SUPREME COURT OF NOVA SCOTIA
Citation: *A.B. v. Main*, 2023 NSSC 47

Date: 20230215
Docket: Hfx No. 493997
Registry: Halifax

Between:

A.B.

Plaintiff

v.

Andrew Main

Defendant

LIBRARY HEADING

Judge:	The Honourable Chief Justice Deborah K. Smith
Heard:	September 12th, 13th and 14th, 2022, in Halifax, Nova Scotia
Subject:	Civil action for sexual assault and battery.
Summary:	The Defendant admitted that the abuse occurred but denied certain aspects of the Plaintiff's allegations.
Issues:	(1) What was the nature and extent of the abuse. (2) What injuries were suffered by the Plaintiff as a result of the abuse. (3) What damages is the Plaintiff entitled to. (4) Did the Plaintiff fail to mitigate his damages.
Result:	The court determined the nature and extent of the abuse. The court was satisfied that, as a result of the abuse, the Plaintiff suffered serious and prolonged psychological or

mental injury that negatively affected both his education and his employment.

The court awarded the Plaintiff general damages of $110,000.00 and $225,000.00 for loss of earning capacity. A claim of $15,000.00 for the cost of future care was dismissed.

The court concluded that the Defendant had not proven that the Plaintiff failed to mitigate his damages.

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DECISION

Judge: The Honourable Chief Justice Deborah K. Smith

Heard: September 12th, 13th and 14th, 2022, in Halifax, Nova Scotia

Counsel: Michael Dull and Basia Sowinski, for the Plaintiff
Kerri Ann Robson, for the Defendant

By the Court:

[1] Few things in life are more tragic and unfathomable than the sexual abuse of a child. The effects on the victim can be profound and life altering. While money can never truly compensate an individual for the trauma that they have suffered, it is one method of recognizing the harm that has been done.

BACKGROUND

[2] The Plaintiff in this action is 41-year-old A.B. In December 1987, when A.B. was approximately six years of age, he moved with his family from Ontario to Nova Scotia, eventually settling on the Noel Shore. While there, the Plaintiff's family rented a farmhouse from the Defendant's mother. At the time, the Defendant lived with his mother across the road from the property the B.'s were renting.

[3] The rental property had outbuildings on it, including a barn. The Defendant would regularly visit the property to do chores in the barn or repair machinery. The Plaintiff was an inquisitive young child who liked to follow the Defendant around to see what he was doing. As a result, the Plaintiff and the Defendant had regular contact with one another.

[4] In addition, the Plaintiff and his sister * would visit the Defendant's home to play video games which, according to the Plaintiff, was something of a novelty at the time.

[5] In or about 1989, when the Plaintiff was seven years old and the Defendant was approximately 29 years old, the Defendant sexually abused the Plaintiff on numerous occasions. The testimony of the two parties concerning the abuse is somewhat inconsistent, but not greatly so.

THE PLAINTIFF'S VERSION OF EVENTS

[6] A.B. testified of three incidents of abuse that he can specifically recollect. He says that one incident took place on a woodlot behind the house on the property his family had rented. He had received a small hatchet for Christmas and had been invited to chop wood with the Defendant. The Plaintiff was doing something, turned around, and saw that the Defendant had his penis out. The Plaintiff testified that the Defendant then came over to him, undid the Plaintiff's pants, put his hand down his

pants and “fondled” him for a minute or two. The Plaintiff testified that he was terrified and didn’t know what to do. He remembers that he did not want to get into trouble. He testified that he took off back up to the farmhouse.

[7] The Plaintiff testified that the other two incidents of abuse both took place in the Defendant’s home, while the Plaintiff and his sister were there to play video games. He said the Defendant would have him and his sister sit on his lap when playing the games. He testified that on one occasion, the Defendant put his hands on the outside of the Plaintiff’s pants, “rubbing” him. He testified that on the third occasion (which could have been the same day as the second occasion – the Plaintiff wasn’t sure) the Defendant put his hand down the Plaintiff’s pants and “sort of …. probably did the same thing, fondled me for a couple minutes.”

[8] The Plaintiff testified that there were probably other occasions of abuse, but he cannot recall them vividly, so he is not willing to say that further abuse occurred.

THE DEFENDANT’S VERSION OF EVENTS

[9] The Defendant acknowledged that the abuse took place. In fact, he estimated that he touched or attempted to touch the infant Plaintiff for a sexual purpose approximately twelve times. He denied, however, touching the Plaintiff’s genitals beneath his pants. He testified, on discovery, that he “groped” the Plaintiff’s penis above his pants.

[10] The Defendant recalled the incident where he took his penis out of his pants and showed it to the Plaintiff. He testified that this incident took place in the "beef barn”. He acknowledged unzipping his coveralls, pulling out his erect penis and inviting the infant Plaintiff to touch his penis. He testified that the Plaintiff responded with words to the effect of, “You’re gonna pay for this some day.” He denies touching the Plaintiff’s genitals on this occasion.

[11] The Defendant testified that the Plaintiff’s response to this situation made him realize that what he had done was wrong. He said that while he was still attracted to children, he never attempted to molest a child after the beef barn incident.

[12] In the summer of 1999, the Plaintiff telephoned the Defendant and indicated that he had spoken with a lawyer. The Plaintiff reminded the Defendant what he had done and asked him for $2,500.00 in order for the Plaintiff to keep quiet about everything. The Defendant declined the Plaintiff’s request.

[13] In July 2017, the Defendant was charged by the RCMP with two counts of touching the Plaintiff for a sexual purpose, contrary to s.151 of the *Criminal Code*. He pleaded guilty to one of the charges and was sentenced, *inter alia*, to three years' probation.

[14] In the pre-sentence report prepared as a result of the Defendant's guilty plea, it is suggested that the Defendant himself was the victim of numerous occasions of sexual assault during his childhood, including by his father. While this in no way diminishes the Defendant's behaviour, if this information is accurate, it may provide some explanation for his otherwise inexplicable conduct.

THE COURT'S FINDINGS

[15] I find that, in or around 1989, the Defendant sexually abused and assaulted the seven-year-old Plaintiff on numerous occasions. The exact number is unknown, but, by the Defendant's own admission, it is likely in the range of a dozen times.

[16] There is a discrepancy in the evidence about whether the Defendant touched the Plaintiff's genitals directly on one or more of these occasions, or whether the abuse consisted of the Defendant rubbing the Plaintiff's genitals over his clothing (along with exposing his erect penis). I am not sure that a great deal turns on this. Nevertheless, I am satisfied from the evidence presented that on the occasion when the Defendant exposed his erect penis to the Plaintiff and invited him to touch it, the Defendant put his hand inside the Plaintiff's pants and touched the Plaintiff's genitals. I will explain how I have come to this conclusion.

[17] Overall, both parties to this action appeared to be credible witnesses.

[18] The Plaintiff could not remember all incidents of abuse and was not prepared to testify that further abuse occurred unless he could specifically recollect it. This, in my view, added to his credibility.

[19] The Defendant, however, also appeared to be credible. When charged criminally for the conduct in question, he pleaded guilty to the crime. More importantly, he acknowledged at trial that he had tried to touch the infant Plaintiff for a sexual purpose on numerous occasions (approximately a dozen times) even though the Plaintiff could only remember, and had testified about, three such occasions. This, in my view, added to the Defendant's credibility.

[20] There is a difference, however, between credibility and reliability. Due to the passage of time, I was not satisfied that all of the Defendant's testimony was reliable. I will explain.

[21] Under cross-examination, the Defendant suggested that the "beef barn" incident did not take place in the evening. However, he testified on discovery that it had. When faced with this discrepancy at trial, the Defendant explained that his memory isn't what it once was. That is understandable given that these events occurred over 30 years ago.

[22] In addition, I do not accept the Defendant's evidence that when he exposed his penis, the seven-year-old Plaintiff said words to the effect that the Defendant was going to "pay for this some day." It may be that the Defendant is confusing the beef barn incident with the 1999 telephone call where the Plaintiff asked for $2,500.00. In other words, the statement by the Plaintiff that the Defendant was going to "pay for this some day" may have been made during the 1999 telephone call rather than at the time the Plaintiff was assaulted. In any event, I am not satisfied that at the time the assault took place, the seven-year-old Plaintiff indicated to the Defendant that the Defendant was going to pay for his actions some day.

[23] While, overall, I found the Defendant to be credible, I did not find his evidence to be as reliable as the Plaintiff's evidence.

[24] The Plaintiff has a vivid recollection that when the Defendant exposed his penis, he undid the Plaintiff's pants, put his hand down the Plaintiff's pants and touched his genitals. I accept the Plaintiff's evidence in this regard.

[25] The Plaintiff appeared to be much less certain about whether the Defendant actually touched his genitals on the other occasions when he was abused or whether the Defendant grabbed the outside of his pants. As indicated previously, the Plaintiff testified that the Defendant "sort of …. probably did the same thing, fondled me for a couple minutes" during one of the two other incidents of abuse that the Plaintiff could recollect.

[26] I am unable to conclude that the Defendant actually touched the Plaintiff's genitals directly on the other occasions when abuse occurred. As indicated previously, however, I do not believe that a great deal turns on this.

DAMAGES

[27] The evidence establishes that the Plaintiff was a happy-go-lucky child when his family moved to Nova Scotia. He was in grade one at the time and did well in school. He was curious about how things worked and loved to read.

[28] I have found that the Defendant's abuse of the Plaintiff took place in or around 1989. The Plaintiff would have been in grade two in the spring of 1989 and grade three in the fall of 1989. In grade three or four, the Plaintiff's behaviour changed. He started acting out in class. He became disruptive and unfocused. In addition, he started lying and acting out at home. He was argumentative and was getting into trouble.

[29] When the Plaintiff was in grade six his family (with the exception of his older sister) moved back to Ontario. His behaviour continued to decline. He lost his interest in school. By grade seven he was skipping classes. He ignored house rules. He started smoking cigarettes and drinking by the age of 12 or 13 and, shortly thereafter, started using marijuana. The Plaintiff suffered from insomnia and used marijuana to help him fall asleep.

[30] One night shortly after the Plaintiff finished grade seven, he came home late drunk. He would have been approximately 12 years of age at the time. The next day, his mother called the Plaintiff's father and said that she could no longer control the Plaintiff. She asked that the Plaintiff move in with his father. Unfortunately, this move did not help. The Plaintiff's father was a boilermaker who worked a great deal, often on the night shift. This situation gave the Plaintiff greater latitude. He became friends with a bad crowd and started breaking into cars, as well as a corner store. Eventually, he broke into a golf course and stole a golf cart. He was charged with break, enter and theft as a result of this later incident and ended up in a "boot camp" and at a juvenile detention facility. Fortunately, this experience had a positive effect on the Plaintiff and ended his criminal behaviour (with the exception of illegal drug use).

[31] Unfortunately, the Plaintiff never regained his interest in school. His last completed school year was grade nine.

[32] Shortly after turning 17 years old, the Plaintiff went on the road, hitchhiking to British Columbia. His life then became a series of odd jobs, alcohol and drugs. He struggled with anxiety. He was using ecstasy, cocaine and marijuana. He lived a nomadic lifestyle, moving regularly. He testified that he didn't like himself very much and was never happy in his own skin. He was undependable as an employee and changed jobs regularly.

[33] In 2014, the Plaintiff started working for a company known as *. Very little evidence was given surrounding this employment, but it appears that the Plaintiff was working successfully as a service technician for this company. In the winter of 2016, the Plaintiff ruptured his L4-L5 disc while at work. He has been unemployed and on worker's compensation benefits since that time.

[34] In October 2014, the Plaintiff and his then girlfriend had a child. His son's birth was a turning point in the Plaintiff's life. As a parent, however, he is overprotective. He is terrified that someone is going to hurt his son. He has nightmares and anxiety about this happening. He will not leave his son with anyone other than family.

[35] The Plaintiff has had difficulty functioning in relationships. Nevertheless, he married in 2020. He has a supportive spouse, but there is a lack of intimacy in their relationship.

CAUSATION

[36] In the Plaintiff's pre-trial brief, it is suggested that the abuse perpetrated by the Defendant was a material contributor to the Plaintiff's lifelong poor mental health and resulting underemployment.

[37] The Plaintiff has not produced any medical or expert evidence to indicate that he has been formally diagnosed with a mental health condition as a result of the Defendant's abuse or that the Defendant's actions caused him harm.

[38] Many cases, these days, have become a battle of the experts. Parties retain experts (including some who clearly lack the objectivity required of an expert under our *Civil Procedure Rules*) to advance their case. Significant costs are incurred by both sides, often with little or no benefit to the court. While many cases require expert evidence to prove liability or damages, some do not.

[39] The Defendant has acknowledged, quite properly in my view, that a mental or psychological injury can be established without expert evidence or proof of psychiatric illness. As noted in *Saadati v. Moorhead*, 2017 SCC 28, at ¶ 38:

> …. To be clear, however: while relevant expert evidence will often be helpful in determining whether the claimant has proven a mental injury, it is not required as a matter of law. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of

> course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused *any* mental injury, or at least any mental injury known to psychiatry. While, for the reasons I have given, the lack of a diagnosis cannot on its own be dispositive, it is something that the trier of fact can choose to weigh against evidence supporting the existence of a mental injury.
>
> [Emphasis in the original]

[40] The court also noted that mere upset is not sufficient to ground an action. At ¶ 37, the court stated:

> ….. [A]s *Mustapha* makes clear, mental *injury* is not proven by the existence of mere psychological *upset*. While, therefore, tort law protects persons from negligent interference with their mental health, there is no legally recognizable right to happiness. Claimants must, therefore, show much more – that the disturbance suffered by the claimant is 'serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears' that come with living in civil society (*Mustapha*, at para.9). To be clear, this does not denote distinct legal treatment of mental injury relative to physical injury; rather, it goes to the prior legal question of what constitutes "mental injury". Ultimately, the claimant's task in establishing a mental injury is to show the requisite degree of disturbance (although not, as the respondents say, to show its classification as a recognized psychiatric illness).
>
> [Emphasis in the original]

[41] In this case, I am satisfied that an expert opinion is not necessary to determine the type of damage done to the Plaintiff.

[42] In my view, it is also unnecessary, in the circumstances of this case, for the Plaintiff to produce expert evidence to establish that it was the Defendant's actions that caused him harm. In the case at bar, I am satisfied that the court is capable of determining the matter absent expert evidence. As noted by the Nova Scotia Court of Appeal in *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, at ¶ 158:

> Generally, the test to determine whether the necessary causal link exists is whether the injury would not have occurred but for the defendant's wrongful act. This test is not to be applied too rigidly, however. Causation need not be determined with scientific precision. Rather, causation is essentially a practical question of fact which can best be answered by ordinary common sense: **Snell** at 328; see also **Athey v. Leonati**, [1996] 3 S.C.R. 458.

[43] Defence counsel has acknowledged that the Plaintiff has suffered some anxiety and sleep disturbance as a result of the Defendant's abuse and that he has

struggled throughout much of his life. She questions, however, whether many of the Plaintiff's complaints can be tied to the Defendant's conduct.

[44] Ms. Robson noted other issues that were going in the Plaintiff's life that could have had a negative effect on the Plaintiff, his education and his employment. For example, she noted that the Plaintiff's mother and father separated when the Plaintiff was only five or six years of age and, shortly thereafter, the Plaintiff had a new stepfather. While the Plaintiff has only a vague recollection of his parents' separation, and maintained a positive relationship with both parents after it occurred, he acknowledged at trial that it was difficult adjusting to a new parent who wasn't his father.

[45] Ms. Robson also noted that the Plaintiff moved on numerous occasions in his early years, often changing schools. The Plaintiff's move to Nova Scotia in 1987 was particularly difficult for him, as he had moved several thousand kilometres away from his father. She also noted that when the Plaintiff eventually moved in with his father, he was left unsupervised for periods of time while his father worked evenings and nights.

[46] Further, she noted that while the Plaintiff has never been formally diagnosed with Attention Deficit Hyperactivity Disorder, the question has been raised, more than once, about whether the Plaintiff has ADHD.

[47] This, in my view, focuses on the issue of causation in relation to damages. As noted by the Supreme Court of Canada in *Blackwater v. Plint*, 2005 SCC 58, at ¶ 78:

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

[48] While I accept that there were a number of factors in the Plaintiff's life (including the separation of his parents, numerous moves, the possibility of ADHD, etc.) that could have contributed to the difficulties he experienced over the years, I am fully satisfied that the Defendant's abuse significantly affected the Plaintiff and caused him serious and prolonged psychological or mental injury. The Defendant's

abuse had a profound effect on the Plaintiff and altered the course of his life. This was evident during the course of the trial, which took place over three decades after the abuse occurred.

[49] At trial, with the consent of both parties, the Plaintiff's Victim Impact Statement from the Defendant's criminal sentencing was entered into evidence. This statement sets out the Plaintiff's views on how the Defendant's abuse affected him. He described going from being an outgoing, happy, innocent boy to misbehaving and causing trouble. He noted that he started to mistrust adults and authority figures, which led to many issues in school. He said he turned to drugs and alcohol to deal with the pain of the memories. I accept the Plaintiff's evidence in this regard.

[50] I am satisfied, on a balance of probabilities, that the Defendant's actions caused the Plaintiff to suffer greatly and negatively affected both his education and his employment.

GENERAL DAMAGES

[51] The Plaintiff is seeking general damages of $175,000.00, relying on the following decisions:

> *Nova Scotia (Attorney General) v. B.M.G.*, *supra*: This case involved a troubled thirteen-year-old boy who was repeatedly sexually assaulted by his probation officer. The offending conduct included oral sex and anal rape. The trial judge (at ¶ 161 of his decision) described the abuse as the most degrading kind of sexual abuse imaginable. The young plaintiff had suffered physical and mental abuse at home before the sexual abuse occurred. The trial judge determined that an appropriate range for non-pecuniary damages for cases involving severe and continuing abuse of a child, which has ongoing negative effects on the victim, was between $125,000.00 and $250,000.00 (170,870.54 - $341,741.07, adjusted for inflation) and awarded non-pecuniary damages, including aggravated damages, of $125,000.00 ($170,870.54 adjusted for inflation). That figure was upheld on appeal.
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> *L.M.M. v. Nova Scotia (Attorney General)*, 2011 NSCA 48: This case also involved a troubled 13-year-old boy who was sexually assaulted numerous times by his probation officer. The assaults included oral sex and digital penetration. The trial judge awarded general damages of

> $125,000.00 ($159,213.81 adjusted for inflation). This amount was upheld on appeal.
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> *A.M.S. v. Wootton*, 2016 NSSC 351: This case involved a 23-year-old woman who was assaulted on one occasion at a riding stable. The assault involved digital penetration. The effects on the plaintiff, who had pre-existing problems with depression, were profound. Shortly after the assault, the plaintiff attempted suicide. The plaintiff had been sexually abused on two prior occasions. The court awarded non-pecuniary damages, inclusive of aggravated damages, of $140,000.00 ($166,931.46, adjusted for inflation).
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> *Zando v. Ali*, 2018 ONCA 680: This case involved co-workers (physicians). The assault involved the defendant thrusting his erect penis into the plaintiff's face and then penetrating the plaintiff's vagina. The assault occurred on one occasion. The trial judge awarded general damages of $175,000.00 ($200,843.33, adjusted for inflation). This award was upheld on appeal.

[52] The Defendant submits that if general damages are awarded, they should be in the range of $25,000.00 to $42,000.00. The Defendant relies on the following cases:

> *C. (J. C.) v. Keats*, 1995 CarswellSask 87 (Q.B.): This case involved two young children who were sexually abused over six years by a friend's father. With the exception of one attempt to have one of the girls perform fellatio, the assaults consisted of "flashing" and touching. The court was concerned about the fact that neither plaintiff had sought counselling after the assaults. In addition, the trial judge expressed concern that there was no independent professional evidence to assist in analyzing how much of the plaintiff's complaints could be attributed to the defendant's conduct. Each plaintiff was awarded general damages of $18,000.00 ($31,387.24, adjusted for inflation).
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> *V.P. v. Canada (Attorney General)*, 1999 SKQB 180: This case involved a seven- year-old child who was sexually abused by the administrator of a residential school. The abuse involved inappropriate touching of the child and the administrator putting his penis between the child's legs and

> ejaculating. There was no attempt at intercourse. The trial judge assessed non-pecuniary damages at $35,000.00 ($57,187.83, adjusted for inflation).
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> *A.B. v. C.D.*, 2011 BCSC 775: This case involved a seventeen-year-old student who was sexually abused by a teacher. The abuse consisted of hugging, kissing and touching. General damages were awarded in the amount of $50,000.00 ($63,685.62, adjusted for inflation).
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> *R.D. v. G.S.*, 2011 BCSC 1118: This case involved a young girl who was sexually abused by her stepfather. The abuse consisted mainly of the defendant touching the plaintiff's breasts. In addition, nude photographs of the plaintiff's breasts were discovered in the defendant's bedside table. General damages were awarded in the amount of $35,000.00 ($44,579.87, adjusted for inflation).
>
> *T.M. v. G.M.*, 2016 BCSC 149: This case involved the sexual abuse of a young girl by a friend's father. The abuse consisted of viewing, touching and video taping the plaintiff's vagina and buttocks and masturbating in front of her. Expert evidence provided by the plaintiff (who was 12 years old at the time of trial) indicated that the plaintiff appeared ambivalent concerning the sexual assaults. The psychologist retained by the plaintiff did not diagnose the plaintiff with a psychological condition and did not make any future treatment recommendations. The court found that the plaintiff was a very resilient child and assessed non-pecuniary/aggravated damages at $33,000.00 ($39,348.13, adjusted for inflation).

[53] In addition to the cases relied on by the parties, I have found the following decisions to be of assistance:

> *D.M. v. W.W.*, 2013 ONSC 4176: In this case, a 12-year-old plaintiff was sexually assaulted by his 36-year-old maternal uncle. His uncle rubbed the plaintiff between his legs, touched his genitals and rested his hand on the plaintiff's groin. The effects of the abuse on the plaintiff were significant and continued for many decades, up to the time of trial. The plaintiff sought general and aggravated damages between $75,000.00 and $95,000.00. The court awarded general and aggravated damages of $95,000.00 ($118,537.08, adjusted for inflation).

> *H.L. v. Canada (Attorney General)*, 2001 SKQB 233; 2002 SKCA 131; 2005 SCC 25: This case involved a 14-year-old child who was sexually assaulted by the supervisor of an after-school boxing club. The victim was subjected to acts of masturbation on two occasions and to requests for sexual favours. The effect of the abuse on the plaintiff was significant. The trial judge awarded general damages, including aggravated damages, of $80,000.00 ($125,749.49, adjusted for inflation). This award was upheld on appeal.

[54] In my view, assessing general damages in cases involving sexual abuse is different than assessing general damages in cases involving personal injuries that have been suffered as a result of an accident. The Nova Scotia Court of Appeal provided significant guidance in this regard in *Nova Scotia (Attorney General) v. B.M.G.*, *supra*. In that case, the court suggested that judges should take a functional approach when assessing damages in sexual abuse cases. The court stated at ¶132:

> In my view, an award of non-pecuniary damages in sexual battery cases ought to take into account the functions of the award. These are to provide solace for the victim's pain and suffering and loss of enjoyment of life, to vindicate the victim's dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts.

[55] The court, citing *Blackwater v. Plint*, *supra*, went on (at ¶134) to refer to the following non-exhaustive list of factors that may be considered when fashioning a non-pecuniary damages award in a case of sexual battery:

- the circumstances of the victim at the time of the events, including factors such as age and vulnerability;
- the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were;
- the circumstances of the defendant, including age and whether he or she was in a position of trust; and
- the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

[56] In the case before me, I am satisfied that the four factors referred to in *B.M.G.*, *supra*, sufficiently address the matters that I should be considering when determining

a proper general damage award for A.B. Applying these factors to the case at bar, I make the following findings.

The circumstances of the victim at the time of the events, including factors such as age and vulnerability

[57] The Plaintiff was a vulnerable child of only seven years of age at the time these assaults occurred. All forms of sexual abuse, regardless of the victim's age, are egregious. The sexual abuse of a child is particularly egregious.

The circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were.

[58] Sexual assault, by its very nature, is violent, invasive and degrading. The sexual abuse of the Plaintiff in this case was not as invasive as other cases (for example: in *B.M.G.*, *supra,* the assaults included oral sex and anal rape; in *L.M.M.*, *supra*, the abuse included oral sex and digital penetration). One must be careful, however, not to over-or under-emphasize the nature of the physical acts that occurred (i.e.: whether the assaults involved touching the Plaintiff's genitals over or under his pants, or whether penetration occurred). This was discussed in detail in *R. v. Friesen*, 2020 SCC 9, where the court stated:

> [142] ….. [C]ourts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, 'judges should think in terms of what is most threatening and damaging to victims' (p.180). Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in *McDonnell*, **an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause (paras. 111-15). Sexual violence that does not involve penetration is still 'extremely serious' and can have a devastating effect on the victim (*Stuckless (1998),* at p. 117*). This Court has recognized that 'any sexual offence is serious' (*McDonell,* at para. 29), and has held that 'even mild non-consensual touching of a sexual nature can have profound implications for the complainant'** (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.).
>
> ……

[144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [TRANSLATION] 'relatively benign' (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). **Implicit in these decisions is the belief that conduct that is unfortunately referred to as 'fondling' or [TRANSLATION] 'caressing' is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (Benedet, at pp. 299 and 314; Wright, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.**

[145] Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, **courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved (see Wright, at p. 150).**

[146] Fourth, it is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale (see *R. v. R.W.V.*, 2012 BCCA 290, 323 B.C.A.C. 285, at paras. 19 and 33). This is an error – there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference. As the Ontario Court of Appeal recognized in *Stuckless (2019)*, physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration (paras. 68-69 and 124-25). Similarly, **it is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus, or penetration. For instance, depending on the circumstances of the case, touching that is both extensive and intrusive can be equally or even more physically intrusive than an act of fellatio, cunnilingus, or penetration.**

[Emphasis added]

[59] While the court in that case was dealing with a criminal sentencing, its comments, in my view, are also apt in the civil context.

[60] That is not to suggest that the invasiveness or violence of the Defendant's actions is not relevant when it comes to assessing damages. Clearly, it is. It is one of the considerations set out by the Court of Appeal in *B.M.G., supra*. However, the notion that the inappropriate touching of a child for a sexual purpose is a minor act fails to recognize the seriousness of all forms of sexual abuse, regardless of its nature.

[61] In this case, the Defendant assaulted the Plaintiff on numerous occasions. The Defendant's physical interference with the Plaintiff was less pronounced than in some other cases such as *B.M.G., supra* and *L.M.M., supra*. His actions, however, were invasive and degrading.

<u>The circumstances of the Defendant, including age and whether he or she was in a position of trust</u>

[62] The Defendant was an adult of approximately 29 years of age at the time the abuse occurred. The Plaintiff submits that the Defendant was in a position of trust at the relevant time. The Defendant disputes this assertion. Neither counsel provided the court with any authority in support of their client's position.

[63] In *R. v. P.S.*, [1993] O.J. No. 704 (Ont. Ct. J. (Gen. Div.)), affirmed at [1994] O.J. No. 3775 (Ont. C. A.), Blair J., when dealing with s. 153(1) of the *Criminal Code,* described a position of trust as follows:

> **32** There is very little assistance in the case law as to what constitutes 'a position of trust or authority'. Quite possibly this is due to the very fact specific nature of such an enquiry.
>
> **33** There are certain relationships which fall easily into the category, such as parents and grandparents, legal guardians, foster parents and certain relatives. In commenting upon the characteristics of offenders of this class, as studied by the Committee, the Badgley Report stated as follows:
>
> > 'The common denominator linking these different classes of offenders was that, by reason of their biological, legal or social relationship to their young victims:
> >
> > 1. Their opportunities for sexually abusing the children 'at hand' were greater than ordinary.

> 2. Correspondingly, their young victims were particularly vulnerable to them.
>
> 3. By so acting, these offenders breached the vital position of trust reposed in them due to their special relationship to their young victims.
>
> …..'

[64] The court went on to state at ¶36:

> **36** One needs to keep in mind that what is in question is not the specialized concept of the law of equity, called a 'trust'. What is in question is a broader social or societal relationship between two people, an adult and a young person. 'Trust', according to the Concise Oxford Dictionary (8th ed.), is simply 'a firm belief in the reliability or truth or strength of a person'. Where the nature of the relationship between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts of reliability and truth and strength are put to the test. Taken together, all of these factors combine to create a 'position of trust' towards the young person.

[65] See also *R. v. Audet*, [1996] 2 S.C.R. 171, at ¶¶ 32-40; *R. v. Aird*, 2013 ONCA 447, at ¶34 and *C.S. v. Nigro*, 2010 ONSC 3204, at ¶ 47.

[66] I am satisfied that the nature of the relationship between the Plaintiff and the Defendant was such that the Defendant was in a position of trust towards the Plaintiff. The fact that the Defendant was an adult and the Plaintiff was a child does not, in and of itself, put the Defendant in a position of trust (see *R. v. A.Q.D.*, 2002 NSSC 222, at ¶ 65). It is the nature of the relationship that must be assessed.

[67] In this case, the Plaintiff was an inquisitive young child who was very interested in the adult Defendant's activities. The Defendant (whose mother rented the Plaintiff's family the farmhouse that they were living in) was a regular visitor at the property. As a result, the Plaintiff and the Defendant had regular contact with one another.

[68] During the Defendant's testimony, he indicated that he was often at the rental property at least twice a day, often more. While there, he had more contact with the Plaintiff than anyone else. He said that when he went over to the barn or the garage, the Plaintiff was very often there at his side. He testified that when the Plaintiff's family moved in, the Plaintiff's mother was very excited, as she thought it would be

good for the Plaintiff to spend time with the Defendant, since they shared similar interests.

[69] I am satisfied that the nature of the relationship between the Plaintiff and the Defendant was such that it created an opportunity for the Defendant to abuse the Plaintiff. The Plaintiff was vulnerable to the Defendant due to the age difference between the two. I find that the Defendant was in a position of trust in relation to the Plaintiff and that he breached that trust when the sexual abuse occurred.

The consequences for the victim of the wrongful behaviour including ongoing psychological injuries

[70] As indicated previously, I am satisfied that the consequences for the Plaintiff of the wrongful behaviour were profound. I appreciate that the abuse that occurred was not as invasive as other forms of sexual abuse. However, as noted by the Supreme Court of Canada, any form of sexual abuse is serious. When considering a proper award of damages, an important consideration is the consequences of the abuse on the victim. How was he affected by the Defendant's conduct? In the case at bar, I am satisfied that the Defendant's actions had a profound effect on the Plaintiff and dramatically altered the course of his life. This needs to be taken into account when determining the appropriate award for general damages.

[71] Determining non-pecuniary general damages in cases of sexual abuse is not an easy task. As noted by the British Columbia Court of Appeal in *S.Y. v. F.G.C.*, [1996] B.C.J. No. 1596 (C.A.), at ¶ 55:

> What is fair and reasonable compensation for general damages, including aggravated damages, in this case is not easy to say. 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.

[72] While the authorities relied on by the parties are helpful in assessing the Plaintiff's general damages, each case turns on its own facts. Most of the cases relied on by the Plaintiff involved acts of abuse that were much more invasive than in the case at bar (recognizing, of course, that all forms of sexual abuse are serious and invasive). Some of the cases relied on by the Defendant, in my respectful view, fail to recognize the serious effects of sexual abuse (for example: *C.(J. C.) v. Keats*, *supra*) or deal with a victim who did not seem to be significantly affected by the

Defendant's conduct (*T.M. v. G.M.*, *supra*). I conclude that an appropriate present day range for non-pecuniary damages for sexual abuse of this nature (invasive and serious but not at the more severe level that existed in cases such as *B.M.G.*, *supra* or *L.M.M.*, *supra*) that has had a significant effect on the Plaintiff is between $45,000.00 (*R.D. v. G.S.*, *supra*) and $167,000.00 (*A.M.S. v. Wootton*, *supra*).

[73] I award A.B. general damages of $110,000.00.[1]

LOSS OF EARNING CAPACITY

[74] The Plaintiff submits that as a result of the Defendant's abuse, he has been underemployed in both the type of work that he performed, and in his inability to maintain steady employment. He has claimed $300,000.00 for loss of earning capacity.

[75] The Defendant submits that the Plaintiff was able to train, learn skills and obtain well-paid work in a field of his choosing. He notes that in 2015 (the year before the Plaintiff injured his back) the Plaintiff earned in excess of $100,000.00. The Plaintiff stopped working in 2016 due to his back injury.

[76] The Defendant suggests that there is insufficient evidence that the Plaintiff's underemployment was caused by the abuse.

[77] I am satisfied, on a balance of probabilities, that as a result of the Defendant's abuse, the Plaintiff lost his interest in school and failed to complete his education. I am also satisfied, on a balance of probabilities, that as a result of the Defendant's abuse, the Plaintiff started to use and abuse drugs. Finally, I am satisfied that the Plaintiff's lack of education and drug use affected his earning capacity throughout the years.

[78] Generally, there are two ways to prove a loss of income. If there is evidence to establish what the Plaintiff would likely have earned had the tortious conduct not occurred, and there is evidence upon which the court can determine what the Plaintiff earned following the tortious activity and will likely earn in the future, the court can perform a mathematical calculation to quantify the loss. This is referred to as the

[1] The Plaintiff's spouse testified at trial about a lack of sexual intimacy in their relationship. The Plaintiff's medical records, tendered into evidence by consent, establish that the Plaintiff is on testosterone replacement therapy and is prescribed Cialis. Without expert evidence, I am unable to determine whether the lack of sexual intimacy between the Plaintiff and his partner results from the Defendant's abuse, low testosterone levels or some other reason. Accordingly, my award for general damages does not take this factor into account.

mathematical approach. Actuarial evidence is usually required in these types of cases. The court considers the actuarial calculations, decides whether the facts supporting the calculations have been established and applies negative and positive contingencies to the actuary's opinion.

[79] Sometimes, however, it is impossible to know what the Plaintiff would have earned had the tortious conduct not occurred. This is particularly so in cases involving infants who, at the time of the tortious activity, have not yet completed their education, or decided on their future career aspirations. In these circumstances, the Plaintiff is said to have suffered "the impairment of a capital asset, the capacity to earn" (*B.M.G., supra*, at ¶ 175). Trial judges facing these circumstances deal with lost earning capacity using what is known as a global approach. A global approach was used in both *Nova Scotia (Attorney General) v. B.M.G.*, *supra*, and *L.M.M. v. Nova Scotia (Attorney General)*, *supra*.

[80] In the case before me, the court must take a global approach. The Plaintiff was only seven years old at the time the abuse occurred. His education and career path had not yet been mapped out. In addition, the court has not been provided with any actuarial evidence in support of this claim.

[81] Assessing loss of earning capacity in cases of historical sexual abuse is fraught with difficulty. Trial judges are asked to go back in time and make factual findings about what a Plaintiff would have done, education-and career-wise, if the assaults had not occurred. Obviously, this exercise is not an exact science. When using a global approach, it is not uncommon for the trial judge to consider the careers of the Plaintiff's parents and/or siblings.

[82] The evidence establishes that the Plaintiff has worked a large variety of jobs over the years. He has busked, been a cook, worked in a snowboard rental shop, worked for a graphic design business, was a carnival worker for a very short period, did basic construction work including drywalling and tiling, worked on natural gas rigs offshore, was a computer store technician, was an apprentice boilermaker, worked as a welder/fabricator and, eventually, became a service technician maintaining pumping equipment for gas stations. He moved from job to job quite regularly.

[83] A.B.'s income tax summaries, which were entered into evidence, establish the following:

Tax Year	Total Line 150 Income
2000	$11,085.00
2001	$2,417.00
2002	$5,954.00
2003	$5,885.00
2004	$5,438.00
2005	$13,176.00
2006	$5,586.00
2007	$40,985.00
2008	$58,430.00
2009	$32,785.00
2010	$13,201.00
2011	$41,794.00
2012	$41,060.00
2013	$64,874.00
2014	$77,614.00
2015	$101,702.00

[84] The Plaintiff acknowledged at trial that there were one or two occasions when he had a brief "cash job" that would not be reflected on his income tax returns.

[85] I have reviewed the evidence provided at trial concerning the education and careers of the Plaintiff's parents and siblings. I was not provided with the educational background of the Plaintiff's father, but his mother and his siblings have all completed high school (his sister * completed high school by way of an adult upgrading course). The Plaintiff's father worked as a boilermaker for his entire career. The Plaintiff's mother and siblings have worked in a wide variety of jobs over their careers, sometimes taking courses and earning certificates along the way. At the present time, the Plaintiff's mother has a house painting business. The Plaintiff's older sister runs her own business helping to rehabilitate aggressive dogs and boarding animals. His middle sister has a diploma in social work and, just prior to trial, had started working as a youth support worker. The Plaintiff's youngest

sister runs a business with her finacée processing and handcrafting sausages and seafood products for sale to retail stores and farmers markets.

[86] I am satisfied, and I find, that had it not been for the sexual assaults by the Defendant, the Plaintiff would have graduated from high school and gone into a trade. Like his mother and his siblings, he would likely have held a variety of jobs over the years, but his employment history would not have been nearly as erratic as it has been.

[87] The Plaintiff's income tax summaries show sporadic income (particularly in the early years) that eventually improved over time, particularly in the last five years prior to his back injury. His last few years of employment, before he injured himself, establish the type of work that he was capable of doing, and the level of income that he was capable of earning, had he not fallen into a life of alcohol and drug abuse. This is significant in my view.

[88] The Plaintiff's present inability to work is caused by his back injury, not the actions of the Defendant. However, the Plaintiff's lack of formal education will, in my view, restrict the types of employment available to him going forward. This difficulty, however, is easily remedied, should the Plaintiff wish to do so. I am completely satisfied that the Plaintiff has the ability to obtain his grade 12 equivalency quite quickly, should he elect to do so.

[89] Taking all matters into account, I conclude that it is appropriate to award the Plaintiff the sum of $225,000.00 for lost earning capacity.

COST OF FUTURE CARE

[90] The Plaintiff is seeking the sum of $15,000.00 for the cost of future psychological treatment.

[91] The Defendant submitted that very little, if any, evidence was given at trial in support of this claim. I agree.

[92] An award for the cost of future care should reflect what the evidence establishes is reasonably necessary to preserve the Plaintiff's health (as per McLachlin J. (as she then was) in *Milina v. Bartsch et al.,* 1985 CarswellBC 13 (S.C.), at ¶ 212).

[93] At the trial of this action, the only evidence that I was provided concerning the claim for the cost of future care was a suggestion by the Plaintiff that, two and a half weeks before trial, his family doctor suggested that counselling would possibly be beneficial to him. I was not given any evidence that the Plaintiff, who has never sought out counselling in the past in relation to the abuse that he has suffered, now wishes to participate in counselling. In my view, this is a significant void. If a litigant is going to seek funding for counselling, an evidentiary foundation should be established for this claim. In my view, the evidentiary foundation should include an indication from the Plaintiff that he wishes to participate in counselling.[2]

[94] In addition, I was not provided with any evidence, whatsoever, concerning the cost of counselling (if, indeed, the Plaintiff would incur a cost in this regard) or how many counselling sessions would be reasonable for the Plaintiff.

[95] At the end of the day, I have not been provided with evidence establishing that psychological counselling is reasonably necessary in this case. Nor have I been provided with any evidence concerning the cost of counselling. As a result, the Plaintiff's claim for cost of future care is dismissed.

FAILURE TO MITIGATE

[96] The Defendant suggests that the evidence is clear that the Plaintiff has failed to mitigate his losses. In particular, the Defendant notes that the Plaintiff has not sought out any mental health counselling to help him deal with the consequences of the Defendant's abuse. The Defendant acknowledges that the Plaintiff may not have understood the impact of the abuse until later in his life and may not have been able to mitigate his damages early on. He submits, however, that once the Plaintiff's son was born in 2014, the Plaintiff began to understand the impact of the assaults on his life. According to the Defendant, the Plaintiff should have acted at that time to obtain counselling to assist him in overcoming the consequences of the Defendant's actions.

[97] In *Byron v. Larson*, 2004 ABCA 398, the court summarized the law of mitigation as follows:

[2] There may be some cost of care expenses that are so obviously required that a party does not need to testify about the intention to use them. For example, an individual who is rendered a quadriplegic and, as a result, requires a wheelchair, will not likely have to testify about their intention to use a wheelchair. In my view, counselling is different.

> [15] The general proposition underlying the principle of mitigation is that a defendant cannot be held liable for damages which the plaintiff could have reasonably avoided: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. (‘*Janiak’*); *Silvaniuk v. Stevens* (1999), 244 A.R. 75, 1999 ABCA 191 (*‘Silvaniuk’*). Once a plaintiff establishes the liability of the defendant, damages, and quantum of damages, the burden shifts to the defendant to prove that the plaintiff could and should have mitigated his or her losses: *Janiak* at 163. To establish mitigation, the defendant must prove on a balance of probabilities that: 1) the plaintiff acted unreasonably; and 2) had the plaintiff acted reasonably, his or her losses would be reduced or eliminated: *Janiak* at 163-166.
>
> [16] Whether a party has been reasonable in refusing to accept medical treatment is a question of fact: *Janiak* at para. 7; *Engel v. Salyn*, [1993] 1 S.C.R. 306 at 316. The trier of fact must make the determination of reasonableness taking into consideration all of the surrounding circumstances; *Silvaniuk* at para. 12. Whether a plaintiff’s conduct in respect of his or her injuries was reasonable ‘includes submitting to reasonable medical treatment and following medical advice when appropriate’: *Silvaniak* at para. 12.

[98] As noted from the above, the burden is on the Defendant to prove that the Plaintiff could have avoided or reduced his damages by mitigating.

[99] It is clear from the evidence before me that the Plaintiff has told very few people about the assaults by the Defendant. He testified that he was ashamed of what occurred. Until recently, the Plaintiff has not told his medical doctor of the abuse.

[100] While it may appear obvious to some that counselling will assist individuals in dealing with the consequences of abuse, in my view, the matter is not that simple. Counselling can be very helpful for some and not so helpful for others. A great deal depends on the make-up of the individual who has been harmed and the communication level that exists between the counsellor and the patient. In addition, it must be recognized that some individuals, like the Plaintiff, experience difficulty discussing matters of abuse with others.

[101] The evidence before the court is that the first time counselling for the abuse was mentioned to the Plaintiff by a medical practitioner was approximately two and a half weeks before the trial. The burden is on the Defendant to satisfy me that the Plaintiff acted unreasonably in not mitigating his damages and that, had he acted reasonably, his losses would have been reduced or eliminated. In this case, that burden has not been met.

PRE-JUDGMENT INTEREST

[102] The parties have agreed that the Plaintiff is entitled to pre-judgment interest on general damages at a rate of 2.5% from the date of the filing of the Notice of Action (November 14th, 2019). They have further agreed that this interest will not be compounded.

[103] Counsel for the Plaintiff has confirmed that his client is not claiming pre-judgment interest on any other damages.

COSTS

[104] I will hear from the parties on the issue of costs if they are unable to resolve the matter by agreement.

Chief Justice Deborah K. Smith