aggressive and sneaky. She would lie for no reason and blame others for things. She was indifferent about school and did not make friends. While she was not overly aggressive, she hit other children on occasion and was intrusive, especially with the boys in the house. K.N.K. really struggled with school and when she was anxious she would shut down and block everything out. When Ms. Taylor helped K.N.K. with homework, she would not remember things they had done the day before. K.N.K. never talked about her family. She was very parental with her younger siblings.
- [70] The other children were placed in a staffed resource set up by Métis Family Services. They remained there together until early 2000. None of the caregivers from that resource testified. There are a number of reports of incidents of extreme behaviour by some of the plaintiffs during this period of time, the facts of which have been admitted.
- [71] C.K., then six years old, engaged in defiant and sometimes violent behaviour. He threw things at others. He broke a chandelier and a light cover and threw broken glass at staff. He turned on a faucet in a bathroom in an apparent attempt to flood it. He threw a toy with great force at his younger sister. On another occasion he kicked her in the head and on her back. He grabbed the breasts of a staff member, pushed her in the stomach and kicked at her. He swung a part of the stair banister at a staff member and then kicked her. He seriously hurt a child at school. In many of these incidents, he swore at these people, using very explicit, sexual language.
- [72] Four year old C.N.K. acted out twice. The first time involved mainly the use of extreme language. The second involved some physical aggression. In addition to yelling and screaming, she threw her shoes and kicked and punched at a staff member and wrote all over her walls.
- [73] M.M.K., who was three, pulled a butter knife out of a drawer and pointed it at a staff member.
- [74] There were problems with this resource and it was closed in February 2000. The children were placed in different foster homes.

- [75] Dr. Larry Krywaniuk was retained by the Ministry to prepare a psychological and parenting capacity assessment. He interviewed K.A.K., K.N.K., C.K. and M.K. in December 1999 and observed a visit between the parents and the children in January 2000.
- [76] In his assessment report, Dr. Krywaniuk described K.A.K., K.N.K. and C.K. as taciturn and not very responsive. M.K. was quite chatty and more open. They all had difficulties with a vocabulary test; the three oldest scored in the 1st percentile or less and M.K. in the 5th percentile, suggesting significant delays. Dr. Krywaniuk described K.N.K. as appearing somewhat different than the other children, with a faint scar on her left cheek. He stated that she looked "rather downcast", did not show much of a range of affect and generally seemed "sad, quiet and reserved". He testified that she seemed unaware of the emotional part of affection.
- [77] Dr. Krywaniuk observed that all of the children tended to be guarded and withdrawn, and he noted that C.K.'s behaviour started to break down towards the end of the family visit.
- [78] Dr. Krywaniuk is the only witness who interviewed the parents. While I cannot make findings about the parents from this evidence, his impressions may assist me to put some of the evidence in context.
- [79] Dr. Krywaniuk's general impression was that this had been a highly dysfunctional family for a number of years. He found the parents to be highly defensive, minimizing various behavioural issues and denying the use of alcohol and drugs in the face of what he considered obvious evidence to the contrary. He felt that the children were influenced by the parents. With respect to the visit, he described a "passive quality" to the parents and said that there did not seem to be a lot of emotional commitment between the parents and children; the children seemed to be "just there". It was his view that the children all had special needs in respect of behavioural, developmental and emotional issues and because of this they required a "better-than-average level of parenting."
- [80] He expressed concerns about continued contact between the parents and the children:

There is at least some indication that, the longer the children stay in care, the more the older children disclose regarding abuse and family dysfunction. I think it is likely that the parents will continue to communicate their level of distrust to the children, undermining their recovery and potentiating them for further difficulties. The background information indicates that there is continued concern for the safety of the children, despite the parents' protestations to the contrary. For example, there appears to be a denial of children's problems and continued substance abuse. I understand that there is considerable bickering in front of the children and a general lack of authority. ... The older children have significant problems and I think it is likely that the younger children will develop along the same lines because of the parental attitudes.

- [81] There is evidence from various foster parents that the children acted out after the access visits. The Ministry later curtailed the visits and in April 2002 stopped them altogether.

- [82] In March 2000 K.A.K. was assessed by Dr. Mary Korpach. Dr. Korpach interviewed K.A.K. three times but was not able to gather much information because K.A.K. was very quiet and "generally refusing to speak". However, she observed K.A.K. to be "an extremely fearful girl, who has learned to withhold any verbalizations, perhaps to avoid any negative consequences". She thought that K.A.K. had a significant degree of psychological tension and stress. Dr. Korpach strongly recommended that she be referred for individual art or play therapy.
- [83] Jay Polowin was a social worker responsible for the K. family file in March 2000. He testified about his observations of the plaintiffs at that time. He said that K.A.K. was very quiet, at times non-communicative, and also had aggressive outbursts. He was concerned about her emotional and mental health and tried (unsuccessfully) to get her some therapy. K.N.K. had some behaviour similar to K.A.K. and there was some concern about sexualized behaviour with adult males. He described C.K. as shy but he would engage and was somewhat positive, playful and active. M.K. was very quiet and withdrawn and had a "dead look in her eye". C.N.K. was gregarious and outgoing. M.M.K. was also withdrawn and appeared "somewhat downcast".

Findings and conclusions about neglect and abuse

- [84] In my view, the evidence establishes that all of the plaintiffs suffered extensive neglect by the parents M.H. and G.K. and that K.N.K. suffered serious, on-going physical abuse by M.H. Other than the testimony of K.N.K. and C.N.K., there is little direct evidence about what went on in the home prior to June 1999. However, there is a body of circumstantial evidence. The most reasonable inference to draw from the numerous reports to the Ministry and the various observations of the children by social workers and school personnel is that M.H. and G.K. led a lifestyle that involved the regular abuse of alcohol and at least intermittent domestic violence between the parents, all of which the children were exposed to, and persistent neglect of the basic needs of the children. The family moved often, the parents rarely provided proper accommodation and in general did not regularly attend to their children's essential nutrition, hygiene and health care. On apprehension in August 1998, most of the plaintiffs had long-standing, severe, untreated head lice, C.N.K. had an untreated skin condition, M.K. and C.N.K. had terribly rotted teeth and K.N.K. had numerous physical injuries, all of which had been observed by others.
- [85] The Ministry had strong evidence that K.N.K. had been physically abused as early as March 1993, when she was examined by Dr. Hlady, and this continued over the years. Various people observed injuries on K.N.K. in 1996, 1997 and 1998. In 1998, Dr. Korn was extremely concerned for her safety should she be returned to her parents, for good reason. The multiple injuries that K.N.K. had when she was finally apprehended in May 1999 were serious. The evidence was quite overwhelming that they were non-accidental.

- [86] The Crown concedes that K.N.K. was physically abused by her mother. However, Ms. Johnson submitted that K.N.K.'s evidence about the abuse was vague, exaggerated in places and inconsistent with the evidence of her siblings and therefore is of limited reliability.
- [87] While K.N.K.'s story was bizarre at times, overall she was quite consistent about how her mother treated her. There was much she did not remember, which is not surprising given her age at the time, the nature of the abuse, and what I observed was her limited capacity to reflect on her past life as a child. My impression was that some of K.N.K.'s memories were non-specific about timing and frequency. For example, she testified about her mother putting salt in her food so she could not eat it, and about sleeping in the dryer, but it is not possible to determine if these things occurred rarely or frequently. She did, however, remember that she slept on the floor without blankets and in an attic filled with fibreglass, and her mother stomped on her left ear, banged her head in the shower and burned her left hand on the stove. These memories were consistent with the observations of other witnesses as well as with the circumstantial evidence. When K.N.K. arrived at the Taylor home in May 1999, Velma Taylor observed that she had tiny scratch marks all over her body and she also found her sleeping on the floor with no blanket. The injuries to K.N.K.'s left ear, and others she described, were observed by many witnesses and quite well documented.
- [88] The only other sibling to testify about these matters was C.N.K., who remembered several things that K.N.K. did not mention. I do not consider this to be an inconsistency that diminishes the credibility of either witness, as it is not surprising that the two would have different memories, especially considering how young they were at the time.
- [89] Overall, I found K.N.K. to be a sincere witness who tried to describe what she remembered. I have not accepted all of her evidence literally, but I have accepted it in general. It clearly establishes that she was physically and emotionally abused by her mother on a fairly constant basis. C.N.K.'s evidence establishes that she witnessed at least some of M.H.'s abuse on K.N.K. In addition, given the nature of the various homes the family occupied and the large number of children, it is reasonable to conclude that all of the plaintiffs were exposed at least at times to the abuse of K.N.K.
- [90] The evidence of K.N.K. and C.N.K. also establishes that many of the plaintiffs' basic needs were consistently neglected. Neither had happy memories of growing up. Both said that they did not go out with friends and none came to their home. C.N.K. had no memory of anyone cooking or of the family sitting down for dinner. K.N.K. remembered being always hungry. K.N.K.'s affection for her father, based on her memory that he did not physically abuse her, shows how bereft her life was.
- [91] The evidence of K.N.K. and C.N.K. about general neglect is consistent with the observations of social workers and others who had contact with the family over these years. While some home visits were positive, there were many observations of a dirty, inadequate home environment, where the children did not appear well cared for at all. The testimony of Linda Shortried, the school principal, was particularly telling, as she observed the children at

school during 1998 and 1999 before apprehension. I accept her evidence that the plaintiffs often came to school without food, that C.K. searched the garbage cans, and they all appeared hungry, sad and withdrawn. The constant lice problem was chronic and never addressed by the parents.

- [92] The Crown also concedes that the Ministry had knowledge of domestic violence and parental drug and alcohol abuse but submits that there is no direct evidence that the plaintiffs suffered directly as a result. In my view, the evidence shows that the parents, particularly M.H., abused alcohol to a substantial degree and that this permeated the family's life together. K.N.K. testified that her parents drank beer every day and her mother was "always drunk". The fact that five of the six plaintiffs have been diagnosed with alcohol-related neurodevelopmental disorders is very significant. While M.H.'s pre-natal use of alcohol was never confirmed, there is a body of circumstantial evidence from which the only logical inference to draw is that M.H. used alcohol extensively throughout the years she had her children. This clearly affected all of the plaintiffs.
- [93] I agree with the Crown that the plaintiffs failed to prove some of the allegations set out in the statement of claim. There is no evidence that any of the plaintiffs were sexually abused or that any of them other than K.N.K. was physically abused by either parent. While there is evidence that at least some of the plaintiffs were often hungry or appeared to be hungry, there is no evidence that any of them were suffering from malnutrition. However, there is evidence that supports a finding that all of plaintiffs suffered from overall serious neglect, which stemmed from M.H. and G.K.'s lifestyle of abusing alcohol and perhaps other drugs, and their apparent lack of capacity to parent. The plaintiffs were not provided with basic, adequate housing, food and clothing. While some of these things were provided from time to time, it appears that this was only when the parents accepted help from others, which was rare. There was no normal family environment, no substantive care or nurturing and little, if any, opportunity to develop relationships with other children outside of school. In my view, the behaviours of all plaintiffs observed by others at the time of apprehension or shortly thereafter is evidence of children who had no sense of personal security, no understanding of boundaries and little, if any, ability to relate to other people in a healthy way. They refused to talk about what went on in the family home.
- [94] The Crown submits that the Ministry's decision to apprehend the plaintiffs in 1999 is not proof in and of itself that they had been severely abused and neglected, and says that (except for K.N.K.) the plaintiffs were removed because they were only at risk of being abused and neglected. I do not disagree with this generally but it is my view that the decision to apprehend is some evidence that these plaintiffs were in need of protection and while they were clearly at risk of being abused and neglected, I am satisfied that they had also been neglected to a substantial degree, as I have described, and that this did affect them all, causing psychological injuries.

2. Divisible or indivisible injuries

- [95] I have found that each plaintiff suffered psychological injuries. Below, I will determine the precise extent and nature of these injuries, which are of course unique to each plaintiff. At this point, I will discuss psychological injuries in a more general way.
- [96] Both parties take the position that the plaintiffs' psychological injuries are divisible from the consequences of their neurodevelopmental disabilities.
- [97] The plaintiffs submit however, that any injuries related to their subsequent experiences in the foster care system are indivisible from their psychological injuries, which they say were caused by exposure to their parent's neglectful and abusive care only. They also submit that the thin skull rule applies, because the Ministry's decision to leave the plaintiffs in the care of their parents was particularly devastating for them, given their pre-existing conditions.
- [98] The Crown submits that the damages caused by the neglect and abuse are of a different nature than the damages caused by the neurodevelopmental disabilities and are divisible. Ms. Johnson pointed to the dramatic difference between C.N.K.'s level of functioning and her behaviour and those of her siblings, which shows that there is a significant causal connection between ARND and the conduct disordered behaviours. The Crown also says that the plaintiffs suffered damages from their negative experiences after 1999, which are also divisible. In the alternative, the Crown submits that if the damages are found to be indivisible, then the crumbling skull doctrine applies and damages should be reduced to take into account the plaintiffs' original position, which was compromised by their ARND.
- [99] In order to assess whether the plaintiffs' claimed psychological injuries are divisible or indivisible from other causes, it is necessary to first address the other possible non-tortious causes of these injuries: pre-existing conditions and subsequent negative experiences.

Pre-existing conditions

- [100] As noted above, all of the plaintiffs except C.N.K. have been diagnosed with ARND, a neurodevelopmental disorder that has affected their cognitive function. ARND is clearly a pre-existing condition.
- [101] Dr. Julianne Conry, a registered psychologist, is one of the professionals at the Asante Centre who assessed K.A.K., K.N.K. and M.M.K. The Asante Centre is a multi-disciplinary facility for the evaluation, diagnosis and management of individuals with a history of pre-natal alcohol and drug exposure and Dr. Conry has extensive experience in the neuropsychological assessment and evaluation of children and adults with these exposures. Dr. Christine Lilley, also a registered psychologist with similar experience, participated in the assessments of C.K. and M.K. at the Sunny Hill Health Centre. Neither Dr. Conry nor Dr. Lilley were tendered by the plaintiffs as expert witnesses. However, all counsel agreed that the court should accept opinion evidence elicited from each of them in cross-examination about the nature of fetal alcohol syndrome and ARND. Neither gave opinion evidence that was specific to the plaintiffs.

- [102] I was satisfied that both of these witnesses were qualified to give opinions in this general area. Dr. Conry's experience is primarily as part of an assessment team. She is not directly involved in follow-up or treatment and her knowledge of the area is based on her assessment experience and understanding of the literature. Dr. Lilley had similar experience.
- [103] Dr. Conry explained that fetal alcohol syndrome (FAS) is defined by evidence of growth deficiency, a specific set of facial abnormalities, and evidence of central nervous system damage that occurs in individuals exposed to alcohol during gestation. Not all individuals so exposed have full FAS but they may show some signs of FAS, indicating what is now referred to as ARND. Individuals diagnosed with ARND would not have the physical characteristics of individuals with FAS, such as the facial abnormalities, but they may have the same severity of dysfunction.
- [104] Both Dr. Conry and Dr. Lilley described the "primary disabilities" arising from FAS or ARND as problems with adaptive behaviour, language, attention, reasoning and memory. Dr. Conry explained that adaptive behaviour is the ability in an age appropriate way to meet societal demands, i.e. to be able to determine what to do in various life situations. Problems with adaptive behaviour affect an individual's daily living skills and socialization. Such individuals need more teaching, more routine and more consistency than others. Dr. Conry agreed that the research has shown that impairment to adaptive skills is probably the most devastating long term disability arising from FAS and that those with partial FAS or ARND are at equal or greater risk of having life skills problems as those with full FAS. She thought that this may have something to do with early diagnosis and whether protections are put into place earlier for those with full FAS, although she said that this was "just a hypothesis".
- [105] Dr. Conry also testified about "secondary disabilities", which are problems that arise from the original disability caused by the alcohol exposure. She said that these disabilities included things like dependant living, employment, substance abuse, institutionalization, school suspensions and sometimes sexual difficulties. She also included mental health problems as a secondary disability but said that this was only partially correct because pre-natal alcohol exposure can increase the susceptibility to mental health problems. She agreed that defiant and oppositional behaviours, limited self control, emotional dysregulation and difficulties with socialization and attention are commonly seen in individuals with FAS or ARND. One study assessed the prevalence of mental health problems at 90%, disruptive school experiences at 60%, the need for living supports at 80 to 100% and alcohol and drug abuse at 30%. However, Dr. Conry stressed that there is a lot of variability because the extent to which these behaviours and secondary disabilities develop relates to both the underlying FAS and environmental circumstances. Moreover, the samples used in studies may be quite selective.
- [106] Dr. Conry explained that protective factors in an individual's environment can also decrease the risk that secondary disabilities will arise. It was her opinion that the stability of the home, particularly in early childhood, was the biggest factor that would decrease the risk,

and conversely, negative childhood experiences such as physical or sexual abuse, domestic violence, or changes to home placements greatly increase the risk. She described this as "very complicated ... you can't really say ... what percentage is this, and what percentage is that." While she agreed that protective factors may or may not help, she said that she would expect to see a difference between a person diagnosed with ARND who had experienced good parenting and one who had experienced bad parenting.

[107] Dr. Lilley's opinion was consistent with this. She testified that a stable home, being free from abuse and neglect, and having an early diagnosis were protective factors. She saw secondary disabilities as caused by a mix of alcohol exposure and life experience. She said that it is difficult to say which behaviour is caused by the alcohol exposure and which is caused by the trauma because the population of children with FAS also have a high rate of trauma. She thought both factors were important but if forced "to have a horse race" she would give a slight advantage to alcohol.

[108] Dr. Lilley agreed that absent trauma, the baseline level of disability would be quite high. She said that she would expect to see a lot of academic problems and possibly problems with things like living independently and maintaining employment.

[109] Dr. William Koch, a psychologist, gave expert opinion evidence about the psychological conditions of the plaintiffs, the relationship of those conditions to their experiences with their biological parents, and the prognosis, functional disability and treatment of those conditions. He is not an expert in the area of FAS but he has assessed individuals who have been diagnosed with FAS and he is familiar with some of the literature. Dr. Koch agreed that there is an elevated risk that a person with FAS will have other problems, particularly with impulsivity, but he disagreed that FAS was the sole cause of these problems. It was his opinion that FAS was co-related but not causative.

[110] Dr. John Pullyblank is a registered psychologist who conducted a vocational assessment of C.K. In the course of his review, he opined that C.K.'s early home environment

... was likely to exacerbate his neurocognitive problems through teaching that acting out was an appropriate response, as well as not providing him with other more adaptive strategies.

[111] Dr. Pullyblank has some expertise with Attention Deficit and Hyperactivity Disorder (ADHD) but not FAS. He testified that ADHD and FAS overlap to a significant degree. Based on the documentation he reviewed, Dr. Pullyblank was aware that FAS was a likely diagnosis in C.K.'s case, as prior test results indicated problems with lower intellect, executive functioning and behavioural control. He was of the view that the kind of behaviour problems that lead to serious conduct disorders are "most strongly related to upbringing". He agreed that FAS was co-related but he did not agree that it was essential.

- [112] Dr. Pullyblank's evidence is consistent with Dr. Koch's opinion but inconsistent with the opinions of Dr. Conry and Dr. Lilley that there is a closely intertwined causal relationship between FAS and environment. I accept the opinions of Drs. Conry and Lilley on this issue given their expertise in FAS.
- [113] All of this is cogent evidence that (a) cognitive deficits in respect of adaptive behaviour, language, attention, reasoning and memory are caused by ARND; (b) some psychological injuries such as mental health problems, behaviour disorders and substance abuse disorders are caused by both ARND and environmental factors; (c) these two causal factors are closely intertwined such that these psychological injuries are indivisible from both causes; and (d) individuals with ARND are at risk of developing many of these psychological injuries regardless of their environment.
- [114] I will address the particular psychological injuries that pertain to each plaintiff when I assess non-pecuniary damages. More generally with respect to K.A.K., K.N.K., C.K., M.K. and M.M.K., I find that only their cognitive disabilities and problems with adaptive behaviour can be isolated to ARND. The rest of their psychological injuries that I find have been proven (other than psychotic conditions) stem from both their ARND and their childhood experiences in their parents' care between August 1993 or their birth and June 1999.
- [115] These psychological injuries are primarily behavioural and conduct disorders. Dr. Conry said that it is not possible to determine what percentage of behavioural problems is caused by ARND and what is caused by traumatic experiences. Dr. Lilley put slightly more emphasis on the alcohol exposure but thought that both causes were important. Based on this evidence, I find that these injuries are indivisible as between these two causes.

Subsequent experiences

- [116] All of the plaintiffs, in varying degrees, had difficulties after they were apprehended in 1999. K.A.K., K.N.K. and C.K. experienced multiple placements. K.A.K. and K.N.K. suffered quite profoundly after they were moved from a stable foster home in 2003. K.A.K. became involved in drugs and possibly prostitution after she re-connected with her parents in 2005. C.K. was moved from one foster home due to allegations of physical abuse. M.K. was seriously affected when she was moved from an excellent foster home after 10 years of stability. C.N.K. and M.M.K. fared much better after the initial apprehension and have remained in stable, positive homes.
- [117] Mr. Coad concedes that the numerous foster placements were stressful and negatively impacted the plaintiffs but says that all of the placements broke down because of their behaviour disorders, which were caused by the Crown's negligence. He submits that any injuries suffered as a result of these later experiences are indivisible from the original psychological injuries.

- [118] The Crown submits that the negative experiences of the plaintiffs after their apprehension caused injuries that are divisible from the injuries caused by their exposure to their parents' care during the relevant time.
- [119] Many of the plaintiffs' psychological injuries escalated after apprehension, for various reasons. Multiple placements were obviously difficult but most of them broke down as a result of conduct disordered behaviours. Generally, I agree with the plaintiffs that these subsequent experiences exacerbated the injuries they had already suffered and are indivisible. However, there were some events that resulted in injuries that were markedly different and can be separated. I will address these when I assess the damages for each plaintiff.

Crumbling skull and thin skull

- [120] The plaintiffs say that they were undamaged at the time of the injuries that were caused by being left in their parents' care and the thin skull rule applies because they were more severely affected by the parents' neglect and abuse because of their pre-existing conditions.
- [121] The Crown says that only the crumbling skull doctrine applies here, as many of the plaintiffs' problems stem from their neurodevelopmental disorders, and damages must be reduced to take into account the psychological injuries that they would have suffered in any event.
- [122] In my opinion, the evidence of Dr. Conry and Dr. Lilley shows that both the crumbling skull and thin skull doctrines are at play here. I disagree with the plaintiffs' argument that they were undamaged at the time of their injuries, as ARND clearly causes significant disabilities and must be considered in assessing the plaintiffs' original position. I find that all of these plaintiffs were at a measureable risk to suffer these psychological injuries in any event due to their ARND.
- [123] However, I agree with the plaintiffs that the thin skull rule also applies, because the injuries of these five plaintiffs were probably more dramatic than they would be for an individual without ARND. This is evidenced to some extent by the difference between their psychological conditions and that of C.N.K. I found Dr. Krywaniuk's assessment in early 2000, that K.A.K., K.N.K., C.K. and M.K. had special needs in respect of behavioural, developmental and emotional issues, to be quite astute. It is entirely consistent with the evidence of Drs. Conry and Lilley that positive environmental factors can have a significant effect on individuals with ARND by reducing the risk of further problems of this kind, and conversely, negative environmental factors can increase the risk of these problems.
3. Non-pecuniary damages
- [124] An award for non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. Each award is specific to the particular plaintiff and the circumstances of the case. Courts commonly take a number of factors into account

when assessing these damages, such as the age of the plaintiff, the nature of the injury, the severity and duration of pain, the extent of any disability, the extent of emotional suffering and more generally, impairments to the plaintiff's life: see *Jokhadar v Dehkhodaei*, 2010 BCSC 1643 at para. 112.

- [125] The plaintiffs seek damages in the \$200,000 to \$250,000 range for the three oldest plaintiffs and in the \$25,000 to \$50,000 range for the younger ones. They rely on *A.D.Y. v M.Y.Y.* (1994), 90 BCLR (2d) 145 (SC), and a number of cases involving sexual abuse as guidance: *Singh v Bains*, 2008 BCSC 823; *D.H. v L.J.H.*, [1997] BCJ No. 2724 (SC), and *S.Y. v F.C.G.* (1997) 26 BCLR (3d) 155 (CA).
- [126] The Crown says that appropriate awards in this case would be \$70,000 for K.N.K., \$25,000 for each of K.A.K. and C.K., \$10,000 for each of M.K. and C.N.K. and \$5,000 for M.M.K. In respect of K.N.K., it relies on *A.D.Y.; A.C. v Y.J.C.* (2003), 36 RFL (5th) 79 (Ont.SCJ.); and *B.P.B. v M.M.B.*, 2006 BCSC 1027, varied 2009 BCCA 365. In respect of the other plaintiffs it relies on *K.L.B. v British Columbia*, 51 BCLR (3d) 1 (SC), rev'd on liability 2001 BCCA 221, 2003 SCC 51, and *R.L.L. v R.L.*, [1999] BCJ No. 1764 (SC), aff'd 2001 BCCA 386.
- [127] In *A.D.Y.*, the plaintiff brought an action against his parents for assault, battery, false imprisonment and intentional infliction of mental suffering. In assessing damages, Dorgan J. noted that there were no decisions of this Court in which damages were exclusively awarded for the physical abuse of children but there were cases in which damages were awarded for abuse that involved both physical and sexual components. She considered it appropriate to look to those cases on the basis of expert evidence that the effects of both types of abuse may be similar, depending on the circumstances, and more specifically that the plaintiff had suffered effects and would continue to face difficulties similar to those suffered and faced by survivors of sexual abuse.
- [128] In this case, only K.N.K. was physically abused, and there is no evidence that she, or any of the other plaintiffs, were affected by the parents' conduct in a similar way to those who experience sexual abuse. Given this, I do not consider it helpful to look to damage awards given in cases involving sexual abuse. Moreover, the cases referred to me by the plaintiffs involved very serious abuse and generally very high awards: \$325,000 for general and aggravated damages in *Singh*, where the plaintiff suffered serious losses as a direct result of 10 years of sexual abuse by her uncle; \$150,000 in *D.H.* where the plaintiff was physically abused by her mother, stepfather and four brothers and sexually abused by her stepfather between the ages of 4 and 10 years; \$250,000 in *S.Y.*, where the Court of Appeal reduced a jury award at the rough upper limit in a case where the plaintiff was sexually abused by her stepfather from the age of 7 to 14 and physically and verbally abused for a further four years. In my opinion, this range of damages is not applicable to the circumstances of the case at bar.

- [129] R.L.L. is a case where the trial judge awarded \$25,000 in general and aggravated damages for one incident of assault and battery by a father on his daughter. The plaintiff's physical injuries were not serious but the judge considered this in the context of the parent-child relationship. This award was upheld on appeal, where the Hall J.A. expressed the view that the judge could legitimately take into account the violation of the parent-child relationship and the traumatic effect a parental beating can have on a young person.
- [130] I did not find R.L.L. to be particularly helpful. It ultimately involved one incident of assault and battery and the award included an amount for aggravated damages. Here, the actionable wrong is not an intentional tort by the parents, but rather negligence on the part of the Crown. While context is always important, and the effect of the parent-child relationship is certainly relevant to the assessment of general damages, there is no basis in this case to consider aggravated damages.
- [131] A.D.Y. and some of the other cases referred to me by the Crown are more helpful. They establish a broad range of damages from about \$15,000 to \$120,000 in present values, depending on the severity and frequency of the abuse and neglect and the effect on the plaintiff. It is difficult, however, to compare one abusive or neglectful circumstance to another. I will review the applicable cases as they may be relevant to each plaintiff's claim.

The effect of the parents' neglect and abuse

- [132] I have found that all of plaintiffs suffered from overall serious neglect, which stemmed from M.H. and G.K.'s lifestyle of abusing alcohol and perhaps other drugs and their apparent lack of capacity to parent. The plaintiffs were not provided with basic, adequate housing, food and clothing, a normal family environment, any substantive care or nurturing and little, if any, opportunity to develop peer relationships outside of school. K.N.K. was physically abused by her mother over many years and suffered serious injuries, much of which the other plaintiffs must have observed. By the time they were apprehended in May and June 1999, the plaintiffs had no sense of personal security, no understanding of boundaries and little, if any, ability to relate to other people in a healthy way. In varying degrees, they all acted out with angry and aggressive behaviours. That is all they knew.
- [133] I have already described some of the plaintiffs' behaviours observed by others after their apprehension. In order to assess non-pecuniary damages, it is important to consider what happened to each of them subsequently.

K.A.K.

- [134] There is little evidence about K.A.K. in the first six to eight months after she was apprehended. She was very quiet and unresponsive when Dr. Krywaniuk saw her in December 1999. On February 8, 2000, she was moved from the Métis resource and placed in the foster home of Vicki Travis. In March 2000 Dr. Korpach observed her to be extremely fearful and tense.

- [135] In September and November 2000, Ministry files record that Ms. Travis reported concerns about K.A.K.'s aggressive behaviour, describing her as acting up, kicking things, threatening to run away, hiding, being verbally abusive, slamming doors and ripping posters off the walls.
- [136] On December 7, 2000, K.A.K., then 10 years old, was moved to the foster home of Patti Knackstedt, where K.N.K. had also been placed the previous month. Ms. Knackstedt was an experienced foster parent who had provided weekend respite care for Vicki Travis. She described K.A.K. when she first arrived as very withdrawn, like there was "nobody home", afraid, defiant and sneaky. She testified that K.A.K. and K.N.K. together would do the opposite of what was asked of them and would go out of their way to hurt someone's feelings or destroy someone's things. This vindictive behaviour did slow down after awhile but never completely stopped. She also said that K.A.K. seemed afraid to ask for a second helping of food at meals.
- [137] Overall, K.A.K. did well with Ms. Knackstedt, who described her behaviour as going in three month cycles of good behaviour that would break down. Her behaviour went "right off the wall" after visits with the parents, where she would be defiant, not listen, and cause problems in the house. K.A.K. also pulled out her hair from time to time, sometimes to the point where she would be almost bald on top, and she had a problem with bed wetting. Ms. Knackstedt handled these problems well and was quite bonded with K.A.K.
- [138] Judy Smith was K.A.K.'s social worker from September 2001 to 2006. She described K.A.K. as very withdrawn, silent, and lacking trust, and had a difficult time communicating. In November 2001, Ms. Smith requested an assessment and counselling for K.A.K., based on reports that her behaviour had been escalating, particularly the hair pulling. There is some evidence that the hair pulling became worse after the access visits with the parents.
- [139] Both Ms. Knackstedt and Ms. Smith said that K.A.K. was well below her grade level at school.
- [140] In March 2003, K.A.K. was assessed by Dr. Nur Shaw, a Child and Adolescent Psychiatrist. Dr. Shaw described K.A.K. as always quite quiet, having intermittent eye contact and providing only short, superficial responses. Her impression was that
- ... [K.A.K.], at this point, does not exhibit longstanding symptoms of a major mood disorder, but given her biological vulnerability [suspected Fetal Alcohol Syndrome], past history of trichotillomania [hair pulling], as well as poor social skills and poor coping strategies, she will likely have ongoing problems with affect dysregulation in the future. This will increasingly become problematic as she faces the psychological tasks of adolescence...
- [141] She recommended that K.A.K. engage in therapy as she faced adolescence and exhibited more difficulty with self-regulation, and that she remain within her current foster placement due to attachment issues relating to having been in multiple homes. She did not think that K.A.K.'s symptoms warranted medication at that point. Dr. Shaw testified that she

continued to see K.A.K. approximately once a month after this and eventually did prescribe medication, as K.A.K. was having difficulties with performance, social anxiety and sleep disturbance.

[142] In September 2003, K.A.K. began receiving counselling from Madeleine De Little, who practised play therapy. Ms. De Little described K.A.K. as developmentally almost half her age, very quiet, soft spoken and barely keeping eye contact. She said that K.A.K. could not go back in time and was only able to talk about what was happening in the present.

[143] On November 28, 2003, K.A.K. was removed from the Knackstedt home after a fire broke out in the house while K.A.K. was home and the foster parents were out of town. This proved devastating for K.A.K. In the years that followed, she was very unstable.

[144] K.A.K. was initially placed with another foster family, but was moved again on April 7, 2004 to the home of Alison Redline. K.N.K. was also placed there at that time.

[145] Ms. Redline testified that she knew both girls when they were living with the Knackstedt's and was aware of the circumstances that led to their departure. She described K.A.K. as shy and reserved but happy to be there at first. However, after about two weeks the girls' behaviours deteriorated. They got into trouble together, skipped out of school and ran away from home from time to time. They also began fighting with each other and engaging in violent and destructive behaviours. K.A.K. was very aggressive. Ms. Redline said that she would go into rages and attack K.N.K.

[146] Eventually, K.N.K. was moved to another foster home, but K.A.K.'s behaviour continued to deteriorate. She threatened to hurt herself with a kitchen knife, she pulled out all her hair and continued to have bed wetting problems. She was no longer going to school and she could not be left at home alone. Ms. Redline sought a psychiatric assessment. She was very worried for K.A.K. Dr. Shaw was so concerned about K.A.K.'s deteriorating behaviour that she wrote a letter "To whom it may concern" stating:

Given the ongoing decline of patient's behaviour, in terms of self care, school attendance, and further regression that has occurred with yet another foster placement with increased suicidal ideation, since fire-setting situation that occurred with foster placement of almost 3 years, she requires intensive intervention to manage attachment disorder, difficult emotions that are in keeping with Anxiety NOS, trichotillomania and affect dysregulation. Thus, her presentation now warrants long term Rx intervention such as Dallas House, which has an extensive waiting list.

As her symptoms continue to escalate with ongoing SI [suicidal ideation] - she may need in hospital admission to APU as soon as possible.

[147] On May 31, 2004, K.A.K. was admitted to the Adolescent Psychiatric Unit at Surrey Memorial Hospital, where she stayed for a month. Dr. Shaw and her team were concerned that K.A.K. was not receiving the services she required. On June 16, 2004 she signed another letter, this time addressed to Judy Smith, in an effort to help the Ministry understand the significance of following their recommendations. This letter stated in part:

Given her history, diagnosis and constellation of symptoms, the existing treatment literature and our clinical experience indicate that without appropriate and consistent intervention and support, the severity of K.A.K.'s difficulties will indeed worsen. Specifically, K.A.K. will most likely continue to manifest her issues in such a way that she will have poly-substance abuse problems, chronic suicidal ideation with suicide attempts, and involvement with the forensic system.

[148] The letter recommended that the Ministry maintain K.A.K. in a consistent foster placement, with the Redlines, and provide in-home support and respite for them. It also recommended that K.A.K. be provided with schooling in a specialized setting, programming when she was not in school, and on-going therapy and intervention at the Maples Adolescent Treatment Centre.

[149] Unfortunately, Ms. Redline was not able to take K.A.K. back because she could not maintain the level of care that K.A.K. required. When K.A.K. was discharged from hospital on June 28, 2004, she went to various placements until November, when she was placed in a staffed resource in Surrey, known as SPARA.

[150] Judy Smith testified that the Ministry tried to do what it could but K.A.K. did not comply. When K.A.K. went to SPARA in November 2004, she stopped receiving therapy from Madeleine De Little. It appears that funding for this therapy was terminated. Ms. Smith said that K.A.K. did not want to go and it was difficult getting her foster parents to take her.

[151] K.A.K.'s behaviour at the SPARA resource continued to deteriorate. She started leaving (going "AWOL") and began looking for her parents. She started using drugs. She was suspended from school from time to time. Staff had difficulty managing her behaviour. In June 2005, K.A.K. left a note when she went AWOL, stating:

Headed to Whalley. I don't know how long I'll be in Whalley for. I going down there to see my mom & dad. They need to make more money and so I'm letting them use me... Good bye and don't expect me back this time cuz I have a home in Whalley with my parent's friends I have found contact again.

[152] Ms. Smith testified that she went to see K.A.K. one time after she had returned from being AWOL. K.A.K. told Ms. Smith that she had been to her parent's and her mom had beaten her up. She showed Ms. Smith her bruises. Ms. Smith observed that K.A.K. was not using drugs before she connected with her parents. In the summer of 2005, Ms. Smith asked K.A.K. where she was getting her drugs. K.A.K. told her she got them from her mom and dad. She also told Ms. Smith that she was "working", in that her mother was "hooking her up

with a guy". Ms. Smith understood this to mean that K.A.K. was prostituting. K.A.K. told her as well that her mom got violent when she was drinking and using drugs.[2] After this, Ms. Smith took steps to obtain a restraining order against the parents.

- [153] K.A.K. was moved from the SPARA resource in October 2006. After that, she was in a number of placements, ranging from very short term to a year.
- [154] In July 2008, at age 17, K.A.K. was assessed at the Asante Centre. The results are recorded in an assessment report, dated January 6, 2009. K.A.K. had an overall IQ in the 3rd percentile, indicating significant impairment in cognition. She also had significant impairment of core academic skills, executive functioning, problem solving, memory, communication, adaptive behaviour and social skills. She had mild problems with attention and activity level. She was diagnosed with alcohol-related neurodevelopmental disorder (ARND) and substance abuse disorder. A number of recommendations were made for K.A.K.'s medical, home and school management, which included access to a psychiatrist and counselling.
- [155] After this, there is little evidence about K.A.K. until September 12, 2010, when she was admitted to the psychiatric unit at Burnaby Hospital as an involuntary patient. Dr. Barbara Rana, her treating psychiatrist, described K.A.K. on admission as talking to herself and unresponsive. She was reported to have tested positive for cocaine and admitted to hearing voices. Dr. Rana testified that K.A.K. was unresponsive until November. She described K.A.K. as very agitated, pacing all the time, and responding to delusions. She started K.A.K. on medication when her psychosis did not clear. It took a long time for her to improve. She had difficulty developing trust with anyone. She has gone AWOL from the hospital a number of times. Dr. Rana said that she goes to her parents, "which needs to be stopped". After the first time, K.A.K. returned acutely psychotic. She has since been on injection medication, which has stabilized her psychosis. The parents also visited K.A.K. in hospital but Dr. Rana eventually issued directions to forbid this due to negative effects on K.A.K.'s health.
- [156] Dr. Rana described K.A.K. as a complicated patient. She has a multiple diagnosis of fetal alcohol spectrum disorder, substance abuse and an underlying psychotic condition, most likely schizophrenia. She also has "huge problems with boundaries" and needs a therapist who can deal with her issues on a one to one basis. In March 2011, K.A.K. was discharged to a home outside the city where she has a significant level of care.

Expert evidence

- [157] Dr. Koch provided a tentative opinion about K.A.K.'s psychological characteristics because she failed to appear for her assessment appointment and he was not able to interview her. He relied only on records from 1991 to 2009. Despite this, the facts he relied on were generally consistent with the evidence at trial and my findings, and I consider his opinion evidence helpful.

- [158] With respect to the family, Dr. Koch assumed that there was out of control alcohol consumption by the parents, frequently accompanied by domestic violence; anger problems of one or both parents; neglect of the children with respect to their nutrition, hygiene and supervision; and physical abuse of K.N.K. by the parents. He also assumed that there was some violence between the siblings and some exposure to sexual activity by the parents. Other than these last two matters, the facts he relied on were borne out by the evidence.
- [159] With respect to K.A.K., Dr. Koch made the following assumptions: diminished cognitive abilities with intellectual function on the borderline between mentally handicapped and low average; problems with receptive and expressive language and very poor academic performance; psychological distress between age 7 and 18, such as insomnia, enuresis, depressed mood, anxiety, hair-pulling, nightmares, suicidal ideation, and rapidly shifting mood and anger outbursts as early as age 13; aggressive behaviour, vandalism/property damage, fire-setting, going AWOL overnight, truancy; and impulsive and dangerous drug use, and risky, impulsive sexual behaviour between age 15 and 18. Most of these facts were also borne out by the evidence.
- [160] Dr. Koch did not provide any diagnoses for K.A.K. but stated that fetal alcohol syndrome or affect and childhood conduct disorder should be considered. He was of the view that the conduct disorder placed her at increased risk for adult antisocial personality disorder, although it did not appear that she had yet shown the breadth of conduct problems as a young adult as would be required for this diagnosis. He was also of the view that K.A.K. had suffered significant internalizing problems, such as anxiety, nightmares and depressed mood, as well as substance abuse disorder, the latter since early adolescence. He thought there was reasonably strong evidence to support a diagnosis of borderline personality disorder, which would explain her multiple suicide threats, gestures and attempts.
- [161] Dr. Koch stated that childhood conduct disorder is defined as a "repetitive and persistent pattern of behaviour in which the basic rights of others or major age-appropriate norms or rules are violated." The criteria for a diagnosis requires that the individual manifest at least three of the following behaviours:
- (a) aggression to people and animals, e.g., often bullies or threatens others, often initiates physical fights, has used a weapon, physical cruelty to people or animals, forced others into sexual activity, stolen with force, (b) destruction of property such as deliberate fire setting or other vandalism, (c) deceitfulness or theft, such as break and enters, conning others for profit, theft, and (d) serious violations of rules, such as staying out at night despite prohibitions, running away from home overnight at least twice, and frequent truancy from school.

[162] He described antisocial personality disorder as a diagnostic term that refers to long-standing problems in conforming to societal rules and causing harm to others, and an adult variant of conduct disorder. This is diagnosed when an individual shows a pervasive pattern of three or more of these behaviours:

... repeated actions that would be grounds for arrest, repeated lying or conning others, impulsivity, aggressiveness, reckless disregard for safety of self or others, consistent irresponsibility, and lack of remorse for one's actions; as well as being at least 18 years of age and showing evidence of Conduct Disorder predating age 15 years.

[163] Borderline personality disorder, he stated, refers to long-standing problems in interpersonal relationships, self-image, emotional control and impulsivity. A diagnosis requires that an individual exhibits at least five of these characteristics:

(a) frantic efforts to avoid abandonment, (b) pattern of unstable and intense interpersonal relationships, (c) identity disturbance, (d) impulsivity in at least 2 areas that are potentially self-damaging (e.g. spending, sex, substance abuse, reckless driving, binge eating), (e) recurrent suicidal behaviour, gestures or threats, (f) affective instability, (g) chronic feelings of emptiness, (h) inappropriate intense anger, (i) transient, stress-related paranoid ideation or severe dissociative symptoms.

[164] Dr. Koch opined that these problems were "highly likely" the product of K.A.K.'s disturbed home environment for the first 8 to 9 years of her life. He explained that being vicariously exposed to family violence against others increased the risk of both future conduct disordered behaviour and internalizing problems such as depression and borderline personality. He felt that her prognosis for the future was poor due to fetal alcohol intellectual and academic deficits and her borderline personality characteristics, neither of which are likely to improve. Similarly, he thought that her substance abuse was unlikely to improve without treatment and that she appeared to be a non-compliant individual.

[165] In his report, Dr. Koch did not consider K.A.K.'s more recent psychotic condition, which may be schizophrenia. In cross-examination, he said that he would not predict that this condition would relate to K.A.K.'s childhood experiences.

The positions of the parties

[166] Plaintiffs' counsel submits that K.A.K.'s lot in life was dramatically altered when she was returned to her parents' care in August 1993: it put her on a one-way course that she was not otherwise able to escape. Mr. Coad says that she was robbed of her childhood, her humanity and her dignity and was the most psychologically damaged plaintiff, having spent the longest period of time with her parents. He argued that K.A.K. developed an unhealthy attachment to her parents as a result of the years she lived with them and would not likely have reconnected with them at age 14 had she been permanently removed from their care in 1993. He seeks \$250,000 in non-pecuniary damages on her behalf.

[167] The Crown concedes that K.A.K. presents a complex psychological profile but submits that her damages must be assessed on the basis of the actual abuse and neglect she experienced. Ms. Johnson says that K.A.K.'s exposure was limited to the parents' domestic violence, some drug and alcohol abuse and inappropriate conduct, and non-pecuniary damages should be in the range of \$25,000. She relies primarily on the damage awards given in K.L.B., which ranged from \$10,000 to \$25,000.[3] There, the plaintiffs were mistreated in two foster homes. Ms. Johnson submits that the nature of the abuse in K.L.B. was more serious than in this case and moreover, there is no evidence before this Court about how the parents' conduct affected K.A.K.

Assessment

- [168] In K.L.B., the abusive conduct was described as "forced eating of porridge on at most several occasions, a crawl down a driveway, occasional indiscriminate hitting, one severe beating, sexual assault between children, the use of demeaning language and punishments, uncontrolled sexual activity between children, one exposure to adult sexual misbehaviour, and forced drinking of soapy water on occasion." These events took place over two years and there was no violence and no injury except for once, minimally. The judge considered this conduct relative to the less restrained parental model at the time, and found the nature and duration of abuse to be moderate.
- [169] It is difficult to compare the circumstances in K.L.B. to those here, but it is my view that the overall conduct by the parents in this case was quite severe. It is also my view that K.A.K. was much more seriously affected by this exposure than the plaintiffs in K.L.B.
- [170] The judge in that case found that the abusive conduct caused fright on occasion, sadness, loneliness, helplessness, mistrust, embarrassment, shame and emotional upset. There is no subjective evidence from K.A.K. about how her parents' conduct affected her but the evidence I have reviewed shows that she is clearly a very psychologically damaged young woman. Her most severe problems, as described by her treating psychiatrist, are her neurodevelopmental disorder, her psychotic condition and her substance abuse. She has also suffered serious behavioural and other psychological problems over many years. I find that that K.A.K. has a number of the characteristics of a childhood conduct disorder and borderline personality disorder, as described by Dr. Koch. These include aggressive behaviour, destruction of property, serious violations of rules, such as going AWOL on a frequent basis, impulsivity in respect of substance abuse and sex, suicidal behaviour, and inappropriate intense anger. She has also suffered from other internalizing problems such as hair-pulling, bed-wetting and other sleep related issues.
- [171] In contrast, none of the plaintiffs in K.L.B. were found to have suffered serious psychological disorders that related to the abuse. I consider the damages awarded in K.L.B. to be much lower than is warranted in the circumstances of this case.

- [172] The trial judge in K.L.B. also found that the plaintiffs would have had difficulties as adults in any event because of the impoverished circumstances of their birth family as well as unrelated events that occurred after the abuse, and took this into consideration in assessing damages. The same applies here.
- [173] I find that K.A.K.'s psychological injuries that I have described (other than her psychosis) have resulted from multiple causes, including her ARND and her experiences in her parents' care after 1993. Her earlier exposure to her parents before 1993 and after 2005 also played a role. It was after this latter exposure to her parents that K.A.K. began using drugs, although she was at risk of substance abuse as a result of her ARND and early environment. In addition, the loss of the Knackstedt placement in November 2003 had a significant impact on K.A.K.'s psychological health. Before that, her problems appeared to be relatively under control. She had been assessed by Dr. Shaw and was receiving counselling from Madeleine DeLittle. After, her behaviour deteriorated, she became violent and destructive to herself and others and could no longer attend school. She was hospitalized for a month in May 2004. One of Dr. Shaw's recommendations at that time was that K.A.K. be placed in a consistent foster placement. This did not occur. It appears that K.A.K. improved to some extent after her hospitalization (she was attending school), but her behaviour began to deteriorate again in late 2004. By the summer of 2005 she was seeing her parents.
- [174] I cannot accept Mr. Coad's submission that K.A.K. would not likely have reconnected with her parents had she remained in care after 1993. This is speculative. There is no evidence about the circumstances that led to K.A.K. seeking out her parents and there is no expert evidence on these attachment issues. Other than the Asante Centre assessment in July 2008, there is simply no evidence about K.A.K.'s life between 2006 and September 2010, when she was admitted to Burnaby Hospital in a psychotic state.
- [175] I find that only K.A.K.'s psychotic condition is a divisible injury; the rest of her psychological injuries are indivisible from all of these multiple causes. These subsequent events did not cause new injuries. They exacerbated the old ones, but in a way that was of a different order of magnitude than her psychological injuries before 2003. I also find that K.A.K. was at a measurable risk to suffer many of these injuries due to both her original position and these subsequent traumatic events in her life, and this must be taken into account by reducing the damages to which she is entitled.
- [176] In all of these circumstances, I consider an appropriate award of general damages for K.A.K. to be \$80,000.
- K.N.K.
- [177] K.N.K. was observed by many people to have multiple injuries when she was apprehended in May 1999 and she disclosed very little information to anyone. In December, Dr. Krywaniuk saw her as sad, quiet and reserved. Her behaviour in the first year was variable, ranging from shutting down to intrusive and aggressive. In September 2000, her relationship with the Taylors had broken down and she was moved to the Travis foster

home, where K.A.K. and M.M.K. were then living. That placement did not last long. On November 13, 2000, K.N.K. was placed with Patti Knackstedt. As with K.A.K., this was an excellent placement. Ms. Knackstedt and K.N.K. were very bonded to one another. K.N.K. testified that this was her favourite foster home.

- [178] Ms. Knackstedt described K.N.K.'s behaviour when she first arrived as very withdrawn but a little more verbal than K.A.K., and similarly afraid, defiant and sneaky. She thought the two sisters were a bad combination, leading each other astray, doing the opposite of what was asked of them and going out of their way to be nasty and destructive. While this behaviour slowed down after awhile, it never completely stopped. She described K.N.K.'s behaviour as going in three month cycles, like K.A.K.'s. Also like K.A.K., K.N.K. seemed afraid to ask for a second helping of food at meals. At school, K.N.K. was below her grade level but she was on a regular program.
- [179] Ms. Knackstedt observed "tons of scars" across the top of K.N.K.'s head and cauliflower ears, one worse than the other. K.N.K. had surgery on her damaged ear when she was with Ms. Knackstedt. After that, K.N.K. began to open up and talk to Ms. Knackstedt about her past. The two became quite close. K.N.K.'s behaviour improved. In September 2003 she began play therapy with Madeleine De Little, which continued until May 2004, when funding was terminated.
- [180] Ms. Knackstedt testified that after the house fire in November 2003, she wanted K.N.K. to stay but the Ministry wanted to keep the two sisters together. Leaving the Knackstedt home was unrelated to K.N.K.'s behaviour but it proved to be devastating for her. K.N.K. testified that this was "maybe the worst thing" that had happened to her since she was apprehended. She continued to contact Ms. Knackstedt for some time.
- [181] The Ministry did place K.N.K. and K.A.K. together after they left the Knackstedt's, but this did not last long. When the girls were placed with Alison Redline in early April 2004, their fighting became so intense that K.N.K. was moved again. On April 26, 2004 she was placed with Judy Hilscher, where she stayed for a year. Ms. Hilscher knew K.N.K., as she had provided respite care when the girls were living at the Knackstedt's. She said that K.N.K. seemed very happy to be moving in to her home and quickly found her place. She got along well with the Hilscher's other foster daughter and loved to do chores and gardening. K.N.K. was at least an average student and never missed a day of school. However, after she started high school she became more testy and stopped wanting to please others so hard. In February 2005 K.N.K. was having difficulties with social activities, was exhibiting some sexualized and sometimes aggressive behaviour, and was caught stealing from stores.
- [182] Unfortunately, in April 2005, K.N.K. got upset when she was told to clean her room and threatened to slit Ms. Hilscher's throat and light the Christmas tree on fire. Ms. Hilscher said that she did not take the physical threat seriously, but she could not have K.N.K. back because of what she interpreted as a threat to burn the house down.

- [183] It took the Ministry several months to find another placement for K.N.K. While in respite care, she and another foster child set fire to wallpaper that they had peeled off the wall. In May and June, she went AWOL numerous times.
- [184] On June 10, 2005 K.N.K. moved into a SPARA resource in Langley. Lynn Petersen worked there at the time. She described K.N.K. when she first arrived as a "tiny girl", very quiet and withdrawn. She testified that after a few weeks she started seeing acting out behaviours, at times quite extreme. K.N.K. was almost bullying towards staff, constantly demanding, irritating and criticizing. Later she became involved with the wrong kids, got into drugs, began going AWOL and engaging in criminal activities. Of particular concern was K.N.K.'s relationship with a boy who lived close by and supplied her with drugs. She would leave SPARA and be gone often for weeks.
- [185] In November 2006 the SPARA resource was taken over by another care giver. Ms. Petersen decided to take K.N.K. to live with her. She said that K.N.K. was in a bad way at the time. K.N.K. moved to Ms. Petersen's home in February 2007. K.N.K. did well at first, but again, this did not last long. She began drinking and doing drugs, leaving school and going AWOL. In January 2008 K.N.K. resided in an aboriginal treatment centre, where she did well. She returned to Ms. Petersen in June and continued to do well for another six months. By December 2008, she was back into alcohol and drugs. She went AWOL in May 2009 and after that Ms. Petersen decided that other arrangements had to be made. She felt she could no longer help K.N.K. She continued to have contact with her for awhile, but this stopped after K.N.K. threatened her. Eventually, K.N.K. spent time in a juvenile correctional facility. On October 26, 2009, as a term of her probation, she was admitted to the Spirit Bear Treatment Centre in Abbotsford.
- [186] K.N.K. did well at Spirit Bear, where she received both individual and group counselling and attended a modified school program. Her probation ended in July 2010 but she stayed at Spirit Bear until December. Lyn Ned, the Executive Director of the centre, testified that K.N.K. was "amazing" when she participated, but was inconsistent and did not complete anything she started. When she was not participating, she was aggressive, very defiant and manipulative. She struggled with her school work.
- [187] In the fall of 2010, K.N.K. was assessed at the Asante Centre. The results showed that she has an overall IQ in the 1st percentile, an extremely low range, indicating significant impairment in cognition. She also has significant delay in core academic skills, significant impairment in executive function, communication and adaptive skills and mild difficulty with distractibility. She was diagnosed as having neurodevelopmental disorder but alcohol exposure could not be documented and was consequently unknown. Recommendations were made for medical, home and school management, which included a referral for psychiatry for further evaluation due to concerns about symptoms of depression.

[188] After K.N.K. left Spirit Bear, she lived in a room and board situation, which did not last long, as she started drinking again. In January 2011 she moved to Victoria and is living in a family home.

Expert evidence

[189] Dr. Koch opined that K.N.K. suffers from poly-substance abuse disorder, childhood conduct disorder with early onset and antisocial personality disorder. It was his view that the primary factor contributing to these disorders is "K.N.K.'s extreme abuse and neglect in her biological parents' care." He accepted that other things, particularly ARND and subsequent experiences such as unstable foster home placements also contributed, but in a lesser way. With respect to subsequent experiences, he stated:

... it is probable that with a more benign early childhood, she would not have found herself in the circumstances she did between the ages 14 and 17 years, and she appears [sic] to be well on her way to substance abuse and conduct disorder problems well before these latter stressors.

[190] Dr. Koch was very pessimistic about K.N.K.'s prognosis for overcoming these problems due to the absence of good, drug-free support outside the residential treatment context, educational disadvantage, poly-substance abuse and the presence of anti-social personality disorder.

[191] Dr. Koch relied on an extensive review of documents, a 3 ½ hour interview with K.N.K. and the results of various psychological tests. He was less certain of his opinions because K.N.K. gave vague and evasive responses to some historical questions during the interview and gave some invalid responses to the tests. Despite this, I accept most of Dr. Koch's diagnostic opinions, as the facts he relied on are generally consistent with the evidence I have accepted in respect of K.N.K.'s history. In his report, Dr. Koch described K.N.K.'s life with her parents as follows:

K.N.K. was exposed to an extremely abusive situation as a pre-school child. She lived for approximately 7 years under conditions of extreme physical abuse, extraordinary neglect, and exposure to domestic violence, parental substance abuse, possibly inappropriate sexuality, and what appears to have been a chaotic and frightening home environment.

[192] This description is reasonably consistent with my findings. While it is not known how frequently K.N.K. was physically abused, it is clear that it was quite constant over a number of years and sometimes extreme, as demonstrated by the injuries to her left ear and the scars on her scalp. I would agree with Dr. Koch's assessment that the home environment was chaotic and at times frightening for K.N.K.

[193] With respect to his specific diagnoses, Dr. Koch explained that determining whether a person meets the criteria is matter of clinical judgment. It is not my role to assess whether or not a diagnosis is correct, nor is it necessary that it be correct. There is evidence that K.N.K. has displayed some, but certainly not all of the behaviours required under the

criteria for childhood conduct disorder. She has been aggressive to others (but not animals, in fact to the contrary), she has been destructive to property (although not often), she has been deceitful by stealing, and most importantly she has been defiant of rules by going AWOL on a fairly constant basis, at least by 2005. These behaviours, along with her substance abuse, are clearly conduct disordered behaviours regardless of the label.

- [194] I am more concerned about Dr. Koch's diagnosis of antisocial personality disorder, as it forms part of the basis for his pessimistic prognosis for K.N.K.'s future. As he explained, this is a diagnosis that is not made until a person is 18 years old, and K.N.K. was just 18 when Dr. Koch assessed her. Moreover, he was uncertain about his opinions due to problems with the reliability of the information he received from K.N.K. and her test results. There is no question that K.N.K. has demonstrated impulsive and aggressive behaviour and has been consistently irresponsible. However, there is a real absence in the evidence of some of the behaviours that define the criteria for antisocial personality, such as repeated actions that would be grounds for arrest, repeated conning of others and lack of remorse. In my opinion, the evidence shows only that K.N.K. demonstrates some of the behaviours that may be associated with antisocial personality disorder.

The positions of the parties

- [195] Mr. Coad submits that K.N.K. was physically and emotionally abused in her parent's home for almost six years longer than she ought to have been, with the frequency and severity increasing as time passed. He says that as a result, K.N.K. was denied the ability to develop healthy emotional and life skills and entered the foster care system damaged and in need of treatment. She is now 19 years old with debilitating psychological injuries and bleak prospects for the future. He seeks an award of \$250,000 in non-pecuniary damages.
- [196] The Crown agrees that K.N.K. was physically and emotionally abused but says that the effects of the abuse were not as severe as in other cases, and there is no evidence that K.N.K. was traumatized. Ms. Johnson submits that an award of \$70,000 would be appropriate, considering the damages assessed in A.C., A.D.Y. and B.P.B., as they involved more serious physical and emotional abuse.

Assessment

- [197] The nature of K.N.K.'s injuries and the severity and duration of the abuse to which she was exposed are distinctly different from the other plaintiffs. At a very young age, she was treated with profound neglect and quite severe physical and emotional abuse, which caused serious physical injuries and caused or contributed to psychological injuries that include serious conduct disordered behaviours and poly-substance abuse. These disorders continue to affect K.N.K. today and will be very difficult to control for the rest of her life.

[198] In A.C., the plaintiffs, a brother and sister, brought an action against their mother for breach of fiduciary duty and were awarded \$100,000 in general and aggravated damages. The court accepted the plaintiffs' evidence that they were subjected to very severe mental and physical abuse over an 8 year period, which included repeated assaults by choking, beating, kicking and pushing, holding their heads under water and pouring scalding water on them. The impact on the plaintiffs was devastating. They suffered from post-traumatic stress disorder, were unable to form and maintain close relationships and were seriously compromised in their ability to perform effectively in an academic or work environment.

[199] The judge described the abuse and its effect at para. 78:

The assaults on the plaintiffs were frequent, almost daily occurrences. They were sadistic, more like torture than punishment. They occurred over many years, beginning when the children were very young. The effects on the plaintiffs were profound, at the time and since. In a very real way, these plaintiffs were robbed of their childhood.

[200] In A.D.Y. the plaintiff was awarded \$85,000 for non-pecuniary and aggravated damages against his parents for assault, battery, false imprisonment and intentional infliction of mental suffering. Over an 8 year period, the plaintiff was regularly hit with a belt and wooden paddle, confined for days or weeks to a locked bedroom where the furniture was eventually removed, and forced to eat food left over from one meal at the next. He was berated for stupidity and character defects and he had marks of physical abuse.

[201] Dorgan J. accepted that the plaintiff was a challenging child to raise, having been diagnosed with ADD and hyperactivity, but said at paras. 85-87:

... this is not a case of parenting strategies or disciplinary methods which were reasonable given that challenge, nor is it a case, with the help of hindsight, of benignly ineffective parenting. This is a case of brutality.

A child is entitled to expect the family home to be something of a haven; not Utopia but generally safe, fair and supportive. Within the home a child may legitimately expect discipline and guidance given with affection and respect.

In his family home this plaintiff was subjected to frequent verbal and physical abuse. He was physically confined and isolated. He was afforded little respect and no dignity. He was made to feel worthless.

[202] She found that the parents' conduct robbed the plaintiff of his childhood and at times his humanity. The effects on him were far-reaching. His self-esteem was poor and he had difficulty trusting and associating with people. He was at risk of developing further depressive episodes and psychiatric symptoms and he required long-term, extensive therapy.

- [203] In B.P.B., the plaintiff's general damages were assessed at \$95,000[4] in an action against her father for breach of fiduciary duty and for physical and emotional abuse over the course of many years. The trial judge found that the plaintiff was physically and emotionally abused by her father, who could not control his rage. The abuse started when the plaintiff was a young child and became more severe when she entered puberty. The father repeatedly and brutally assaulted the plaintiff on innumerable occasions, assaulted his wife in front of his children, and created an atmosphere of intense fear and intimidation in the home. The court found that the abuse had a profound effect on the plaintiff's emotional health. Her childhood was marked by fear, intimidation, physical injuries and degrading insults, and her adolescent years were chaotic. She was resistant to treatment.
- [204] K.N.K. was not able to provide many details of the abuse inflicted upon her by her mother. However, there were enough people who observed physical injuries on her over the years, some very serious. Her ear was so badly damaged that she required surgery. While the evidence is not as concrete as that in these other cases, I find that the abuse was quite severe and prolonged.
- [205] K.N.K. was also not able to give evidence about her subjective feelings in relation to the abuse and neglect, which is not surprising given her cognitive deficits. Nevertheless, I find that she was quite profoundly affected by it. Many people observed her demeanour over the years. In 1996, Dr. Korn found K.N.K. at age four to be sombre and he was not able to interact with her. Another physician described her two years later as unusually placid and withdrawn, with tears in her eyes. Linda Shortreid, the school principal, described K.N.K. (as well as K.A.K. and C.K.) as sad, withdrawn and non-communicative. In 1999, Dr. Korpach found her to be reserved, avoidant and constricted, hiding under the sofa when asked about her life at home. Velma Taylor described K.N.K.'s "dark moments" when she would shut down. In late 1999, Dr. Krywaniuk observed that she looked "rather downcast", did not show much of a range of affect, generally seemed "sad, quiet and reserved", and seemed unaware of the emotional part of affection. In later years, others observed K.N.K. to fluctuate from being very quiet and withdrawn to acting out in aggressive and destructive ways.
- [206] All of this is cogent evidence that K.N.K.'s experiences in her parents' care after 1993 seriously affected her. The expert evidence about FAS and ARND establishes that K.N.K.'s emotional response to the abuse showed as conduct disordered behaviours. In my view, the nature of the abuse and neglect and its effect on K.N.K. was quite comparable to that suffered by the plaintiffs in the cases reviewed above, but as I have already explained, there is no basis here to include an award for aggravated damages as was done in those cases.
- [207] K.N.K.'s psychological injuries have resulted from multiple causes, primarily her ARND and her experiences in her parents' care after 1993. With respect to her later experiences in the foster care system, I accept that K.N.K.'s removal from the Knackstedt home in 2003, which was unrelated to her behaviour, contributed greatly to the unfortunate decline in her

behaviour as she was entering adolescence. However, I accept Dr. Koch's opinion that she was well on her way to conduct disordered behaviours before this, and I find that her descent into substance abuse and more serious conduct disordered behaviour was probably inevitable given all of the contributing causes. Accordingly, I find her psychological injuries are indivisible from all these causes. I also find that there was a measureable risk that K.N.K. would have suffered these kinds of psychological injuries in any event due to both her original position and the subsequent trauma of losing the Knackstedt placement, and this must be taken into account in reducing the amount of damages to which she is entitled.

[208] Taking all of these factors into account, it is my view that K.N.K. is entitled to an award of \$120,000 for non-pecuniary damages.

C.K.

[209] C.K. was defiant and at times violent in the first six months after he was apprehended. His first placement after he left the SPARA resource in January 2000 lasted six months. During that time there were reports of aggressive, defiant and sexualized behaviour, perpetual lying, non-responsiveness and extreme moodiness. On June 30, 2000 he moved to the residence of Mary and Jim Thorn, where he stayed for almost three years.

[210] Mary Thorn testified that C.K. was quiet and a bit shy when he arrived but soon began to disobey rules and act out. He would steal things and when confronted was unable to explain his actions. He would sometimes wake up in the middle of the night crying and was unable to say why he was crying. Around the time he had visits with his siblings he would have bad dreams and would run around the house, crying. He would also get more defiant and rude after visits with his parents. He was always worried there was not going to be enough food. He was physically aggressive towards people and things and sometimes made threats. Twice he kicked Mr. Thorn. He had trouble at school. He did not do well and was suspended numerous times. In late 2002, C.K. was seen by a psychiatrist, who put him on medication. After this his behaviour was observed to improve and he was less aggressive.

[211] In February and March 2003, C.K. attended a program for children who witness abuse. When asked to draw what he thought abuse looked like, C.K. drew a picture of his father wielding a knife towards his mother and cutting off her head. He then ripped up the picture and went through the office pushing furniture and ripping things off the walls. He did not return to the program. Mary Thorn said that his behaviour was very bad after this and it continued that way until C.K. was moved to another home in May 2003. There is also evidence that his destructive behaviour escalated at school.

[212] Denise Bogle was C.K.'s social worker at this time. She testified that the Thorns were good foster parents who provided structure and a safe place for C.K. but they were older people and she was concerned that C.K.'s aggressive behaviour was getting worse. She put him in several temporary placements to stabilize him and find a proper group home. This lasted just over eight months. During this time, C.K. continued to exhibit a lot of anger and hostility and continued to be suspended from school.

[213] In June 2003, C.K. was seen by Dr. Keith Saunders, a registered psychologist. Relying on information provided by social workers, foster parents, the school and C.K., Dr. Saunders formed the impression that C.K. had an intense, fearful, emotional attachment with adult caregivers and a number of unresolved issues resulting from negative experiences in his earlier childhood and home environment.

[214] Dr. Saunders' assessment included these observations:

It appears that C.K.'s feelings often overwhelm his cognitive abilities and he reacts to people in his environment with an intense mixture of dependency and opposition. This confusing mixture often results in rejection by others and then the abandonment issues arise and he gets very demanding and aggressive with others, or distancing and wanting to move away from the situation.

C.K. appears to have significant anger and rage problems. ...

[215] He made several recommendations, including weekly appointments with a psychologist to "work on and monitor his anger management, affect regulation, insecure emotional attachment and traumatic childhood experiences." Dr. Saunders continued to see C.K. in a series of 10 sessions, which ended in October 2003. He was able to develop a good relationship with C.K. to the point where C.K. could begin trauma therapy. However, no funding was available for this and his sessions with Dr. Saunders stopped.

[216] In February 2004, C.K. was placed in the first of two foster homes that did not last long. In the first, he turned a butcher knife toward his stomach and his foster mother could not get it away from him. He drew a picture of himself with someone firing a gun saying, "You deserve to die C.K.", and a person lying in a pool of blood saying, "Don't kill me". He also made threats to kick his pregnant foster mother in the stomach. In the second home, he refused to take his medication and was agitated and violent. He punched his foster mother, tried to jump out of a second story window, and trashed his room. He did calm down, took his medication and expressed regret, but he continued to be out of control and physically aggressive and threatening towards his foster parents. On April 29, 2004 he was moved to another home, where he stayed for just over a year.

[217] In May 2004, C.K. was assessed at the Sunny Hill Centre for Children due to concerns about his behaviour and development and suspected pre-natal exposure to alcohol. Dr. Lilley prepared an assessment report. The results showed that C.K.'s overall intelligence score was in the 2nd percentile and his intellectual profile was extremely uneven. He had low to

average visual-spatial intelligence but a significant weakness in verbal intelligence. This showed he has a mild intellectual disability for language-based thinking. Dr. Lilley noted that C.K. showed signs of emotional distress during the assessment but opined that the results accurately described C.K.'s functional level, as they were consistent with community reports, as well as with a prior assessment done in 2000. C.K. was also considered to have a neurodevelopmental disorder with unconfirmed alcohol exposure, or ARND. Dr. Lilley was of the view that C.K. was in "urgent need of intensive psychiatric and mental health support".

- [218] C.K. began seeing Dr. Douglas Maskall, a psychiatrist, in September 2004. Dr. Maskall's primary role was to manage C.K.'s medication and assist caregivers with behaviour management. He agreed with Dr. Saunders that C.K. would likely need long-term psychotherapy with a highly skilled trauma therapist. He followed C.K. for several years but his involvement was limited.
- [219] In April 2005, Denise Bogle asked Dr. Saunders to prepare a treatment plan for trauma counselling in an effort to obtain funding. Dr. Saunders recommended therapy for a year. Unfortunately, no funding was obtained.
- [220] In June 2005, C.K. raised allegations that his foster parents had been physically abusive to him and he was removed from that home on July 5, 2005. He went to relief care or short term placements and was AWOL on and off throughout the summer. One time, Ms. Bogle picked him up at his parent's place in Surrey. On September 6, 2005 he was placed at a SPARA resource in Langley. It was there that C.K. met Michael Bird, which turned out to be a very positive turn.
- [221] SPARA was a specialized resource which housed a maximum of two children and employed four staff who rotated every two days. Michael Bird had been hired to work with C.K. Mr. Bird described C.K. in the first week as generally cheerful, highly spirited with lots of energy and rarely focusing on one activity for a long time. Within two weeks, however, there was an incident where C.K. went into a "full on rage" after he was not allowed to sleep at a friend's house. Mr. Bird said that C.K. began to destroy the living room, throwing furniture and smashing plates, and this quickly escalated to a physical attack on Mr. Bird. He held C.K. by the wrists and tried to get him to calm down. When C.K. broke down, Mr. Bird said that he saw for the first time how hurt and broken C.K. was. He assured C.K. that he was not going to leave him. He described this as a strong bonding moment.
- [222] In the first three months, Mr. Bird observed C.K. to be hyperactive, superficial and lacking in trust and boundaries. He was always guarded but he sexualized situations and talked about this in public. He could not see consequences associated with his behaviour. In the fall of 2005 C.K. would go AWOL, usually to his parents, and when he came back he would be a "real handful", generally off his medication and "completely unglued". In December he started seeing a therapist, which continued until 2009. Mr. Bird attended with him. He said that the goal was to help C.K. learn coping skills and strengthen their relationship. Mr. Bird

believed that the therapy was beneficial.

- [223] Within six months, C.K. began to stabilize. He stopped going AWOL. He was doing well in a school program that focussed on boys with attention and behaviour problems and his behaviour improved.
- [224] In July 2006, Mr. Bird left his job at SPARA but he missed C.K. and maintained contact with him. In November, the SPARA resource closed and C.K. moved to Mr. Bird's home, where he has remained since. It has not been easy. After a short honeymoon period, C.K. returned to defiant behaviours which at times escalated to angry outbursts and rages. Mr. Bird has tried various strategies to deal with C.K. and has shown profound understanding and compassion.
- [225] C.K. struggled in school, both academically and socially. Mr. Bird said that C.K. was very concerned with how people saw him, gradually stopped taking medication and refused to take any at all when he was 16, apparently without showing adverse effects. He had a good year in grade 9, but began attending school less and less. He was suspended numerous times in 2008 for truancy, fighting, lighting fires and doing drugs. He also began smoking marijuana, and continues to do so on a regular basis. He did not go to school at all in the 2010-2011 year. He has become involved in hockey and achieved considerable success in this past season. He is able to look after his room and do laundry, but completing chores is always a challenge. He is very explosive at times and has difficulty taking direction, even from Mr. Bird.
- [226] In July 2008, C.K.'s younger brother C.G.K. moved into Mr. Bird's home. The two boys got along fairly well the first year but now they occasionally fight and are not close. Mr. Bird believes this is reflective of the age difference between them.
- [227] C.K. is still not able to express his feelings and is very guarded with his emotions. Mr. Bird said that C.K.'s first response is anger and it has always been a challenge for him to take responsibility for his actions. He still acts out, causes damage to property, and has no awareness that he could be in trouble. At times, Mr. Bird is afraid of C.K., as he is now 18 and fairly strong.
- [228] C.K. has not talked to anyone in any detail about his life with his parents. He did tell Mr. Bird that his parents did drugs, and in May 2004, while listening to music in Denise Bogle's car, he told her that he had heard worse things than songs about death when he lived with his parents.[5]

Expert evidence

- [229] Dr. Koch's opinion about C.K. is somewhat difficult to assess because, in addition to records, he relied to a significant extent on information he elicited from C.K. in interview and some of that information was not in evidence or was inconsistent with the evidence. Moreover, Dr. Koch had limited confidence in his opinions because C.K. was vague and unresponsive in the interview and he thought that C.K. under-represented the extent of his psychological problems.
- [230] Dr. Koch was of the view that C.K. suffers from FAS, childhood conduct disorder, marijuana abuse disorder, binge drinking disorder, a major depressive disorder and other anxiety-related problems. He attributed the conduct disorder as a "highly probable consequence of exposure to his parents' lifestyles and inadequate caregiving." He also attributed this exposure as a primary contributor to C.K.'s substance abuse and a partial contributor to his depression. However, in cross-examination, Dr. Koch said that it was difficult to link causality of substance abuse problems to the parents but he agreed that C.K. is at a higher risk to develop alcohol and drug problems due to both his parents and FAS. He also agreed that being apprehended and living in strange environments at a young age are factors that would lead to a variety of mental health problems but this was highly dependent on the background characteristics of the child and the quality of the environments. Where the environment is benign, the impact should diminish over time. On the other hand, multiple disruptions can have a significant effect on anxiety-related problems and interpersonal attachments.
- [231] Aside from FAS, Dr. Koch stated that the conduct disorder was the most salient diagnosis, as it is frequently a precursor to antisocial personality disorder and it will handicap C.K. in a variety of ways. In addition, because of his FAS, C.K. is at a higher risk for adverse mental health consequences as a result of his daily marijuana use. Dr. Koch thought that he is less likely to recover from his depression, more likely to relapse, and will continue to have episodes of depression into the foreseeable future. He recommended that C.K. have treatment for substance abuse and cognitive behavioural therapy for his depressed mood.

The positions of the parties

- [232] Plaintiffs' counsel submits that C.K.'s exposure to his parents' neglect after 1993 has had a severe, long-lasting and profound effect on him. Mr. Coad described C.K. as an emotional and social cripple and says that there is no sign that any drastic change is possible. He seeks \$200,000 in non-pecuniary damages.
- [233] The Crown concedes that not all of C.K.'s conduct disordered behaviours can be attributed to his ARND but submits that some of his post-apprehension conduct was likely the result of a child with compromised executive functioning, due to ARND, which undermined his ability to deal with later stressors such as his apprehension and subsequent negative experiences in the foster care system. As with K.A.K., Ms. Johnson stressed that his

damages should be assessed on the basis of an exposure to domestic violence, some drug and alcohol abuse and inappropriate conduct by the parents. She suggested that an award of \$25,000 would be appropriate for C.K.

Assessment

- [234] Dr. Koch's diagnosis of depression was based largely on what C.K. told him about feeling depressed and sad, losing weight and appetite, having trouble sleeping and experiencing mild fatigue. Similarly, his diagnosis of binge drinking disorder was based on what C.K. told him about drinking every Friday until he gets drunk. None of this was in evidence and some of it was inconsistent with Mr. Bird's evidence about C.K.'s activities and appetite. Accordingly, I can give no weight to these diagnoses.
- [235] However, there is ample evidence that C.K. has quite serious psychological problems. His behaviour when he was first apprehended was clearly disturbed, and this continued to a lesser degree when he lived with the Thorns. He was put on medication by a psychiatrist in 2002, when he was 9 years old. The drawings he made about abuse and his physically aggressive and violent conduct showed much more than just cognitive difficulties and impulsivity. Dr. Saunders came closest to getting through to C.K. in 2003, and he was of the view that C.K. needed at least a year of trauma therapy to address symptoms of anxiety, depression, anger, post-traumatic stress and dissociation. Without accessing such therapy, C.K.'s symptoms became worse over time. The violence he displayed to his foster mothers in 2004 is very disturbing. Michael Bird's description of his first confrontation with C.K.'s aggression in 2005 was quite profound but understated: he realized just how hurt and broken C.K. was.
- [236] Fortunately, C.K. has found stability with Michael Bird and has since received some therapy to help him with his coping skills. He is doing better as a result, but he still displays significant problems with trust, anger, physical aggression, defiant behaviour and marijuana abuse. I agree with Dr. Koch that much of this can be subsumed in the diagnosis of conduct disorder.
- [237] Dr. Koch described the parental household as "quite extraordinarily toxic", which may not be far from the truth. I find that along with his ARND and subsequent experiences in the foster care system, C.K.'s exposure to his parents' lifestyles and inadequate care-giving was a material contributing cause of his emotional problems and conduct disorder, and these psychological injuries are indivisible from these other causes. As with the other plaintiffs, I also find that he was at a measureable risk to develop a conduct disorder in any event although I do not consider that risk to include the acute symptoms I have described.
- [238] Taking all of this into account, I assess C.K.'s non-pecuniary damages at \$95,000.

M.K.

- [239] In December 1999, Dr. Kywaniuk observed M.K. to be quite chatty and more open than her older siblings. On February 8, 2000, M.K. was placed, with her younger sister C.N.K., back in the Gorman home.
- [240] Judy Gorman testified that the two girls ran right into the house to their bedrooms as if they had never left. She said when M.K. had telephone contact with her parents, she would get very upset, and told her that her biggest fear was that her parents would steal her or take her away from the Gormans.[6]
- [241] Ms. Gorman described M.K. as "the extreme stubborn one", who will talk when she feels like it and will shut down completely when she does not. M.K. was extremely helpful around the house. She struggled in school. She had learning assistance but would not cooperate, was nasty to her teachers and refused to do a modified program. She refused to get involved in any activities outside of school and would stay at home and play with the younger children in the neighbourhood. Ms. Gorman's descriptions of M.K. are somewhat inconsistent with the observations of social worker Jay Polowin in the spring of 2000. He said that M.K. appeared very quiet and withdrawn and had a "dead look in her eye".
- [242] M.K.'s school records do not record on-going defiant behaviours. For the most part, throughout elementary school, she is noted to be polite, friendly and cooperative. By 2002, when she was in grade 3, her learning difficulties became apparent and she was referred to support services. The primary behaviour issue noted was her shutting down when challenged with tasks.
- [243] However, there is evidence that shows other behaviour problems. In August 2002, M.K. was assessed by Dr. Mary Korpach. Dr. Korpach described M.K. as a "highly anxious and avoidant child" who appeared to have learned that "the best response to an unpredictable world is to remain still and not speak." She recommended that M.K. receive therapy, such as art therapy, for what she assumed was early trauma, as well as a psycho education evaluation.
- [244] M.K. was referred to Dr. Saunders in February 2003 apparently due to difficulties she was having at home and at school. He prepared a Caregiver Support Report, aimed at assisting foster parents. He went to the Gorman home six or seven times but saw M.K. only once and had difficulty engaging her. Much of the information on which he based his recommendations came from Ms. Gorman and school staff. He described M.K. as
- ... a shy, emotional, restless, defiant and disorganized child with significant historical attachment difficulties. She has problems in organizing, prioritizing, and activating her mind, effort regulation, mental focussing and memory. In school these difficulties are further exacerbated by problems of inattention, poor cognitive processing, and inappropriate social interactions.
- [245] In September 2003, Madeleine De Little began play therapy with M.K. Ms. De Little said that M.K. was more outgoing than her older sisters, would sometimes get very angry, and could express herself through play therapy. In March 2004 she reported that M.K. was

working through themes of protection, nurturing, healing and confusion of adult roles and would need to continue in counselling for some time. In May 2004, the funding for this counselling was terminated. However, it appears that Ms. De Little continued to see M.K., at least until November 2004. On November 29, 2004, she wrote to Ms. Gorman and Judy Smith about irrational behaviour that she observed was triggered by M.K. having to do math homework.

- [246] In July 2004, M.K. told Judy Gorman that she had been sexually assaulted by a relative who had stayed at the house.[7] Ms. Gorman said that they talked and cried about this but she did not observe any change in M.K.'s behaviour. The perpetrator subsequently pleaded guilty to criminal charges of inappropriate touching.
- [247] By 2005, when M.K. was in grade 6, the school records note some stubborn and disrespectful behaviour with adults who worked with her in learning assistance. This is consistent with Ms. Gorman's testimony. The school records show that M.K. struggled more as she got older. There is some indication that in 2006-2007 she was designated as a student in need of intensive behaviour intervention and mental health support. There is no evidence about her attitude in high school.
- [248] M.K. was assessed at the Sunny Hill Health Centre for Children in September 2009. Her overall intelligence level was found to be in the 3rd percentile, which is classified as a borderline ability level. Her cognitive profile was uneven. She was very weak in tasks that involved abstract thinking and her verbal skills were below the 1st percentile, in the extremely low range. The team concluded that M.K. met the criteria for a diagnosis of fetal alcohol spectrum disorder, specifically ARND. Dr. Lilley expressed the view that mental health support could be helpful but she noted that M.K. was not willing to do this.
- [249] M.K. stayed with the Gormans for 10 years. In June 2010, she had a physical altercation with her sister C.N.K. and then went AWOL. Ms. Gorman would not take her back. M.K. spiralled down. She wanted to come back. Ms. Gorman offered her respite with conditions, but said that M.K. did not follow through with any of them. M.K. was placed with Alana Doherty, who was looking after M.M.K. and four younger K. siblings. This arrangement did not work out, and M.K. was moved again in August. Ms. Doherty described M.K. as very controlling and negatively affecting the behaviour and well-being of M.M.K.
- [250] Since then, M.K. was in various temporary placements and a group home. Her behaviours escalated. Kashia Boberska, M.K.'s social worker, testified that M.K. was having "severe explosions" and was taken to hospital by police. On February 16, 2011 she was placed in the Stehiyaq Treatment and Wellness Centre in Chilliwack, which deals with drug, alcohol, mental health and trauma issues.
- [251] Ms. Boberska also said that since being at the Doherty's, losing the Gorman home was a topic of conversation every time she saw M.K. She said that M.K. wanted to know what she needed to do in order to go back there.[8]

Expert evidence

[252] As with C.K., Dr. Koch elicited information from M.K. in interview that was not in evidence. It was his opinion that M.K. suffers some FAS deficits resulting in mild cognitive impairment as well as attention deficit disorder, oppositional defiant disorder (ODD) and generalized anxiety disorder (GAD). He attributed the latter two disorders predominantly to M.K.'s adverse home environment and parental neglect.

[253] Dr. Koch explained in his report that ODD is diagnosed in children or adolescents where the patient does not meet the criteria for the more serious conduct disorder. The criteria for ODD require four or more of the following eight behavioural problems:

- (a) often losing temper, (b) often arguing with adults, (c) often defying or refusing to comply with adult requests/rules, (d) often deliberately annoying others, (e) often blaming others for his mistakes/misbehaviour, (f) often touchy or easily annoyed, (g) often angry and resentful, (h) often spiteful and vindictive.

[254] He described GAD as "a mental health condition comprised of pervasive and difficult to control worry accompanied by multiple symptoms of physical tension" and stated:

Adults with GAD retrospectively report greater maternal rejection and neglect, as well as less maternal love in childhood. Among children and adolescents, anxiety related problems typically decrease during early adolescence and then increase from middle to late adolescence. Opinion is mixed as to whether GAD is a chronic, episodic or evolving condition through the adult life span.

[255] Neither of these diagnoses was very strong. For his diagnosis of ODD, Dr. Koch relied on his review of records but agreed in cross-examination that M.K.'s elementary school records did not provide strong evidence of the presence of ODD. His diagnosis of GAD was based only on his test results and limited information from M.K.

The positions of the parties

[256] Mr. Coad seeks an award of \$50,000 in non-pecuniary damages for M.K. given Dr. Koch's diagnosis of ODD and GAD and the impact these disorders continue to have on her.

[257] The Crown submits that M.K.'s damages must reflect the shorter duration of her exposure to her parents' care and the extent to which she is less damaged than her older siblings. Ms. Johnson suggested an award in the range of \$10,000.

Assessment

[258] Without testimony from M.K., there is a scant evidentiary basis on which to assess damages. M.K.'s cognitive disabilities have clearly affected her. The evidence shows that her shutting down behaviour stems from frustrations when faced with challenges, which are directly related to her cognitive limitations.

- [259] Neither of Dr. Koch's diagnoses is supported by the evidence. While M.K. displayed some of the behaviours of ODD, there is insufficient evidence that such behaviours occurred "often" as required in the criteria. Dr. Koch's GAD diagnosis was based only on his test results and information from his interview with M.K., which of course was not in evidence.
- [260] Dr. Koch said that this was a very weak diagnosis due to the limited amount of information he was able to elicit from M.K. I note two additional things: the test results revealed no significant anxiety, and Dr. Koch interviewed M.K. in March 2010, before she left the Gorman home and subsequently spiralled downward emotionally.
- [261] Dr. Korpach observed in 2002 that M.K. was an anxious child but there is no evidence that she was a worrier. Ms. Gorman described her as extremely stubborn but said nothing about anxiety or worrying.
- [262] M.K. lived with her parents for the first five years of her life. I find that this environment, which I have already described, had a negative effect on her. Dr. Koch testified that there is good evidence that exposure to things like neglect and witnessing abuse at a young age impacts children whether or not they remember these things, and the impact shows in conduct problems. There is some evidence of anxious and defiant behaviour, which continued from time to time throughout the ten years that M.K. lived at the Gorman home.
- [263] I find that these anxious and defiant behaviours were caused by both M.K.'s ARND and her exposure to her parents' care. The sexual assault in 2004 may also have contributed to M.K.'s anxiety but there is little evidence about how this actually affected her. All Dr. Koch could say was that there are many negative consequences from sexual assault. Ms. Gorman did not observe any changes in her behaviour. I find all of these injuries to be indivisible.
- [264] However, it is difficult to assess the cause of M.K.'s more recent symptoms of extreme anger. These symptoms are markedly different from the evidence about her behaviours before this. They appear to stem from the loss of the Gorman home in 2010 but there is simply no evidence, other than the testimony of M.K.'s social worker, which establishes a causal connection. Dr. Koch did not provide an expert opinion about this. He testified only that the loss of the Gorman placement could have had a negative effect on M.K.'s mental health, as being uprooted from a stable environment would be difficult for her.
- [265] The loss of the Gorman home was related to M.K.'s behaviour despite the stability she had there for 10 years. However, there is insufficient proof of what caused M.K.'s recent downward spiral, and I find that these symptoms of injury are divisible from M.K.'s earlier anxiety and defiant behaviour. I also find that due to her original position, M.K. would likely have had some anxiety and defiant behavioural problems regardless of her exposure to her parents' care prior to 1999. Taking these factors into account, I assess her non-pecuniary damages at \$30,000.

C.N.K.

- [266] C.N.K. acted out with extreme language and some aggression when she lived in the SPARA resource but these behaviours did not continue. On February 8, 2000, C.N.K. was placed, with M.K., in the Gorman home and she has remained there since. She has done well. Ms. Gorman described her as a delightful, energetic and smiling child, but also stubborn and prone to lying. She loves sports and she has a normal social life.
- [267] C.N.K. did well in elementary school. When M.K. left she had a difficult time and her grades started slipping. Math is her weakest subject. She has weekly tutoring but there is no evidence of serious academic problems.

Expert evidence

- [268] Dr. Koch opined that C.N.K. had no clinically significant mental health problems and appeared to have escaped her parents' care relatively unscathed. He found some evidence in the records that C.N.K. had some conduct and educational problems in her early school years, which he attributed in part to her then unstable foster care arrangement, residual difficulties arising from inadequate parenting in her toddler and pre-school years prior to apprehension, and exposure to the disordered conduct of her siblings.
- [269] Dr. Koch viewed C.N.K. as vulnerable in the future in that she will be exposed to inappropriate role models in her siblings with multiple, severe psychological problems, and this will place her under some degree of stress.

The positions of the parties

- [270] While C.N.K. has escaped her parents' care relatively unscathed, Mr. Coad submits that she is entitled to be compensated for her exposure to over four years of extreme and chronic neglect, evidenced in part by the state of her health when she was apprehended in 1999. He says that C.N.K.'s testimony shows that she was robbed of her childhood and her humanity and seeks \$25,000 in non-pecuniary damages.
- [271] The Crown takes the same position with C.N.K. as with M.K. and submits that an award of \$10,000 would be appropriate.

Assessment

- [272] C.N.K. was not assessed for FAS and there is no evidence that she suffers from a neurodevelopmental disability. As a young child, C.N.K. suffered from her parents' neglect in ways she is now unable to articulate, but she has fortunately been able to carry on and live a productive life nonetheless. However, her exposure to her siblings - particularly M.K. - has been stressful for her. She has clearly been affected by M.K.'s behaviour and this will no doubt continue. I don't doubt that she will also be affected by the others, particularly her older siblings who have had more serious problems. I find that this is caused by C.N.K.'s exposure to her family environment before apprehension and by her exposure to the behaviours of her siblings both before and after apprehension. The second is an indirect

consequence of the first. I also find that this injury is indivisible as it cannot be attributed to one cause or the other.

[273] I assess C.N.K.'s non-pecuniary damages at \$15,000.

M.M.K.

[274] There is little evidence about M.M.K.'s behaviour after her apprehension. She was placed in the same foster home as K.A.K. in February 2000 and was moved in January 2001. On August 9, 2001, at the age of five, she was placed in the home of Alana Doherty. She still lives there, along with four of her younger siblings.

[275] Alana Doherty testified that M.M.K. hardly speaks and has had problems interacting with the other children. She is very withdrawn and did not have any friends at school until grade five. She struggles very hard in school and has been on a modified program since grade four. Ms. Doherty also said that M.M.K. physically attacked her twice and has quite often destroyed her room.

[276] Ms. Doherty said that M.M.K. looks after her own hygiene to a point but she has to give her a routine to follow. She helps around the house if asked but needs literal instruction and someone to help her with independent living skills.

[277] In 2004, Ms. Doherty gave M.M.K. a horse and got her involved in riding therapy. In 2006, M.M.K. was assessed at the Asante Centre due to concerns about learning and socialization. Her full scale intelligence was assessed in the 5th percentile, the borderline classification of ability, with significant discrepancies among the subtest scores. She has significant math and spelling difficulties. She cannot tell time or understand money values. She has significant impairment in her verbal reasoning skills and verbal memory. Her understanding of language is mildly delayed but her use of language, as well as her adaptive and social skills, are significantly delayed. She was diagnosed with neurodevelopmental disorder, alcohol exposure unknown. Recommendations included continued participation in therapeutic horseback riding and working with animals.

[278] In October 2008, M.M.K. was further assessed for learning problems and anxiety by Dr. Zoltan Horvath, a paediatrician. Dr. Horvath observed M.M.K. as shy and withdrawn. He concluded that she had significant problems with anxiety and could also have had some degree of depression. He did not think there was one overall organic or genetic problem that explained all her symptoms. He thought she would benefit from counselling and cognitive-behavioural exercises. Dr. Horvath saw M.M.K. again in January 2009. He noticed some improvement in her mood but thought that significant problems remained. Although M.M.K. was reluctant, he strongly urged her to pursue counselling.

- [279] In the spring of 2010, M.M.K. told Ms. Doherty that she talks to a spirit named "Sam" and sometimes in the night sees lights shooting out of her mirror. Dr. Horvath saw her again in February 2011. He described her behaviour in the office as highly anxious and refusing to interact or discuss anything. Given the severity of her anxiety, he prescribed anti-depressant medication. He was also concerned about M.M.K.'s reported hallucinations and recommended a psychiatric evaluation.
- [280] M.M.K. has since been seen by a psychiatrist but no diagnosis has yet been made. Ms. Doherty testified that she has noticed a positive change in M.M.K. since she has been taking the medication prescribed by Dr. Horvath.

Expert evidence

- [281] Dr. Koch opined that M.M.K. suffers from a neurodevelopmental disorder, consistent with FAS, which significantly limits her academic skills, and showed oppositional defiant or conduct disorder in her pre-school years which has since disappeared. With respect to "Sam", he thought the most likely diagnosis was schizophrenia, but he was not at all sure about this. He said it was also possible that M.M.K. may have concocted this story as a coping strategy, given her verbal and social skill limitations.
- [282] The only behaviour he attributed to her parents' neglectful caregiving was M.M.K.'s oppositional and defiant behaviour in early childhood. However, he attributed this only indirectly, as it was his view that this was the likely consequence of M.M.K.'s exposure to the conduct disordered behaviour of her older siblings.
- [283] Dr. Koch did not attribute schizophrenia to any one cause. He said there were genetic and organic factors, and possibly exposure to interpersonal trauma. He thought the most likely major contributor was fetal alcohol exposure but that exposure to her conduct disordered siblings could have contributed at least partially to her psychotic symptoms. This was a very tentative opinion. It is also inconsistent with his evidence about schizophrenia with respect to K.A.K., where he said that he would not predict that her more recent psychotic condition would relate to her childhood experiences.
- [284] M.M.K.'s prognosis hinged primarily on her psychotic symptoms. If she does not have schizophrenia, Dr. Koch thought that the symptoms are likely to fade away and further deterioration of mental status and behaviour is unlikely. If she does, then M.M.K.'s chances of completing her education and finding reasonable employment are poor and she is at high risk of alcohol and drug use due to her older siblings with significant abuse problems.
- [285] Other than her neurodevelopmental disability and psychotic symptoms, M.M.K.'s biggest problem is her excessive shy, fearful and socially withdrawn behaviour. Dr. Koch thought that this would also limit her educationally and vocationally. However, he did not attribute this to any particular cause.

The positions of the parties

- [286] Mr. Coad seeks \$50,000 in non-pecuniary damages for M.M.K. on the basis that her family background partially contributed to her psychotic symptoms. He submits that Dr. Koch's evidence establishes causation under the "material contribution" test outlined in *Resurface Corp. v Hanke*, 2007 SCC 7.
- [287] The Crown submits that M.M.K.'s behavioural problems when she came into care and subsequently are explained by her neurodevelopmental disorder and says that an award of \$10,000 would properly reflect the short duration of her exposure to her parents' care. The Crown did not respond to the "material contribution" argument other than to submit that there is no causal connection between the abuse and neglect and M.M.K.'s psychotic symptoms.

Assessment

- [288] In *Resurface*, McLachlin C.J. held that the material contribution test, which is an exception to the basic "but for" test of causation, involves two requirements: (1) it must be impossible for the plaintiff to prove that the defendant's negligence caused the injury using the "but for" test due to factors outside the plaintiff's control, and (2) it must be clear that the defendant breached a duty of care owed to the plaintiff thereby exposing her to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. She described these as "exceptional cases".
- [289] The application of the material contribution test is not an easy one and the issue was not fully argued before me. The two requirements have been interpreted narrowly but it appears that the Supreme Court of Canada will be looking at this issue again: see *Clements (Litigation Guardian of) v Clements*, 2010 BCCA 581, leave to appeal to SCC granted June 16, 2011. However, even without the benefit of argument, my view is that the evidence in this case falls far short of meeting the requirements for the material contribution test described in *Resurface*. There is simply no evidence before me that establishes any causal link between M.M.K.'s recent psychotic symptoms and her exposure to her parents and siblings prior to 1999. Dr. Koch's evidence was equivocal, tentative and inconsistent on this issue.
- [290] M.M.K. was three years old when she was apprehended. She has no memory of living with her parents. I agree with Dr. Koch's assessment that M.M.K. showed defiant and conduct disordered behaviour for a number of years after her apprehension. When she arrived at the Doherty's, she was extremely withdrawn and at times exhibited angry, violent outbursts. Much of this angry behaviour has subsided and M.M.K. is doing quite well. I attribute this improvement to the kind, loving and stable home the Doherty's have provided.
- [291] I find that M.M.K.'s defiant and conduct disordered behaviour stems from a number of causes, including her neurodevelopment disabilities, exposure to both her siblings and her parents during her first three years of life, and negative experiences in the foster care

system for the next two years. Although Dr. Koch did not make a direct link between M.M.K.'s behaviour and her parents, he testified that there is good evidence that exposure to things like neglect and witnessing abuse at a young age impacts children, even if they do not recall these things, and the impact shows in conduct problems. I agree that being raised in the neglectful environment described earlier can only be harmful to a child with M.M.K.'s deficits. I would not expect her to remember those early years given her young age, but it is simply common sense to find that those years had a negative effect on her and played a causative role in her behavioural problems.

[292] Fortunately, M.M.K.'s defiant and conduct disordered behaviours subsided and have for the most part disappeared. The evidence is not clear when this happened, but it does appear that M.M.K. is still vulnerable to defiance. In August 2010, when her sister M.K. stayed at the Doherty's, M.M.K.'s behaviour was seriously affected. She stopped looking after her horse and lied about it.

[293] The evidence does not establish that any of M.M.K.'s other problems are causally connected to her life before apprehension. Taking into account M.M.K.'s original position, an award of \$20,000 is appropriate in these circumstances.

4. Future pecuniary damages

(a) Cost of future care

[294] The plaintiffs make a number of claims for the cost of future care, including independent living support services, psychological and substance abuse treatment, and education and employment support services. The most substantial claims are for independent living support services. They rely on recommendations made by Alison McLean, an occupational therapist.

[295] The Crown challenges these claims on the basis that many of the recommended services are not causally connected to the plaintiffs' exposure to their parents but rather to their neurodevelopmental disabilities and psychiatric disorders. Ms. Johnson also submits that Ms. McLean's recommendations are based on an exaggerated picture of the life skills deficits of the plaintiffs that have not been established by the evidence. In addition, she says that many of the services are or will be provided by provincially funded agencies, primarily Community Living BC (CLBC), and an award for the cost of future care would result in double recovery.

[296] Mr. Coad submits that whether or not all or some of these services may be provided by government agencies, the plaintiffs are entitled to an award for future care costs. He stressed the persistent lack of funding for various services that these plaintiffs have faced over the past decade and says that the only way to guarantee that they get the services they need is for the court to award the full cost of care. In the alternative, he submits that the court should make an award based on a contingency of 50% that the public funds will not be available due to under-funding or policy changes.

- [297] I have already addressed the Crown's position on causation with respect to these claims. Because of the Crown's admission of liability, it has already been established on a balance of probabilities, under the "but for" test, that the Crown's negligence caused or contributed to the plaintiffs' damages (here psychological injuries). It is now up to the plaintiffs to establish any future losses according to the probability of their occurrence, or relative likelihood. However, the Crown raises legitimate questions about the plaintiffs' original positions and double recovery.
- [298] There are several problems with the plaintiffs' claims for independent living support services and with some of the expert evidence.
- [299] First, it is important to reiterate that the plaintiffs do not claim damages arising from their cognitive disabilities, but only for the psychological injuries caused by the Crown's negligence. Accordingly, they must establish that there is a real and substantial likelihood that they will incur these future care costs because of their psychological injuries. In my view, except for K.A.K., they have not done so. The evidence shows that any requirements the plaintiffs may have for living assistance flows from their cognitive disabilities related to ARND, regardless of their psychological injuries.
- [300] Dr. Koch, who was the plaintiffs' primary expert witness on issues of functional disability, did not opine about the plaintiffs' abilities to live independently. The various assessments of the plaintiffs, which were not adduced as expert reports, identify problems with the ability to live independently but do not identify the causal factors. The only evidence linking this to the psychological injuries is that of Dr. Conry, but her evidence was not specific to the plaintiffs. She testified in general terms about dependant living as a secondary disability arising from FAS or ARND and influenced by environmental factors. She also acknowledged research which indicated that 100% of individuals with FAS at the lowest level of intelligence required living assistance and about 80% of those at higher levels required some level of support. More importantly, Dr. Conry said that problems with adaptive behaviour (a primary disability) affect an individual's daily living skills. Ms. McLean's recommendations rely on the expert opinions of others, mainly Dr. Koch, and she makes assumptions about the relationship between the plaintiffs' psychological injuries and their abilities to live independently that are not supported by the evidence.
- [301] Second, to quantify future care costs, the plaintiffs rely on the evidence of Dr. Geoffrey Young, a consulting economist, who provided present value tables and calculations for a number of Ms. McLean's recommendations. The plaintiffs are aboriginal. Embedded in his calculations, Dr. Young used mortality rates for all BC residents rather than for aboriginals. The Crown challenged this, referring to reduced life expectancies for aboriginal males and females as published by Health Canada in 2005. Dr. Young acknowledged that current data shows that aboriginal people have shorter life spans but he was of the view that aboriginal mortality rates are improving. That may be so, but there is no data before me to support this. While shorter mortality rates should be taken into account when using Dr. Young's present value discount factors, there is no evidentiary basis to assist me to do so, but I have

kept this in mind in using his present value tables.

- [302] Dr. Young also included HST in some of his calculations for future care costs but he did so inconsistently and did not consider exemptions that may apply. He conceded that he is not an expert in this area. I have not considered HST in the awards for future care, as the evidence is not sufficiently reliable and, in any event, many of these costs will be incurred at a time when the HST will no longer apply.
- [303] I will address some of these issues in further detail in relation to each plaintiff. Before I do, it is important to discuss the legal principles that apply to an assessment of future care costs and how these principles apply in this case.

Legal principles

- [304] Future care costs are intended to compensate a plaintiff for an amount that may reasonably be expected to be expended in putting him or her in the position he or she would have been in absent the injury. Again, the plaintiffs' original positions must be considered because they are not entitled to be compensated for any damages they would have suffered anyway: see *Blackwater*, para. 78.
- [305] In awarding future care costs, there is a duty to be reasonable and an award must be moderate and fair to both parties: see *Andrews v Grand and Toy Alberta Ltd.*, [1978] 2 SCR 229 at pp. 241-42.
- [306] In *Krangle (Guardian ad litem of) v Brisco*, 2002 SCC 9 the court stated at paras. 21-22:
- Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial ... requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require.

- [307] It is also important to prevent double recovery where social assistance benefits may be received in the future. In *Krangle*, the issue was whether the plaintiffs would incur future costs to care for their disabled son once he became an adult. The trial judge concluded that they would not, because the cost for his care in a group home was covered by the province's welfare scheme. He did, however, make an award of \$80,000 as a 5% contingency that the government would in the future change its policy of providing group home care. The Supreme Court of Canada affirmed this conclusion and agreed that the cost of care would be fully met by the social security program in force in British Columbia. At para. 43 the court discussed contingencies:

Of course, there remains a possibility that the law will again be changed, this time in a way that makes the Krangles responsible in whole or in part for Mervyn's adult care. There is no reason, however, to suppose that this possibility is greater than the 5% determined by the trial judge. The provision of care for adult disabled persons by the state appears to be a constant feature of Canadian social policy; certainly this is so in British Columbia. The contingency award made by the trial judge provides adequate security against the possibility of change.

- [308] A different approach was taken in *Fullerton (Guardian ad Litem of) v Dallaire*, 2006 BCCA 339, where the court held that benefits provided in a scheme known as the At Home Program should not be taken into account in quantifying future care costs. It did not consider that case to be one of double recovery, as in *Krangle*, because the At Home program was not a universal benefit and was only available to the plaintiffs if no compensation was awarded in the tort action. A similar approach was taken in *Strachan (Guardian ad Litem of) v Reynolds*, 2004 BCSC 915, but in a later application to adduce further evidence, 2006 BCSC 362, the court deducted benefits that were actually received by the plaintiff after judgment in order to avoid double recovery.
- [309] In this case, the evidence establishes that the cost of various services will be provided to some of the plaintiffs by the Crown through CLBC. In my view, the benefits provided by CLBC are part of the social security program in BC, similar in kind and substance to the program considered by the court in *Krangle*. They are universal benefits of long-standing that are generally available regardless of tort compensation. While CLBC has been providing services to adults with developmental disabilities since 2009, the same services have been provided in some form for about 60 years.
- [310] Paula Grant, the Director of Quality assurance for CLBC, testified that community living services have increased over time and now there are two streams of eligibility: (1) adults with a developmental disability, and (2) adults with significant limitations in adaptive functioning and a diagnosis such as FAS. The first stream, known as the DD stream, has a broad range of services, including three levels of living supports, community inclusion services to assist with things like employment and skill development, respite care for caregivers, and limited psychological services. The second stream, known as the Personalized Supports Initiative, or the PSI stream, is relatively new, and provides similar but less intensive services that may be more individualized.
- [311] The criteria for eligibility in the DD stream is a diagnosis that includes an assessed measurement of intellectual functioning within a 10 point range of borderline level of overall cognitive ability. K.A.K., K.N.K., C.K. and M.K. all fall within this range, but M.M.K. is slightly outside it. She has a number of cognitive disabilities that may put her in this category but this is not certain. K.A.K. is already receiving services in the DD stream and K.N.K. has been deemed eligible for CLBC services. It is likely that C.K. and M.K. will also be eligible for CLBC services; that they, as well as K.N.K., will be eligible in the DD stream; and M.M.K. will be eligible for CLBC services at least in the PSI stream.

- [312] In Krangle, the cost of group home care was certain and undisputed. In this case, except for K.A.K., the precise services to which the plaintiffs may be eligible and their respective costs are not certain. Some services may be provided by CLBC and others by government entities such as Health Authorities or the Ministry. The plaintiffs submit that because the precise services are not guaranteed, the cost of future care should not take these potential services into account. The Crown submits that CLBC and other agencies are in a better position to assess the ongoing needs of the plaintiffs and the court should award only the costs of future care that will not be government funded. I cannot accept either submission. It is the court's duty to assess future care costs on the basis of the evidence and it would not be appropriate to in effect delegate this function to one of the parties to this litigation. However, it is important to avoid double recovery.
- [313] The evidence is clear that CLBC provides assistance for independent living and employment support services, but does not fund substance abuse treatment, on-going psychological treatment and education support services. There is evidence that CLBC would look to other agencies or the Ministry itself to fund these services but there is no evidence that any funding is available to the plaintiffs. Accordingly, for these claims that have been proven to the requisite standard, there is no basis to reduce such an award to prevent double recovery.
- K.A.K.
- [314] The future care cost claims made on behalf of K.A.K. are based on Ms. McLean's recommendations. Mr. Coad claims \$976,727 for independent living support services, \$68,000 for substance abuse treatment, \$69,406 for psychological treatment, and \$117,010 for employment supports if K.A.K. is found to be employable.
- [315] Dr. Koch provided no opinion regarding K.A.K.'s future care needs and he made no treatment recommendations. Ms. McLean relied entirely on recommendations contained in the assessment of K.A.K. done by the Asante Centre in 2008. This report was admitted into evidence only for the purpose of establishing the diagnoses and assessment that was done at that time. As I indicated before, it was not admitted as opinion evidence as to K.A.K.'s future needs and the recommendations contained in that report were made for the purpose of medical, home and school management. Moreover, there was no attempt made to isolate the causes of K.A.K.'s various disabilities.
- [316] There is, however, current evidence about K.A.K.'s present condition and needs. Dr. Rana, who has been K.A.K.'s treating psychiatrist since September 2010, testified that the issues set out in the Asante Centre assessment remain the same except that there is now the additional diagnosis of a psychotic disorder, most likely schizophrenia.
- [317] More specifically, K.A.K.'s assisted living needs were assessed by representatives from CLBC and the Fraser Health Authority before she was discharged from hospital in March 2011. They determined that she required residential support in a shared living situation, with additional respite and one-to-one supports, at a monthly cost of \$9,200 less the amount to

be paid from social assistance for rent contribution. The CLBC portion of that cost is approximately \$3,500, which covers a live-in caregiver and 20 hours per week for respite care. This is the portion that was considered to be associated with K.A.K.'s developmental disability. The balance of approximately \$5,000 is presently being provided by Fraser Health. This covers an additional 30 hours per week of one-to-one support, on the basis that these requirements were necessary to address K.A.K.'s problems over and above her developmental disability. This additional support is more costly.

- [318] The claim of \$976,727 for independent living support services is based on the assumption that K.A.K. would live for the rest of her life in a family care home where an individual would provide her with daily life skills support, with additional one-to-one support and case management services, at an annual cost of \$38,554. This claim does not take into account the services that are provided by CLBC in respect of K.A.K.'s developmental disability.
- [319] Despite the lack of expert evidence, the Ministry's own assessment of K.A.K. establishes that she needs a substantial level of assisted living because of her cognitive disabilities related to ARND, and she needs additional supports because of her psychosis, substance abuse and emotional problems. I have found that K.A.K.'s psychotic condition is unrelated to the defendant's negligence and divisible from her other psychological injuries but her substance abuse and other emotional problems are related and indivisible. Accordingly, I am satisfied that K.A.K. has established a real possibility that she will need some additional living supports because of her psychological injuries. However, these future needs must take into account the measureable risk that K.A.K. would have required these additional supports in any event due to her original position.
- [320] Clearly, K.A.K. is presently being maintained at a very high level of care, which may not be sustainable in the long term. There is no guarantee that this will continue indefinitely. The agencies are monitoring it regularly with the hope that K.A.K. will improve and they may be able to reduce the support to a more financially sustainable level. If Fraser Health is not able to maintain its funding in the future, CLBC will not be able to replace it.
- [321] It is my view that K.A.K. is entitled to an award for independent living support services in the amount of \$170,000. This is based on an annual cost of \$24,000, which is 40% of the current cost being incurred by Fraser Health. This takes into account the component related to K.A.K.'s psychosis and a contingency that she would have required these supports in any event. The present value of this annual cost is approximately \$608,000. While Fraser Health is currently providing substantial resources to support K.A.K., there are no guarantees about continued funding. In order to avoid double recovery, it is my view that this award should be based on a 40% contingency that the Crown will not be able to continue to fund this (approximately \$243,000), and reduced by a further 30% contingency that K.A.K. will not require this level of care for the rest of her life. An award of \$170,000 takes all of these factors into account. I have also considered the higher life expectancy Dr. Young used in his present value tables but I do not consider it necessary to make any

further deductions to account for this.

- [322] The rest of K.A.K.'s claims for future care costs relate to her psychological injuries that I have found to be indivisible from causes other than the Crown's negligence. For each, I have taken into account the measureable risk that K.A.K. would have required these services in any event, as a result of her neurodevelopmental disabilities, her psychotic condition and her experiences in the foster care system, and with her parents, after 1999.
- [323] The claim of \$68,000 for substance abuse treatment is based on the assumption that K.A.K. would participate two times throughout her life in the Portage Program in Quebec, a four to six month residential program for "mentally ill chemical abusers", which has an annual maximum cost of \$45,500.
- [324] This recommendation by Ms. McLean was taken from a plan referred to in the Asante Centre assessment for K.A.K. to enter into long term treatment in the Portage Program in Quebec or an adjunct program in BC. Dr. Rana testified that substance abuse is a huge problem for K.A.K. and she may require in-house or residential treatment. There is no evidence about the length or frequency of such treatment. Ms. McLean acknowledged that she did not know how many times K.A.K. would require such treatment. She provided evidence about several residential programs in BC offering treatment for three to 12 months. She did not know if K.A.K. was eligible for any funding that might be available. She also provided evidence about several First Nations residential programs which offer treatment for three to six weeks but again she did not know if these would be suitable or if K.A.K. would be able to access funding by a national First Nations agency.
- [325] Paula Grant testified that CLBC does not fund substance abuse treatment. Cheryl Blake, the CLBC Regional Quality Service Manager for Surrey and Delta, testified that CLBC would look to other agencies to fund this. As I indicated above, there is no evidence about what, if anything, would be funded by other agencies.
- [326] K.A.K. clearly needs treatment for substance abuse but the evidence does not establish what kind and duration of treatment would be appropriate for her. Ms. McLean provided a range of cost for residential treatment from \$1,500 to \$7,500 per month, the higher amount being the cost of the Portage Program in Quebec. It is difficult to assess this, particularly in the absence of expert evidence, but in the circumstances I consider an award of \$30,000 to be reasonable.
- [327] The claim of \$69,406 for psychological treatment is based on the assumption that K.A.K. would attend the Vancouver Dialectical Behaviour Therapy (DBT) Centre for 12 months at a cost of \$17,680 and engage in one-to-one psychological counselling for her lifetime on average of once a month at an annual cost of \$2,040.
- [328] There is evidence that K.A.K. will receive government funded mental health services, which include a psychiatrist and a case manager, but not trauma counselling. CLBC does not provide this kind of counselling. There is ample evidence that K.A.K. needs some kind

of counselling for her many emotional problems but there is no evidence that treatment at the DBT Centre would be appropriate for her. The hourly cost for counselling is \$170. I consider an award of \$25,000 to be appropriate. It is roughly based on providing weekly counselling sessions for one year and monthly sessions for a further 10 years.

- [329] K.A.K. claims \$117,010 for employment services if she is found to be employable. This is based on the assumption that she would have annual one-to-one assistance for selecting, obtaining and retaining either paid or volunteer employment, starting in three years, at a maximum annual cost of \$5,000.
- [330] There is evidence that CLBC provides these services but no specific evidence about the duration and frequency of these services and how much funding would be allocated. Ms. Grant said that CLBC is continuing to push forward with an "employment first" initiative. Ms. McLean provided evidence that these services would cost between \$3,500 and \$5,000 per year.
- [331] It is clear that K.A.K. is not presently capable of employment for a number of reasons, but as set out below, I have not found her to be permanently unemployable. Ms. McLean recommended employment services on an annual basis starting no sooner than two years from now and perhaps up to 10 years. I find that K.A.K. will require some employment services in the future on an annual basis. I assess the annual cost at \$3,500, to start no sooner than in five years (at a present value of approximately \$73,000), and to be reduced substantially to take into account K.A.K.'s original position.
- [332] To prevent double recovery, the award should be based on a contingency that these services will not continue to be provided by CLBC or an equivalent government agency. I assess this contingency at 20% given the general nature of the evidence about the provision of these services. I consider an award in the amount of \$8,000 to be reasonable for employment support services.

K.N.K.

- [333] The future cost claims made on behalf of K.N.K. are \$517,036 for independent living support services, \$29,700 for substance abuse treatment, \$36,104 for psychological treatment, \$39,792 for education supports, \$221,701 for employment supports, and \$311,900 for parenting supports. The claims for education and employment supports are made only if K.N.K. is found to be employable.
- [334] These claims rely on Ms. McLean's recommendations, which are based on the following assumptions: (1) K.N.K.'s learning disability, cognitive difficulties, emotional, personality and substance abuse disorders "are in large part owing to the history of her biological parents' abusive and neglectful caregiving"; (2) K.N.K.'s psychological conditions include Dr. Koch's diagnoses of conduct disorder, antisocial personality disorder, polysubstance abuse disorder and symptoms of generalized anxiety and depression; and (3) had she not suffered the abuse and neglect of her parents' care, K.N.K. would have been able to

complete high school and perhaps some level of post-secondary education, obtain and maintain employment, live independently with roommates or a partner, manage basic finances and have the basic skills to parent children.

[335] Many of these assumptions are not supported by the evidence. The evidence shows (and this is not disputed) that K.N.K.'s cognitive disabilities are caused only by ARND. I have found that K.N.K. demonstrates only some of the behaviours that may be associated with antisocial personality disorder. There is no evidence that she has symptoms of anxiety and depression. Most importantly, Ms. McLean assumed that K.N.K. has "at least mild learning disabilities" but the evidence is clear that she has a significant developmental disability. With or without her psychological injuries, K.N.K. will have difficulty living independently.

[336] Ms. McLean relied on this comment in Dr. Koch's report as being related to K.N.K.'s ability to care for herself:

Finally K.N.K. is extremely unlikely to function as a well-adjusted adult even if she is successful in substance abuse and personality disorder treatment ... I strongly believe that she will continue to be vulnerable well into the future.

[337] However, Dr. Koch gave no opinion evidence about K.N.K.'s level of functioning in respect of day to day living. These comments were followed by a recommendation that K.N.K. should have an on-going supportive problem solving relationship with a skilled psychologist.

[338] Ms. McLean herself did not recommend a specific level of living supports. She recommended that K.N.K. live either in a shared living environment or in her own apartment with the assistance of a life skills worker.

[339] I find that K.N.K. will need assisted living services because of her cognitive disabilities related to ARND regardless of her psychological injuries. The extent of the services that she will need is not clear but the evidence does establish that she will be entitled to these services from CLBC. There is no basis to make an award for assisted living supports.

[340] However, I agree with Dr. Koch's assessment that K.N.K. will have difficulty functioning as a well-adjusted adult. Her biggest problem is drug and alcohol abuse and she is at significant risk to relapse. I find that K.N.K. will need continuing support to help her stay away from drugs and alcohol and maintain a healthy lifestyle. Again, I have taken K.N.K.'s original position into account in assessing these future care costs.

[341] Dr. Koch recommended that K.N.K. be treated and monitored as necessary for substance abuse for at least the next 10 years. He also suggested that K.N.K. could benefit from psychological treatment at the Vancouver DBT Centre, which treats individuals with personality disorders, but he did not know how much treatment she would require. He recommended access to monthly one-to-one counselling until K.N.K. is 30 years old.

- [342] Ms. McLaren provided a range of cost for substance abuse treatment from no cost to \$18,900 for a 42 day residential program, and for therapy at the DBT Centre from \$3,210 to \$17,680, depending on how many individual and group sessions an individual requires.
- [343] My view is that K.N.K. should have access to residential substance abuse treatment and follow-up monitoring at some point in the future, as well as counselling. An award of \$30,000 will provide for future substance abuse treatment and an award of \$25,000 will provide for counselling. I have based this latter award roughly on weekly sessions for a year and monthly sessions thereafter for up to 10 years.
- [344] K.N.K. has not yet completed her high school education for reasons related to both her ARND and to her psychological injuries and she needs assistance with this. CLBC does not provide education supports. There was some evidence that the Ministry has programs to assist former children in care to continue their education, but there was no evidence that K.N.K. would actually receive funding for this. Ms. McLean suggested an educational consultant (at \$175 per hour) and a private tutor (at \$40 to \$47 per hour) two to four times a week for 39 weeks for at least two years. I agree that K.N.K. will need most of these services for two years to help her complete her courses in a modified program. I consider an award of \$10,000 to be appropriate given the relevant contingencies.
- [345] As I outline below, I have found that K.N.K. is employable but she will have considerable challenges in obtaining and keeping a job. She needs assistance with this. Ms. McLean suggested that K.N.K. receive employment support services perhaps every one to two years starting in two to four years, at a cost of \$3,500 to \$5,000 per year. My view is that K.N.K. will likely need these services every two years, starting in two years, at an annual cost of \$3,500 (at a present value of approximately \$43,000). This should be reduced substantially to take into account K.N.K.'s original position, and because this kind of support is provided by CLBC, the award is to be based on a 20% contingency that these services will not be provided in the future. I consider an award of \$5,000 to be a reasonable contingency award for employment support.
- [346] Ms. McLean bases her recommendation for parenting support on information she obtained from K.N.K. that she would like to have children. This was not addressed at all either in evidence or argument. There is no basis to make an award for parenting supports.

C.K.

- [347] The future care cost claims made on behalf of C.K. are \$2,879,540 for independent living support services, \$93,900 for substance abuse treatment, \$16,177 for psychological treatment, \$210,878 for education support and \$198,806 for employment support services. These last two claims are made only if C.K. is found to be employable.
- [348] All of these claims rely on Ms. McLean's recommendations, which are based on the following assumptions: (1) C.K.'s "cognitive, language, academic, emotional and behaviour deficits are in large part owing to his disorders other than the FAS and ADHD, and that, in

turn, these disorders are a result of his early caregiving", (2) had C.K. received care that managed his neurodevelopmental disabilities and not his parents' neglectful care and frequent moves between foster homes and schools, he would have been more successful at school and he would have been employable at a minimum wage job; (3) because of the care he received, he is effectively unemployable and at risk for chronic underemployment, he is at a higher risk of criminal charges and incarceration, at high risk of being exploited and will require care for his mental health disorders; and (4) C.K.'s mental disorders include post traumatic stress disorder (PTSD), obsessive compulsive disorder (OCD), socially deviant behaviours, oppositional defiant disorder, conduct disorder, substance abuse and depression.

[349] From this Ms. McLean concludes that C.K. will require a significant level of paid support services possibly throughout his life, which include independent living supports, mental health and substance abuse interventions, educational and employment support, and financial management. She assumes that C.K. will require assisted living supports in the range of \$5,000 to \$10,000 per month, which would include full time life skills workers and consultations with other professionals.

[350] This is a very high level of support, the basis for which is not supported by the evidence. As with K.N.K., C.K.'s cognitive, language and academic problems are caused only by ARND. In my view, Ms. McLean's assumptions understate C.K.'s cognitive difficulties and overstate his mental health issues. While there may have been past diagnoses of PTSD or OCD, Dr. Koch did not diagnose either of these disorders, and he stated only this in relation to C.K.'s ability to care for himself once he becomes an adult:

Presuming that he will be employment-challenged, he will probably have to support himself on some form of welfare payments, which will be very small. C.K. will be at high risk for spending his welfare money on drugs or alcohol, and his intellectual limitations and impulsivity are unlikely to lead him to budgeting his limited income wisely. Thus, he is at high risk for not being able to live on welfare payments which will likely stimulate some forms of illegal behaviour (e.g., theft, drugs sale) or homelessness. This is not to say that C.K. cannot engage in the usual activities of daily living (e.g., washing oneself, dental hygiene, feeding himself), but that his particular combination of mental health deficits will consign him to the economic fringe of our society with attendants of further mental health, drug use, and anti-social conduct.

[351] I find this extremely negative picture to be quite speculative and in any event, linked entirely to C.K.'s future economic circumstances, which are more properly compensated in a claim for future loss of capacity to earn income. Dr. Koch made no recommendations regarding living assistance.

[352] C.K.'s psychological injuries include quite serious conduct disorders and emotional problems which have interfered with his ability to attend school and function socially. However, like K.N.K., I find that C.K. would have required assisted living regardless of his psychological injuries, due to his cognitive disabilities arising from ARND. His current level

of living support is entirely adequate. Mr. Bird is providing C.K. and his younger brother with care in a shared care home, with additional help from a support worker for about 30 hours per week.

- [353] C.K. has not yet been assessed by CLBC but the evidence establishes that he will be eligible for services in the DD stream when he turns 19. The plan is for C.K. to remain with Mr. Bird at the same level of care he is receiving now. My view is that there is no basis to find that he requires anything more than this for living support and that this is what will be required as a result of his ARND. Any additional supports required as a result of C.K.'s psychological injuries can be addressed with the appropriate substance abuse and psychological treatment, which I find he clearly requires. I have taken his original position into account in assessing these future care costs.
- [354] Dr. Koch recommended at least one stay at a residential substance abuse treatment facility in the future. He was pessimistic that C.K. would attend and comply and thought more than one attempt would be necessary. He was also concerned that C.K. would not respond well to psychological treatment but he recommended a significant course of cognitive behavioural therapy and on-going booster and problem-solving sessions until C.K. is 30 years old.
- [355] Ms. McLean reviewed a number of substance abuse treatment options based on Dr. Koch's recommendation as well as a report from James Dunn, an intervention specialist. Mr. Dunn suggested treatment options for C.K., also based on Dr. Koch's opinions. Neither Mr. Dunn nor Ms. McLean were qualified to, and did not, opine on the best option for C.K. The cost for residential programs varies widely, from \$30,000 to \$60,000 for a single admission.
- [356] The evidence is that C.K. uses only marijuana on a daily basis. Dr. Koch assumed that C.K. also used alcohol regularly and had a binge drinking disorder, which is not supported by the evidence. Mr. Bird's observation was that C.K. "self-medicates" with marijuana, to calm himself down, and would be resistant to treatment. I am not confident that a residential treatment program is necessary or feasible in C.K.'s case, at least in the foreseeable future. My view is that C.K. would benefit much more with long term therapy to help him address not only his substance abuse issues but also his behavioural and emotional problems. However, there is a real risk that C.K.'s substance abuse issues will get worse as he gets older, so I would include a contingency for one residential treatment program in the future.
- [357] I consider it appropriate to award \$25,000 for substance abuse treatment and \$35,000 for counselling, the latter being roughly based on weekly sessions for two years and monthly sessions thereafter for up to 10 years.

- [358] C.K. also requires education support. Ms. McLean recommended an educational consultant (at an annual cost of \$3,500) as well as one-to-one tutoring, two to four hours per day for 180 days per year (at a cost of \$14,400 to \$33,840), and she estimated three to six years for C.K. to complete a modified grade 12 program. Ms. McLean's lower range cost estimates are reasonable but I think two years is a more realistic time frame. I consider an award of \$20,000 to be appropriate given the relevant contingencies.
- [359] Ms. McLean suggested that C.K. would need employment services every one to two years, starting when he finishes a modified grade 12 education. I agree that he will likely need these services approximately every two years, starting in two years, at an annual cost of \$3,500 per year (at a present value of approximately \$44,000). This should be reduced substantially to take into account C.K.'s original position, and because this kind of support is provided by CLBC, the award is to be based on a 20% contingency that these services will not be provided in the future. I consider \$5,000 to be a reasonable contingency award for employment support.

M.K.

- [360] The future care cost claims on behalf of M.K. are \$421,647 for independent living support services, \$24,029 for psychological treatment, \$49,770 for education support, \$105,626 for employment support services, and \$20,251 for therapeutic or leisure activities.
- [361] As with the others, these claims rely on Ms. McLean's recommendations, which are based on the following assumptions: (1) if M.K.'s only disorder was mild intellectual disability, her only difficulties would be with learning and academic achievement and she would have had the potential to complete at least a modified grade 12 (with educational supports through the school system), live independently with only occasional supervision, guidance or assistance, and succeed in at least basic, minimum wage employment (with vocational training); (2) as a result of the caregiving provided by her parents, M.K. developed social phobia, ODD and GAD; and (3) as a result of these psychological disorders, M.K. has a significantly reduced potential for succeeding in life skills, vocation and social and leisure activities, she is at risk for not completing school, she may not be able to work, and she is at risk to be drawn into illicit drug use and prostitution. She suggested two options that could meet M.K.'s assisted living needs: a shared care environment or her own apartment with the assistance of a life skills worker, with less intensive supports in the future.
- [362] As with C.K., I find that Ms. McLean has understated M.K.'s cognitive disabilities and overstated her psychological injuries. She relies on Dr. Koch's diagnoses of ODD and GAD, neither which were supported by the evidence. Ms. McLean acknowledges that the loss of the Gorman home has been an "emerging problem" but concludes generally that M.K. has a significantly reduced potential for independent living. There is no evidence to support this conclusion. Until M.K. left the Gorman home in 2010, there was no indication that her potential for independent living was affected by her psychological injuries. The evidence does not establish what kind of support she may need but it does establish that she will be

eligible for CLBC services. There is no basis to make an award for assisted living support.

- [363] Dr. Koch was of the view that M.K. should have long term access to mental health services. He suggested 40 hours of cognitive behavioural therapy for GAD to be followed by monthly private sessions for the next 10 years. He also thought that M.K. deserved continuing educational rehabilitation.
- [364] M.K. needs educational and likely employment assistance but the evidence establishes that this is as a result of her cognitive disabilities. She also needs mental health services for her symptoms of anxiety and defiant behaviour, but not to the extent suggested by Dr. Koch, as this was based on a diagnosis of GAD, which is not supported by the evidence. Ms. McLean's recommendation for therapeutic or leisure activities was based on Dr. Koch's concern that M.K. was at a higher risk for antisocial behaviour due to her ODD, aboriginal status and ARND, but I have not found evidence that M.K. has ODD.
- [365] In my opinion, M.K. is entitled to an award for psychological treatment in the amount of \$10,000, which is roughly based on monthly sessions for approximately five years, and takes into account her original position. There is no basis to make an award for any other future care costs.

C.N.K.

- [366] The future care cost claim for C.N.K. is \$10,200 for long term counselling as recommended by Dr. Koch. It was his opinion that C.N.K. should receive limited supportive and problem-solving psychological care over the next five years. I agree that C.N.K. should have access to counselling but not on a regular or monthly basis. I would award C.N.K. \$5,000 to provide her with counselling on an as needed basis.

M.M.K.

- [367] The future care cost claims for M.M.K. are \$451,559 for independent living support services, \$58,369 for education support, \$113,830 for employment support services and \$52,639 for clinical counselling.
- [368] All of these claims are based on Ms. McLean's recommendations. However, those recommendations are based on the assumptions that, absent her exposure to her parents' care, M.M.K. would not have developed difficulties with anxiety, excessive shyness and social withdrawal, and would have been at less risk to develop psychotic symptoms. There is no evidence to support these assumptions. Dr. Koch did not attribute M.M.K.'s excessive shyness, fearfulness and socially withdrawn behaviour to her parents' care. With respect to her psychotic symptoms, Dr. Koch said only that exposure to her conduct disordered siblings could have contributed at least partially to her psychotic symptoms, but I have not accepted his evidence on this issue.

[369] Dr. Koch had only one recommendation for M.M.K., that she be regularly monitored by an adolescent psychiatrist to get a perspective on her psychotic symptoms and such problems as fearfulness, shyness and social withdrawal.

[370] Given the evidence (and lack of evidence), no award for future care costs is appropriate here. There will be no cost for a psychiatrist, as this is covered by the provincial health services plan, and as I have already determined, M.M.K.'s psychological injuries did not include her psychotic symptoms or her problems with fearfulness, shyness and social withdrawal.

(b) Loss of future income

[371] Three of the plaintiffs, K.A.K., K.N.K. and C.K., claim damages for loss of future income on the basis that they are either unemployable or less employable than they would have been as a result of their psychological injuries. They seek awards on the basis of what they would have earned over their lifetime absent these injuries.

[372] The Crown disputes these claims and says that these plaintiffs would have had the same earning capacity with or without their exposure to their parents' care. In the alternative, it says that an award for loss of future income should not be based on an earnings approach given the ages of the plaintiffs and their uncertain career paths.

[373] As set out below, it is my opinion that these plaintiffs have established to the requisite standard that, in varying degrees, they have been rendered less capable overall of earning income as a result of their psychological injuries. However, the Crown raises a valid question with respect to the original positions of these plaintiffs, which must be considered in assessing these losses.

Legal principles

[374] An award for future loss of income is to compensate a plaintiff for his or her loss of earning capacity. This kind of loss is proven if the plaintiff establishes that it is a real and substantial possibility that he or she will suffer a future income loss. This is a difficult assessment, particularly in this case, because none of these plaintiffs have an employment history to use as a starting point.

[375] In *Brown v Gola* (1985), 26 BCLR (3d) 353 (SC), the court set out some general factors for assessing a loss of earning capacity:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [376] These factors must be considered in the context of each case in order to determine what a particular plaintiff would realistically have done in the future had the injuries not occurred. An inability to perform an occupation that is not a realistic one is not proof of a future loss: *Perren v Lalari*, 2010 BCCA 140.
- [377] This kind of loss can be quantified in two ways; (1) a mathematical or earnings approach, where the loss is more easily measureable, and (2) a capital asset approach, where the loss is not as easily measureable. The latter approach is used most often where the plaintiff is young and his or her career path is uncertain. The amount of damages should reflect the degree of chance that the future loss will occur as well as any other negative or positive contingencies pertinent to the case: see *Perren* at para. 32; *Danicek v Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at paras. 301-311; *Reilly v Lynn*, 2003 BCCA 49 at para. 101.
- [378] The Crown submits that the education levels and vocational status of the plaintiffs' biological parents and the achievement orientation of the household is a factor to consider when assessing future income loss. It says that it is highly probable that K.A.K., K.N.K. and C.K. would have followed the vocational patterns of their parents and spent most of their lives on social assistance.
- [379] While this argument has some logic, I cannot accept it. There was no opinion evidence before me that these factors apply in a case like this, where the plaintiffs were apprehended at relatively early ages, and there was little evidence about these factors. The only admissible evidence came from K.N.K., who said that her parents did not work and were around the house every day. The Crown sought to rely on hearsay evidence from Dr. Krywaniuk, who interviewed the parents in 2000. Dr. Krywaniuk testified that he found them to be highly defensive, minimizing various behavioural issues and denying the use of alcohol and drugs in the face of evidence to the contrary. While they may not have had a motive to lie about their education and vocational backgrounds, I do not consider any of the information the parents provided to Dr. Krywaniuk to be sufficiently reliable to be admitted for its truth.
- [380] The Crown also raises the issue of disability social assistance, which these plaintiffs may be eligible to receive if they are not able to work. It submits that such payments are deductible from an award for future loss of earnings. It relies on *M.B. v British Columbia*, 2003 SCC 53. In that case, McLachlin C.J. (for the court on this issue) determined that social assistance benefits are deductible from awards for past income loss on the basis that social assistance benefits are a form of wage replacement that do not fit within the charitable benefits exception to the rule against double recovery. At para. 39, she held that a rule of deductibility was consistent with *Krangle*, which she considered to be relevant:

[Krangle] has relevance to the case at bar in that it was clearly an underlying aim of the Court to avoid double recovery in such a situation. If it is appropriate to deduct social assistance benefits that might be received in the future from a damage award, in order to eliminate the risk of double recovery, then it seems it must also be appropriate to deduct social assistance benefits that have been received in the past. [emphasis in original]

[381] I agree with the Crown that the rule against double recovery applies generally to pecuniary claims, whether past or future. This is because the assessment of damages focuses on what the injured person requires to be restored to his or her original position, not on how the tortfeasor may be punished: see *Ratych v Bloomer*, [1990] 1 SCR 940 at para. 46. However, in this case, the Crown has submitted, and I agree, that the most appropriate way to quantify these plaintiffs' future losses of earning capacity is the capital asset approach rather than the earnings approach. This approach does not lend itself to mathematical calculations comparing income that would have been earned absent the tort and what is projected to be earned or received in the future, although consideration of such evidence may assist in assessing an individual's loss of earning capacity.

[382] There is some dispute as to whether the plaintiffs will be eligible for disability social assistance if they receive tort compensation. The evidence is that these plaintiffs are or will be eligible to receive \$906 per month.[9] The plaintiffs referred to s. 10(2) of the *Employment and Assistance for Persons with Disabilities Regulation*, BC Reg. 265/2002 (the Regulation), which provides that a person without dependants is not eligible for assistance if he or she has assets greater than \$3,000. The Crown adduced evidence that recipients of a court award can maintain their eligibility through the use of a trust or a registered disability savings plan (RDSP).

[383] Michelle Lauzon, the Manager of Community Relations and Service Quality for the Ministry of Social Development, testified that

- a) funds in a discretionary trust (managed by a trustee) are considered to be exempt assets and funds in a non-discretionary trust (managed by the person) are considered to be exempt up to \$100,000;
- b) regardless of the kind of trust, disability assistance will not be reduced where monies are spent on things like medical goods, and individuals are entitled to withdraw up to \$5,484 annually for any purpose;
- c) funds held in an RDSP are considered to be an exempt asset, with no monetary limit; and
- d) there is also a monthly exemption for the first \$500 of earned income.

- [384] Most of this evidence is reflected in the Regulation. Section 10(1) lists the assets that are exempt for the purpose of eligibility for disability assistance, which include assets held in trust for a person with disabilities. Section 12(1) defines disability-related costs. Section 12(2) provides that assets held in trust up to \$100,000 are exempt and permits the minister to authorize a higher limit. Assets also include income earned in a trust as set out in s.1.
- [385] This evidence shows that although there is some discretion regarding asset exemptions and limits, there is a reasonable likelihood that these plaintiffs will be eligible to receive disability social assistance benefits regardless of the payment of tort compensation. In my view, this should be taken into account as a relevant positive contingency when assessing the loss of future capacity to earn income.

K.A.K.

- [386] Mr. Coad submits that there is sufficient evidence before the Court to determine that K.A.K. is currently unemployable, and without considerable assistance through psychological counselling, substance abuse treatment and employment services, will remain unemployable. He relies on the evidence of Dr. Koch that K.A.K.'s personality and substance abuse problems, in combination with her impulsivity, will interfere with her ability to keep employment once she obtains it. He seeks damages of \$578,600, which is based on the average earnings of aboriginal females with a high school certificate or equivalent.
- [387] The Crown submits that K.A.K.'s diagnosis of schizophrenia is the primary reason she would be unable to complete her education and obtain and maintain employment, and says that the most probable outcome for K.A.K., regardless of her exposure to her parents, is that she would live on disability social assistance.
- [388] Dr. Koch was very pessimistic about K.A.K.'s future vocational prospects. He attributed this to a number of negative indicators, only some of which are related to the psychological injuries stemming from her exposure to her parents: borderline intellectual functioning and limited academic skills, interpersonal problems associated with her borderline personality, severe substance abuse, suicidality, general impulsivity, and aboriginal status. He stated:

Her intellectual and academic deficits will restrict markedly the types of work she can obtain. Her personality and substance abuse problems in combination with her impulsivity will interfere with her keeping employment once she obtains it. Her impulsivity, sexuality, drug habits, and - sadly - aboriginal status will place her at heightened risk for entering the prostitution market. These will increase the probability of incarceration, which will further limit her eventual employability.

- [389] This evidence falls short of establishing that there is a real and substantial possibility that K.A.K. is permanently unemployable but it does suggest that her prospects for earning income will be compromised by both her ARND and her psychological injuries. Dr. Koch places some emphasis on impulsivity, which, he said, stems from both ARND and serious conduct disorders, including borderline personality.
- [390] As I have found, K.A.K. is a very psychologically damaged young woman, with attributes of a borderline personality. She has not attended school since grade 10. The evidence of Dr. Shaw and Gudrun Shipmann, her psychiatric social worker at Burnaby Hospital, establishes that K.A.K. is not presently able to work as a result of her cognitive disabilities, psychotic condition, substance abuse, and to a lesser extent ongoing emotional problems. However, there is no evidence that her cognitive disabilities alone render her unemployable and her psychotic condition is being successfully treated with medication. While I am not satisfied that K.A.K. will be unemployable for the rest of her life, I find that there is a real and substantial possibility that when she is able to work, she will have difficulty obtaining and maintaining employment as a result of her psychological injuries, in particular her emotional problems, conduct disorders and substance abuse.
- [391] I am satisfied that these psychological injuries have made K.A.K. less capable overall from earning income from basic types of employment. I also find that she would realistically have faced similar difficulties in the future had these psychological injuries not occurred and this must be factored in to the assessment of her future loss of capacity to earn income.
- [392] To quantify this loss, Mr. Coad relies on the evidence of Dr. Young, who valued what K.A.K. would have earned in the future at \$578,600, based on the average earnings of aboriginal females with a high school certificate or equivalent. Dr. Young also provided a value of \$354,600 based on the average earnings of aboriginal females with no certificate, degree or diploma. He took into account negative contingencies such as mortality, unemployment, part-time employment, retirement before age 70, as well as standard discounts for interest and inflation.
- [393] I find this earnings-based approach inappropriate in this case, as the loss is not easily measureable. K.A.K.'s career path is extremely uncertain. She has not completed high school, has never been employed, and there is no evidence about what kind of employment she may want and be able to obtain. It is highly speculative to assume that K.A.K. would have been able to earn an income anywhere near the average figures used by Dr. Young. None of the contingencies he incorporated into his analysis took into account persons with neurodevelopmental disabilities. Moreover, his present values do not take into account positive contingencies such as entitlement to disability social assistance. This contingency alone could reduce a comparable projected lifetime earnings value by as much as \$273,724 (based on receipt of \$10,872 annually to age 69, the age at which Dr. Young ceased his calculations). The best Dr. Young's evidence can do is provide a high benchmark against which to assess the evidence before me on this issue.

- [394] It is clear that K.A.K. has significant problems irrespective of her psychological injuries that will affect her ability to earn income for the rest of her life. Her original position was seriously compromised and this will limit type of work she may be able to do. In spite of this, I find that there is a real possibility that K.A.K. could have found and maintained some employment for intermittent periods of time throughout her life had she not suffered the psychological injuries. Now, there is a real possibility that these intermittent periods will be shorter or less frequent.
- [395] In A.D.Y., Dorgan J. determined that the plaintiff would have fallen into the same income bracket regardless of the abuse inflicted upon him by his parents, but because of it, he would likely suffer increased work limitations within that income bracket, delayed training and education, and postponed entry into the workforce. She considered evidence that the present value of the plaintiff's future loss of earning capacity was \$362,400, based on the difference between the average earnings for all BC males (what he would have earned) and 15% below the first quartile earnings for all BC males of the same age (what he would be able to earn due to a reduced earning capacity). She agreed that this was a useful guide and fixed a global amount of damages for future loss of earning capacity at \$125,000.
- [396] The Crown says that K.A.K.'s original position was far worse than the plaintiff in A.D.Y., who had been diagnosed with Attention Deficit Disorder and hyperactivity, suffered from diabetes and had a criminal conviction. Ms. Johnson argued that an award for K.A.K. should be considerably less and suggested a nominal amount of \$5,000.
- [397] It is difficult to compare cases such as this. In A.D.Y. the evidence about the plaintiff's potential in relation to education and employment was positive. In this case, the evidence is not positive. I agree with the Crown that K.A.K.'s original position was more compromised but I do not agree that an award of \$5,000 comes close to properly compensating her for this loss.
- [398] Taking into account the relevant negative and positive contingencies, I consider an award of \$50,000 to be fair and appropriate.

K.N.K.

- [399] Mr. Coad submits that K.N.K.'s current psychological profile will be an impediment to her seeking, obtaining and maintaining employment and it is a real and substantial possibility that she is unemployable due to her antisocial personality disorder. He seeks damages of \$576,800 on the same basis as he seeks for K.A.K.
- [400] The Crown submits that K.N.K. is employable and will likely be able to find some kind of minimum wage employment, in the same way as she would have absent her exposure to her parents' neglect and her mother's abuse after 1993.
- [401] K.N.K. testified that she would like to be able to complete her high school diploma through home schooling and in the future would like to work with youth, get involved in acting or become a make-up artist. She had some work experience when she was at Spirit Bear,

where she did landscaping for a month and a half, but this ended in an altercation with another girl on the last day. She also participated in an employment skills program, where she was assisted with preparing a resume and preparing for a job interview. Lynn Ned testified that K.N.K. presents herself very well and does well in structured environments.

- [402] According to Dr. Koch, K.N.K. is at high risk of not completing a grade 12 education, and even if she does she will be limited to a utilitarian grade 12 diploma that will not prepare her for professional or skilled work. He opined that her antisocial conduct and impulsivity, as well as her potential to relapse into substance abuse, is likely to interfere with her ability to keep any employment she is able to obtain. He thought that K.N.K. is at a much higher risk than the average woman her age for losing work through misconduct or absenteeism. He also stated that she is at a higher risk for incarceration and being pulled into the sex trade due to her limited employment skills, antisocial personality, substance abuse problems and aboriginal status.
- [403] While Dr. Koch was "exceedingly pessimistic" about K.N.K.'s prospects, he did not say that she was unemployable.
- [404] In my view, the evidence does not establish that K.N.K. is unemployable, but she will have considerable challenges in obtaining and keeping a job. The limitations on the kind of work she will be able to do stem from her ARND but her psychological injuries, in particular her conduct and substance abuse issues, will affect her ability to maintain any employment she is able to obtain. As with K.A.K., I find that K.N.K.'s psychological injuries have made her less capable overall from earning income from basic types of employment but I also find that she would realistically have faced similar difficulties in the future had these psychological injuries not occurred, and this must be factored in to the assessment of her future loss of capacity to earn income.
- [405] Dr. Young valued what K.N.K. would have earned in the future at \$576,800, based on the average earnings of aboriginal females with a high school certificate or equivalent, and \$350,800 based on the average earnings of aboriginal females with no certificate, degree or diploma.
- [406] I find this earnings-based approach inappropriate to assess K.N.K.'s future loss. She has not completed high school and has only had one job placement for a very short period of time. There is no expert evidence providing an assessment of K.N.K.'s capacity for employment, and her evidence about what she would like to do in the future may not accord with her abilities. Again, I find it highly speculative to assume that K.N.K. would have been able to earn an income anywhere near the average figures used by Dr. Young. Her original position was seriously compromised by her ARND and associated cognitive deficits. As with K.A.K., Dr. Young did not take this into account, nor do his present values take into account positive contingencies such as entitlement to disability social assistance. This contingency alone could reduce a comparable projected lifetime earnings value for K.N.K. by as much as \$274,778.

[407] Despite this, I find that there is a real possibility that K.N.K. could have found and maintained employment for reasonably sustained periods of time throughout her life had she not suffered the psychological injuries. Now there is a real possibility that these periods of employment will be shorter or less frequent.

[408] Taking into account the relevant negative and positive contingencies, I consider an award of \$80,000 to be appropriate to compensate K.N.K. for her compromised ability to obtain and maintain employment.

C.K.

[409] Mr. Coad submits that C.K. is essentially unemployable, relying on the evidence of Michael Bird, Dr. Koch and Dr. John Pullyblank. He seeks damages in the amount of \$519,300, based on the first quartile average earnings of BC males. The Crown submits that, with the assistance of CLBC, C.K. will likely be employable in the same way as he would have been absent his exposure to his parents' neglect after 1993.

[410] Dr. Pullyblank conducted a vocational assessment of C.K. It was his opinion that C.K. could have achieved basic employment despite his neurocognitive problems had his symptoms been properly managed. He thought that C.K.'s behavioural and social problems were best captured in what others had diagnosed as conduct disorder as well as attachment disorder, and reiterated that there is a substantial contribution to these disorders from early childhood experiences and repeated transitions between homes and schools. He stated that C.K.'s ongoing psychosocial problems "create profound barriers to acquiring and retaining work" and he thought that the best predictor of job retention is social skills.

[411] He elaborated in his report:

... it is my opinion that at his present level of functioning, particularly in terms of his conduct problems and substance abuse, [C.K.] has minimal potential for both further education/training, and for employment. As noted, it is my opinion that his early home experiences are a substantial contributor to this outcome. Therefore, while well-managed ADHD/FAS could have resulted in basic employment, it is my opinion that poorly managed ADHD/FAS with conduct and attachment difficulties results in [C.K.] being effectively unemployable at his present level of functioning.

[412] The Crown challenges this opinion and submits that it is not liable for failing to manage C.K.'s ADHD/FAS. I agree that this is not the basis of the Crown's liability. However, C.K.'s neurodevelopmental disabilities did render him more vulnerable to the effects of poor and neglectful parenting, and as I have determined, the Crown must take its victim as it finds him.

- [413] Dr. Pullyblank's prognosis for improvement was very poor and the risk of deterioration high. He recommended ongoing access to psychiatric and psychological care and suggested the use of a coach, an occupational therapist and a rehabilitation assistant to help C.K. foster better behavioural control.
- [414] Dr. Koch opined that C.K. is currently totally disabled as a student and will have difficulties obtaining and maintaining employment. While he acknowledged that C.K.'s cognitive limitations secondary to ARND are a major impediment, he stated:
- ... the primary reason he appears to be unwelcome in the school setting appears to be his conduct disorder. The combination of his Conduct Disorder and substance abuse issues is likely to interfere in his ability to find, keep and prosper at education and work into the foreseeable future. Although not all adolescents with Fetal Alcohol Syndrome, Conduct Disorder and substance abuse turn out badly, this is a very powerful set of negative prognostic indicators for his future functioning.
- [415] Dr. Koch expressed the view that C.K.'s intellectual deficits will limit his potential career options to relatively low-earning jobs and his impulsivity, conduct disorder and substance abuse will not be welcome in most employment settings. He thought that C.K. was at high risk to be incarcerated due to a combination of his intellectual deficits, impulsivity, conduct disorder, substance abuse and aboriginal status.
- [416] Michael Bird's evidence confirms that C.K. has significant behavioural and conduct problems that will likely interfere with his ability to finish school and obtain and maintain employment. He testified that C.K. expressed interest in getting employment within the last six months, prepared a resume and went to a Youth employment agency, but became too anxious to continue with the process. He said that C.K. becomes explosive and can't take direction from him when doing things like yard work but he thought that the dynamic of their relationship may not show C.K.'s competency in a work setting.
- [417] I found Mr. Bird's observations and assessment of C.K.'s behaviour to be quite astute. Not all of his evidence was negative. He described C.K. as "quite versed" in doing chores and motivated by getting paid, but instructions must be written down and completing the chores is a challenge. He said that C.K. had done well socially from time to time. For example, he had a girlfriend for about six months, during which time his behaviour improved, and he has also had good experiences playing hockey and attending First Nations summer camps.
- [418] Mr. Bird was particularly concerned about C.K.'s regular use of marijuana over the past two years. He believes that C.K. uses it as a coping mechanism but said that C.K. is rarely prepared to talk to him about it.

- [419] While the expert evidence provides a very negative prognosis for C.K., Dr. Koch does not go so far as to describe him as unemployable and Dr. Pullyblank does not say that he is permanently unemployable. Clearly, C.K. is very compromised in his ability to obtain a job and keep it, but it is my view that with substantial supports there is a real possibility that he will be able to work in the foreseeable future.
- [420] As with K.A.K. and K.N.K., C.K. will be limited in the kind of work he will be able to obtain as a result of his ARND and cognitive limitations, but his psychological injuries will affect his ability to obtain and keep a job. He has serious emotional, conduct and substance abuse issues. I find that these psychological injuries have made him less capable overall from earning income from basic types of employment. I also find that he would realistically have faced similar difficulties in the future had these psychological injuries not occurred and this must be factored in to the assessment of his future loss of capacity to earn income.
- [421] Dr. Young used a different approach to value what C.K. would have earned in the future. Instead of using average earnings of aboriginal males, he used first quartile average earnings of BC males, calculating a present value of \$519,300 for males without a certificate, diploma or degree. He explained that the first quartile represents the bottom 25% of male earners and gives an indication of earnings where it is expected that a person will earn less than the average.
- [422] The Crown submits that there are problems with Dr. Young's calculations in relation to contingencies and mortality rates. Dr. Young applied average contingencies for the first quartile, as this is the only data available, but he agreed that the contingencies are likely higher than the average. I have already addressed Dr. Young's use of non-aboriginal mortality rates.
- [423] I agree with the Crown that these issues suggest that Dr. Young's valuations are higher than they ought to be, and more importantly, they do not take into account C.K.'s neurodevelopmental disability. These factors justify a substantial reduction of the first quartile earning figures to start with. In addition, the possible receipt of future disability social assistance benefits alone could reduce a comparable projected lifetime earnings value for C.K. by as much as \$269,147.
- [424] In any event, I have determined that the earnings approach is not appropriate here, for the same reasons I have given in relation to K.A.K. and K.N.K. As with the others, I have only considered this evidence as a high benchmark against which to assess C.K.'s future loss of earning capacity and I have taken into account not only the relevant negative and positive contingencies but also the issues raised by the Crown.
- [425] It is highly speculative to assume that C.K. would have been able to earn an income within the first quartile figures used by Dr. Young. His original position was seriously compromised by his ARND and associated cognitive deficits but I find that there is a real possibility that he could have found and maintained basic employment for reasonably sustained periods of time throughout his life had he not suffered the psychological injuries.

Now there is a real possibility that these periods of employment will be shorter and less frequent.

[426] Taking into account the relevant negative and positive contingencies, I consider an award of \$95,000 to be appropriate to compensate C.K. for his compromised ability to obtain and maintain employment.

Summary

[427] To summarize, the plaintiffs are entitled to damages in the following amounts:

K.A.K.

Non-pecuniary damages

\$80,000

Future care costs

Assisted living

\$170,000

Substance abuse treatment

\$ 30,000

Psychological treatment

\$ 25,000

Employment assistance

\$ 8,000

Total

\$233,000

Future loss of earning capacity

\$50,000

Total

\$363,000

K.N.K.

Non-pecuniary damages

\$120,000

Future care costs

Substance abuse treatment

\$30,000

Psychological treatment

\$25,000

Education assistance

\$10,000

Employment assistance

\$ 5,000

Total

\$70,000

Future loss of earning capacity

\$80,000

Total

\$270,000

C.K.

Non-pecuniary damages

\$95,000

Future care costs

Substance abuse treatment

\$25,000

Psychological treatment

\$35,000

Education assistance

\$20,000

Employment assistance

\$ 5,000

Total

\$85,000

Future loss of earning capacity

\$95,000

Total

\$275,000

M.K.

Non-pecuniary damages

\$30,000

Future care costs

Psychological treatment

\$10,000

Total

\$40,000

C.N.K.

Non-pecuniary damages

\$15,000

Future care costs

Psychological treatment

\$ 5,000

Total

\$20,000

M.M.K.

Non-pecuniary damages

\$20,000

[428] Costs may be spoken to, as well as issues related to tax-gross-up and management fees.

"Fisher J."

[1] The claims of the two youngest plaintiffs were discontinued before trial and the claim of C.G.K. was dismissed by consent during final argument.

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- [2] This hearsay evidence of what K.A.K. told Ms. Smith about her involvement with her parents, drugs and possible prostitution was admitted under the principled exception to the hearsay rule.
- [3] These claims were held to be statute-barred on appeal but a majority of the Supreme Court of Canada stated that the trial judge's findings on the appropriate quantum of damages should be upheld.
- [4] The defendant was found 65% liable, and so the award was reduced to \$61,750. However, this judgment was varied on appeal on the issue of indivisible damages, and the original amount assessed, \$95,000, was upheld as the appropriate award.
- [5] This hearsay evidence was admitted under the principled exception to the hearsay rule.
- [6] This hearsay evidence was admitted under the principled exception to the hearsay rule.
- [7] This hearsay evidence was admitted under the principled exception to the hearsay rule.
- [8] This hearsay evidence was admitted under the principled exception to the hearsay rule.
- [9] \$716 of this amount is applied towards rent contribution to CLBC for those receiving assisted living benefits.
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