

**COURT FILE NO.: CV-16-48**

DATE: 20190814

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

D.S.

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) J. Preszler and A. Zaltz, for the Plaintiff

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Plaintiff

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- and -

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Louis Omer Quesnelle

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) Self-Represented

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Defendant

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**) Heard: May 21, 2019**

### REASONS FOR JUDGMENT

**CORRECTED** – Paragraphs 45 to 51 inserted

C.M. SMITH, J

## Overview

- [1] This is a motion for default judgment in the action brought by the Plaintiff, D.S. (hereinafter "Plaintiff"), as against the Defendant, Louis Omer Quesnelle (hereinafter "Defendant"), for damages caused by the Defendant's intentional torts of assault, sexual assaults, and other misconduct of a sexual nature, committed against him during the period from January 1, 1987 to November 11, 1992, when he was between the ages of five and ten years old.

### **Factual and Procedural History**

#### **Findings of Guilt in Criminal Proceedings as against Defendant**

- [2] As a result of the assaults, sexual assaults, and other misconduct of a sexual nature that the Defendant committed against the Plaintiff, the Defendant was convicted on charges of assault, sexual assault and sexual interference contrary to the provisions of the *Criminal Code*.
- [3] In his reasons for sentence, Justice Mulligan of this court, summarized the findings of fact set out in the verdict as follows:

Mr. Quesnell began a common-law relationship with S.S., D.S.'s mother. She moved into a residence owned by Mr. Quesnelle. She was 31 and had two children, her daughter L.S., who was 10, and her son D.S., who was 5...

Mr. Quesnelle was found guilty of sexual activity involving D.S., who at that time was a child between the age of five and ten. ... D.S. was required to have a shower with Mr. Quesnelle on a regular basis, almost every weekend. While in the shower, D.S. was required to give Mr. Quesnelle oral sex. Mr. Quesnelle ejaculated on his face and in his mouth. D.S. did not recall being physically forced, but there were other acts of violence outside of the sexual activity, which formed the basis of other counts. D.S. gave evidence that he felt he was being bought when he went to McDonald's with Mr. Quesnelle on many weekends. D.S. did not tell anyone about the sexual activity at the time, however, there was evidence that he did tell a social worker some years later, when he was about 13. Unfortunately, this report was not fully investigated.

...Mr. Quesnelle was in a position of trust or authority over D.S. for a five-year period, when D.S. was 5 to 10 years of age. He was his step-father. He abused his position of trust and committed numerous sexual assaults over a prolonged period of time.

*R. v. Quesnelle*, 2013 ONSC 476

- [4] The facts found to be proven on each verdict subsequently affirmed by the Court of Appeal were set out by Justice Mulligan as follows:

(i) assault, contrary to s. 266 of the *Criminal Code*:

D.S. [i.e. the Plaintiff] recalled specific incidents of physical abuse by Mr. Quesnelle. On one occasion, he recalled being picked up and thrown in the air, only to land on the ground because Mr. Quesnelle had seen him doing the same thing to a frog.

...

Mr. Quesnelle picked him up while he was playing in the driveway, threw him up in the air and he landed on the ground...His evidence was that he was playing with a frog and Mr. Quesnelle had seen him throw a frog up so he responded by doing the same thing to D.S..

(ii) sexual assault, contrary to s. 271(1) of the *Criminal Code*:

D.S. [i.e. the Plaintiff] was five to ten years old and was residing with his mother and sister at Mr. Quesnelle's cottage. Mr. Quesnelle resided there, as well, D.S. told the court that during this period of time, he was required to have a shower with Mr. Quesnelle on a regular basis...it was D.S.' evidence that he was forced to give Mr. Quesnelle oral sex while in the shower...he testified that Mr. Quesnelle ejaculated on his face and in his mouth...he [i.e. the Plaintiff] said in his evidence: "He [i.e. the Defendant] tried to have sex with me and that didn't work, and he got angry and I got beat up. I got smacked."

He [i.e. the Plaintiff] testified that Mr. Quesnelle bent him over the bed and, as he stated in his evidence: "I can clearly remember me telling him 'No, no, no, no.' I remember me screaming it over and over.

As far as the frequency of sexual assault in the shower, he [i.e. the Plaintiff] stated: "It would vary, but normally once a weekend."

He talked earlier in his evidence about going to McDonald's with Mr. Quesnelle every weekend, and other treats, and he was asked: "Question: Did it, in your mind, have any relationship between these things and the assaults that were occurring? Answer: It was like I was being bought. That's what it felt like."

...

The elements of sexual assault involve intentional application of force without the consent of the complainant in circumstances of a sexual nature. In a case such as this, consent is not an issue because D.S. was five to ten years of age and under the age of consent. The issue for determination is whether or not the events took place.

I accept D.S.' evidence that sexual activity, oral sex with Mr. Quesnelle took place on a regular basis when he was living at the Quesnelle cottage.

...

I accept his evidence that sexual assaults took place frequently, most weekends over the period when he resided in the Quesnelle cottage when he was five to ten years of age.

(iii) sexual interference, contrary to s. 151 of the *Criminal Code*:

I apply the same analysis as in court five [i.e. sexual assault, contrary to s. 266 of the *Criminal Code*] to the elements of this count. Further, I accept that Louis Quesnelle touched D.S. with his penis by placing his penis in D.S.' mouth on a regular basis for a sexual purpose while showering with D.S.

*R v Quesnelle*, 2013 ONSC 7818 and 2015 ONCA 554

**Proof of Defendant's Assault, Sexual Assaults and Other Misconduct of a Sexual Nature, Committed Against Plaintiff**

- [5] The defendant's convictions in *R. v. Quesnelle*, 2013 ONSC 7818 for assault, sexual assaults, and sexual interference were upheld by the Court of Appeal in 2015 ONCA 554, and therefore constitute proof that he committed these crimes. See s. 22.1 of the *Evidence Act*, RSO 1990 c. E.23.
- [6] The Defendant's convictions on those offences also constitute the factual proof of the intentional torts causing the damages the Plaintiff claims. See *Intact Insurance Company v. Federated Insurance Company of Canada*, 2017 ONCA 73 at para. 18 and s. 22.1 of the *Evidence Act*, RSO 1990 c. E.23.
- [7] Based on those authorities, I am satisfied that the findings of fact in *R. v. Quesnelle* constitute proof of the intentional torts committed by the Defendant as against the Plaintiff herein.

**No Limitation Period in Respect of Causes of Action**

- [8] Sections 16(1)(h), (h.1) and (h.s2) of the *Limitations Act* SO 2002 c 24 Sch. B applies herein, such that the action is not precluded by operation of any limitation.

### **Procedural History**

- [9] The Plaintiff commenced the herein action by issuing a Statement of Claim on March 10th, 2016 which was subsequently served on the Defendant, Mr. Quesnelle, on April 15th, 2016.
- [10] The Defendant chose not to file a Statement of Defence in the action and as a result was noted in default on June 3rd, 2016 pursuant to the provisions of Rule 19.02(a) of the *Rules of Civil Procedure*, RRO 1990 Reg. 194. The defendant is thereby deemed to admit the truth of all allegations of fact made in the Statement of Claim.

### **Plaintiff's Mental and Emotional Injuries**

- [11] The Plaintiff attended for a psychiatric evaluation by Dr. Z. Waisman, MD FRCP(C) who is a certified subspecialist in forensic psychiatry and geriatric psychiatry. Dr. Waisman opined that the Plaintiff meets the diagnostic criteria for PTSD, Major Depressive Episode, currently moderate and non-psychotic, and a Substance Misuse Disorder in remission. D.S. also suffers from Generalized Anxiety Disorder and a Bipolar Disorder Type 2.
- [12] Dr. Waisman also commented on the impact of the abuse on D.S.:

#### **"Impact of the Abuse"**

Psychiatric and psychological disorders are the products of multiple causation. The field of behavioural science is not advanced enough to provide an actuarial tool or a system that delineates the extent of impact of each variable on the individual mental state.

D.S. reported "problems with people of authority", "problems maintaining a job", "ongoing anxiety issues", "feelings of guilt and shame", "lack of motivation", and "depression" as a result of the abuse.

I will now address each one of D.S.'s domains of functioning and offer my opinion on causation based on the interview with D.S., psychological testing, and review of collateral information.

#### **Interpersonal Relationships**

He described difficulties with trusting authority figures as a direct result of the abuse. Despite these events, D.S. has not been able to sustain significant relationships with others on all levels (intimate, familial and social). Overall, in my opinion the impact of the abuse in this domain is severe.

### **Educational and Occupational Trajectory**

It is impossible, based on the lack of scientific measures and the somewhat limited background information (I was not provided with his school records) available regarding D.S., to determine the relative contribution of the abuse on D.S.' academic performance in comparison to other factors such as lack of academic aptitude. In my opinion, the sexually assaultive behaviour by the boyfriend did affect D.S.' educational performance, but the extent of the effect cannot be defined with precision based on the available data. In terms of occupational trajectory, in my opinion D.S. may have obtained a more substantial career in his chosen occupation with a higher degree or level of training.

### **Sexual Functioning**

He denied any difficulties in achieving erection, libido, and ejaculation in the context of a sexual act but he described confusion and issues around mistrust in intimate relations beyond the sexual act. In my view, based on the available information, the sexually assaultive behaviour impacted D.S.' ability to maintain and enjoy intimacy. He denied being confused or perplexed about his sexuality or masculinity. He is avoidant of individuals with homosexual orientation and pursued male dominant attitudes and pursuits.

### **Prognosis**

- [13] "In D.S.' case factors that favour recovery include: passage of time, social supports through his family, and the absence of physical injuries or illnesses. Factors that worsen prognosis include: ongoing litigation and comorbidity with substance abuse (currently in remission), lack of psychopharmacological and/or advance psychotherapy for PTSD and depression. Overall D.S.' prognosis remains dependent upon his success in treating his comorbid conditions." Dr. Waisman also opined with respect to the prognosis that it is "guarded".

### **Subjects Description of Injuries**

- [14] D.S. described the incidents of the abuse at the hands of the Defendant as follows;

"I was molested from the ages of 5 to 11. It started when I was about 5 on a weekly basis. I had to perform oral sex on my mother's boyfriend at the time. It never gets easier. It was a ritual thing, Saturday or Sunday, depending, breakfast, a lot of time in the shower. Yeah, I am not going to go into too many details, because I don't know how many medications I would need to calm me down. Every time I talk about it, it opens a Pandora box. He is serving a 5-year prison sentence because of this. I watched him do this to my sister as well. And not only sexual, it's also physical. Mental. He is a sick man. I don't know what else to say."

[15] The Plaintiff was also asked by Dr. Zakzanis to describe the impact of this experience over the course of his life. In the Plaintiff's words,

"I can't have a relationship with any guys. I can't trust men at all. I don't like authority figures, parents, police, that has changed in the last 5 or 6 years because I am trying to do better, but in my teen years I started drinking when I was 14. I always got in trouble. Wrong choices, I don't know if I was mirroring him, I don't know. When I was 14, I tried to put myself into a group home and thank God I did, and got some training and medications. They put me on Chlorpromazine and Epival, there was another mild tranquilizer. I was in it for 2 years and then I went AWOL and signed myself out because the supervisor was leaving, and I had built a rapport with him and no one else, and I freaked out when I found out he was leaving. Then I lived on the street for about 6 months. Then my mom took me back in and I met my wife. And then all this time, I am an alcoholic. Age 16 I was a full-time alcoholic, recreational use of weed, and at 17 I went into the hospital because of the week. I was frightened and hospitalized for a week. I was in Youthdale for a period of 4 days, until my mom signed me out and then we had children, me and my wife. I got a good paying job, property management, it lasted 3 or 4 years, and my alcohol and mental health got in the way and I knew my boss was coming to fire me so I quit. I didn't want the confrontation. I tried odd jobs, and I couldn't do it. I couldn't do it, I lose focus with repetitive things, I don't understand it. I then get frustrated and angry, and I am hard on myself if I do something wrong, I am really hard on myself and feel like an idiot. And a lot of the jobs, I only completed Grade 9, I could only do factory work which is really repetitive, and I couldn't do. 90% of the guys in the labour business are men, as bosses and supervisors, and so, I really don't know how to explain it, but I could never trust any of them. I trust women more than I trust men, I don't know why, it stems from my childhood I guess. I applied for ODSP because the doctor I was seeing, the psychiatrist, said I shouldn't be working. I tried CBT classes, I have tried a number of different classes, and I have seen a lot of doctor who just don't care, government paid doctors who just don't care. I have always wanted a proper psychologist and psychiatrist. Maybe they can help. I have always been, you're just another client, here is some pills, just go home. This was in 2007, I was approved in 2009 and I was a non-earner since. But in 2010, I became sober and I started seeing a guy from Canadian Mental Health, he was my caseworker. So in 2010, I had Louis arrested, as I was sober, as I had somebody I could speak to. I went back to college. At the same time ti court case was going on and really busy, and I got a degree. I got a degree in Addictions and Community Service Worker. I went to Everest College. It was a one-year program. The teacher ran her own programs, and I learned about myself, it taught me a lot about me. So my student placement hired me, as an Addiction/Hostel Desk Clerk. I worked at a homeless shelter as an Addictions Counsellor and babysitting a bunch of grown men when they went to bed. I did it for 3 months. I broke boundaries with a client, and I quit. We had too much of a similar story, and we went out for drinks one night, and what I did was unethical, to see clients after work. I knew it was wrong and I couldn't live with myself, and I told my boss, and he respected the fact that I did and quit. In the past two years, me and my wife have split, I gained custody of my children. She could not handle it anymore. She couldn't handle my ups and downs and my drinking and me not being faithful to her. So we separated, and her mom and

stepfather still lived with me and her stepfather passed away August 2, 2015 and we tried to reconcile. She came back for a few months, and her mom died in September 2015, and she was in my home. We tried to reconcile until about December, but then, she had found independence or something, as it just didn't work, and then she cheated on me, which was ultimately the best thing that could have happened, because I knew how it felt. Anyways, she ran off with some dude, and I have the children have had full custody of my children, June 13, 2016 and on the 14th, at 1:00 a.m., my house burned to the ground. Electrical. It's been a big mess since then. I have been a big mess since then. I am skipping stuff. When I was getting good, Louis was sentenced to 5 years, and then they let him out on an appeal 16 days later, and that threw me, that was the worst thing that could have happened, my mental health went to shit in 2015 or 2014. Right back to drinking daily. Doing what I wanted, with who I wanted. No control. Now I don't have any doctors so I can't get back on any medications. That is my biggest problem. I don't think a general practitioner should be giving me medication for my mental health. After the fire, it was a mess, it put me into a darker spot, and drinking really excessive, really bad, and I moved into my mom's basement. I didn't go out for days, or shower, and thankfully she was there to help my children and this whole time I was trying to fight my mind about Louis. I always think about it. I couldn't even change my children as kids. I couldn't bathe them. I couldn't change them, I was always afraid that someone would say something. I have two boys, and I don't have a normal relationship. I can't hug them. I can't cuddle them. If they have a nightmare, I don't know how to console them. The kids you know, they should be able to sit on the couch and cuddle and watch a movie. I can't do it. It's just 'don't touch me'. I don't like being touched from anyone, even my fiancée. It's affected the love that I can show them, you should be able to show them, and I can't. I don't know how to explain it, but I would think you should be able to bathe and change your children, but all I have is flashbacks, and I don't like it. I drink to self-medicate. I drink now. I drink a 24 every night, if not every other night. I am getting better at it, but every time I have to deal with something that has to deal with Louis, it gets worse. I had the appointment last week, and it has been worse since. Now all I do is think about it, and think about it. It gets better sometimes, but it is always there. I don't know how to explain it. And I knew I had this one today, it's not your fault, you are not the monster. I knew I had to come here and talk about it. And if I didn't drink last night, I would have been a basket case. I know this."

### **Future Prospects**

- [16] In addition to his comments above about prognosis, Dr. Waisman also indicated that he would recommend further treatment including Cognitive Behaviour Therapy, which in turn would include prolonged exposure therapy and cognitive processing therapy. Dr. Waisman also outlines a possible course of pharma therapeutic treatment for D.S. who he notes "appears motivated to deal with his psychiatric problems". The doctor suggests at least one year of ongoing psychotherapy as outlined above at a frequency of once per week would be necessary.



- [17] The authors of the Psycho-Vocational Assessment Report opine as follows; "based on D.S.' presentation, the psychological testing results within the current evaluation, his declaration of currently struggling with alcoholism, and in consider of the aforementioned medical documentation provided for review, it is our considered opinion that from a psychological perspective, D.S. does suffer from a complete inability to work in any capacity at this exact time. Given his current psychological status, it is also our opinion that from a vocational perspective, D.S. suffers a complete inability to work at a job for which he is suited by education, training or experience. (emphasis in the original)"
- [18] When asked if D.S. has suffered a loss of competitive advantage in the marketplace, the authors of the Psycho-Vocational Assessment Report responded as follows "D.S. has many barriers to re-entering the workforce at the present time. First, his psychological status likely has a profound impact on his competitive advantage in the workplace. In particular, given his declared/documented psychological restrictions, his ability to attain and sustain gainful employment (i.e. perform job searches, network, prepare for/attend job interviews, maintain a regular full-time/daily work schedule, focus on/successfully complete required work tasks on a daily basis" may be compromised. Another pertinent factor is D.S. declared struggles with alcoholism, which profoundly impacts his competitive advantage and likelihood of securing/maintaining gainful employment. Furthermore, it is important to consider that D.S. has been out of the workforce for approximately four years. Accordingly, it is reasonable to postulate that D.S. has experienced a "decompensation" of previously held skills, knowledge, and abilities."
- [19] When asked whether D.S.' working life has been shortened, the authors of the report indicated "while it is reasonable to postulate that D.S.' working life has indeed been shortened, given the nature of the subject incident, it is difficult to calculate the extent of the impact."

### **Analysis**

- [20] Rule 19.06 provides that a Plaintiff is not entitled to judgment on a Motion for Judgment or trial merely because the facts alleged in the Statement of Claim are deemed to be admitted, unless the facts entitle the Plaintiff to judgment.
- [21] In this case, there is a wealth of highly persuasive cogent, clear, evidence, including the Defendant's conviction on the criminal offences and subsequent incarceration, the evidence of the various practitioners including their observations of D.S.'s input on the matter, and further, the fact of the Defendant's disinterest in the proceedings and default, all of which justifies a finding that the sexual abuse, breach of trust, assault on the Plaintiff, Defendant all occurred as alleged by the Plaintiff in his Statement of Claim. 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.

### Causation

- [22] The Plaintiff is further obliged to establish on the balance of probabilities that his injuries were caused as a result of the actions of the Defendant. In the case of *Blackwater v. Plint*, [2005] 3 SCJ 58 at paragraph 78, Chief Justice McLachlin, as she then was, held as follows:

The rules of causation require 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 the cause of the plaintiff's damage, the defendant is fully liable for that damage.

- [23] The authors of the psycho/vocational assessment report opine on child sexual abuse on victims generally at page 10, "According to the National Center for Victims of Crime, there are multiple effects of child sexual abuse on the victims. In the short term, after two years following the abuse, victims may exhibit regressive behaviours, sleep disturbance, eating problems, behavioral performance, problems at school and unwillingness to participate in school or social activities. Longer effects may involve anxiety, self-destructive behaviours such as alcoholism or drug abuse, and insomnia. Victims may show fear and anxiety in response to people who share characteristics of the abuser, i.e.) the same sex as the abuser or similar physical characteristics. Victims may experience difficulties in adult relationships and adult sexual functioning. Survivors may feel anger at the abuser, at adults who failed to protect him and themselves for not having been able to stop the abuse. Victims may experience traumatic sexualisation or the shaping of their sexuality in developmentally inappropriate and interpersonal dysfunctional ways. Victims may feel betrayed and an inability to trust adults because someone they depend on has caused them great harm or failed to protect them. Victims may feel powerless because the abuser repeatedly violated their body space and acted against their will through coercion and manipulation. Abusers may cause victims to feel stigmatized, ashamed and responsible for the molestation. Victims of child sexual abuse have higher rates of re-victimization and later sexual assaults than non-victims." Dr. Waisman also opines about the impact of sexual abuse in a general sense on victims at page 11 of his report at Tab 2a of the Motion Record.
- [24] Based on all the evidence before me, I am satisfied on the balance of probabilities that the Plaintiff's psychological complaints, substance abuse problems, and his various challenges as set out in the evidence before me would not have occurred "but for" the actions of the Defendant.

### Damages

- [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] 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.

### **The "Cap"**

- [27] Damages for catastrophic personal injury were "capped" in what has come to be known as "the trilogy" of cases being *Andrews v. Grand and Toy Alberta Limited*, [1978], 2 SCR 229, *Thornton v. District No. 57*, [1978] 2 SCR 267 and *Arnold v. Teno*, [1978] 2 SCR 287. Those cases held that a plaintiff claiming a non-pecuniary damages as a result of personal injuries should not be entitled to recover more than \$100,000. I am advised by counsel that when adjusted for inflation that figure is now approximately \$350,000.
- [28] The question of whether the so-called cap created by the trilogy should apply to intentional torts such as sexual abuse was considered by the British Columbia Court of Appeal in the case of *S.Y. v. F.G.C.*, 1996 CanLII 6597 (BC CA) ["S.Y."]. The plaintiff in *S.Y.* was the victim, as a minor, of repeated sexual abuse by her stepfather. At trial, the jury awarded \$350,000 in general damages. That award was considered by the British Columbia Court of Appeal on appeal, the particular issues being:

- 1) whether the trial judge should have instructed the jury with respect to the cap on general damages; and
- 2) whether the jury's award of compensatory damages was inordinately high.

[29] On the question of whether there should be a cap on awards of non-pecuniary damages for sexual abuse, the court reasoned as follows at paragraph 30:

I am not persuaded that the policy reasons which gave rise to the imposition of a cap in "the trilogy" have any application in a case of the type at bar. In my opinion the differences described by Cory J. [*Hill v. Church of Scientology of Toronto* [1995], 2 S.C.R. 1130] exist in this case as well. The policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, do not arise from intentional torts involving criminal behaviour. There is no evidence before us that this type of case has any impact on the public purse, or that there is any crisis arising from the size and disparity of assessments. A cap is not needed to protect the general public from a serious social burden, such as enormous insurance premiums. Insofar as damage awards may be so high as to be wholly erroneous, or wholly disproportionate, an appellate court may intervene to correct disparity, and to foster consistency.

In contrast, sexual abuse claims do not usually result in awards guaranteeing lifetime economic security. In the catastrophic personal injury cases, awards under other heads of damages are so high that there may be a lesser need for general damages to provide solace and to substitute for lost amenities. In some cases, sexual abuse victims may require and deserve more than the "cap" allows, due to the unpredictable impact of the tort on their lives. Judges, juries and appellate courts are in a position to decide what is fair and reasonable to both parties according to the circumstances of the case.

[30] The decision in *S.Y.* has been further considered and recognized by the Courts of Appeal for both British Columbia and Ontario. In the case of *Henry v. British Columbia (Attorney General)*, 2017 BC CA 420 ["Henry"], the British Columbia Court of Appeal did not disturb the trial judge's decision in that case to "follow...the reasoning in *S.Y.*, a case involving sexual assault, to conclude that the cap should not apply to Mr. Henry's claim". The court reached that decision after considering the applicability of the trilogy of cases referred to above.

[31] The Court of Appeal for Ontario has also recognized that the decision of the Court of Appeal for British Columbia in *S.Y.* created a principled basis for an exception to the "cap" on damages: quote from the decision of Borins, JA in the case of *Padfield et al v. Martin et al*, [2003] O.J. No. 2003 at paragraph 29.

It is in theory open to this court to create an exception to the cap and to decide that it does not apply in certain circumstances on policy grounds. For example,

the Supreme Court of Canada concluded in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, that the cap does not apply in defamation cases, because the function of general damages is different in such cases than in personal injury cases. In British Columbia, the Court of Appeal has concluded that the policy reasons for the cap are not present, and therefore the cap does not apply, where the cause of action is an intentional tort involving criminal behaviour, such as sexual assault: *Y. (S.) v. C. (F.G.)* (1996), 26 B.C.L.R. (3d) 155.

### **"Worst Case" Facts and the Historical Evolution of Damages in Sexual Abuse Jurisprudence**

- [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] 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.
- [34] In *P.B.*, Cunningham J, as he then was, awarded non-pecuniary general damages in the amount of \$100,000 and a further amount of \$75,000 as aggravated damages. The *P.B.* case was considered by the Court of Appeal for British Columbia in the *S.Y.* case where the jury awarded \$350,000 which was reduced on appeal to \$250,000 on the basis that it was "wholly out of proportion...because the award at bar was twice what was awarded in *P.B. v. W.B.*, which at the time was regarded as the "worst case". The court, however, went on to emphasize its recognition that fair and reasonable compensation in cases involving sexual abuse of minors is an evolving area of the law. At paras. 55 through 57, Mr. Justice Macfarlane of the Court of Appeal for British Columbia held as follows:

[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.

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

[57] Critical to any assessment is the view which the trier of the facts takes of aggravating features. ....

[35] These critical "aggravating features" referred to by the BC Court of Appeal in *S.Y.* were subsequently codified by the Supreme Court of Canada's decision in *Blackwater v. Plint*, 2005 SCC 58 ["Blackwater"] approving the factors considered by the trial judge in that case which were as follows:

- 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.

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] 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.)

[36] The factual circumstances underlying the present cause of action weigh heavier, in terms of the factors contemplated in *Blackwater*, than those canvassed in the recent appellate decisions upholding the availability of general damages in the upper range of \$290,000 to \$300,000: *McCabe v. Roman Catholic Episcopal Corporation*, 2019 ONCA 213 ["McCabe"] and *M.B. v. 2014052 Ontario Ltd.*, 2012 ONCA 135 ["M.B."]. In *McCabe*, the victim of sexual abuse was more than twice the age of the plaintiff in this action was when the subject sexual abuse first began. The incident of sexual abuse in *McCabe* was singular, whereas in this action as outlined above, the subject sexual abuse occurred weekly for a period of over five years. The fiduciary character of the stepparent/child

relationship as between the plaintiff and the defendant in this case involved a level of trust categorically more intimate than in the pastoral relationship in *McCabe*. While the victim of sexual abuse in the case of *M.B.* was an adult, there was no fiduciary relationship as between her and the plaintiff.

- [37] Two recent cases from the Ontario Court of Appeal bear consideration here as well, those being the case of *McCabe v. Roman Catholic Episcopal Corporation*, 2019 ONCA 213 ["McCabe"] and *Zando v. Ali*, 2018 ONCA 680 [*Zando*]. The *Zando* case involved a single incident of sexual assault as between two adults who were friends and co-workers. The trial judge in that case had set general damages in the amount of \$175,000 based on the complainant's report of feelings of shame, guilt, humiliation and degradation and her feelings of betrayal and mistrust regarding her colleague. In that case, the Ontario Court of Appeal held at page 19 as follows:

The trial judge's determination of damages did not depend on a finding that the respondent suffered long-term psychological trauma from the one incident of sexual assault, nor in my view would it be an error in principle for a trial judge to assess damages at that level in the absence of evidence of such long-term injury. As noted earlier, damages for sexual battery or assault are not solely to compensate for physical or mental injuries. They fulfill a range of functions, including "the recognition of the humiliating and degrading nature of the wrongful acts" (*Nova Scotia (Attorney General) v. B.M.B.*, 2007 NSCA 120 per Cromwell, J.A. (as he then was)).

Applying the *Blackwater* factors to the case at hand leads me to conclude that this case is at the upper end of the worst-case scale and approaches the *P.B. v. W.B.* case in terms of stark horror. At the time of the events in question began, the plaintiff herein was a five-year-old boy. Can there be anything more innocent or vulnerable than a five-year-old child?

- [38] The sexual assaults continued on a weekly basis for over five years and continued on a weekly basis for in excess of five years. On each of those occasions, the plaintiff was required to perform oral sex on the defendant, often involving the defendant ejaculating in the plaintiff's mouth or onto his body. Indeed, in his reasons for judgment in the case of *R. v. Louis Quesnelle*, 2013 ONSC 7818, Mulligan J accepted the evidence of the plaintiff herein on this point and found at page 37, line 17,

"...that sexual assaults took place frequently, most weekends over the period when he resided in the Quesnelle cottage when he was five to ten years of age."

If, as the plaintiff has advised, and as Mulligan J found, the activity occurred regularly for a period of five years on a weekly basis then there was something in excess of 250 discrete incidents of sexual assault as between the defendant herein and the plaintiff. Sexual assault is, by its very nature, a violent offence. The sexual assault in this case, involving as they did repeated acts of compelled fellatio, including ejaculation, could not possibly be more invasive or degrading.

- [39] At the time of his trial in 2013, the defendant was 71 years of age which means that at the material time herein, being 1987 to 1992, the defendant was between 45 and 50 years of age or some 40 years older than the Plaintiff. In 1987, the plaintiff, his sister and his mother were residing in a small winterized cottage near Bailieboro near Peterborough. Mr. Quesnelle owned a smaller cottage next door and after a time he and the plaintiff's mother commenced a common-law relationship which resulted in Mr. Quesnelle moving into the plaintiff's home. At that time the plaintiff was about five and his sister was about ten. Justice Mulligan found that Mr. Quesnelle was controlling, both physically and emotionally, of the plaintiff, his sister and his mother. The plaintiff saw the defendant as his stepfather. I find that the defendant was in a position of trust toward the plaintiff at all material times.
- [40] The last *Blackwater* factor, being in my mind the most aggravating of the four factors, involves the consequences for the plaintiff for the wrongful behaviour, including his ongoing psychological injuries which have been enumerated above. The defendant took an innocent five-year-old boy, used him horribly for his own purposes and satisfaction for five years before effectively discarding him and leaving him to deal with the fallout from that horrible mistreatment. The plaintiff has been dealing with a vast assortment of emotional and psychological problems ever since, and as noted above, his prognosis for recovery is, at best, "guarded" in the words of Dr. Wiseman.
- [41] Given the facts of this case and the case law set out above, I am of the view that the cap should not apply in this case.
- [42] I award the plaintiff damages in the amount of \$400,000.
- [43] The plaintiff shall also have pre-judgment interest on the foregoing amount from the date the cause of action arose, which I find on the evidence before me, to be January 1st, 1987 through until the date of this judgment, and post-judgment thereafter in accordance with the provisions of the *Courts of Justice Act*.
- [44] The plaintiff shall also have his costs of this action on a partial indemnity basis.

### **Economic Damages**

- [45] The plaintiff includes a claim in his Application herein for pecuniary damages arising from past and future economic losses resulting from the Plaintiff's inability to earn a livelihood.
- [46] As noted above, the plaintiff retained the services of Dedicated Economic Consultants Limited and in particular, Ms. Deborah Carter, an economic consultant and a labour market economist. Ms. Carter was asked to prepare estimates of past and future earnings for the plaintiff. Her report dated February 1<sup>st</sup>, 2018 is filed in the Motion Record in this matter. Ms. Carter had the benefit of the report of Dr. Zakzanis, referred to elsewhere in this decision, and of Dr. Waisman, which she refers to extensively in the course of her



own report. In particular, Ms. Carter refers to Dr. Zakzanis' comments to the effect that, "it is also our opinion that from a vocational perspective, D.S. suffers a complete inability to work at a job for which he is suited by education, training or experience". Ms. Carter also cites Dr. Waisman's report and, in particular, his answer to a question about D.S.'s ability to become gainfully employed; "Yes, the synergistic effects of PTSD, mood disorder, and substance abuse resulted in an inability to work on a regular basis, sustain competitive employability and advance."

- [47] The plaintiff also relies on the decision of Leach, J of this court in *D.M. and W.W.*, 2013 ONSC 4176 on the issue of economic damages. At paragraph 135 of that case, Leach, J commented on the difficulty of assessing loss of income in cases of sexual abuse and made reference to the decision of the court, B.C. Supreme Court in *Brooks v British Columbia*, 2000 BCSC 735 wherein the court commented as follows:

In childhood sexual abuse cases, there's rarely an educational or employment history unaffected by the injury to serve as a baseline measure of natural aptitude or intelligence, or, of pre-trial income, or, as a predictor of future capacity to earn...Thus, when the Court gazes in the proverbial crystal ball, the lost or impaired capacity that it discovers there is relevant to the quantification of both past and future loss. Not surprisingly, therefore, the legal principles developed for the assessment of future loss of capacity are sometimes referred to by judges to assist in the assessment of damages for past pecuniary loss as well.

- [48] Given the nature and extent of the evidence before me on this matter and given the content of the reports of the three experts referred to above, I find the plaintiff has experienced and will continue to experience very real and substantial economic loss as a result of the actions of the defendant herein, which takes the form of a loss of earning capacity due to the plaintiff's inability to work on a regular basis, sustain competitive employability and advance.
- [49] In her report, Ms. Carter has attempted to quantify the economic loss of the plaintiff by reference to Statistics Canada's *Life Tables* and calculates net present values of the future loss using the rates as set out in Rule 53.09. Ms. Carter offers two scenarios: One based on the expected lifetime earnings for a high school graduate and the other scenario being predicated on expected earnings for a college graduate. Using the various factors in each of those two scenarios, Ms. Carter arrives at, "absent abuse potential earnings". In the plaintiff's case, Ms. Carter assesses those values as follows:

*Summary of Past and Future Earnings*

Level of Education	Past Earnings	Net Present Value (NPV)
High School Diploma	\$440,142.00	\$1,092,733.00

College Diploma	\$398,181.00	\$1,232,915.00
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- [50] There is evidence before the court that the plaintiff obtained a college degree in Addictions and Community Service Work from Everest College. That being the case, I am awarding the plaintiff damages for economic loss at the upper end of the range proposed by Ms. Carter; that being the sum of \$1,631,096.00 representing past earnings of \$398,181.00 and the NPV of future earnings of \$1,232,915.00. There will be a deduction from that amount in accordance with the recommendations of Ms. Carter's report, of the plaintiff's actual earnings to date. Based on the evidence before me, it would appear the plaintiff worked for a period of three months as an Addictions Counsellor for the Salvation Army in Barrie, Ontario at the rate of \$16.00 per hour. He also worked for a period of three years as a property manager at a residential condominium in which capacity he enjoyed a net income of \$2,500.00 per month or \$30,000.00 per annum. I estimate the plaintiff's income from the Addictions Counsellor's job based on an hourly rate of \$16.00 an hour, assuming a 40-hour week for each of 12 weeks, results in an income of \$7,680.00. I assess the plaintiff's income from the property manager job at \$30,000.00 a year for three years would be \$90,000.00 for a total of \$97,680.00. That amount will be deducted from the upper end of Ms. Carter's range being \$1,631,096.00 for total of \$1,533,416.00. That amount will be subject to pre- and post-judgment interest from the date the cause of action arose, being January 1<sup>st</sup>, 1987 through until the date of this judgment and post-judgment interest thereafter in accordance with the *Courts of Justice Act*.

### **Punitive Damages**

- [51] The plaintiff also included a claim for punitive damages in his pleadings herein. Punitive damages are an exceptional remedy rarely granted. The primary purpose of punitive damages is essentially to punish the defendant and to send a message of deterrence both to the defendant, and to the community at large. The purpose of punitive damages is not to compensate the plaintiff. Given the five-year penitentiary sentence imposed on the defendant by Justice Mulligan, I am of the view that the issues of punishment and deterrence have been fully and effectively addressed already. In arriving at that decision, I am mindful of the principles set out in the case of *Whitten v Pilot Insurance Company*, [2002] 1 S.C.R. 595.



C.M. Smith, J