

CANADA / JUDGMENT

M.R.P. v. Smith

2025 BCSC 1002

COURT

Supreme Court of British Columbia

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2025 BCSC 1002 M.R.P. v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.R.P. v. Smith,

2025 BCSC 1002

Date: 20250602

Docket: S220386

Registry: Vancouver

Between:

M.R.P.

Plaintiff

And

James Arthur Smith

Defendant

Restriction on Publication: A publication order dated March 4, 2022 has been imposed by the Court in this matter prohibiting all persons, entities, and publications from publicly transmitting in any way the plaintiff's name in connection with these proceedings, and in connection with the subject matter of these proceedings. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Justice Giltrow

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

March 3-7 and 10-14, 2025

Place and Date of Judgment:

Vancouver, B.C.

June 2, 2025

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Overview

- [1] The plaintiff, M.R.P. ("MP"), who is now 34 years old, alleges that from the time she was about three years old the defendant, her step-father, regularly sexually abused her until she left the family home when she was 14. She asks the Court to find the defendant liable for the torts of sexual assault and battery as well as intentional infliction of mental suffering. She further asks that damages be awarded to her for the injury and losses she has suffered as a result of the defendant's wrongful actions.
- [2] The defendant denies he committed any of the torts alleged, and in the alternative, says that he did not cause the injury and losses alleged by the plaintiff.
- [3] As I explain in these reasons for judgment, I have found that the defendant did commit the acts alleged by the plaintiff, and that he is liable for sexual battery and assault. I dismiss the claim for intentional infliction of mental suffering, as I find that the defendant's indifference to the consequences of his actions against the plaintiff does not demonstrate the calculation to cause harm that tort requires. Nevertheless, the defendant's actions during the years of the plaintiff's childhood have caused serious harm to the plaintiff. Despite her determination and resilience at times throughout her life, and despite her demonstrated capacity to form meaningful and loving relationships with friends and people she has trusted over the years, the plaintiff has suffered significant psychological injuries due to the defendant's actions. This is a case in which aggravated as well as punitive damages are appropriate, given the vulnerable position of the plaintiff as the defendant's step-daughter, and the abuse of the defendant's position of trust.

Brief Chronology of the Family

- [4] The plaintiff was born in August 1990. Her older brother D had been born in 1986. Sometime within the two years after she was born, her biological father left the family home.
- [5] In January 1993, the defendant and MP's mother began a relationship. They moved in together in June 1993, when MP was 2 years and 10 months old. In September 1993, the defendant and MP's mother bought a house in Chilliwack, and the family moved there. They married in 1995. The plaintiff's brother S was born to her mother and the defendant in 1996. The family lived in Chilliwack until 1997, when they moved to an apartment in Surrey. They moved a number of times again after this during MP's childhood, always within the City of Surrey.
- [6] MP left the family home when she was 14.

Plaintiff's Evidence of Abuse

- [7] The plaintiff attested that her earliest memories are of abuse by the defendant. These memories are of events in the apartment they lived in before the family moved to Chilliwack.

Toe Sucking

- [8] MP testified that she remembered the defendant playing pornographic videos on the television in this first apartment. She said he instructed her to mimic the women in the pornography by sucking on his toes, moaning, and rolling her eyes. She recalls the defendant would praise her for doing so. She recalls the living room, the television and the balcony door, and testified that this happened a few times in this setting. She recalls picking her fingernails while he showed her pornography on the television, that the defendant would tell her not to, and she would throw them defiantly at him.
- [9] MP recounted a memory where she was with the defendant and his friend C. The defendant instructed her to remove his dirty sock slowly and suck on his toes. He told her to mimic and make noises like the women on the television while she sucked on his toes. MP recalls feeling disgusted by the smell of his toes and the feeling of his toenail scraping the roof of her mouth.
- [10] MP is unsure how many times the defendant made her to suck on his toes, but she recalls it happening several times. It was not clear in testimony whether the memory of the defendant's friend C being there was the same as the particular memory with the toenail scraping her mouth.

Pornography

- [11] MP testified that the defendant forced her to watch pornography on several occasions during her childhood. She said this would happen when MP and the defendant were the only two people home. MP recalled a time when the defendant played pornography on a big television in the living room on the main floor of their home. The volume was high. She described how she felt unable to escape the sound of the pornography, and that the only way to get to her bedroom was through the living room where the pornography was being displayed.
- [12] She recalled another memory of the defendant playing pornography on the television when she was around 12 years old. She recalled feeling particularly scared this day. MP recalled the pornography featuring two women who were topless in a kitchen. She recalled that this incident occurred when they lived in Surrey at a residence on or near 98th Avenue.
- [13] MP also recalls finding pornography that was not hidden on the family computer. She recalls that it was primarily of celebrities, and recalls the Olsen twins and Hillary Duff having "accidents" and the paparazzi having got photos of their body parts.

Toilet Training and Bathing

- [14] MP testified that she recalled that during the period the family lived in the Chilliwack house, to which they moved when she was 3, the defendant would touch her inappropriately when he was teaching her how to use a toilet. She recalls feeling a "weird pressure" when he wiped her bottom, and recalls he put his fingers in her anus. She also recalls he touched her vulva while she was on the toilet. MP contrasted this to when her aunt taught her how to use the toilet. Her aunt would instruct her to wipe herself, but the defendant always insisted on wiping MP himself.
- [15] MP believes she was between the age of three to four when this was happening because her little brother S had not been born yet, and he was born when she was four.
- [16] MP also recalled that when she was around age three to four, the defendant would stare at her while she bathed. She recalled that by contrast when her mother would bathe her she "would teach me modesty" and would look at MP as little as possible. MP said the defendant yelled at her when she attempted to turn away or hide her body from him.
- [17] She also testified that the defendant would rub MP's vulva under the guise of washing her when she bathed. She remembered feeling that she wanted him to stop. She testified that she did not say that to him at the time because she felt afraid.

Nighttime Touching

- [18] MP testified that she wet the bed almost every night throughout her childhood until she was around 14 years old. She testified that she often woke up to the defendant massaging her vulva, and he would say he was checking to see if she had wet the bed.
- [19] Sometimes, MP would pretend to be asleep when the defendant touched her vulva at night. If she let on that she was awake during this touching, the defendant would say things like "Go back to sleep", and "Why are you awake? It's the middle of the night". She recalls being afraid of being in trouble.
- [20] MP recalled an incident that occurred when she was around eight years old. She recalls the timing because she had recently been to Disneyland and they were living in a particular house at that time. She shared a room with her two brothers, and she slept in the top bunk of a bunk bed. She woke up to the defendant standing beside the bunk bed with his hands down her pyjama pants. MP testified that this is the first time she recalls him penetrating her vagina with his fingers. She also recalls he moved his fingers around inside her vagina. She specifically remembered the snap of the elastic on her pyjamas when he pulled his hand out of her pants when she woke up. She remembers him saying on that occasion "Shh, I'm just checking if you peed the bed."
- [21] She testified about the nighttime touching "I remember that occurring throughout my childhood, regularly and consistently in most of the houses we lived in." She testified that she is not exactly sure when it ended, or when it started, but she remembers it happening in the Chilliwack house, all the way up to the memory she described when she was eight years old. By that time the family had left the Chilliwack house. She recalls they lived in a small house for a short period, and all three children shared a room. She believes these nighttime events happened between the ages of two to eight mostly, because she could not recall if it happened in the next house. When asked in examination-in-chief how frequently these incidents of nighttime touching occurred, she testified: "Every night. There may have been some nights he didn't come, but I remember it being a regular part of life."
- [22] MP testified that she stopped wetting the bed after she moved out of the family home at 14.

Masturbation

- [23] MP testified that she also witnessed the defendant masturbating during her childhood. She described an incident where she was about 13 years old. She came home from school, no one else was home, she put on the television and had a nap on the couch. She woke up to the defendant sitting on or at her feet and masturbating beside her. She recalls everything shaking. She observed him tuck his penis back into his pants and walk away once she woke up. She can recall the room it was in, but is not sure which house. She said they moved around a lot.

Kissing

- [24] MP testified that from the time she was younger the defendant would kiss her on the lips "and get mad if I wiped away the wetness so there was a really uncomfortable kissing going on." This continued after she was 12 years old.

Border Crossing

- [25] MP recalled an incident when she was about seven or eight years old where she was in the backseat of a vehicle traveling across the border with her mother, the defendant and another individual. She recalls the defendant was to her left, her mother in the front seat, and another person was driving. She heard the adults discussing how they were going to hide her when they crossed the border. The defendant made her sit on the floor of the vehicle between his legs and covered her with a green blanket. While she was in this position, she testified that the defendant pushed her face into his crotch, closed his legs and held her there. She recalled feeling his genitals against her face.
- [26] In recounting this incident, she testified that her recollection was that abuse was "woven in to daily life."

Lap Sitting

- [27] MP testified that the defendant would pick her up and sit her on his lap. She said he would place his hands on her vulva over her clothes and massage it, and he would move her back and forth on his lap. She testified her memory is foggy, but does not recall the defendant ever putting his hand on her vulva under her clothes when she was on his lap. She recalls being about seven years old when she remembers thinking "what is there? what is that? there's something hard under my butt that I'm moving back and forth on." The defendant made comments about the hardness she felt being her own "boney butt." It was not until she was older and learned more about bodies that she realized she believed the defendant was moving her body on his own erection. MP believes he was using her body to sexually stimulate himself.
- [28] MP recalled a specific time when she was about seven years old where the defendant forced her onto his lap and he whispered in her ear asking if it made her uncomfortable. She testified she was fearful for her safety and therefore said no. She said the defendant called her a "good girl."
- [29] MP testified that the defendant did this regularly. She recognized it was about to happen as it would typically begin with him picking MP up, walking to a chair, sitting her on his lap and holding her there. She said this would happen particularly, but not only, when they were alone.

- [30] MP is not sure exactly when the lap sitting stopped, but thinks it had stopped by her 10th birthday. She recalls her mother giving her \$20 on her tenth birthday to go to the movies, and does not think the lap sitting was still going on by that time.
- [31] I will pause here in recounting MP's testimony to note that the further events of alleged abuse described below were testified by MP to have occurred after she called the Kids Help Phone when she was 11 or 12 years old, and after a social worker from the (now named) Ministry of Children and Family Development ("MCFD") came to the family home in 2002, both of which I will address below.

Peephole

- [32] MP recalled a day shortly after her and her family had just moved into a new house in Surrey. That morning, the defendant, who had usually gone to work by that time, was the only other person in the home. When MP returned from school that day, she went to her bedroom and noticed a towel on the ground where it had not been before and a tape measure on the dresser. She went downstairs, where her mother and S were in the kitchen and the defendant in the room adjacent. MP asked who had left a tape measure in her room. He said it was not him, "even though he was the one who'd been home all day."
- [33] She said that after that, the defendant started following her around the house. If she went to her room he came upstairs after her and went to his. There was a day MP observed drywall dust on the carpet of her closet. She stated that she always kept her room very clean, and that the carpets had recently been cleaned before the family moved into the home, so she noticed the drywall dust that had not been there previously. MP testified that she looked under a shelf near the dust and discovered a hole that had been drilled into the wall. She testified:

There was a hole. I knew he was watching me through that hole. I covered that hole with paper as well as black electrical tape. And I kept finding the paper, I found it once ripped on the floor, I found it once with a hole puncture through. It was some night when nobody was home when I went to the other side, I wanted to see what was on the other side. There was a picture hanging. I took the picture down and inside the whole was one of those plastic insert thingies that people hang pictures with and it was just loosely sitting there and you just touched it and it would fall because the hole was big and it was a direct view into my bedroom through that hole. I remember a wave of nausea coming over me at that moment and I fell backwards, I start crying I realize what was going on. After that James said he was going to put a tv in my bedroom and build me a desk. I remember James coming into my room and I would stand there and watch him in my room and he pointed to the hole and said "you found it hey?" with the electrical tape over it.

- [34] MP believes she was either 12 or 13 years old when this occurred. She recalled it being right around the time she started menstruating.

Other Recollections

- [35] MP recalled an incident sometime after she was 12 years old where she got out of the shower and was wearing just a towel. The defendant called her over to a landing situated upstairs. He was standing underneath where she was, and he spoke to her briefly. Moments after this occurred, MP said she realized the defendant had been looking up her towel.
- [36] MP testified that when she was around age 12 to 13, her worn underwear went missing out of the bathroom when she was in the shower. She said she came out of the shower, the door was open and her underwear was gone. She said the only person home when this occurred was the defendant.
- [37] She also testified that after the MCFD visit to the home in 2002 "there was still a few times he kissed me after that." She said the kisses were "intentionally wet, he would lick his lips beforehand and he would get me wet and then he would behave as though he had hurt feelings when I would wipe my mouth and he would do it again and tell me to leave it wet."
- [38] MP also recalled that the defendant touched her and commented on her body after the MCFD visit. She attested:

There was other times of touching. There was a time when I was 13 and C was there again and they were teasing me, they were drinking, they were talking about my body "don't let your stomach get bigger than your boobs" and they were coming and they were snapping my bra strap and smacking my butt and stuff. It was just me at home alone with them.

Various Living Places

- [39] MP's family moved frequently when she was a child, all within the lower mainland. In testimony she recalled instances of abuse and related them to the surrounding rooms in which they occurred. In some cases, the distinctions between the different homes and rooms was a means by which her memories were marked and timelines roughly established. Accordingly, I will briefly summarize the evidence relating to where the family lived at different points addressed in MP's evidence.
- [40] MP testified that her earliest memories of abuse by the defendant were at the apartment the family lived in before they moved to Chilliwack. She was not clear in testimony that she knew what city this apartment was in. The defendant confirmed in testimony that the family lived in an apartment in New Westminster from June 1993 to September 1993 before they moved to the house he and MP's mother purchased in Chilliwack. This New Westminster apartment building is in fact where the defendant and MP's mother met, as they were both tenants there. Their parking spots were next to each other, which was how they got to talking. He lived in the building with a roommate in a two bedroom + den apartment, and MP's mother lived in the building with her children, MP and D. They met in January 1993, and MP's mother and the two children moved in to the defendant's apartment after his roommate left, in June 1993. The defendant testified that it was the apartment manager's

suggestion that they moved in together to save money.

- [41] The defendant initially testified that he began living with the family when MP was 3 or 4, but later in testimony confirmed MP was 2 years 10 months, in June 1993. The defendant could not recall whether the children had bunkbeds yet or separate beds in this first apartment.
- [42] MP testified that she recalled instances of toe sucking and pornography in this apartment. These occurred in the living room. She could recall the television and the balcony door.
- [43] The family moved from this apartment to a house in Chilliwack that the defendant and MP's mother purchased in September 1993. MP was 3 years old and D was 7 years old when the family moved to Chilliwack. MP's mother worked nights from September to November 1993. S was born in 1994.
- [44] The family lived in the Chilliwack house for 4 years, moving then to Surrey in 1997 when MP was about 7 years old. The family lived in Surrey for the rest of the time that MP lived with the family, until she was 14. The defendant attested that they lived in 3 rental houses and 3 houses they owned in Surrey before MP moved out.
- [45] While they were in the first rental home in Surrey, when D was about 12 years old, D moved to Edmonton to live with his biological father. MP was about eight years old then. The defendant testified that D was back and forth between his father's home and his mother and the defendant's home throughout his teenage years.
- [46] MP recalls nighttime touching, and specifically the first instance of digital penetration when she was around eight years old, happening while she was in a top bunk. She did not testify to recalling instances of nighttime touching in any other bed, and this was not explored in evidence. The defendant confirmed that the three children slept in one room with MP on the top bunk. It was not made clear in evidence when this was, but on the whole of the evidence it appears that this sleeping configuration with the three children would have been in place from some time after S was born in 1994 to 1997 when they moved from Chilliwack, and in the small house they lived in after Chilliwack in 1998 when D left to live with his father. This is the period when MP was approximately four to eight years old.
- [47] The instance of the pornography showing two women together in a kitchen was recalled by MP as showing in the living room when she was 12 and she could not avoid it because she could not get to her bedroom without passing through the living room. It was not clear in evidence which home this was.
- [48] MP's recollection of the specific instance where she woke to find the defendant masturbating next to her was on a couch in the living room of a specific home when she was 13. It was not clear in evidence which home this was.

[49] MP's evidence about sitting on the defendant's lap was not tied to a specific home. The defendant confirmed in testimony that MP would sit on his lap--although he attests that it was not for a sexual purpose--during her childhood up until she was eight or 10 years old. This means it occurred in several homes.

[50] MP's evidence about the peephole was with respect to a house the family had recently moved to in Surrey when she was about 13 years old. She recalled the carpets having been cleaned before they moved in, which the defendant confirmed in testimony, and she recalled the layout of the upstairs and downstairs of the house.

The Defendant's Evidence About the Alleged Abuse

[51] The defendant denies all the allegations made by MP. I set out below his evidence with respect to each of the allegations set out above.

- a) Toe sucking: The defendant stated simply that this allegation was "false."
- b) Pornography: The defendant denies watching pornography with MP. When asked if as an adult he ever looked at pornography he said: "the only pornography would be like a playboy magazine or something similar to a still picture, or say watching a movie and there would be an exotic sex scene that would show full frontal, that would be the extent of the porn that I would watch. I would not watch hardcore pornography." He testified he did not watch pornography with other individuals, which would implicitly include MP. He did not address in testimony the images MP said she found unhidden on the family computer.
- c) Toilet training and bathing: The defendant denies that he ever toilet trained or bathed MP, that her mother took care of that.
- d) Nighttime touching: The defendant denies the nighttime touching MP alleges or that he ever inappropriately touched her genital area. He does confirm that MP wet her bed as a child up to about the age of eight, not 14 as MP attested, but says that MP's mother was the one to deal with that. He says he was not involved with checking on MP.
- e) Masturbation: The defendant denies he ever masturbated in MP's presence.
- f) Kissing: The defendant states that MP's allegations of kissing are false.
- g) Border crossing: The defendant testified that the family did cross the US border three or four times because the defendant's mother had a time share in Port Townsend. He said that his friend C would never have been in the car with them, as he did not have a passport due to a criminal record. However, MP did not testify that the 3rd adult in the car was C. The defendant testified that he never told MP to hide, and there would be no reason to do so.
- h) Lap Sitting: The defendant testified that MP would sit on his lap during her childhood. Both parties testified that this had ended by the time MP was ten years old, however this is where the congruence in the parties' testimony ends. The defendant denies there was any sexual aspect to MP sitting on his lap, and expressly denies ever having an erection while MP was

on his lap or touching MP's genitals over her clothes, or at all, while she sat on his lap. He also testified, contrary to MP's testimony that he would have her sit on his lap when no one else was around, that he would always also have S on his lap when MP was on his lap.

- i) Peephole: The defendant confirmed there were holes on each side of the wall of the home described by MP and that he heard from MP's mother that it was possible to see MP's bedside table area through the holes. He denies ever looking through the holes.

MP's Attempts to Get Help

- [52] None of MP's other family members who lived in the same home as MP and the defendant during the period in question were available to testify. Both of MP's brothers have died in recent years, and MP testified that she understands her mother's health is precarious, and the stress of testifying at this trial would be dangerous for her. Neither party sought to call MP's mother as a witness.
- [53] MP testified that she assumed all along that her mother never noticed the defendant's sexualized behaviour toward MP until MP expressly raised it.
- [54] MP attested that she tried to report the abuse and get help on several occasions as a child and teenager.

Issue of Prior Consistent Statements

- [55] Before reviewing the evidence regarding MP's attempts to get help regarding the abuse, I will address the purpose for which the evidence was admitted and for which I have considered it. No objection was made to MP's testimony-in-chief about her attempts to report the abuse and get help. In cross-examination counsel suggested to the plaintiff that her recollections of abuse were recent, resulting from recollections arrived at through therapy, and that her recollections were of events that did not happen. The plaintiff denied this. The defendant has also made the reports to authorities relevant by pleading that:

The Ministry of Child and Family Development and the police have investigated the Plaintiff's claims of sexual assaults against the defendant and have concluded that no such conduct occurred, and the investigations were subsequently closed.

- [56] The only objection to evidence of the plaintiff having reported the abuse as a teenager came during the examination-in-chief of the plaintiff's former school counsellor, Mike Musgrove. However, by that time the allegation of recent fabrication had been made in the cross-examination of the plaintiff, accordingly, I allowed Mr. Musgrove's testimony on this point.
- [57] The evidence regarding MP's reports of the abuse to others is necessary to understanding the narrative and chronology of the relevant events, as well as to considering the legal relevance of the defendant's factual pleading that the police and MCFD have opened and closed investigations relating to this alleged abuse. It is also necessary evidence to consider in response to the defendant's argument that the plaintiff's memories are false, and may

result from traumas she experienced later in life. I do not, however, rely upon this evidence for the prohibited inference that MP's testimony is more likely to be true because it has been repeated more than once: *R. v. Tso*, 2020 BCCA 358, para. 39.

Kids Help Phone

- [58] MP recalls having called the Kids Help Phone once from a payphone. She recalled they asked her some questions, and remembers feeling uncomfortable answering them and that she was she was scared to give specifics about any abuse. She believes she gave her name.

2002 Ministry Visit

- [59] MP testified that shortly after her call to Kids Help Phone a representative from the MCFD came to their house. She said has always assumed this was because of her call, although as I will discuss below, the MCFD notes from that period are ambiguous on this point; it may be that the 2002 MCFD visit was the result of a call by someone else. The evidence at trial does not permit any determination to be made on this point.
- [60] MP recalled that the social worker that came spoke first with her mother and the defendant in the kitchen, while MP stayed in the living room. Then the social worker came to speak to her. MP remembers that this was difficult because her mother kept going back and forth between the rooms and MP needed privacy. MP said she decided to test the social worker to see how she would respond to other things going on at home before saying anything about sexual abuse. MP recalls, for example, telling the social worker first about an event that she felt was unfair: that the defendant had made her call all her friends to cancel her own birthday party, but that the next month her parents threw a birthday party for her brother S. She assessed the social worker's response to that and determined she would not tell her more. She testified that the social worker did not ask her if she was experiencing sexual abuse in the home. MP said she decided not to tell the social worker about the abuse because she did not believe the social worker would get her out of the home, and she would not be safe. MP testified that the social worker did not provide her a safety plan, but only gave her her card. MP recalls thinking at the time that she would not call that social worker.
- [61] The defendant confirmed that this 2002 MCFD visit occurred. He testified that he came home one day in 2002 and a social services worker was in the house with MP and her mother. He testified this was the first interview or investigation relating to allegations made against him by MP.
- [62] The defendant attested that from this MCFD interview he learned that MP was uncomfortable sitting on his lap, was feeling unloved at home and was feeling suicidal.
- [63] The defendant testified that he was not told during the 2002 MCFD visit that his actions toward MP could be seen as sexual abuse. He further testified that the only outcome of the 2002 MCFD visit was the recommendation that MP stop sitting on the defendant's lap, and that she be provided more support by her mother and the defendant.

CF&CS investigation report

[64] In cross-examination, the defendant was shown a document entitled CF&CS Investigation Report, which he recognized having seen previously. He understood it to be the report of the Ministry of Child and Family Services relating to the first call to the Ministry in 2002.

[65] Counsel for the defendant requested that the report be put into evidence after the defendant was cross-examined on it. The report was entered as an exhibit at trial by consent. On its face, the document is three pages of a larger report. The rest of the report was not tendered in evidence by either party.

[66] The report is dated September 11, 2002. It lists all three children, and indicates that MP is the "Subject Child." The location of the home is noted as being on 155A Street, Surrey, BC. It identifies "The Client" as MP's mother.

[67] In the section called "Caller Information" the caller name is blank or has been redacted. The call date is noted as August 13, 2002 and time 17:02. The "Nature of the Call" is listed as "Protection Report." I set out portions of the information contained in the report below. In doing so I have replaced MP's first name, which is used throughout the report, with the initials "MP" in accordance with the Order of this Court in this proceeding dated March 4, 2022.

[68] The "Information Provided" states:

AFTER HOURS MEMO READS AS FOLLOWS:

[Blank] CALLED TO REPORT CONCERN [blank] REGARDING

[MP] [blank]

BEING SEXUALLY ABUSED BY HER STEP-FATHER

[69] The following section entitled "Assessment of Report/Request" includes:

AFTER HOURS MEMO READS AS FOLLOWS:

[Blank] CONCERN

[blank] [MP]

[blank] POSSIBLE SEXUAL TOUCHING BY STEP-FATHER

[70] This section goes on with subsequent notes. There are more evident redactions from the report. The report does include:

August 27/02: TALK WITH JAMES (STEP FATHER, DISCUSSED THE TOUCHING THAT WAS DESCRIBED IN THE INTAKE 9HOLDING [sic] [MP] ON HIS KNEE WITH HIS ARMS AROUND HER). SW EXPLAINED THAT BECAUSE OF HER AGE, [MP] MAY FEEL UNCOMFORTABLE AND SHE THINKS IT IS INAPPROPRIATE. ALSO EXPLAINED HER SUICIDAL TALK. MOM/DAD BOTH APPEARED TO CARE FOR [MP] AND WERE OPEN TO SERVICES IF [MP] AGREED.

August 28/02: TALKED TO [BLANK] JAMES ABOUT [MP]. STATED THAT SHE IS FEELING UNLOVED AND DOES NOT FEEL CLOSE TO EITHER PARENT. SAFETY PLAN WAS EXPLAINED, LET THEM KNOW I WOULD BE TALKING TO PATTY, DISCUSSED THE SEXUAL TOUCHING, MADE JAMES AWARE THAT IT MADE [MP] UNCOMFORTABLE AND THAT IT WAS A FORM OF SEXUAL ABUSE. IT NEEDS TO STOP.

[71] On cross-examination the defendant denied recalling being advised at the time that MP had made an allegation of sexual abuse or of conduct that was a form of sexual abuse and that it had to stop.

After MCFD visit

MP

[72] MP testified that after the MCFD visit she felt she was in trouble: "it was like suddenly my mom and James were no longer willing to give me eye contact or talk to me." She said the intensity of her feelings of being unsafe in the house increased significantly. She felt like she had tried to ask for help, but the defendant had a renewed sense of confidence because nobody helped her.

[73] She testified that the incident in which the defendant looked up her towel from where he was standing below her happened after the MCFD visit, and that this really hurt her spirit. She also testified that the incidents of him kissing her and her missing underwear as well as the peephole occurred after the MCFD visit.

Defendant's Response to 2002 MCFD Visit

[74] The defendant testified in direct examination that after the 2002 MCFD visit he tried to bring MP into his life more. He said he had been busy with S's soccer and giving attention to D who at the time was starting to get in trouble with the law, so he had not been available for MP. He testified that he tried to make more time for MP after the 2002 MCFD visit.

[75] However, on cross-examination he also attested that he began to keep his distance from MP after the 2002 MCFD visit. I will return to this below.

Disclosure to Older Brother

- [76] MP recalled a time where her mother and the defendant were having an argument, which she said was quite common. She was in her bedroom when her brother D came in and sat on her bed. He stated that he had just heard the defendant say something about being charged for sexual assault "because of this family". D asked MP if the defendant had ever touched her.
- [77] MP recalled feeling a moment of relief and replied "yes". She showed D the peephole, and told him how the defendant had said, "You found it, hey?" She testified "I explained it all to D." She said D became very protective and angry. She and D went outside for a walk. During the walk, D kicked garbage cans and spoke about wanting to kill the defendant.
- [78] MP slept at her friend's house that night. She recalled that her friend's mother woke her up in the morning saying that her mother was there to pick her up, and that her mother was very angry.
- [79] On the drive home, MP's mother was very angry. She called MP a "lying bitch" and drove erratically. MP understands that this was related to D telling their mother that MP had told him she had been abused by the defendant.

The Defendant's Letter to MP

- [80] The defendant wrote the plaintiff a letter in late 2003 or early 2004 ("the Letter"). MP recalls the day she received the Letter the defendant tried to enter her room and she would not let him. Later she found the Letter on the table.
- [81] In testimony the defendant confirmed that on examination for discovery he had said he did not recall writing the Letter, but that since then his memory was refreshed and he now has a memory of writing it. He testified he wrote it because MP would not talk to him.
- [82] The Letter contains, among other things, statements of apology. I will address the Letter, its admissibility, and the defendant's testimony in relation to it in detail below.

Disclosure of Mental Health Concerns

- [83] MP testified that by the time she received the Letter from the defendant her mental health was really suffering. She testified she was depressed and was vocal about feeling suicidal. She told her mom and "everybody" that she was feeling suicidal. She recalled writing her first suicide note when she was eight years old, and that suicide felt like her only way out, a sort of safety plan. After saying what the defendant had been doing, and not being believed or protected, she became more vocal about her suicidal feelings around the age of 13.
- [84] The defendant testified that he knew of MP's suicidality at least by the time of the MCFD visit when she was 12.

Summerland Disclosures (Ms. Smith, Ms. Anderson, MCFD)

- [85] MP left the family home in Surrey when she was 14, part way through grade eight. She wanted to go live with her papa (grandfather) in Keremeos, but was told by her mother that she would go stay with the defendant's parents in Summerland. The defendant's sister and her two children were living there at that time as well. MP testified she stayed there nine months.
- [86] While she was in Summerland, MP told two adults something about what the defendant had done, and why she had left home. These were the defendant's mother, Geraldine Smith ("Ms. Smith"), and MP's friend's mother, Valerie Anderson ("Ms. Anderson"), both of whom testified.
- [87] The defendant's mother, Ms. Smith, testified that MP's mother had phoned her and asked if MP could come and stay because "she had allegations that James had, sexually and from what I understood it was peeping through a hole in the wall."
- [88] Ms. Smith testified that the day after MP arrived she told MP that she would take her to the police "because nobody deserves to be abused." She testified they "talked for quite a while on that." Ms. Smith did not take MP to the police. There is no admissible evidence before me as to why not.
- [89] Ms. Smith testified that MP was very pleasant and helpful when she first moved in, and for some time after that. She said that things were going well until several months after MP arrived, when Ms. Smith found out MP had gotten into some minor trouble at school.
- [90] MP attested that things were both good and bad living in Summerland. She said that at school she made good friends, and felt she was getting some self-esteem socially. She said however that although she was away from the defendant, she found it rough living with his parents and his sister and her two children.
- [91] MP befriended Chantal Anderson in Summerland. Through that friendship MP came to know and feel comfortable with Ms. Anderson, Chantal's mother. As noted, Ms. Anderson testified. While MP and Ms. Anderson's memories do not align on the details, they both testified that MP spoke to Ms. Anderson about MP not having felt safe at home, and agreed that Ms. Anderson, who was already a foster parent, would contact the Ministry about MP.
- [92] MP testified that she told Ms. Anderson about the abuse by the defendant. She recalled that Ms. Anderson took her to the MCFD office in Summerland. MP did not testify about what happened at the MCFD office or what, if anything, MCFD did after that. She stated on cross-examination that she understood that the Ministry had determined she was not in need of protection.

- [93] Ms. Anderson attested that she knew MP was living with her step-grandparents because she felt "very unsafe" and "did not feel comfortable in her own home." Ms. Anderson did not recall that MP gave a lot of details about abuse, but that she felt she did not have privacy, that there was a hole in the wall, and that she believed she was being watched by her step-father.
- [94] Ms. Anderson did not attest that they went to the MCFD office together, but instead that she asked the MCFD worker she worked with as a foster parent whether she could also foster MP.
- [95] Ms. Anderson testified that she and her now ex-husband were told by the social worker that they did not know the history of MP's past, and that she would "put my husband into a compromised position." She did not feel it was right but "I really didn't have anywhere to go from there." She did not foster MP, but MP stayed over at their house often.
- [96] There was conflicting evidence on the circumstances preceding MP's departure from Mr. and Ms. Smith's home. MP testified that MCFD had already called her step-grandparents by the time she got home from Ms. Anderson's, and that she was no longer welcome there. While she did not raise this in her testimony on direct examination, on cross-examination MP testified that after she contacted the Ministry, the defendant's mother and sister beat her, and his mother stated "how could you say that about our son" and his sister said "how can you say that about my brother" and they made fun of her for wanting to go into foster care.
- [97] Ms. Smith denies that she beat MP.
- [98] Ms. Smith learned that MP had been disrupting her French class by arriving late on more than one occasion and bringing coffee and treats for some of the students, despite being asked by the teacher not to. Ms. Smith testified that after she tried to discipline MP for this MP left the home, and shortly thereafter Ms. Smith received a call from the Ministry. MP left for good shortly after that.
- [99] After she left the defendant's parents' house, MP stayed for a period with her grandfather in Keremeos. She recalls feeling safe, and playing dominos with her papa's elderly neighbours. Although she was in grade nine at the time, she did not attend school in Keremeos. She says she wished staying longer was an option, but her mother had said she could not because there was no high school. MP recalled that in fact there was a high school.
- [100] She then stayed with her cousin in East Vancouver. MP testified that she was struggling with her mental health at that time, feeling agoraphobic, and frightened about going out. She said she was worried the defendant was after her. MP testified that her cousin took her to see several doctors during that period.

- [101] MP did grade 10 by distance education. She completed the year but failed two courses. She then learned about an alternative school in New Westminster called Purpose. MP explained that Purpose is a school that supports students who need more individual support or can not succeed in the regular school system. She testified that "expectations are higher at Purpose." As I will discuss later in these reasons, it appears that going to Purpose ultimately made a significant positive difference in MP's trajectory.
- [102] MP had begun grade 11 at Purpose when her cousin told her that MP needed to move out. MP came home from school one day and all her belongings were packed in garbage bags. Her cousin told MP that she had found a suicide note written by MP, and that she was concerned about the impact of MP's mental health on her own family.
- [103] After moving out of her cousin's house, MP moved into a three-bedroom apartment with her brother D and his girlfriend who was then eight months pregnant.

Disclosure to School Counselor

- [104] MP eventually disclosed the abuse she had suffered to Mike Musgrove, who was then the school counsellor at Purpose. MP believes this was in about 2006. She recalled her disclosure to Mr. Musgrove came about after an event on a field trip that caused her serious upset. She recalled that she and her classmates were at a bowling alley as part of gym class. MP came across a woman in the washroom who was visibly upset and who disclosed to MP that she was being forced to touch her uncle's penis. MP testified that she recognized this as abuse right away.
- [105] MP ran out of the washroom to seek help for the woman by telling a teacher. The teacher asked how old the woman was, and MP stated that she believed the woman was 22 years old. MP was then told that there was nothing they could do because the woman was not a child.
- [106] MP recalled how she was deeply upset about this. Her teacher later took her to the school counsellor and asked her to speak with him. Initially, MP did not want to speak to Mr. Musgrove but eventually she began to feel safe speaking with him.
- [107] MP testified that she eventually disclosed the details of the defendant's abuse to Mr. Musgrove. She said this was the first time she told anyone the full extent of the abuse she experienced.
- [108] Mr. Musgrove testified at trial. His testimony confirmed that MP had been brought to him by the PE teacher after MP had become very upset on a bowling field trip. He confirmed that MP had revealed to him that she had been sexually abused by her stepfather.

- [109] As I have explained, counsel for the defendant objected to the admissibility of Mr. Musgrove's evidence of MP's disclosure of the abuse for a hearsay purpose. The evidence was admitted to rebut the allegations of recent fabrication which arose in the course of cross-examination of MP.
- [110] Mr. Musgrove's recollection was that MP did not share much detail of the abuse she was disclosing, although he did recall her telling him about a hole in the wall.
- [111] MP testified that after she disclosed the abuse to Mr. Musgrove she began meeting with him almost every day for the rest of that school year, and that he listened to and supported her. Mr. Musgrove's recollection was that they met a couple of times a week for a few weeks, but that it was a small school, so they had daily interaction outside of their meetings.
- [112] Mr. Musgrove told MP that he was required to report the abuse to the police.

Police

- [113] MP testified about going to the Surrey RCMP detachment with Mr. Musgrove. She described this experience as difficult, and she recalled feeling scared. MP spoke with a male police officer and, despite feeling uncomfortable with him, did her best to tell him everything about the abuse.
- [114] MP recalled how she received a follow-up call from the RCMP. She was told that there was not enough evidence to move forward with charges against the defendant. MP recalled receiving that call while sitting with Mr. Musgrove in his office. Mr. Musgrove did not recall this. Mr. Musgrove also did not recall being informed that the police had determined that there was insufficient evidence upon which to proceed. He said "I am starting to doubt my own recollection. I thought they had decided to go forward with charges."
- [115] The defendant testified at trial that he did receive a phone call from a police officer and that this was the first time he learned that MP had made allegations against him about sexual touching and abuse.
- [116] His recollection at examination for discovery was that this call occurred before MP moved out of the house to Summerland, which occurred in the spring or summer of 2004. At trial he testified the call came in 2005, after MP had moved to Summerland.
- [117] At trial the defendant said he was unprepared at examinations for discovery but has now reflected and better recalls the timeline of events.
- [118] MP believes her report to the police was made in 2006, whereas the defendant believes he received the call from the police in 2005. Mr. Musgrove could not recall the year. I conclude the report to the police and the call to the defendant from the police occurred sometime after MP started at Purpose in September 2006.

- [119] The defendant testified that it was a very short conversation with the police officer. The officer told him that MP had made allegations of sexual abuse against him, and asked the defendant to come to the police station to make a statement. The defendant testified at trial that he did not go to the station on his lawyer's advice and that he chose not to communicate to the police based upon his right to silence. He could not recall in testimony if he told the police officer he would not be coming to make a statement, or if he just did not go.
- [120] However, in examinations for discovery, the defendant stated that the police officer asked him to come down for a "lie detector--a polygram is that what it's called? I said sure. I hung up the phone. I phoned him back, and I said me and my lawyer will come down, and he said no, don't worry about it. And that was the extent."
- [121] It is uncontroverted that the defendant was not interviewed by the police and never has been.

Youth Agreement

- [122] When MP was about 17, after she had been out of the family home for three years, she entered into a youth agreement with MCFD. While counsel for the defendant suggested this was a third Ministry investigation leading to a determination that MP was not in need of protection, there was no evidence at trial upon which to determine that any investigation by the Ministry occurred at this stage.

Defendant's Letter

Apology Act, S.B.C. 2006 c.19

- [123] As I have noted, MP testified that some time in 2003 or 2004, before MP moved out of the family home at 14, the defendant wrote her the Letter. MP did not testify about the contents of the Letter, only that she received it at that time. The defendant did not testify about the Letter in direct testimony. He was asked on cross-examination what the Letter said. The defendant testified "that I was sorry for the thing I had done." A *voire dire* was then held to determine the admissibility of the Letter.
- [124] The defendant objected to admissibility of the whole of the Letter based upon the Apology Act, S.B.C. 2006 c.19. The plaintiff argued that whole of the Letter is admissible, the only constraint being that the specific statements of apology in the Letter are admissible only for purposes other than "as evidence of fault or liability of the person in connection with that matter" (s. 2(2)) or "factors going to fault or liability" (as counsel put it in submissions). The parties made full submissions in support of each of their positions.
- [125] During the course of the *voire dire*, the Court asked the parties to consider whether the Apology Act applies to the Letter, as on the uncontested evidence the Letter was written and received in 2003 or 2004, before the Apology Act came in to force in 2006.

- [126] After an opportunity to research and consider, counsel for the defendant advised the Court that based upon the reasoning in *Lane v. Kock*, 2015 ONSC 184, with respect to very similar provisions in the Ontario Apology Act, his view was that the Apology Act does not apply to the Letter, and the objection to admissibility was withdrawn. In *Lane* Justice Bale held:
- [7] As a rule of statutory interpretation, there is a strong presumption that the legislature does not intend legislation to be applied retroactively: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014), at p. 761.
- [8] The application of the Apology Act to the apology in issue in the present case would be a retroactive application because it would change the legal effect of a past event. Counsel for the defendants argues to the contrary; and, relying on subsection 2(3), says that the Act is directed at a future event, i.e., the trial at which evidence of the apology is not admissible. I disagree. Although the Act does affect the admissibility of apologies, the purpose of the legislation is to promote the making of apologies, and not to reform the law of evidence. The event to which the Act is directed is the making of the apology, not the trial of an action arising from the act or omission in relation to which the apology was given. In this case, the making of the apology was a discrete event which began and ended on one day in 2006, and it would be wrong for the law to reach back and change its legal effect. Doing so would not promote the social purpose of the legislation.
- [127] While there is a question as to whether the Apology Act may have retroactive application as procedural rather than substantive law, the reasons of Bale J. of the Ontario Superior Court of Justice are persuasive, and I agree with them.
- [128] The Letter was accordingly admitted into evidence.

The Letter

- [129] The defendant was cross-examined on the Letter he wrote to MP in 2003 or 2004. Discussion of his evidence in these reasons is facilitated by inserting the full text of the Letter:

[MP]

Sorry for making you feel the way you do. It was totally inappropriate and wrong. I admit it. Because of what happened in the past you do have some hatred against me fair enough. But why are you insisting that I was spying on you. Sure there was a hole in the wall but from what your mother said you could see in but you couldn't see anything but the top of your night table, so what would [sic] there be to see. I haven't looked through the hole and I haven't done anything since social services has been to see us. So why are you doing [sic]. If you are trying to break me and your mother up for some reason it's not going to work. What might happen is you're going to give your mom an emotional breakdown and then we will all not have her. Because I know I haven't done anything to deserve this treatment again. Sure I did before but I got it together and thought I was doing pretty good by staying away from situations that may raise judgment. I'm sorry you feel this way. But can we not put this in the past and move forward in a positive way and become

somewhat of a normal family. I miss you and I love you so please try and forgive

Love

James

Ps please reply

[130] On its face, the Letter refers to past conduct and events with respect to which the defendant recognized the need to change his behaviour, and for which he understood the plaintiff was angry at, and even hated, him. However, on cross-examination, the defendant would not admit that this past conduct he was referring to was anything more than neglecting the plaintiff and not making her feel part of the family. He did not acknowledge that his past conduct at least included the uncontroverted fact that the plaintiff felt uncomfortable when he would put her on his lap. Moreover, the change in conduct he said he had achieved by the time he wrote the Letter, and to which he was referring in the Letter, was distancing himself from the plaintiff--the same conduct that he said was the only past conduct he was apologizing for.

[131] I will return to a more detailed examination of the defendant's evidence about the Letter below.

Adverse Events in MP's Life

[132] The defendant argues that several adverse events in MP's life have impacted her memory, stating in his closing argument:

due to the multiple episodes of trauma the plaintiff experienced, her memory has become distorted and/or amplified such that the trier of fact cannot determine the plaintiff's testimony to be reliable and/or credible.

[133] The defendant also points to these adverse events in arguing that he was not a cause of the psychological injuries the plaintiff suffers.

[134] Therefore, I will review here the evidence of adverse events that have occurred in MP's life since she left home at 14.

[135] MP's hard work, diligence and resourcefulness as a young person are remarkable. Through grades 11 and 12 she attended school full time, got high grades, worked evenings and weekends at two jobs--all of this with no stable home. She then went to Douglas College achieving many A and A+s, and eventually getting her Bachelor of Arts in Child and Youth Care Counselling in 2016. She began a career as a Family Counsellor in 2016, which she maintained until she went on Long Term Disability for post-traumatic stress disorder (PTSD) in August 2023.

- [136] Through this period MP did suffer adverse, stressful and traumatic experiences. She entered a marriage that became psychologically abusive. And, when she was on an internship in Uganda in 2016, she was kidnapped and sexually assaulted by someone she knew. When she told her then husband what had happened, he insisted she return home to Canada right away, which she did. However, she testified that when she got home her husband said she was "disgusting and probably had AIDS," had packed her belongings, and told her to leave their home. She did so, and returned to Uganda a week later to complete her practicum. That ended their marriage.
- [137] The plaintiff recounted how before they married she had told her husband about the sexual abuse she had experienced as a child--something she was dreading doing. He was upset and spoke to his mother about it. His mother's reaction was unkind: MP recalls her saying that MP could not wear white at the wedding. MP said she did not feel safe or supported by her husband's family after that. MP said that there were good times in her marriage, but ultimately her husband was controlling and psychologically abusive. Her husband was not physically abusive toward her until she returned home after the sexual assault in Uganda when he hit the wall next to her, which she understood was to frighten her, as it did. Their divorce was finalized in 2018.
- [138] MP attests that her return to Uganda after the sexual assault was important and helpful to her healing from that trauma. I will return to this below.
- [139] Counsel for the defendant also points to MP's brother D's violence toward her. MP confirms that D was violent, however this violence arose well after their childhood, while she was living with D and his girlfriend, and after that couple's baby was born. Moreover, while it was physical, there is no evidence D touched MP violently. Rather, the only incident MP recounted in testimony was D striking the wall beside her.
- [140] Counsel for the defendant also points to evidence that a man MP was involved with after her marriage broke up was unfaithful to her, and this required her to get tested for sexually transmitted diseases. MP admits this was stressful, but was not asked if she found it traumatic.
- [141] Counsel for the defendant also points to an event in 2024 when MP was hospitalized for endocarditis, which in extreme cases can be fatal. She was very sick. MP does not hesitate to characterize this as a frightening and stressful time.

Liability

Credibility

- [142] The defendant denies all allegations made by MP. He denies he did any of the acts alleged by her, and pleads further that if he did any of the tortious acts, he did not do them intentionally.

[143] The onus is on the plaintiff to establish the torts alleged. However, in the face of the detailed descriptions of tortious acts attested to by the plaintiff, the defendant has advanced a theory that the plaintiff's memories are false. The defendant's closing argument states:

The plaintiff's testimony of the defendant sexually touching her on multiple occasions every day for years and years again has to be examined through the lens of common sense. Some of these alleged episodes occurred when the plaintiff was in a bedroom with her brother and/or stepbrother. All the siblings were in the same room.

In addition, the plaintiff's testimony was that her mother was in another room in close proximity when this sexual touching or abuse occurred. Her explanation was that she didn't think that her mother was aware of the abuse. In addition, her other explanation was that her brothers were sleeping when the abuse occurred. Again, it is respectfully submitted the numerous alleged occurrences happening daily over many years without somebody noticing stretches common sense.

A more consistent and plausible explanation is that due to the multiple episodes of trauma the plaintiff experienced, her memory has become distorted and/or amplified such that the trier of fact cannot determine the plaintiff's testimony to be reliable and/or credible.

[144] The defendant did not seriously press in cross-examination or argument that the plaintiff is lying. Rather the emphasis of the defendant's case is that the plaintiff's memories are unreliable due to the other traumas she has experienced.

[145] Credibility and reliability are not the same thing. Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186. Reliability analysis "is concerned with the accuracy of a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue": *Ford v. Lin*, 2022 BCCA 179 at para. 104; see also *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016).

[146] In *Bradshaw* Madam Justice Dhillon gave a helpful summary of the principles to be employed when assessing credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya*

v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).

- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [147] MP requested at the outset that she not be required to be in the courtroom with the defendant. By consent, when MP testified, the defendant observed her testimony remotely from another room in the courthouse. After her testimony, MP did not attend the remainder of the trial, either in person or remotely.
- [148] Throughout her testimony MP was generally calm in her demeanor, despite the obvious effort this required. Her effort was evident at moments when she would pause and take deliberate breaths before continuing with her testimony. She also requested brief extra breaks after portions of her testimony. Throughout cross-examination MP was steady and straightforward in her answers.
- [149] On the theory that other traumas have impacted MP's memory, the defendant focused in evidence and argument on the reliability of the plaintiff's memory rather than on her credibility. While the defendant does not expressly say it, one conclusion he is inviting the Court to draw, given his general denial of all allegations, is that MP's memories of abuse are false.
- [150] I did not find the plaintiff to be a witness whose credibility was suspect. She was consistent throughout her testimony, including under cross-examination. There was no evidence that the plaintiff sought to mislead the Court. I have considered carefully however whether her recollections are reliable. I address this below.
- [151] The defendant was also calm and respectful in his conduct throughout his testimony. He demonstrated no evident emotion, including when denying the allegations made against him by MP, and in testifying about the death of his son, S, and of his step-son D.
- [152] Below I consider the credibility and reliability of the parties' testimony with respect to particular points that were salient in evidence.

Other Family Members

- [153] I will first address the argument the defendant advances that because none of MP's family members--her two brothers or her mother--noticed anything, then it is unlikely to have occurred.
- [154] There is no evidence either way as to whether MP's brothers observed any of the acts at issue. There is no evidence that either of them said or did anything until D asked MP about the statement he heard during the argument between the defendant and MP's mother. However, I can not make the inference that the defendant proposes from this that neither noticed anything. There may be other explanations for the absence of evidence of either of them saying anything to MP or anyone. Neither of MP's brothers is alive to testify.
- [155] Similarly, I cannot infer from the evidence at trial that MP's mother did not notice anything. The evidence at trial is simply insufficient to establish that. In fact, the evidence at trial leaves open the possibility that MP's mother may have been aware of improper conduct by the defendant, but did not do or say anything about it. For instance, the evidence is that in 2002 MP's mother was told by MCFD that MP was uncomfortable with how the defendant was having MP sit on his lap. Yet there was no evidence MP's mother spoke to MP or the defendant about it. This would indicate that even knowing there was an allegation of sexually inappropriate touching, MP's mother did, at that time, not speak about it. Thus, the absence of evidence of MP's mother saying or doing something that would suggest she knew about improper conduct by the defendant during MP's childhood is not evidence that she did not know of anything. In at least one instance she knew there was at least an allegation of improper conduct, but there is no evidence she said anything to MP or the defendant about it.
- [156] I also note that the defendant's own evidence also provides another possible explanation for MP's mother saying or doing nothing about anything improper or suspicious she observed during those years: he testified not only that she worked nights for three months while he was home alone two nights a week with MP and D when MP was three years old, but also, more generally, he testified that MP's mother was often drunk, drank at least bottle of wine a night, and was "not a very good mother." I do not make any findings about these latter assertions, but in the face of this evidence, I am not prepared to rely upon MP's mother's silence or inaction as proof that she did not notice anything improper, as the defendant urges me to do.
- [157] The evidence also leaves open the possibility that it was MP's mother who called MCFD in 2002. This possibility is supported by the defendant's testimony that he suspected that either MP's mother or MP called MCFD, as well as by the MCFD 2002 notes, which on their face could be read to indicate that MP's mother was the caller, as she is identified as "the client". I am not making that finding, but conversely, I am not prepared to find, as counsel for the defendant argues, that MP's mother noticed no suspicious activity by the defendant throughout MP's childhood.

[158] I will note here that there are statements in the report of the psychiatric expert called by the plaintiff that suggest MP's mother has in the years since MP's childhood admitted to having been aware the defendant was abusing MP. I give no weight to these statements, nor has counsel for MP suggested I should. There was no direct evidence at trial on this point. As I have said, MP's mother did not testify.

A. Defendant's response to 2002 Ministry visit

[159] In reflecting on salient points of evidence where credibility appeared to be at issue, I first consider some internal inconsistencies in the defendant's testimony about how he responded after he first learned MP had told third parties she was uncomfortable with how he was touching her.

[160] The defendant testified initially that the only two things he learned from the Ministry's 2002 visit to the family home was that a) MP was uncomfortable with sitting on his lap and b) that she was feeling unloved in the home. His evidence about this changed over the course of his testimony to add that he learned she was feeling suicidal. Here I will address how the defendant said he responded to the news of the first two things he said he learned.

[161] At first, in examination-in-chief, he testified that having learned MP was feeling unloved, he made a deliberate effort to spend more time with her and to include her in the family. He testified he did that by taking her out to movies, talking to her more, and by him and MP's mother getting MP "more involved in family life to create more of a bond in family life to build family love which she said she was missing." He also said he took MP out for lunch and asked her more questions about school, trying to include her in family conversations.

[162] He repeated this point in his testimony: that he made an effort to include MP in the family after the 2002 MCFD visit. "Trying to get the family together is what I was trying to do."

[163] However, under cross-examination he testified that after the 2002 MCFD visit, he was of the view that it was either MP or MP's mother who had called the Ministry, and that he accordingly could not trust either of them, and so he pulled away and built a wall around himself at that time.

[164] This is inconsistent with his testimony that he made an effort to actively include MP more in family activities after the 2002 MCFD visit.

B. The Letter

[165] The defendant testified that the allegations he learned of from the 2002 MCFD visit were "very minor."

[166] While under cross-examination about the Letter, the defendant emphasized his testimony that the salient thing he had learned about MP from the 2002 MCFD visit was that MP was feeling unloved at home.

- [167] He insisted on cross-examination that the sentence in the Letter "It was totally inappropriate and wrong. I admit it" referred not to any specific event but rather to "she wasn't being loved; she had fallen behind the rest of us." He attested that the only conduct of his own that he was referring to was not making MP feel loved and involved with the family, and to him being involved with S's soccer and D's issues with the law that arose when he was a teenager, as well as MP's mother "not being a great mother."
- [168] When asked in cross-examination why he did not then say in the Letter that he was referring to MP being unloved, he replied: "because that's what we had talked about at the social services meeting." However, on the defendant's own evidence, they also talked about MP feeling suicidal and very importantly, feeling uncomfortable sitting on the defendant's lap. However, his testimony about the Letter gave no acknowledgement to this being an issue MP had raised in the past.
- [169] With respect to the following sentence "Because of what happened in the past you do have some hatred against me, fair enough" the defendant testified that the thing that "happened in the past" that he was referring to was: "Just the way the family was .she was a teenager she did not like me, for what reason I don't know." This explanation does not accord with "you have some hatred for me, fair enough." This written statement suggests he recognizes her feeling goes beyond feeling unloved to as far as "hatred," and that "fair enough" he understands the reason for this feeling. However, in testimony he said: "she did not like me, for what reason I don't know." In my view, this evidence is inconsistent with what he wrote in the Letter and the defendant's explanation on cross-examination is not credible.

[170] Further, in the Letter the defendant wrote:

I haven't looked through the hole and I haven't done anything since social services has been to see us.

And a few sentences later:

Because I know I haven't done anything to deserve this treatment again. Sure I did before but I got it together and thought I was doing pretty good by staying away from situations that may raise judgement.

And:

But can we not put this in the past and move forward

- [171] When asked on cross examination what he meant by "staying away from things that may raise judgment" he responded "I thought I was doing pretty good at bringing her back into the family" but he then went on in this answer to also say that by "staying away from situations that may raise judgment" he meant:

as I said earlier, I started to protect myself because of these of what [MP] was doing and saying. So and that's why I said I thought I was doing pretty good and I did nothing to deserve these mistreatment. So I thought I was pretty good at staying away from her and avoiding her because our communication had broken down and she did not want to deal with me and I was very limited to what I would do with her or say to her. I just created my space because I was starting to not trust her.

- [172] On his testimony, the thing the defendant was doing at the time of the Letter was staying away from MP. The statement in the Letter "can we not put this in the past" does not make sense if the past conduct he wanted to "put behind them" was a lack of contact with MP, but then at the time of the Letter he was also "doing pretty good" at "staying away from her," he having pulled himself away and avoiding her. His Letter suggests he had made a change in his behaviour, but overall his testimony described no change.
- [173] His testimony that when he wrote the Letter in 2003 or 2004 "I thought I was doing good by bringing her back into the family" is also incongruous with his testimony that nothing changed with his efforts to include MP more after the 2002 MCFD visit. He testified that MP locked herself in her room before the 2002 MCFD visit, and she continued to do so after that visit and would not talk to him. This is not consistent with his testimony that when he wrote the Letter he thought he was "doing good by bringing her back into the family" and that this is what he meant by "staying away from things that may raise judgment."
- [174] The defendant's testimony that the statement in the Letter "staying away from situations that may raise judgement" referred solely to him failing to include her is not credible. On a plain reading, the Letter is about conduct, not the absence of conduct. The Letter suggests he had, by the time he wrote, stopped doing something, not that he stopped doing nothing (failing to include her). His explanation to the contrary on cross-examination was not credible.
- [175] The defendant's insistence in testimony that he was not referring in the Letter to any specific past action(s) by him, but only inaction, is all the less credible given his testimony that at the 2002 MCFD visit the social worker raised MP's discomfort with how he would have MP sit on his lap. As set out above, the social worker's notes from August 28, 2002 state: "Discussed the sexual touching, made James aware that it made [MP] uncomfortable and that it was a form of sexual abuse. It needs to stop."
- [176] However, the defendant was steadfast in his cross-examination that the only conduct to which he was referring in the Letter was his failure to include MP in family life. He made no acknowledgement that at least the lap sitting (if not more) might be conduct to which he was referring in the Letter.

[177] The defendant's testimony about the Letter and the past events he was referring to in the Letter was not credible. His insistence that the only past conduct of his that he was referring to was neglect of MP is neither internally consistent with respect to the text of the Letter, nor externally consistent with the evidence from both the defendant and the social worker notes about what past conduct of his had been raised with him and with the family.

C. Lap sitting

[178] The defendant's minimizing of the lap sitting is also not credible. He testified that MP's discomfort with sitting on his lap was raised by the social worker at the 2002 MCFD visit, but he said that was not the "main thing" he got from the visit--the main thing he understood was that MP felt unloved.

[179] One would reasonably expect that hearing from a government social worker that his step-daughter felt uncomfortable with how he was getting her to sit on his lap would be a stark and surprising moment for the defendant. It is difficult to readily imagine an inference other than that MP experienced the lap sitting as sexualized. However, the defendant insisted in testimony that the lap sitting was not raised with him in 2002 as being inappropriate sexual touching. He also did not testify, however, as to what, then, he was told was the problem with the lap sitting, if he was not told it was inappropriate sexual touching.

[180] The defendant testified that MP had already stopped sitting on his lap by 2002, as she was 12 years old then. He could not recall at what age MP stopped sitting on his lap, but attested it was some time between the ages of eight and 10 years old. As noted, MP testified that her recollection was that the lap sitting had stopped by the time of her 10th birthday.

[181] The defendant did not attest to having told this to the social worker. Nor did he testify as to what the social worker said "had to stop" as of 2002 if he had already stopped having MP on his lap 2 to 4 years earlier. He denies being told anything had to stop.

[182] His testimony that he was not told in 2002 that MP had raised concerns about inappropriate sexual touching or sexual abuse is inconsistent with the MCFD social worker's August 28, 2002 notes, which state: "Discussed the sexual touching, made James aware that it made [MP] uncomfortable and that it was a form of sexual abuse. It needs to stop."

[183] While there is no unequivocal record of what the social worker was referring to as "sexual touching" in the August 28 notes, on the defendant's testimony it would (at least) be the lap sitting that he testified was raised by the social worker in the 2002 MCFD visit.

[184] This is consistent with the contemporaneous MCFD notes. In a separate entry dated August 27, 2002 the MCFD notes state: "Talk with James (Step Father), discussed the touching that was described in the intake 9holding [sic] ([MP] on his knee with his arms around her). SW explained that because of her age [MP] may feel uncomfortable and she thinks it is inappropriate."

- [185] I also do not find the defendant's explanation of how the lap sitting occurred to be credible. His testimony about the circumstances and the mechanics of the lap sitting is internally inconsistent. The defendant repeated twice in testimony that MP "always" sat sideways across his lap, with her legs together and perpendicular across both legs of his lap, and that he held his arms around her waist, his hands clasped at the side of her waist. In testimony he used his arms to show how he would wrap them around MP's waist as she sat sideways on his lap.
- [186] He also testified however--and contrary to MP's testimony that he would put her on his lap when no one else was there--that it would "always" have been her along with her brother S both sitting on his lap together. While not explored in evidence, the defendant provided no explanation for how both children could fit on his lap at once with MP sitting cross-ways across his lap with his arms around her waist. The defendant did not explain where S would be, or fit, on the defendant's lap. On the defendant's evidence this was going on "always" the same way, with both children on his lap at once and MP sitting sideways, until MP was at least eight years old, when S would have been about four years old. This configuration, and that it was always this configuration, is not credible.
- [187] The defendant's insistence in testimony that he never had MP on his lap alone over many years is not credible in itself. It is rendered even less credible when coupled with his testimony about the mechanics of how he would have MP sit sideways on his lap, as he said, "always."

D. When defendant learned of the allegations

- [188] The defendant's testimony that he was not told in 2002 that the concern with the lap sitting was that it was sexual touching or sexual abuse lacks credibility for the reasons I have set out above. This relates to further incongruities in the defendant's testimony about when he first learned that MP was accusing him of sexually abusing her during her childhood.
- [189] First, the defendant's evidence about what he learned from the 2002 MCFD visit changed over the course of testimony. On cross-examination he explicitly disagreed that he was investigated for abusing MP in 2002, stating that instead the "two things we got" from the 2002 MCFD visit were that MP was feeling unloved, and that she was uncomfortable with sitting on his lap. He later testified that they had also learned from the 2002 social worker visit that MP was feeling suicidal.
- [190] He testified that the allegations made and information received in the 2002 MCFD visit were "very minor" and confirmed in testimony that he meant "the uncomfortable sitting, the unloved, and the suicidal" were "very minor."

- [191] The defendant also testified that he did not learn MP was accusing him of sexual abuse until after she moved to Summerland in 2004. But he also testified that he was disgusted by the allegations he learned from the social services visit in 2002. "I felt disgusted by it. Because a sexual assault is not an easy thing to accept. Someone blaming you for it. It was very disruptive to me. I couldn't understand why."
- [192] So, the defendant testified that in 2002 he was disgusted by the allegation that he understood had been made about him, yet he also denied in testimony knowing in 2002 that MP had accused him of sexual misconduct and characterized the information he learned in 2002 as "very minor". These are incongruous.
- [193] He then later testified on cross-examination that the hole in MP's wall was a topic at the MCFD visit, specifying "the hole was a topic" but "not an allegation". I note though that the hole did not appear until the family had moved to a different home after the MCFD visit in 2002. The defendant was clear about this in testimony--that the issue of the hole arose two years after the 2002 MCFD visit, in the second house they had moved to after the 2002 MCFD visit. Accordingly, his testimony that the hole was a topic at the 2002 MCFD visit may have been a question of reliability (misremembering) or a confusion on the defendant's part about the question being asked. I do not place weight on this.
- [194] More important is the defendant's effort in testimony to distinguish the hole as being merely a "topic" rather than an "allegation." This is not credible, no matter when it arose. The evidence is that the only reason the hole was ever relevant to this family was because MP thought the defendant was watching her through it. That is an allegation, not a topic.
- [195] The defendant testified that he did not learn that MP made further allegations against him until after she moved to Summerland at which time his mother told him. He described the conversation with his mother:

Q Tell me the conversation that you recall between you and your mother when she said, I have -- it must have been really bad news. Like, your teenage daughter believes that you've been sexually abusing her your entire life. That must have been pretty shocking. I would think that would be a conversation you wouldn't forget.

A Oh, yeah. No. She talked to me about it, and I said, it's all false, Mom. And ...

Q Just that casual? No --

A Well, can't get into specifics, but yes. It's pretty much straight up and down. It's -- my mom was pretty blunt. She brought it right up, and I just said, it's all false, Mom.

Q So she asked you directly, did you ever touch this girl? Did you ever do these things?

A Yes. Because Mom was ready to take her to the police if [MP] wanted to.

Q Okay. So again, take me back to the phone call where your mother -- she calls you up. She says, James, I have terrible news. These are the -- [MP] is making these allegations against you. What do you remember that she told you [MP] had said? Like, what was the -- what were the nature of the allegations?

A She didn't say the nature. I don't know if Mom knew the actual details, but she just knew that [MP] was accusing me of sexual abuse.

Q Did you ask her for the details?

A Ask who?

Q Ask your mother for the details.

A I can't recall if I asked for the details or not.

Q And so it would be something you would be very curious about; correct? What did she say to you?

A Abuse is abuse, and it was -- again, I was very upset about it, so I didn't need to know what the -- the actual allegations were because it was all false.

[196] The defendant said that before MP left for Summerland he knew she had alleged discomfort with the lap sitting and that she suspected him of watching her through a hole in the wall. He testified that it was not until the phone call with his mother after MP had moved to Summerland, that he learned the "extent" of the further allegations made against him by MP, that MP alleged he had been sexually abusing her all her life. It strains credulity that defendant did not hear from or ask his mother what, specifically, MP had said he had done. Rather, he just told his mother it was "all false". It also strains credulity that the defendant cannot recall the first time he heard the specific details of the allegations being made by MP.

E. Defendant's response to police

[197] As set out above, the defendant's testimony at trial varied significantly from his statement on examinations for discovery about his interaction with the police. At discovery he said that after being told of the allegations by a police officer, and asked to come make a statement, he phoned the police officer back to say he would come with his lawyer, but the police officer said "don't worry about it and that was the extent." However, at trial the defendant testified that, on legal advice, he chose not to make a statement, however he could not recall if he phoned the officer back to say he would not do so, or simply did not go.

[198] These are incongruous statements about an important event reflect negatively on the defendant's credibility. This is all the more relevant since the defendant relies on this police investigation in his defence, pleading at paragraph 1 of Division 3 "Additional Facts":

The Ministry of Child and Family Development and the police have investigated the Plaintiff's claims of sexual assaults against the defendant and have concluded that no such conduct occurred, and the investigations were subsequently closed.

F. The holes in the walls

- [199] There are aspects of the evidence with respect to the hole in the wall through which MP suspected him of watching her that warrant particular scrutiny with respect to credibility.
- [200] Placement: In cross examination the defendant explained that two holes are required to see through a wall from one room to another, one in each of the drywall layers that lies on either side of the studs. On the evidence of both parties, two such holes existed in the family home, and they aligned such that some portion of MP's room was visible. The defendant testified that he never looked through the holes, but that MP's mother told him "only" MP's bedside table was visible. MP testified that a significant portion of her bedroom was visible.
- [201] I find that if not deliberately placed, it is a remarkable coincidence that two holes in separate rooms should line up so that a line of sight should be available from one room to the next. Nevertheless, I accept that such a coincidence is possible.
- [202] Drywall dust: MP testified that she recalled the family had had the carpets cleaned before they moved in to this house. MP further testified that she subsequently found drywall dust on the floor below the hole in her closet. The inference she drew, and asks the Court to draw, is that the hole was drilled after the family moved in to the home. The defendant testified that he only knew about the drywall dust from MP's testimony, but he did confirm that the carpets had been cleaned before the family moved in to that home.
- [203] Defendant never looked through the holes: The defendant testified that one hole was in the ensuite bathroom of his and MP's mother's room, and the other was in MP's closet. While the defendant was able to give detailed testimony about the sizes and placements of the two holes, testifying that the bathroom hole was the size of a drywall anchor and the closet hole was the size of a missed drill hole, he testified that he never looked through the holes.
- [204] The defendant testified that the hole in the bathroom arose because he was painting the bathroom and pushed in a pre-existing drywall anchor into the exterior of the wall. He then either "ran out of drywall mud or it dried up I can't remember" so the hole stayed open. He did not attest to when or if he ever patched it up or completed the intended project of painting the bathroom. He testified that the hole in the bedroom was next to a closet organizer that was installed before the family moved in. He said the hole looked like someone had missed when they were drilling to install the closet organizer.

- [205] As noted, the defendant was express in his testimony that he never looked through the holes, and that his knowledge of what could be seen into MP's bedroom came only from MP's mother, who had looked and told him she could only see MP's bedside table through the holes.
- [206] While under cross-examination about the Letter, in which he stated that he never looked through the hole, the defendant said "it was impossible to peep through the hole." He explained the layout of the room, the closet, the ensuite, the location of the hole in the bathroom and closet (three feet from the wall) and concluded "so it would be impossible for it to be a peephole at all." This is inconsistent with his prior statement in the Letter and his evidence that he understood from MP's mother that one could see into MP's room, at least to the extent of seeing her bedside table.
- [207] The defendant gave no evidence about the plaintiff's testimony that she repeatedly found the tape and paper with which she covered the hole removed, or that he said to her about the hole "you found it, hey?"
- [208] I find it improbable that the defendant made the effort to look at the two holes such that he was able to describe both of their respective locations and size precisely in testimony, including the hole in MP's closet, but that he did not look through the holes at any time, including after the allegations were made, at least to see what was visible in MP's room, given the serious nature of the allegation.
- [209] I do not find the defendant's testimony that he never looked through the holes credible. In saying this, I am not finding at this point in the analysis that he looked through them improperly or before the allegations were made, but I do not find it credible that even if he had not looked before the allegation was made, he did not look after it was. This weighs against the defendant's credibility.

G. Nights and MP's mother

- [210] I turn now to memories MP recalled from earlier in her childhood and the defendant's related testimony.
- [211] The defendant testified that he did recall MP wetting the bed up until about the age of eight, when they lived in the first rental house in Surrey. He could not say how often it happened. He said that MP's mother took care of it.
- [212] There was a period of time after the family moved from New Westminster to Chilliwack in September 1993 that MP's mother worked nights at a bank in Vancouver. The defendant's testimony was that this continued to about November 1993. He testified that MP's mother would take MP to her sister's on Monday nights and MP would stay there and come home Thursday mornings. Since D was going to school this would allow MP's mother to sleep during the day. During that period the defendant was home alone at night with D Monday, Tuesday and Wednesday nights, and with D and MP Thursday and Friday nights. MP's mother was home Saturday and Sunday nights.

- [213] The defendant testified MP would be in bed around 7:30 before MP's mother left for work at 8:00 pm. MP's mother would get home around 4:00 am, at which time she would check on MP.
- [214] As noted, this was a period during which both MP and the defendant testified MP was wetting the bed regularly. During this period, on the two nights a week the defendant was home alone with MP and D, he testified that he slept through the night and never checked on MP, who was three years old at the time. He testified he never poked his head in or checked just to see how she was doing. "I had no reason to go into [MP's] room" he said. He said he was not interacting with MP the nights he was home alone with her and her brother.
- [215] The defendant testified that MP was a child that would go to sleep right away, and that she slept through the night. "If she was getting up to go to the bathroom I wouldn't know, the bathroom was beside her room." Again, this was with reference to the period MP was three years old.
- [216] It stretches credulity that two nights a week for three months the defendant never once had occasion or felt compelled to open the door of a three-year old's bedroom to check on her throughout the night. This is further so because the defendant testified that D, who was seven at that time, was also wetting his bed in the same bedroom.
- [217] I do not find the defendant's testimony that throughout this period he never went into MP's bedroom at night to be credible.

H. Toilet training and bathing

- [218] The only evidence that the defendant gave with respect to the allegations MP made about him touching her genitals inappropriately during toilet training and bathing was that he never did either of these activities with MP.
- [219] On balance I find it unlikely that the defendant never once assisted with either of these activities with MP, as they lived in the same home from the time she was 2 years and 10 months old.

MP's Memories

- [220] The plaintiff was challenged on cross-examination to admit that her memories of abuse are uncertain, and that she has used her therapy sessions to try to remember instances of abuse. She denied this unequivocally. She attested that she has always known and remembered she was abused by the defendant, and rather than trying to remember, she has tried to forget the instances of abuse. She attested that her only uncertainty is as to specific dates and timelines, but she has no doubt of her memories of regular abuse by the defendant.

[221] In argument, counsel for the defendant says that the allegations made by MP "are improbable, implausible and do not accord with common sense or practical reality", and as I have noted, goes on to suggest:

A more consistent and plausible explanation is that due to the multiple episodes of trauma the plaintiff experienced, her memory has become distorted and/or amplified such that the trier of fact cannot determine the plaintiff's testimony to be reliable and/or credible.

[222] As I have said, counsel for the defendant did not press the argument that MP is lying (that is, not credible). Rather, the defendant's argument is that MP's memories are unreliable, or false, because of her psychological state due to other traumas and adverse events in her life.

[223] I heard no basis in the plaintiff's own testimony upon which to conclude that the memories she was describing were false, or of events that simply did not occur. MP's testimony conveyed detailed and specific memories of the defendant's touching of and sexual conduct toward her. The only evidentiary basis that compels considering the argument that her memories are false is the defendant's denial under oath of all the events to which MP attested.

[224] No expert evidence tendered at trial supports the defendant's false memory argument. The defendant's psychiatry expert Dr. Abi Dahi did not opine that MP's memories were false or provide any psychiatric explanation for MP's memories being potentially false. This was not surprising, as Dr. Dahi did not assess or meet with MP.

[225] As I will discuss below, Dr. Dahi is of the view that the plaintiff's expert Dr. Shao-Hua Lu should have explored MP's pre-verbal life events in his assessment of her. However, this is not because Dr. Dahi is of the view that such events may have caused MP to have false memories of abuse. Rather, he states in his report "[t]he above information is highly important in assessing the impact of claimed sexual traumas in [MP]'s life" [emphasis added]. Dr. Dahi's opinion goes to causation of injury and loss, not liability.

[226] In cross-examination by counsel for the defendant, Dr. Lu was asked about memory distortion and amplification:

Q Okay. And in terms of -- there is a phenomenon in the psychiatric literature that when it comes to, for example, events, whether they're traumatic or nontraumatic events, and we're trying to recall, there is a phenomena known as memory distortion that can occur?

A I think that occurs to everybody. You know, whether or not it's traumatic or nontraumatic. Even celebratory events can be distorted. Oh, I had such a great time. Well, no, you were -- you were too drunk to remember. I mean, you know, people -- people have memory distortions at different points, yes.

Q Yes. And -- and that, basically, what can actually occur sometimes is we don't accurately remember certain events, and there can actually be a phenomenon known as memory amplification that can occur. Are you aware of the phrase "memory amplification"?

A That can be something that can occur. I'm not too sure how you apply to a specific. I'm answering in a general sense.

Q Yeah. In other words, when I talk about memory amplification, Doctor, I'm referring to a phenomena where, basically, people will amplify their memories of what occurred, and what that means is sometimes they're remembering -- remembering episodes that never took place; correct?

A The -- the -- that's different. What you're saying is they're making things up to fill in the gap. That's a -- that's a different -- memory amplification would be, you know, my fish was this big, but it's this big, but the fish exists. What you're describing is the fish never exists. That's different.

Q But in terms of memory amplification can incur -- can occur where somebody's trying to recall something and has a recollection that there were multiple incidents that occurred over a prolonged period of time, but in actual fact, the number of occurrences of the trauma or the frequency of the occurrences may be an error?

A I think that's where the court comes in with multiple witness statements. I am not in any position to answer that particular element. What I can say is in individuals with trauma, because of the way trauma is laid down, those memories -- because of the increasing cortisol and its specifics, they can be quite vivid many, many years later and with high level of clarity. Now, it may not be the specifics to elements. So, for example, people with -- may remember as a red car instead of a green car. But the actual motor vehicle accident itself and this traumatic event can be quite accurate. So in terms of the distortion, there might be elements of distortion of the specifics, but within the actual elements of the trauma itself, can be highly reliable. Now, when it comes to -- you know, do one event become multiple events, I see no evidence in -- in my -- in evaluation of MP to suggest that plays a role in my evaluation and in her description.

Q Okay. But leaving aside MP, you would agree as a psychiatrist, Doctor, that memory distortion and/or amplification can certainly occur when somebody is remembering or recalling traumatic events?

A Yes.

Q Okay. And in terms of -- fair to say, Doctor, that in terms of the psychiatric literature, if somebody says, I, as a 2-year-old, witnessed certain events, the majority of psychiatrists, if not all of the psychiatrists, will say memory at 2 years or younger is easily distorted, and one cannot put a lot of weight on what a 2-year-old says happened?

A The more formal sort of retrieval memory process tend to start around age 4 to 5.

Q Okay. So --

A An individual --

Q Okay. Sorry.

A -- before then can have some memory recollection if those events are repeated. So there is an element of what's called consolidation. If something happened repeated -- one of the things about 2-year-old to 5-year-old is their life is just chaotic; right? Things aren't repeated the same way most of the time because a toddler -- their life is completely chaotic. It's random. But if certain events are repeated and occur over that periods of time, what it does is it can lead to what's called memory consolidation, so those memory -- so there might be specific elements from that -- that age that can become consolidated. Generally speaking, do people remember things before the age of 4 and 5 accurately? Probably not. But if there is a repeated process, they might be. So that's a little bit outside my area of expertise.

Q Sure.

A And that's the best evidence I can give.

[Emphasis added.]

[227] Dr. Lu was careful in evidence to say that there is conflicting evidence in the medical literature about how traumatic events may be consolidated in memory in early childhood.

[228] I found Dr. Lu's evidence and explanations in response to questions asked on behalf of the defendant regarding memory amplification, distortion and remembering events that did not occur to be helpful. Dr. Dahi gave no evidence that contradicted Dr. Lu's evidence on these points.

[229] Far from appearing unreliable, MP's memories of abuse were characterized by her clear memories of specific details associated with the events. There was no basis in the evidence other than the defendant's testimony to find that MP's memories from her childhood are false memories of events that did not occur. As I will explain below, I found the defendant's testimony to be not credible on a sufficient number of points that I am compelled to find that he, unlike MP, was not a credible witness.

Recent Fabrication

[230] The defendant also advances the argument that only because of traumatic events that occurred after MP's childhood, has she recently and erroneously determined that the defendant abused her as a child.

[231] This, however, is inconsistent with MP's attempts to seek help regarding the sexual abuse when she was a child and teenager before these subsequent traumatic events occurred.

a) MP's evidence was she called the Kids Help Phone around the time she turned 12. This was not shaken on cross-examination.

- b) There is no question that in 2002 MCFD was aware of "sexual touching" of MP by the defendant. This was at least the lap sitting, based upon the defendant's testimony and the MCFD file notes.
 - c) There is no question that when MP was 14 she told the defendant's mother that some form of abuse was happening. The defendant's mother confirmed this in testimony. While it is not clear what, beyond the peephole, MP told the defendant's mother about, this belies the argument that the abuse is a recent fabrication made in adulthood.
 - d) Also, when she was 14, MP told Ms. Anderson that she had been abused by the defendant. Ms. Anderson confirmed this in testimony.
 - e) When MP was 16 she told Mr. Musgrove, the school guidance counsellor, that she had been abused by the defendant. Mr. Musgrove confirmed this in testimony.
 - f) When she was 16 she told the police that she had been abused by the defendant. The defendant confirmed that he was called by the police at that time and told that MP had accused him of sexually abusing her.
- [232] All of these instances of MP raising the allegations of sexual abuse were made when she was still a child and then a teenager. All precede the later traumas and adverse events the defendant points to.

Frequency

- [233] I have considered the plaintiff's testimony that the abuse happened daily. With respect to the nighttime touching she testified it happened: "Every night. There may have been some nights he didn't come but I remember it being a regular part of life." She also attested that she recalls abuse being "woven into daily life" and "every day something would happen."
- [234] The plaintiff's testimony was, not surprisingly, not a day-by-day recounting of abuse over 12 years. Daily abuse may be established by evidence of particular events and patterns of conduct. I need not find that the abuse was daily to find that the defendant committed the acts attested to by MP.
- [235] However, the plaintiff's testimony that the abuse happened "every night" or was part of "daily life" does give rise to a consideration regarding credibility and reliability.
- [236] I am satisfied with the plaintiff's credibility on this point. There was no indication she is seeking to deceive the Court on this. I am persuaded that it is the plaintiff's sincere belief and understanding that abuse was "woven into daily life" and that "something happened daily". Moreover, as I will explain below, I am persuaded that the particular events MP described in testimony did happen. I am further persuaded that some of these events happened more than once, and some regularly.

- [237] MP's statement that "something" happened daily may be attributed to the range of activities that sexualized her as a child: viewing pornography; toe sucking; waking to find the defendant with his hand down her pants; being picked up and placed on the defendant's lap and rubbed against his erection; seeing the defendant masturbate near her; hearing sexualized comments by the defendant about her body.
- [238] Moreover, MP's feeling of being unsafe and vulnerable to the defendant's whims or compulsions would likely have been felt constantly by MP.
- [239] Even if it is not literally true that abuse happened daily, it is a reasonable perception of MP's experience. I do not find that MP's testimony on this point impugns her credibility or reliability on the fundamental point required to establish the defendant's liability: that he committed the acts described in MP's testimony.

Beating in Summerland

- [240] One aspect of MP's testimony I am unable to resolve is her evidence that she was punched and kicked by the defendant's mother and sister when she was in Summerland. The defendant's mother denies this happened.
- [241] MP did not attest to this in direct examination. It was raised in cross examination by counsel for the defendant:

Q Now, you testified, in terms of Summerland, that you stayed there for a number of months, and then you attended high school, or part of your high school, in Summerland?

A Correct.

Q Now, did you advise the ministry that you had been attacked by Geraldine Smith, the defendant's mother?

A No, because they attacked me after I went to the ministry.

Q So when you say "they attacked me," who attacked you?

A James's mom and sister.

Q So when you say that they attacked you, are you saying that this was a physical assault on your person?

A Yes.

Q Are you saying that there was punching and kicking?

A Yes.

Q And basically, they pummelled you?

A What does that mean?

Q Okay. They dog piled you and started attacking you all at once?

A Correct.

Q Two of them together. One of them was punching; one of them was kicking?

A No, they were -- I don't know -- both punching and kicking erratically.

Q How long did this beating or pummelling go on for?

A It felt like a very long time. I was on my bed, and they came onto my bed.

Q So at this time you're in a separate bedroom?

A Correct.

Q And they just unilaterally started beating you?

A Correct.

Q No reason whatsoever?

A How dare you say this about our son. How dare you say this about my brother.

Q And this was after you were interviewed by the social worker?

A Correct.

Q They called you a liar?

A They called me a liar, and they made fun of me for wanting to go into foster care, like it would be better than what I had there.

Q And again, you never -- after this beating -- and do you remember what month it occurred?

A No.

[242] In closing argument, counsel for the defendant appears to raise this testimony as undermining MP's credibility generally, including with respect to her allegations against the defendant. He states in his written argument:

However, when one carefully considers the totality of the evidence, it is respectfully submitted that from a common sense, or life experience type of situation, the allegations made by the client are improbable, implausible and do not accord with common sense or practical reality. Further, the allegations of being sexually touched multiple occasions over multiple years are internally and externally inconsistent. The plaintiff claims that Geraldine Smith and Caroline physically assaulted and beat her after she went to the Ministry of Children and Families in Summerland, BC. [MP]'s grandmother [sic] denies this.

[243] I heard only brief testimony on the alleged beating, and there is insufficient evidence upon which to evaluate the credibility of either Ms. Smith or MP's contradicting statements on this point.

- [244] This is a collateral fact going only to credibility. It is not determinative of an issue arising in the pleadings, and is not relevant to any matter that must be proved for the determination of the case. It goes only to MP's credibility as a witness, as well as Ms. Smith's.
- [245] I do consider it relevant that this alleged event occurred after the years of events involving the defendant had already ended, and after MP had already tried to disclose the defendant's sexual abuse to third parties, including to the Kids Help Phone and the MCFD, to her brother D, to Ms. Smith herself when MP first arrived in Summerland, and to Ms. Anderson in Summerland.
- [246] Even if MP is misremembering an event that she now describes as a beating from the defendant's mother and sister (which I am not finding), I do not on balance consider that to affect her credibility with respect to allegations of abuse that she had already made to third parties before the alleged beating occurred.
- [247] However, this gives rise to a further issue. The Court did not hear specific evidence on what exactly MP reported to any third party at any of these stages, except the lap sitting, which is reflected in the August 2002 MCFD notes as a topic discussed by the social worker with the defendant. I did not hear direct evidence of specifically what MP reported to the Kids Help Phone; MP testified that she expressly did not say anything about abuse when she was being interviewed by the social worker in her living room in 2002; Ms. Anderson testified that she knew from MP that MP had moved out of her house because she did not feel safe or comfortable, did not have privacy, and felt she was being watched through a hole in the wall by the defendant.
- [248] Even after the alleged beating, MP reported the alleged abuse to Mr. Musgrove and the police. Mr. Musgrove testified that he recalled MP told him about a hole in the wall, but that she did not go into too much detail about the abuse she was disclosing. The record of the report made to the police was not in evidence.
- [249] It remains possible that the memories of abuse reported in testimony at trial are not the same as what was reported as abuse when MP was 12-16 years old. The danger is that if MP could misremember a beating from the defendant's mother and sister (which I am not finding she has), she could also misremember events involving the defendant.
- [250] However, while I recognize MP "could" misremember events involving the defendant, I have independently assessed MP's evidence regarding events involving the defendant and, as I will explain further, I have found that on balance MP's evidence is more credible than the defendant's. Her evidence is detailed and internally consistent, whereas the defendant's testimony demonstrates more internal and external inconsistencies.
- [251] Accordingly, it is not necessary to make a finding about the beating, as it is a collateral fact that does not affect my assessment of MP's credibility on the material issues raised by the pleadings.

Determination on Events

- [252] I found MP's evidence about the alleged events and actions by the defendant to be internally and externally consistent to the extent one could reasonably expect given her young age during the relevant time period, as well as the approximately 12-year length of the period about which she was testifying. By contrast, as I have set out above, I found several inconsistencies in the defendant's evidence on key points. Given these inconsistencies, I am unable to find the defendant was a credible witness.
- [253] Having made this determination of credibility, I will add the following observation about the defendant's testimony. Overall, the tendency of the defendant's evidence was toward dismissiveness of MP, as though she were an outsider to the family or he did not feel serious concern or responsibility for her. He said he never assisted her on the toilet or bathed her, that it was never he who checked on her when she wet the bed. He did not ever check on her in the night when she was three and he was the only adult home and in charge, and he would not even know if she got up to go to the bathroom in the night during that time. This was in support of his testimony that he never went into MP's bedroom when she was little. He emphasized that she was not naturally included as a member of the family, and that only through deliberate effort such as going for lunch and asking her about school, did he make active effort to include her after the MCFD visit. He said she "always had a roller coaster with anxiety," suggesting that's just the way she was. He described the concerns he learned about from the 2002 MCFD visit, that MP felt unloved, suicidal and uncomfortable sitting on his lap, as "very minor." He conveyed that he was not involved in MP's mother's decision to send MP to live with his parents, and that when his mother asked him about the allegations of sexual abuse, he simply said they were "all false" without asking or knowing just what MP was alleging. This was despite the fact that he would have had cause at that time to inquire whether anything beyond the lap sitting and peephole were being alleged by MP. Even the defendant's contradictory testimony between examinations for discovery and trial about why he was not interviewed by the police suggests a dismissiveness and an evasiveness. There is a significant difference between a person named in a criminal allegation refusing to speak to police based upon their right to silence, and being told by the police "don't worry about it."
- [254] MP described specific events with details--such as the smell of the defendant's foot, the scrape of his toenail on her mouth, the snap of her pyjama pants, the specific locations within the family's various homes of where events occurred, the time of day of the masturbation event, and things the defendant said to her during, or just after, alleged events. I found MP's testimony to be credible and reliable, and I am persuaded that the events MP described involving the defendant happened.
- [255] On the evidence I find:
- a) MP was made to suck the defendant's toe more than once when she was around the age of three years old.

- b) The defendant touched MP's genitals unnecessarily for a sexual purpose during toilet training and bathing of MP.
- c) The defendant touched MP's vagina on a number of occasions at night, including at least one instance of digital penetration, until MP was at least eight years old.
- d) The defendant placed MP on his lap to stimulate his own erection, and would rub her genitals over her clothes. This happened more than once, and the conduct continued until MP was at least eight but possibly 10 years old.
- e) The defendant kissed MP on the face including the lips, and at least once insisted she not wipe off his saliva, kissing her again after she did. This continued after MP was 12 years old.
- f) The defendant was at least careless about putting MP in a position where she felt compelled to view pornography, and more likely than not, he compelled her to view pornography when she was a child. This continued until MP was at least 12 years old.
- g) On at least one occasion, when MP was about 13 years old, the defendant masturbated while sitting on or beside MP's feet as she napped.
- h) On one occasion the defendant placed MP's face into the crotch over top of his pants, covering her with a blanket, while they were in a car.
- i) The defendant looked through holes that permitted a line of sight into MP's bedroom. This was about the time MP was 13 or 14 years old. It is not possible to determine on the evidence whether the defendant ever viewed or sought to view MP through these holes.

Sexual Assault and Battery

- [256] The plaintiff seeks findings of liability against the defendant both for sexual battery, and sexual assault. She seeks to attach liability not just for the intentional application of force without consent to MP by the defendant, which is the tort of battery (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 1992 CanLII 65 at 246), but also for intentionally causing MP the apprehension of imminent contact with her person, thereby interfering with her right to psychological integrity and security of the person, which is the tort of assault: *Allen M. Linden, Bruce Feldthusen, Margaret Isabel Hall, Erik S. Knutsen & Hilary A. N. Young*, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis Canada, 2022) at 53.
- [257] The plaintiff also seeks a finding of liability against the defendant for the intentional infliction of mental suffering. Establishing this requires three elements: a) flagrant or outrageous conduct that is b) calculated to produce harm, and c) results in a visible and provable illness: see *Young v. Borzoni et al*, 2007 BCCA 16, summarizing at para. 23 the framework set out by Justice Wilson (dissenting) in *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 at 127.

- [258] In response to a question from the Court, counsel for the plaintiff agreed in closing submissions that if the defendant demonstrated only indifference to the impact of his actions on MP, the tort of intentional infliction of mental suffering is not established, as the required calculation is not established.
- [259] In my view there was not sufficient evidence at trial to establish that the defendant's attitude toward the consequences of his actions for MP went beyond indifference. While this may have consequences in damages for the torts of sexual assault and battery, it does not lead to liability for intentional infliction of mental suffering. Accordingly, I dismiss the claim for intentional infliction of mental suffering, and turn the analysis to the first two torts alleged.
- [260] By contrast, the defendant is not relieved of liability for battery by any indifference to the consequences of his actions upon MP. "A battery can be committed even though no harm or insult is intended by the contact": Canadian Tort Law, at 48.
- [261] Sexual battery is a form of battery, the traditional test for which is relatively straightforward: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24 at para. 96. The law condemns both the direct physical contact that interferes with the bodily security of an individual (battery), as well as the causation of fear and apprehension that one will be physically interfered with (assault). The relationship between assault and battery is interwoven. As the authors of Canadian Tort Law state at 54: "Assault should be distinguished from battery, although the two are sometimes blurred together and called 'assault'. This does not matter very much where both assault and battery are committed in rapid succession."
- [262] I have outlined above the events that I have found occurred. Those involving direct contact by the defendant upon the plaintiff are sexual batteries.
- [263] In this case the apprehension that her body would be interfered was consistently present for MP during her childhood. She testified that "the abuse was woven into daily life." Her apprehension stemmed from her earliest memories of batteries--being told to suck the defendant's toe, being touched on her genitals beyond the necessary during toilet training and bath time, having her genitals touched at night, being made to sit on the defendant's lap for his own sexual stimulation. The apprehension was exacerbated by the patterns she recognized, including when he would pick her up to put her on his lap, or him coming into her room at night.
- [264] The tort of assault requires an imminence to the interference apprehended. This is unquestioningly made out in certain instances in this case, such as the lap sitting and when the defendant was at MP's bedside.
- [265] I need not determine whether, additionally, the consistent apprehension under which MP spent her childhood meets the "imminence" criteria for the tort of assault even when the anticipated act of interference did not immediately follow. It is apparent on the evidence

that this ever-present anticipation of interference with her bodily integrity has caused MP harm. Fundamentally it is grounded in sexual batteries she suffered repeatedly, as well as assaults she suffered repeatedly, where she quite rightly anticipated the imminent interference with her body that then followed. The nighttime touching is a salient example of both of these, as is the toe sucking, and the lap sitting.

[266] There is also evidence that MP experienced violation of her personal integrity at times when she was not expecting it. For example, when she awoke from an after-school nap to find the defendant sitting at her feet on the couch masturbating, or the times MP was compelled to view pornography with the defendant. Given the number of clear batteries and assaults established on the evidence, I need not determine whether instances of sexualized conduct without contact such as these amount to tortious sexual assaults. I note however that the criminal law of sexual assault establishes an analytical framework by which such instances may be found to be sexual assaults, despite the lack of direct physical contact between the defendant and the plaintiff: see e.g. *R. v. P.M.*, 2024 ONCJ 421 at paras. 62-68, and see *Norberg* at 251 where the Court said: "Although s. 265 [of the Criminal Code] is a statutory provision, the principles underlying it are not irrelevant to an analysis of assault at common law since the offence was derived from the common law crimes of assault and battery."

[267] In this case there was no evidence, and no substantive argument, put forth by the defendant with respect to lack of intent. This is because the theory of the defendant's case was that the alleged acts did not occur. The only variation on this involved the lap sitting, which the defendant testified did occur, however, he denied that ever during the lap sitting did he have an erection, nor touch MP's genitals over her clothes, nor try to sexually stimulate himself. Accordingly, this too was a denial of the offensive conduct, rather than of intent. As Justice Iacobucci explained in *Non-Marine Underwriters*:

98 Intentional battery generally requires only the intent to cause the physical consequences, namely, an offensive touching. *Klar*, *supra*, makes this point at p. 30:

Technically, however, the concept of "intention" in the intentional torts does not require defendants to know that their acts will result in harm to the plaintiffs. Defendants must know only that their acts will result in certain consequences. It is not necessary for defendants to realize that these intended consequences are in fact an infringement of the legal rights of others. Intention, in other words, focusses on physical consequences.

To similar effect is *Linden*, *supra*, at p. 33: "Conduct is intentional if the actor desires to produce the consequences that follow from an act."

99 Moreover, if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen.

[268] As I have said, the defendant did not pursue the argument that he lacked the requisite intent for the tort of battery. His position was instead that the alleged conduct simply did not happen.

[269] Based on my findings of fact with respect to the events that occurred which are outlined at para. 270, I am satisfied on the evidence that the defendant committed sexual assault and battery against MP over the course of a number of years, from the time MP was about 3 years old to when she was about 12 years old.

Causation of Injury and Loss

[270] MP claims that as a result of the defendant's sexual abuse against her she has suffered psychological damage, including PTSD and periods of depression and anxiety. This has caused her to suffer for many years, and more recently, has resulted in her being unable to continue working, as she has become increasingly overwhelmed by her symptoms.

[271] I have found the defendant liable for the tortious acts alleged. The analysis turns then to his alternative arguments. He alleges that MP has suffered no injury or loss, or in the further alternative, that he did not cause any injury or loss claimed by MP. He puts MP to strict proof of any injury and loss.

[272] The defendant's argument at trial with respect to loss and injury suffered by the plaintiff was two-fold. First, he says that MP's psychological injuries are not as severe as she attests because she was able, through much of the period during which she says she was suffering, to carry on her life at a successful and productive level. Second, that the defendant is not the cause of her psychological injuries, but rather, other traumas MP has suffered are.

Legal Principles

[273] As I have determined that the defendant did commit the tortious acts alleged by the plaintiff, the defendant is therefore liable in damages for loss or injury caused by these acts. The law guides the analysis this way:

- a) The defendant must put the plaintiff back in the position she would have been in had the defendant's tortious conduct not occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at para. 32.
- b) The defendant need not compensate the plaintiff for any loss not caused by his tortious act: *Athey* at para. 35.
- c) The burden is on the plaintiff to establish, on a balance of probabilities, that the defendant's tortious act caused both an injury (such as depression or PTSD) and a resulting loss (such as pain and suffering (non-pecuniary loss), or wage loss).

- d) Causation is established where the defendant's tortious act materially contributed to the injury beyond the de minimus range: *Athey* at para. 13-17. This is the assessment to be applied when the simpler "but for" test is inappropriate to the facts, such as in this case, as I will explain.
- e) Once the plaintiff establishes that the defendant's tortious act is a cause of her injuries, the defendant is liable for the full extent of the loss, even if there are other causes of the loss. It is sufficient that the defendant was a cause of the injury and loss: *Athey* at para. 19.
- f) Once the Court determines that, on a balance of probabilities on the available evidence, the defendant committed the tortious act and the tortious act caused the plaintiff's injury, those past events are treated as certainties: *Athey* at para. 28.
- g) By contrast, hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events, need not be proven on a balance of probabilities. Instead, if a hypothetical or future event is, based upon the evidence, a real and substantial possibility, it will be given weight according to its relative likelihood. This is particularly relevant in the assessment of damages. The classic illustration of this is: if the plaintiff's injuries have a moderate chance of worsening, the assessment of damages may be proportionately increased in order to reflect that risk: *Athey* at para. 27.

Facts

Psychiatry Experts

- [274] I will begin by addressing the expert psychiatric evidence in this case, as it is important at the outset to consider what expert evidence was, and was not, before the Court. As I have said, both parties tendered reports from psychiatrists who were qualified at trial to provide expert opinion evidence in the case.
- [275] Dr. Shao-Hua Lu was retained by the plaintiff. Dr. Lu assessed MP June 24, 2024 and provided his opinion report on June 28, 2024. He determined that MP has a combination of PTSD, major depression and generalized anxiety disorders with agoraphobic features.
- [276] Dr. Lu states in his report that MP suffers from "a trio of trauma related symptoms, depression, and anxiety. She clearly re-experienced her abuse in the forms of fearful physical or psychological reactions to the reminders of trauma. There is intense mental or actual effort to avoid the thoughts, activities, and reminders associated with the trauma." Dr. Lu goes on to state: "Her overlapping psychiatric disorders and symptoms are directly related to the result of her childhood sexual abuse."
- [277] Retained by the defendant, Dr. Abi Dahi wrote a report responding to Dr. Lu's report. Dr. Dahi did not assess or meet with MP. Dr. Dahi confirmed in cross-examination that he does not disagree with anything stated in Dr. Lu's report. He would, however, have asked further questions of MP beyond what Dr. Lu asked in his assessment of her.

[278] Cross-examination of both experts was vigorous, and revealed a distinction between the two experts' evidence that counsel for both parties spent some time on in closing arguments. However, in my view any difference between the two opinions was more apparent than real. As I have said, Dr. Dahi confirmed in cross-examination that he does not disagree with anything stated in Dr. Lu's report. The distinction between the two is that Dr. Dahi would have spent time in the assessment of MP asking questions about MP's pre-conscious and pre-verbal experiences--such as about when MP was in utero, whether MP's mother breastfed her, and what violence MP may have seen between her mother and biological father before he left when she was about two years old. These questions would have been in addition to the subject matters that Dr. Lu explored in his assessment.

[279] Dr. Dahi writes in his report:

Overall in his report Dr. Lu tends to blame [MP]'s sexual trauma as the main source of her adult psychological and functional struggles while her foundational (preverbal) and her traumas were ignored. Scientifically the most destructive abuse in human life is neglect. The report confirms severe and tragic neglect toward MP by her mother and her biological father.

[280] I note that MP's biological father left the home when she was about two years old. She has had no meaningful relationship with him since then.

[281] Dr. Dahi's report, which was based only upon his reading of Dr. Lu's report, was based on facts and assumptions that do not accord entirely with the evidence at trial. For example, Dr. Dahi seems to have understood that MP was beaten by her mother and sister. MP does not have a sister, and there was no evidence that her mother ever beat her.

[282] Dr. Dahi also seems to attribute "neglect" to MP's mother because she did not do anything about the sexual abuse. This, of course, assumes rather than refutes that the abuse was occurring, but I have not relied on this assumption in my analysis. As I have explained, on the evidence before me I am unable to place any weight on, or draw any inference from, the lack of evidence of MP's mother's intervention in these events.

[283] Of fundamental importance, both experts agreed that the childhood sexual abuse described by MP to Dr. Lu, and which I have found did occur, is sufficient to cause the mental health symptoms MP suffers.

[284] Dr. Lu testified that his choice of questions to MP was based upon his expertise and experience as a psychiatrist with a background in trauma, as well as his assessment of the information he received from MP over the course of the clinical assessment. He did not choose to explore the pre-conscious and pre-verbal experiences of MP, as he was not of the view this was necessary in light of the other information he received from MP.

[285] In this case, in the circumstances of MP, I agree that this is a reasonable decision by Dr. Lu. Moreover, in the circumstances of this case, there is no reasonable likelihood that the legal result would change even if the additional exploratory questions proposed by Dr. Dahi were asked of MP during her psychiatric assessment. Both psychiatrists agree that PTSD and

major depressive disorder are appropriate diagnoses of MP's symptoms. Both agree that childhood sexual abuse is a sufficient trauma to cause these symptoms. Dr. Dahi confirmed in cross examination that he agrees with Dr. Lu that childhood sexual abuse is sufficient on its own to cause these symptoms, even if other sources of trauma may be present in MP's history.

- [286] Even if at two and a half years old, when the defendant came into her life, MP may have had some pre-disposition (because of some pre-conscious or pre-verbal event she had experienced) to experiencing the mental health symptoms that she went on to experience, she then went on to face a childhood of sexual abuse by the defendant that both psychiatrists agree would be sufficient in itself to cause the psychological injuries MP has suffered. Neither psychiatrist opined that MP's symptoms were "unexpectedly severe" relative to the years of sexual abuse she suffered, such that a pre-existing condition was a potentially contributing cause that needed to be explored, as described in Athey at paras. 34 and 35.
- [287] Moreover, Dr. Lu did explore other adverse events in MP's life, and accounted for them in his assessment and diagnosis of MP. These included: the deaths of her brothers, her marriage, the sexual assault in Uganda and her admission to hospital for endocarditis. He was nevertheless of the view that: "Her overlapping psychiatric disorders and symptoms are directly related to the result of her childhood sexual abuse."
- [288] I accept this opinion. As I set out below, it accords with the evidence of MP's experiences, including her experiences of, and responses to, other adverse events in her life.
- [289] This does not, however, mean that the symptoms MP experiences now are solely caused by childhood sexual abuse. Nor is that Dr. Lu's opinion. He states: "The other traumatic events that MP had suffered while unrelated to her childhood abuse, would have compounded her overall distress."
- [290] This does not detract from finding that the abuse perpetrated by the defendant against MP during her childhood is a material cause beyond de minimus of MP's psychiatric injuries. Given the other adverse events in MP's life, and Dr. Lu's opinion on this point, in this case the appropriate causation analysis is not the "but for" test, but the material contribution test (see Athey at paras. 13-17).
- [291] Having considered the totality of the evidence with respect to other, subsequent adverse events in MP's life, I have no hesitation in concluding that the childhood sexual abuse at the hands of the defendant is a significant cause of the psychiatric injuries she suffers.

Other Traumas

- [292] The defendant described in testimony the other adverse events he thought impacted MP. In his view, MP felt deserted by her biological father, who left when she was about 2 years old. MP disagreed with that proposition when it was put to her in cross-examination. She said she did not know or have any meaningful relationship with her biological father, and only heard negative things about him from her mother, including that he had been violent to her mother. MP said she was happy to have nothing to do with him.
- [293] The defendant also testified that he thought MP felt abandoned by her brother D when he left the family home when he was 14 and she 10. MP was not asked about this expressly, but she did testify about D's continued presence in her life, well beyond this period. D came back and forth between their biological father's home and the family home for several years. MP testified that she felt relief when D asked her about whether the defendant had abused her, and she then decided to tell D what had been happening. D was furious and tried to support her by speaking to their mother about it. Later, in the years after MP had left the family home, she lived with D and his girlfriend. There was no evidence that MP felt abandoned by D, much less that this was an experience so adverse that it could account for her mental health symptoms.
- [294] The defendant also attested that MP's mother was an alcoholic, and not a very good mother. There was no evidence, however, of any ways in which either of these factors, if true, led to behaviour by MP's mother that was harmful or traumatic to MP. The defendant described MP's mother's behaviour in the context of MP feeling unloved and uninvolved in the family. This is not sufficient evidence upon which to find that direct conduct of MP's mother may be a cause of MP's mental health symptoms, including PTSD. If there is any inference that may be drawn from the defendant's evidence on this point it is that MP's mother was inattentive, which left MP vulnerable to sexual abuse by her step-father. However, as I have said, I do not draw any inferences from MP's mother's conduct in this case, both with respect to the absence of her testimony, or any reported acts or omissions by her during the relevant time period.
- [295] The evidence does not support that any of the factors pointed to by the defendant in testimony caused MP any significant or acute distress sufficient to displace childhood sexual abuse as a significant cause of her mental health symptoms.
- [296] The traumas and adversities to which counsel for the defendant additionally points in support of the argument that the defendant's actions did not cause MP's psychological injuries are:
- a) her psychologically abusive marriage;
 - b) the sexual assault in Uganda;
 - c) her brother D's physical violence toward her;

- d) the infidelity of a man she was in a relationship with after her marriage and the stress of having to be tested for sexually transmitted diseases as a result of that; and
- e) the endocarditis she suffered in 2024.

[297] I will review these events in the context of reviewing MP's evidence about her mental health symptoms below. I note at the outset that all of these events occurred well after MP suffered the sexual abuse by the defendant, had reported it, and had already for several years suffered from mental health symptoms.

[298] In argument counsel for the defendant also pointed to evidence of an eating disorder, self-mutilation and suicidal thoughts MP suffered as instances of trauma. However, in my view on the whole of the evidence, rather than being traumas causative of her mental health, the episodic eating dysregulation (I heard no evidence of a diagnosed disorder), self-mutilation and suicidal thoughts about which MP testified experiencing as a child are the very manifestations of the psychological injury for which she seeks redress in this proceeding. With respect, there is no basis in the evidence to support the defendant's somewhat circular argument that these events may have caused the PTSD and major depressive and generalized anxiety disorder with which MP is now diagnosed.

MP's Evidence

Early symptoms

[299] MP testified that she has experienced mental health problems from a young age. She recalled that she wrote her first suicide note at eight years old. MP attested that she saw suicide as her only way out, that it felt like a safety plan.

[300] The defendant confirmed in testimony that he knew of MP's suicidal ideation by at least the time she was 12 years old, when the social worker came to interview the family at their home in 2002. I note that this precedes any other adverse event to which counsel for the defendant points as causative of MP's mental health symptoms.

[301] MP's struggles with mental health continued after she left the family home at 14. For instance, while she was invited to stay with her cousin after she left her grandfather's home in Keremeos, her cousin ultimately asked her to leave after several months because she found a suicide note in MP's room, and became concerned about the impact of MP's mental health on her own family. As MP testified, at that time she was reluctant to leave the house, struggling with both depression and agoraphobia.

Positive relationships

[302] It is important to note, however, that even while MP was struggling with her mental health, she was able to make and maintain caring connections with people. For example, in befriending Chantal Anderson at school in Summerland, MP also developed a positive relationship with Chantal's mother, Ms. Anderson. Ms. Anderson described MP, 14 at the

time, as "so sweet--I fell in love with her right away." This description of MP's demeanor at that time is consistent with her step-grandmother's testimony that when MP first moved to her home she was a good and helpful girl.

- [303] Ms. Anderson testified though, that as she got to know MP better, she felt MP was "broken", that she had had a "rough go."
- [304] I note as well that even though MP's cousin had asked her to leave her home when MP was 15 due to the impact of MP's mental health on her cousin's family, MP later regularly babysat her cousin's child. That her cousin would ask and trust MP to do so despite earlier signs about the impact of MP's mental health is consistent with the evidence overall: MP has struggled for years with her mental health, and yet has worked hard and often successfully at forming and maintaining positive relationships. The evidence is she has people who care about her deeply, as she does them.
- [305] As I will describe below, two of MP's close friends testified at trial. They both attested to MP being caring, intelligent, generous of spirit and a long-time friend whom they loved. However, they also both attested to the negative impact of MP's mental health symptoms on their relationships with MP.

Uganda

- [306] MP returned to Uganda twice in 2016, after she was sexually assaulted, and then again in 2017. She said: "I have a lot of friends there" and she found it healing to return to their support. On cross-examination counsel for the defendant suggested that MP was minimizing the effect of the sexual assault in Uganda on her life. MP replied:

It had a huge impact and I dealt with it. That was a one-off situation. James abused me daily and it was the way I was raised. In Uganda I was supported by the community. It was very different.

- [307] I accept that there was a marked contrast between how MP was supported by the community of people she knew in Uganda after she was sexually assaulted, and how the community responded to her attempts to get help about the sexual abuse she was experiencing as a child in British Columbia. MP attested that "In Uganda I was supported by the community." By contrast, MP's experience in telling adults in positions of authority about the abuse she was experiencing in British Columbia led to no experience of meaningful assistance or greater safety for her. For instance, MP's call to the Kids Help Phone from a pay phone when she was about 12 was followed by a visit from a social worker who interviewed the defendant and MP's mother first, did not interview MP in private, did not ask her if she was being sexually abused, and articulated no safety plan to MP. And yet, the social worker's contemporaneous notes of the interaction state: "Discussed the sexual touching, made James aware that it made [MP] uncomfortable and that it was a form of sexual abuse. It needs to stop." I heard no evidence that there was any follow up or safety plan implemented by the Ministry after that. MP was left feeling unsafe, and her experience was that, to her, the defendant appeared emboldened after she had asked for

help and no one helped her.

- [308] I need not find whether the defendant was in fact "emboldened." This stage of the analysis addresses only the impact of the community's response to MP's request for help, as a child, on the psychiatric symptoms MP experiences today. This is relevant because the defendant argues that the kidnapping and sexual assault in Uganda that later occurred when MP was an adult was a trauma that overshadows any impact the defendant's actions may have had on her.
- [309] I accept MP's evidence that despite the trauma of the assault against her in Uganda, the childhood sexual abuse she suffered at the hands of the defendant is the dominant contributing cause of the mental health symptoms she suffers today. This is in part because the assault in Uganda was a single event, and MP recounts quite promptly experiencing the community's support of her and condemnation of the perpetrator. By contrast, she experienced the childhood abuse for years, and received only limited support from the community, no meaningful response from authorities such as MCFD and police, and observed no clear condemnation of the defendant's conduct.
- [310] Similarly, MP sought help and support when she moved out of the family home to Summerland. Ms. Anderson wished to help her, and inquired about whether she could foster MP. However, the Ministry did not support that. Again, MP's experience was of seeking help and not receiving it.
- [311] When MP reported the abuse to the police when she was 16, two years after she left the family home, the police did not interview the defendant after their preliminary phone call to advise him that the allegations had been made. MP was then told that there was insufficient evidence upon which to proceed with an investigation. Again, MP's experience was of seeking to report the abuse to persons of authority in the community, and no meaningful steps being taken to determine whether the abuse had occurred, and if so, to condemn it and help her.
- [312] Finally, while MP's experience was that her brother D believed that the defendant had sexually abused her, and was furious about it, her mother's reaction at the time was the opposite. Neither MP nor the defendant testified that MP's mother spoke to either of them about the concerns that were raised by the social worker during the 2002 visit. MP testified that in about 2003 or 2004 after MP had disclosed the abuse to D, who she understood then spoke to their mother about it, her mother was angry at her.
- [313] I accept that while the sexual assault in Uganda was a traumatic event, and likely "compounded her overall distress" as Dr. Lu put it, it does not displace the childhood sexual abuse by the defendant as a significant causal factor of MP's mental health symptoms.

D's violence

[314] MP did testify that D was violent to her. However, this was not during their childhood. It occurred several years after MP reported the defendant's sexual abuse, and was not an incident of direct physical violence. While she was living with D and his girlfriend who was pregnant at the time, D threw something at MP, punched a wall and broke a window near her. MP described seeing a decline in D's mental health and behaviour around the time his baby was born.

Death of MP's brothers

[315] There is no question MP has "been through a lot" as the defendant put it in testimony. The deaths of her two brothers, D in 2016, and S in 2022, are stark and tragic losses. Each died as the result of fentanyl poisoning. MP described in testimony grieving both her brothers and having come to a point of peace with that grief. This was consistent with what Dr. Lu observed in his assessment of MP.

Marriage

[316] While the psychological control MP experienced during her marriage and her husband's adverse reaction to the sexual assault in Uganda may have compounded MP's overall distress, MP left that marriage in 2016, and the divorce was finalized in 2018. The evidence is insufficient to support the conclusion the defendant appears to invite, which is that this is a causal factor that on its own or in combination with others would displace the childhood sexual abuse as a significant causal factor of MP's mental health symptoms.

Endocarditis

[317] Similarly, while MP's two-week hospitalization for endocarditis in 2024 was a distressing and frightening event that caused her to feel very depressed and anxious, the evidence is simply insufficient to support the conclusion the defendant invites, which is that this is a causal factor that on its own or in combination with others would displace the childhood sexual abuse as a significant causal factor of MP's mental health symptoms.

Conclusion on Causation

[318] I repeat here the standard by which causation of injury must be assessed, as described by the Supreme Court of Canada in *Athey*:

16 In *Snell v. Farrell*, *supra*, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some

circumstances an inference of causation may be drawn from the evidence without positive scientific proof.

[319] Both experts agreed that childhood sexual abuse as described by MP would be sufficient on its own, without other adverse events, to cause the mental health symptoms MP experiences. While other adverse events may have compounded the distress MP has experienced, I have no hesitation in finding that the sexual abuse perpetrated on MP by the defendant during her childhood is a significant cause--well beyond de minimus--of MP's mental health symptoms. Accordingly, the defendant is liable for the full extent of the loss MP has suffered: Athey at paras. 19 and 20.

Damages

[320] The principles that apply in criminal sentencing cases with respect to childhood sexual abuse have been held to apply equally in the civil context. See for example D.S. v. Quesnelle, 2019 ONSC 3230, where the Court held:

[25] I turn now to the consideration of the appropriate damage award to make in this case. I start by citing Feldman, J.A. from her decision in R. v. D.M., and 2012 ONCA 520 (CanLII), [2012] OJ No. 3616 at para. 38.

Although the case involved one child victim and one incident with no additional violence, this court made it clear that in sentencing, the principles enunciated in D. (D.) applied. Moldaver J.A. repeated the principles of sentencing arising from D. (D.) and I will repeat them here (at para. 72): [page730]

The relevant considerations and principles from D.D., at paras. 34-38, are summarized below:

- (1) Our children are our most valued and our most vulnerable assets.
- (2) We as a society owe it to our children to protect them from the harm caused by sexual predators.
- (3) Throughout their formative years, children are very susceptible to being taken advantage of by adult sexual offenders and they make easy prey for such predators.
- (4) Adult sexual predators recognize that children are particularly vulnerable and they exploit this weakness to achieve their selfish ends, heedless of the dire consequences that can and often do follow.
- (5) Three such consequences are now well-recognized:
 - (i) children often suffer immediate physical and psychological harm;
 - (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult;
 - (iii) and children who have been sexually abused are prone to become abusers themselves when they reach adulthood.

[26] Feldman, J.A. goes on to examine various sentencing concepts relevant to the sentencing of sexual offenders generally in the course, of which, she refers to the notions of denunciation, as well as general and specific deterrence which she felt took "precedence over the other recognized objectives of sentencing". In my view, such notions are equally appropriate in a civil context.

[321] I agree that these considerations are appropriately applied in the civil context.

Non-Pecuniary Damages

[322] The purpose of an award of non-pecuniary damages is to seek to provide solace to a plaintiff for such things as pain, suffering and loss of enjoyment of life. As Justice Gray put it in *A.B. v. C.D.*, 2011 BCSC 775:

[160] Non-pecuniary losses have no objective ascertainable value, because there is no market in health and happiness. It is generally not possible to put a claimant back in the position she would have been in had the injury not occurred, and this is especially true of non-pecuniary loss. The Court must fix a sum that is tailored to AB, and that is moderate but fair and reasonable to both parties, keeping in mind that AB will be fully compensated for her future care needs and other pecuniary losses. The Court does not try to assess a sum for which AB would have voluntarily chosen to suffer such pain, inconvenience, and loss of enjoyment of life.

[323] Unlike in accident and medical malpractice catastrophic injury cases, there is no "cap" on non-pecuniary damages in civil sexual assault cases: *S.Y. v. F.G.C.*, [1996] B.C.J. No. 1596, 1996 CanLII 6597 (C.A.) at paras. 30-31.

[324] The Court must determine what is fair and reasonable according to the circumstances of the case. Comparison to awards made in other cases may be of assistance. General factors to be considered in assessing an award for non-pecuniary damages are age, nature of the injury, severity and duration of pain and disability, emotional suffering, and impairment of life, lifestyle, relationships, and physical and mental abilities. Generally, a plaintiff's stoicism should not penalize the plaintiff, or reduce the award: *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 100.

[325] In cases of sexual abuse, additional factors meriting particular consideration were summarized in *Anderson v. Molon*, 2020 BCSC 1247 at para. 213:

- a) the circumstances of the victim at the time of the events, including factors such as age and vulnerability;
- b) the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were;
- c) the circumstances of the defendant, including age and whether he or she was in a position of trust; and

- d) the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

[326] After reviewing the treatment of these factors in the case law, the Court in D.S. observed at para. 35:

These factors were considered as well by Leach, J of this court in the case of D.M. v. W.W., 2013 ONSC 4176 at para. 128. After enumerating the four factors set out above, Leach, J observed at para. 129,

"Numerous decisions have emphasized that the last identified factor, (gravity of damage caused to the particular victim), is by far the most important factor that the court must consider. See, for example, C. (J.C.) v. Keats, 1995 CanLII 5681 (SK KB), [1995] 8 W.W.R. 570 (Sask.Q.B.), and M.A. v. Canada, [2001] S.J. No. 686 (Q.B.), affirmed at [2003] S.J. No. 28 (C.A.)

[327] In S.Y. the Court of Appeal for British Columbia clarified that aggravated damages are to be assessed as part of general damages:

36 In my opinion aggravated damages are not a separate head of damages. They are a part of general damages. Juries ought not to be instructed as if they are a separate category of damages, particularly in cases of sexual abuse where it is difficult to separate the physical harm, which is often of much less significance than the fright, misery and humiliation connected with it, and the continuing mental suffering from it.

[328] In this case, MP began to suffer the tortious acts of the defendant when she was very young, about three years old. She began to suffer the resulting mental health injuries also when she was young. She described by the age of eight seeing suicide as a way out--a "safety plan" as she put it. This was a devastating result of the defendant's victimization of MP. The injuries to MP's mental health became woven in to her life and her identity.

[329] Dr. Lu explained in cross-examination that trauma during childhood has a complex impact on the development of the self. This lies in contrast to traumas that occur during adulthood, by which time one's sense of self is usually formed. In cases of adult trauma, the trauma causes a change in the person--they are different in an observable way after the trauma than they were before. By contrast, a child impacted by trauma is still forming who they are: "in that sense, they don't have a distinct change," Dr. Lu explained. The reaction to the trauma becomes integrated into the child's development. Dr. Lu explained that trauma will cause a heightened level of cortisol and sense of anxiety, and impact a child's ability to trust people in the same way they otherwise would be expected to. Yet, it is difficult to measure the impact because there is not a distinct change. Rather, it becomes woven in to the child's developing self.

- [330] Dr. Lu explained that "complex childhood PTSD" is not a diagnosis yet in the DSM-V, and he did not want to speculate about its application to MP while the criteria for diagnosis were being developed. However, he did agree that the symptoms he observed in MP are consistent with the fundamental framework of how the condition is understood in psychiatric literature.
- [331] It is not necessary for a diagnosis of complex childhood PTSD to be made for its framework to be helpful to the Court in understanding the nature of the loss MP has suffered. This framework is consistent with the evidence of how MP has suffered throughout her life the repercussions of childhood abuse.
- [332] The fear and anticipation of violations of her bodily integrity that MP experienced were a regular part of her life from her early childhood. She exhibited signs of depression and anxiety early on, including suicidal ideation. Even after she left the family home, when she was living with her cousin in Vancouver, she was often unable to go out because she felt agoraphobic, and feared seeing the defendant. She did grade 10 at home because she did not feel capable of attending school. She continued to express suicidal ideation during that period. Even as the date for this trial approached, 20 years after she left the family home, her mental health symptoms worsened, as she feared seeing the defendant.
- [333] That said, MP has also demonstrated impressive resilience, intelligence and empathy through her remaining teenage years and her adult life. As I have noted, through grades 11 and 12 she attended school in person and full time, got high grades, while working evenings and weekends at two jobs. She did this while living with her cousin and then her brother, and with no parental assistance or oversight. She then went to Douglas College, got many A and A+s, obtained her Bachelor's Degree, and began her career as a family counsellor which she maintained until she went on Long Term Disability for PTSD in August 2023.
- [334] She has also formed meaningful and deep friendships in her life. It is clear that MP is deeply valued by people who love her.
- [335] These are important factors to consider in assessing non-pecuniary damages. In a sense, this resilience that MP has demonstrated, and the determination she has shown to build a successful and productive life despite the childhood trauma she experienced, is akin to the "stoicism" the Court of Appeal has said should generally not be used to penalize a plaintiff in their damage recovery. The active and positive things MP has been able to accomplish do not refute the severity of the mental health symptoms she suffers. Rather, their import is that she did these things despite her mental health symptoms.

- [336] MP does not want to be debilitated, she wants to live a full and happy life. That is apparent on the whole of the testimonial evidence, and in the many choices she has made through her life, including seeking help from people she trusted when she was young; allowing herself to form deep friendships as she got older; returning to Uganda to receive and accept the support of friends and community after she was assaulted, and choosing to work with children and families who require advocacy and support.
- [337] However, despite this drive to build a good life, MP has lived with serious psychiatric symptoms, which have varied in their severity over the years. In 2023 she found she was no longer able to work because of the psychiatric symptoms she was experiencing. She has been on Long Term Disability for PTSD since August 2023.
- [338] MP also described the impact her mental health has had on her relationships. She said she particularly struggles in romantic relationships; that she struggles to understand what a healthy relationship looks like. She said that her last partner was disrupted by MP's nightmares.
- [339] Her friendships have also been impacted by MP's mental health.
- [340] Her friend Joy Warren testified about their friendship, which began in 2013. Ms. Warren said that MP seemed quite reserved when they first met, but kind. They started as classmates at Douglas College and were part of the group that went to Uganda. Even in Uganda they did not know each other that well, but have become closer and closer over the years. They were roommates from 2021 to 2024. Ms. Warren said she has watched MP's mental health ebb and flow over the years. For instance, she said that MP was very low around the time of her divorce in 2016, but then she worked hard to get to a place of stability. While they were roommates, she began to see MP have to "muster the courage" to go to work in the morning, and then sometimes take one day off, then it turned to weeks and then months. Ms. Warren said she watched MP's ability to function decline in the years they lived together. She saw MP have a panic attack and be afraid to leave the house. MP told her she feared seeing the defendant.
- [341] Ms. Warren and MP stopped living together in 2024. Ms. Warren said she was feeling the impact of MP's mental health decline on her own mental health. When MP was distraught "she couldn't hold it in." Ms. Warren said "I wanted to give her the space to experience without it impacting our friendship." Their friendship is again very strong now. However, MP did not go to Ms. Warren's 30th birthday party. Ms. Warren now lives in Mission, where the defendant lives. MP told Ms. Warren she could not attend because she feared seeing the defendant.
- [342] Margaret Lucia has been close friends with MP since 2008, when MP was 18. They met when MP was just about to graduate from high school, and was working at Starbucks, where Ms. Lucia was a manager. Ms. Lucia said that MP "had been taken under the wing of other girls at Starbucks, and I became one of those women." Ms. Lucia said that MP appeared nervous and somewhat fearful back then. She knew that MP was living on her

own, and was looking for a new place to live, "she was very independent and seemed to be on her own." Their relationship grew over the years, and they became very close friends. Ms. Lucia has supported MP through her struggles with her mental health, including suicidal ideation. Ms. Lucia's family has also supported MP over the years. Ms. Lucia described MP this way:

incredibly smart; intuitive; very caring and empathetic; she flourished in university; focused on career and education; cares a lot about her friends and being considerate of her friends, remembering birthdays, making certain events special; very social in the sense that I see her making friends with people in her building, I see her bringing groceries to people who might need a hand. She cares about the greater good of world. She is concerned with current events.

[343] However, Ms. Lucia said that in the last couple of years their relationship has suffered because of MP's mental health. She said that MP has become increasingly fearful, nervous, and paranoid; anyone coming up behind her in a room will startle and upset her. She has become difficult to be around, and intolerant of anything that makes her uncomfortable or that she perceives as dangerous. Ms. Lucia said that MP's reactivity has become very difficult to navigate as a friend. She has also observed that in the last couple of years MP has demonstrated increased fear of leaving the house.

[344] While Ms. Lucia and MP had been in almost daily contact for 17 years, over the past year that has decreased to once every week or two. On the evidence, this is a direct result of the deterioration of MP's mental health.

[345] It is apparent on the evidence that MP has suffered mental health injuries for years as a result of the defendant's abuse, and that these have been significant and painful for her. Further, because the abuse and the injuries from it began so early in life for MP, they are interwoven throughout her life experience. There is no "time before" for her.

[346] In 1996, while MP was suffering the abuse that is the subject of this case, the Court of Appeal for British Columbia said:

This is an evolving area of the law. We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement. (S.Y. at para. 55)

[347] The Court of Appeal went on in S.Y. to hold:

57. In this case the jury was entitled to consider a number of very significant aggravating factors. The defendant occupied a position of trust with respect to this child. Instead of providing an environment for a happy childhood, and for normal development of character, he made her childhood a nightmare. After seven years she told her mother. His response was not remorse. It was anger at being exposed. In different ways, he continued the abuse until life became so unbearable that the girl left home. The psychiatric evidence indicated

the extent of the impact on the plaintiff, and on her relationships with others. She needs a great deal of help in dealing with the psychological trauma she has suffered. Another aggravating feature is the defendant's response to the claims made by the plaintiff. He did not admit liability. His response was to threaten the plaintiff, her mother, and the family doctor. The jury may have taken into account that he did not testify in order to mitigate his conduct, or to apologize.

58. The jury had before it evidence of many of the aggravating factors noted in similar cases. These include the relationship between the parties, the number of assaults, the ages at which those assaults occurred, the frequency and duration of the abuse, the degree of violence and coercion, the nature of the abuse, and the physical pain and mental suffering associated with it.
59. In my opinion an award of \$250,000 would not have been wholly out of proportion in view of the factors open for consideration by the jury.
- [348] As in S.Y., the defendant in this case occupied a position of trust, as MP's step-father. He began to abuse that trust almost immediately, from the time MP was three, until she left the family home when she was 14. MP was inherently vulnerable throughout this period. The consequences on MP have been devastating, despite her efforts to forget and live a life unmarred by this history.
- [349] Another aggravating factor similar to S.Y. is that in this case the defendant avoided accountability when MP sought help when she was young. He also wrote to MP under the auspices of apology but told her she would destroy her mother and the family if she persisted in allegations against him.
- [350] I consider all of the relevant aggravating circumstances--the step-father's breach of trust, abuse of a minor, and lack of remorse--to place this case in a similar range to S.Y. In that case the plaintiff had been repeatedly sexually, physically, and verbally abused by her stepfather from ages seven to eighteen. She was 36 years old at the time of trial, and the effects on her continued to be devastating and profound. In that case the Court of Appeal reduced a jury award from \$350,000 down to \$250,000 (or approximately \$490,000 in current dollars).
- [351] The plaintiff also directs the Court to D.S., and *Waters v. Bains*, 2008 BCSC 823 as relevant comparators.
- [352] In D.S., the defendant became the plaintiff's stepfather when the plaintiff was five years old. The defendant forced the plaintiff to take showers with him and perform oral sex almost every weekend, where the defendant would ejaculate on the plaintiff's face and mouth. This happened persistently for five years.

[353] Before the civil case brought by D.S., Mr. Quesnelle was found guilty of five counts on a ten-count indictment after a five-day judge alone trial. He was convicted of charges of assault, sexual assault and sexual interference. At sentencing the Court in *R. v. Quesnelle*, 2013 ONSC 476 noted:

10 Mr. Quesnelle is now 71 years of age and, according to a doctor's letter and information provided by his current partner, suffers some health issues. He left school at age 15 and has had a good work record for over 25 years, until he had a stroke in 1994. His current income is a retirement pension. He is in a common-law relationship, which has lasted about 20 years. Before that, he had two marriages. He has two sons from his first marriage.

11 With respect to his character and attitude, the pre-sentence report indicates:

"The subject's position on the current conviction absolved himself from any responsibility, while at the same time, he has placed blame on the victims while stating he believes S.S. pursued charges because she is after his financial assets."

[354] In the civil case that followed, D.S. brought a motion for default judgment for damages caused by the defendant's intentional torts of assault, sexual assaults, and other misconduct of a sexual nature. The Court held in D.S.:

[21] The defendant's conduct was intentional, self-serving, violent, despicable, abusive, and constituted a breach of trust of the very worst kind. The defendant should be, and is found liable for that behaviour and will be ordered to pay damages for what is, in my view, the permanent and lasting harm he has done to the Plaintiff.

[355] The Court in D.S. reviewed damages awarded in other cases involving sexual abuse of children:

[32] The "worst cases" document the evolution of the fair and reasonable assessment of damages in cases involving sexual abuse of minors. The severity of the factual circumstances from which this particular cause of action arose is closely akin to the so-called "worst case". In the case of *P.B. v. W.B.*, 1992 CanLII 7666 (ON SC), [1992] OJ No. 2538, hereinafter *P.B.*, Cunningham J, as he then was, summarized the facts as follows; "As was disclosed to the criminal proceedings, the defendant declared to his wife that he would be the first to "break the Plaintiff in" and that no one else would be the first to do so. True to his word, the defendant commenced his pattern of sexual abuse when the Plaintiff was approximately five years of age. The abuse began as fondling and progressed, when the plaintiff reached age seven, to vaginal intercourse. For the next three years the Plaintiff was subjected to fellatio, cunnilingus, sodomy and vaginal intercourse three to four times per week. At age 10, the defendant and his wife separated, and the frequency of sexual abuse diminished while the Plaintiff was living with her mother. The abuse however did not end and occurred every second weekend during periods of access by the defendant. In or about 1983, the Plaintiff became a ward of the Children's Aid Society and most unfortunately, later that year, the defendant obtained custody of her and between the ages of 12 and 17 the abuse escalated to

fellatio and intercourse at least every other day. "

- [33] The facts in P.B. also include reference to at least two subsequent incidents wherein the defendant in that case forcibly attacked and sexually assaulted the Plaintiff.
- [356] The Court went on in D.S. to review other cases, and concluded that given the age and vulnerability of the child, the frequency and invasive and degrading nature of the assaults and the fact that the defendant was much older than the plaintiff and was in a trusted position as a step-parent meant that this case was at the "upper end of the worst-case scale" (D.S. at para. 37). The Plaintiff was awarded \$400,000 in non-pecuniary damages (\$483,000 in current dollars).
- [357] The plaintiff also points to Waters. In that case, the plaintiff was sexually abused by her uncle from age 8 to 18. The plaintiff was fondled, physically assaulted, and vaginally and anally raped. She was also repeatedly forced into oral sex. The defendants included not only her uncle, but also her aunt who she argued breached her fiduciary duty to the plaintiff. Shortly before the abuse began, the plaintiff has lost her mother in a motor vehicle accident. The Court found that aggravated damages were appropriate given the outrageous behaviour of the defendants. The total award for nonpecuniary damages, which included aggravated damages, was \$325,000 (\$469,000 in current dollars).
- [358] Pointing to D.S. and Waters as comparators, counsel for the plaintiff seeks combined non-pecuniary and aggravated damages of \$500,000.
- [359] The defendant does not suggest an appropriate range for non-pecuniary damages, but directs the Court's attention to the review of the range of awards in sexual assault cases by Justice Gropper in A.B. v. Henry, 2025 BCSC 137 which also recognizes S.Y. as a leading authority on aggravated damages in sexual assault cases. The defendant directs the Court to the range of awards established in the different circumstances of the cases summarized by Gropper J. in A.B.:
- [938] In H.N. v. School District No. 61 (Greater Victoria), 2024 BCSC 128, Justice Coval addressed damages to be awarded to a 35-year-old man who was sexually abused by a volunteer at his elementary school in 1999-2000. The abuse consisted of touching, groping, sexualized comments and the defendant repeatedly exposing himself. The plaintiff was awarded \$225,000 in general damages.
- [939] Justice Coval referred to aggravated damages at para. 152: "Aggravated damages augment non-pecuniary damages when the unlawful acts involved humiliating or undignified circumstances" referring to Huff v. Price (1990), 51 B.C.L.R. (2d) 282 (C.A.):

... [T]hey are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant ... that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life ... It is, of course, not the damages that are aggravated but the injury.

[940] The plaintiffs rely on the series of cases to which Coval J. referred:

- (i) *Anderson v. Molon*, 2020 BCSC 1247 - \$275,000 (which included a 10-15% reduction for a prior condition). The plaintiff was 70 years old at the time of trial. While in her late 20s, she was employed as an elementary teacher in a Catholic school. She had a sexual relationship for a few months with the assistant pastor, which was found to be degrading, exploitative and an abuse of power. Justice Crossin said the assaults caused "serious psychological harm" that "had a profound effect upon the plaintiff's psychological well-being" and caused her "pain, anguish, grief, and humiliation. It deeply affected her self-confidence. She has carried these wounds throughout her life."
- (ii) *MacLeod v. Marshall*, 2019 ONCA 842 - \$425,000 jury award, with \$350,000 for general damages and a separate award of \$75,000 for aggravated damages). In high school, the plaintiff had been abused more than 50 times by a priest.
- (iii) *Waters v. Bains*, 2008 BCSC 823, the plaintiff was awarded \$325,000 (\$445,000 adjusted for inflation). Aged 50 at trial, from ages eight to 18 she was sexually assaulted by her uncle in horrific and prolonged ways.
- (iv) *S.Y. v. F.G.C.* (1996), 26 B.C.L.R. (3d) 155 (C.A.), at para. 59, the Court of Appeal reduced a jury award from \$350,000 down to \$250,000 (or \$490,000 in current dollars). The plaintiff had been repeatedly sexually, physically, and verbally abused by her stepfather from ages seven to eighteen. She was 36 years old at the time of trial, and the effects on her continued to be devastating and profound.
- (v) *C.M.A. v. Blais*, 2022 BCSC 214 - Chief Justice Hinkson awarded the plaintiff \$250,000 for sexual assaults that commenced when she was 10 or 11 and continued into her teenage years. The defendant was a close friend of the plaintiff's father, and was 20 years older than her. The assaults involved frequent touching, including massages, kissing, at least one incident of digital penetration, and other invasive sexual conduct. He gave her alcohol, drugs, and money as a form of grooming her to submit to his sexual advances.
- (vi) *C.L.H. v. K.A.G.*, 2022 BCSC 994 - Justice Veenstra awarded \$200,000. The assaults occurred when the plaintiff was between six and 12 years old. They were perpetrated by her brother, who was four years older. They involved sexual touching, including digital penetration, the brother masturbating in front of her, and one incident of partial penile penetration. At trial, the plaintiff was in her mid-50s. Due to the abuse, she suffered anxiety, depression, nightmares, flashbacks, and insomnia.

[941] The defence summarizes these cases:

A review of the case law relied on by the plaintiffs thus reveals a range of \$200,000-\$490,000 in damages for serial sexual assaults perpetrated against vulnerable children by persons in positions of trust and authority. The highest end of the range is reserved for repeated sexual assaults that include penetrative assaults perpetrated against children.

[942] The defence refers to cases where there was one incident of sexual assault, as in the case of each of these plaintiffs:

(i) In *Seymour v. Nole*, 2022 BCSC 867, Justice Shergill awarded plaintiff who was 26 years old at the time of the events \$100,000 for a single instance of sexual assault that included penetration and occurred when she was particularly vulnerable as she was intoxicated and asleep. The defendant's liability for this aspect of the claim was upheld on appeal: 2023 BCCA 329.

(ii) In *R.Y.H. v. Y. LTD and L.E.Y.*, 2021 SKQB 48, the plaintiff bought a bus ticket for a trip to northern Saskatchewan. The last portion of the trip took place in the defendant's truck as the bus company subcontracted to him for this leg of the journey. During this part of the journey the defendant violently sexually assaulted the plaintiff. When she attempted to resist he overpowered her. The sexual assault included violence, fondling, digital penetration and groping. She was awarded \$100,000 in general and aggravated damages.

(iii) In *Zando v. Ali*, 2018 ONCA 680, the Ontario Court of Appeal considered an appeal of the assessment of damages for sexual assault following a judge alone trial. The assault at issue was a single incident of violent sexual assault that was perpetrated by a physician against his friend and colleague in her home during which he tripped the victim, thrust his penis into her face, pulled down her pants and penetrated her vagina. As she left, she observed him masturbating. After setting out the appropriate framework for assessing damages in civil sexual assault cases, the Court endorsed the trial judge's range of \$144,000 to \$290,000 for damages for sexual assault (the equivalent of \$173,000 to \$348,000 in 2024 dollars) and upheld the lower court's award of \$175,000.

[360] In my view the most comparable cases are *S.Y.*, *D.S.* and *Waters*.

[361] This abuse by her step-father happened repeatedly over the course of years, beginning when MP was very young. She reasonably perceived a constant threat as she grew up. She was unsafe in her own home throughout her childhood, and she knew this. This formed her identity and her worldview, and has caused serious psychiatric symptoms throughout her life. She has shown resourcefulness and resilience and a capacity to bring caring people into her life, and to reciprocate their care. In some ways this has alleviated the suffering she might otherwise have endured. Yet her psychiatric symptoms have endured, and in recent years they have overtaken many aspects of her life. She is currently unable to work at a job that she finds meaningful and rewarding and in which her role is important. That is a loss to her and to the community she serves.

- [362] Meantime, the defendant grappled ineffectively with any remorse he may have felt, if any, as demonstrated by his apology Letter, and by his testimony about that Letter. The defendant's avoidance and denial of MP's accusations has had the effect of depriving MP of the support of her family and her community throughout her life, despite her attempts to get help when she was young. That has had a devastating impact on MP.
- [363] Considering the comparatively heightened violence and degradation on the facts of D.S. and Waters, in my view an award of \$330,000 is fair and reasonable compensation for MP's pain and suffering and aggravated damages caused by the defendant.

Punitive Damages

- [364] Aggravated general damages are to be distinguished from punitive damages. Aggravated damages, as part of general damages, are to provide some compensation and solace to victim. The purpose of punitive damages, by contrast, was explained by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59:
- [196] Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner.
- [365] The question of punitive damages is particularly relevant in civil cases where no related criminal conviction has been entered. As explained by the Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 69:

there is recognition that the primary vehicle of punishment is the criminal law (and regulatory offences) and that punitive damages should be resorted to only in exceptional cases and with restraint. Where punishment has actually been imposed by a criminal court for an offence arising out of substantially the same facts, some jurisdictions, such as Australia and New Zealand, bar punitive damages in certain contexts (Gray, *supra*; Daniels, *supra*), but the dominant approach in other jurisdictions, including Canada, is to treat it as another factor, albeit a factor of potentially great importance.

- [366] Punitive damages have generally not been awarded in cases where the defendant has been sentenced criminally for the same acts: see Justice Gropper's discussion in *A.B.* at paras. 958-969.
- [367] In this case, there has been no criminal trial or conviction, nor any punishment imposed by a criminal court.

[368] Both parties agree that the Supreme Court of Canada's judgment in *Whiten* guides the analysis in assessing a claim for punitive damages. The Court should consider:

- (1) whether the misconduct was planned and deliberate;
- (2) the intent and motive of the defendant;
- (3) whether the defendant persisted in the outrageous conduct over a lengthy period of time;
- (4) whether the defendant concealed or attempted to cover up its misconduct;
- (5) the defendant's awareness that what he or she was doing was wrong;
- (6) whether the defendant profited from its misconduct;
- (7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.

[Citations omitted.] (*Whiten* at para. 113)

[369] Additionally, an award of punitive damages must be:

- a) proportionate to the degree of vulnerability of the plaintiff;
 - b) proportionate to the harm or potential harm directed specifically at the plaintiff;
 - c) proportionate to the need for deterrence;
 - d) proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct;
 - e) proportionate to the advantage wrongfully gained by a defendant from the misconduct.
- (*Whiten* at paras. 114-126.)

[370] Relying primarily on *Anderson and MacLeod v. Marshall*, 2019 ONCA 842, the plaintiff in this case seeks a punitive damages award of \$750,000.

[371] In *Anderson*, the plaintiff was a devout Catholic and became an elementary teacher at a Catholic school. The defendant Father Molon was an assistant pastor at the same parish. The plaintiff sought out the defendant for comfort and solace as she was grieving the recent death of her parent. The defendant commenced a sexual relationship with the plaintiff that went on for several months. The plaintiff brought an action for damages against the defendant for sexual battery.

[372] The Court found that punitive damages in the amount of \$250,000 was warranted against the defendant given that he "exploited the vulnerability of a young woman entrusted to his care to engage in a prolonged and repeated course of sexual exploitation." He was also found to have demonstrated a "brazen indifference to the harm caused by his actions" (*Anderson* at para. 248). After adjusting for inflation, the punitive damages award in *Anderson* amounts to \$294,773 in 2025.

- [373] MacLeod involved a high school student who was sexually abused on more than 50 occasions by a Catholic priest and teacher at his school (Marshall). The action was brought against Marshall, as well as against the Basilian Fathers of Toronto who ran the school where the abuse occurred and employed Marshall. It was demonstrated at trial that Basilians were aware that Marshall was abusing boys before they ordained him as a priest. Marshall taught for approximately 36 years and the Basilians repeatedly moved him to different schools when complaints of sexual abuse arose. The jury heard evidence from four other victims of Marshall's abuse. In separate criminal proceedings, Marshall pleaded guilty to sexually abusing 17 minors (MacLeod at para. 3).
- [374] The jury awarded the plaintiff \$350,000 for general damages, \$75,000 for aggravated damages, and \$500,000 in punitive damages. The Basilian Brothers appealed the award of punitive damages. The Court of Appeal for Ontario said:
- [35] The jury granted \$500,000 in punitive damages, well over the \$225,000 range suggested by the trial judge. The trial judge asked the jury to provide full particulars on the conduct the jury considered as justification for the punitive damages award. The jury articulated the following reasons for the punitive damages award, which correspond closely with several of the Whiten factors:
- Concealment: silent shuffle undertaken to divert in conjunction with complaints, avoiding scandal, neglected to document offences. Put children in harm's way -- grossly negligent. No reconciliation with the victims, did not follow own policy from 1991. Betrayal of trust with the community.
- [36] In rendering its award, the jury was no doubt taking into account the evidence that the Basilians knew Marshall had been abusing boys before he was even ordained, they allowed Marshall to sexually abuse children for more than three decades as a teacher and religious figure, and they decided to move him to different schools when incidents of abuse were reported instead of preventing further harm.
- [37] While the award is high, the jury took into account the general objective of punitive damages as punishment, deterrence, and denunciation. The decision also addresses the factors set out in Whiten to determine the blameworthiness of the defendant's conduct. The more reprehensible the conduct, the higher the rational limits for punitive damages.
- [38] The jury may well have been concerned by the fact that the Basilians did not follow their own policy set in 1991, regarding the need to reach out to the victims. This failure to follow their own policy undercuts the Basilians' argument that they should not be judged by contemporary standards, as the Basilians failed to meet even their own standards.
- [39] For these reasons, the quantum is not so plainly unreasonable and unjust as to warrant judicial interference. I would also dismiss this ground of appeal.

- [375] In my view the case before me is distinct from MacLeod which involved the deliberate institutional actions and evasions of the Basilian Brothers over many years. The jury award in that case was directed at those actions.
- [376] In this case the defendant's conduct was deliberate and concealed, and continued for many years. The defendant prioritized his own sexual desires over the well being of MP, his young step-daughter. He took advantage of her natural dependence and vulnerability as a child, and violated her personal integrity in a deeply personal way. Her childhood was scarred by the defendant's actions, and she faces a lifetime of grappling with the consequences.
- [377] The defendant avoided police investigation when the plaintiff was young. He has never faced criminal charges or conviction.
- [378] Taking into account all of these factors, I am of the view that punitive damages of \$250,000 are appropriate in this case.

Damages for Pecuniary Loss

- [379] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64.
- [380] There is no dispute that MP has been on long term disability since August 2023 due to PTSD. This has led to a loss of income.
- [381] Given my determination that the defendant's tortious actions are a cause of MP's PTSD, he is liable in damages for her pecuniary loss.

Past Wage Loss

- [382] MP claims for past wage loss from the period she went on long term disability in August 2023 to the date of trial. Before that she had been employed full time at Westcoast Family Centres Society since 2016. Based upon her Canada Revenue Agency Notices of Assessment, MP claims a net past wage loss of \$71,281. This is based on an expected earning for 2023 to 2025 of \$67,055 based in turn upon her average earning in 2021 and 2022. In 2023 she earned \$61,426 until she went on long term disability, leaving a wage loss of \$5,629. In 2024 she was on long term disability the whole year, leaving a wage loss of \$67,055. MP's wage loss for 2025 to the first day of trial was \$11,176.
- [383] I accept that MP has established she is entitled to an award of \$71,281 for past wage loss, less the long term disability payment she received during the period from August 2023 to trial.

Future Earnings Loss

[384] Given the scope of the plaintiff's claim for past wage loss in this case, it is assessed on the balance of probabilities, as the claim raises no hypothetical past events. By contrast, the assessment of future wage loss requires consideration of future hypothetical events. There is no certainty as to how MP will fare in the future, and whether or when she will be able to return to work. The plaintiff is not required to prove these hypothetical events on a balance of probabilities, but must establish they are real and substantial possibilities, tethered to the evidence: *Athey* at para. 27, and *Dornan v. Silva*, 2021 BCCA 228 para. 63 and 134.

[385] Notably, aside from the methodological difference I have addressed above, the only point upon which Dr. Dahi actually disagreed with one of Dr. Lu's conclusions with respect to Dr. Lu's "highly guarded" prognosis for MP.

[386] Dr. Lu stated:

[MP]'s prognosis is highly guarded. Even with optimal treatment she will have long term symptoms as her abuse and trauma have affected her for much of her life."

Her future remains uncertain with risk and difficulties that cannot be fully anticipated. She will need indefinite psychological treatment to minimize the risk of further deterioration.

[387] Dr. Dahi disagrees with the "highly guarded" prognosis because of MP's positive response to group therapy in the past. He said: "She has been compliant and responsible with her treatment and at least on one occasion of supportive group treatment, she emotionally attached and constructively responded to that treatment."

[388] It cannot be ignored that despite MP's positive response to group therapy in the past, she is debilitated with PTSD and depression today. There is no guarantee that access to group therapy will ensure MP's recovery from her current condition. However, I do note that Dr. Lu's prognosis is inherently contingent on MP's access to further and comprehensive mental health care for MP. He stated:

[MP] is waiting for more psychiatry care She needs regular support. For example, between January and July of last year, she was attending group regularly and it helped her keep working. The loss of that support might have played a role in her current disability.

She has moderate to severe psychiatric symptoms. Based on the chronicity and severity of her symptoms, she is unable to work, and she is disabled At this time it is difficult to know how she would return to work without a much higher level of support.

[Emphasis added.]

- [389] Dr. Lu went on to outline the medical treatments he recommends for MP. As I will address below, I am persuaded that they are warranted, and make the order for cost of future care that the plaintiff has sought, which is intended to address these needs. Accordingly, there is a real and substantial possibility that MP will have a much higher level of mental health support and treatment in the future than she has had in the past.
- [390] MP seeks the equivalent of three years lost earning capacity. While I agree that MP has established a real and substantial possibility that she will continue to incur lost earning capacity for some future period, I am not persuaded that three years is the appropriate measure. MP has demonstrated a strong desire to carry on actively with her life, even in the face of psychological symptoms that have sometimes, as now, been debilitating. She expressed a vision for the future in which she hopes to complete a Master's degree, return to her work at Westcoast and excel at it, and even to return to work in Uganda. This was all contingent upon her mental health symptoms sufficiently subsiding. The damages award for cost of future care is to allow her higher mental health treatment and support in the future. Accordingly, I am of the view that a reasonable assessment of future earnings loss should compensate MP for 18 months of future earnings loss.
- [391] I am not persuaded that a capital asset approach is appropriate in this case despite the argument advanced by counsel for the plaintiff. Instead, I base the award on an earnings approach, based upon the same average annual earning from Westcoast upon which her 2023-2025 past wage loss is calculated being an annual income of \$67,055. This results in an award for loss of future earning capacity of \$100,583.

Special Damages

- [392] MP claims the cost of the counselling she has received since she began seeing Ms. Jocelyn Wood in 2020.
- [393] For 2024 MP's total counselling costs were \$3,260, based on a per session rate of \$80 from January to June, and \$100 from June to December. She continued seeing Ms. Wood weekly in 2025, leading to further counselling costs of \$1000 as of the date of trial. From 2020 to 2023 MP testifies that she saw Ms. Wood approximately every two weeks, paying \$80 a session. This amounts to \$8000 in counselling costs for the years 2020-2023. In total, MP claims \$12,260 for special damages to the date of trial.
- [394] Based upon Dr. Lu's evidence, I am satisfied that these counselling costs are a reasonable, and indeed necessary, cost incurred by the plaintiff to seek to address the injuries she has suffered as a result of the defendant's actions. I would award the full special costs sought to be recovered by the plaintiff of \$12,260.

Cost of Future Care

- [395] I accept the evidence that MP will need counselling for the rest of her life. This accords with Dr. Lu's recommendations for MP which include long-term psychological counselling and psychiatric monitoring, lifelong antidepressant treatment, a return to counselling groups, residential treatment for women with childhood trauma and CBT treatment for agoraphobia.
- [396] MP seeks an award that would cover the cost of two counselling sessions a month for the next 35 years based on the rate charged by her current counsellor of \$140 a session, as well as access to a residential treatment program for psychological injuries, estimated to cost between \$10,000 to \$20,000. Applying a discount rate of 2% in accordance with the Law and Equity Act, R.S.B.C. 1996, c. 253 the total claimed for future health care costs by the Plaintiff is \$130,000.
- [397] I accept this is a reasonable award to seek to compensate for costs of future care.

Health Care Costs Recovery Claim

- [398] Pursuant to s. 3 of the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, MP tendered in evidence a Minister's Certificate, setting out the costs that the Ministry of Health is seeking to recover for health care services paid in relation to MP's injuries resulting from the defendant's tortious conduct. The Minister claims \$15,727.33.

Conclusion

- [399] I find the defendant liable for the torts of sexual assault and battery against MP. I order the defendant to pay MP the following damages:

Non-pecuniary (general and aggravated) damages:

\$330,000

Punitive Damages:

\$250,000

Past Wage Loss:

\$71,281 (less amounts paid to MP for LTD)

Loss of Future Earning Capacity:

\$100,583

Special Damages:

\$12,260

Costs of Future Care:

\$130,000

[400] I further order the defendant to pay:

Health Care Costs Recovery Claim:

\$15,727.33

[401] Costs are awarded to the plaintiff on the regular scale.

"Giltrow J."

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