NOVA SCOTIA COURT OF APPEAL

Citation: ***Nova Scotia (Attorney General) v . B.M.G.***, 2007 NSCA 120

Date: 20071207
Docket: CA No. 278152
Registry: Halifax

Between:

Attorney General of Nova Scotia

Appellant
(Respondent by cross-appeal)

v.

B.M.G.

Respondent
(Appellant by cross-appeal)

Restriction on publication: pursuant to s. 486.3 of the **Criminal Code** on the name of the respondent and any information leading to identity by publishing names of witnesses or reference to residence that would lead to identity of the respondent.

Revised Judgment: The text of this decision has been revised according to the erratum dated March 7, 2008

Judges: Cromwell, Saunders and Oland, JJ.A.

Appeal Heard: September 19, 2007, in Halifax, Nova Scotia

Held: Both appeal and cross-appeal dismissed per reasons for judgment of Cromwell, J.A.; Saunders and Oland, JJ.A. concurring.

Counsel: Glenn R. Anderson, Q.C. and Terry Potter, for the appellant
Kevin C. MacDonald, for the respondent

<u>Publishers of this case please take note</u> that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Editorial Note

Identifying information has been removed from this unofficial electronic version of the judgment.

Reasons for judgment:

I. INTRODUCTION:

[1] In early 1977, B.M.G. was 13 years old and on probation. His probation officer was Cesar Lalo, an employee of the Province. Lalo sexually assaulted B.M.G. repeatedly. Years later, Lalo was charged and convicted of these, along with many other such assaults, and B.M.G. sued the Province for damages. The trial judge, Edwards, J., found that the Province was legally responsible (that is, vicariously liable) for Lalo's assaults although it had not itself been negligent or breached a fiduciary duty to B.M.G. The judge awarded B.M.G. $640,625.00 in damages and prejudgment interest. Both parties appeal the judge's findings in relation to liability and damages.

[2] On the question of liability, the Province submits that the judge was wrong to find it vicariously liable. B.M.G. cross-appeals, arguing that the judge erred in dismissing his claims in negligence and breach of fiduciary duty. I cannot accept either position. In my view, the judge did not err in finding that the Province had not been negligent and did not breach a fiduciary duty to B.M.G. Neither did he err in finding the Province vicariously liable for Lalo's wrongful acts.

[3] B.M.G. cross-appeals with respect to damages, submitting that the judge should have awarded punitive damages. But this submission is premised on the Province having been negligent and breached a fiduciary duty. These claims having failed, there is no basis to award punitive damages.

[4] The Province also appeals the judge's damage award. Its main contention is that the damages are far too high because the Lalo assaults had little, if any, impact on B.M.G.'s educational accomplishments or career path. In my view, the judge did not err in rejecting this contention and in assessing damages accordingly.

[5] I would dismiss the appeal and the cross-appeal. My reasons follow.

II. FACTS:

A. Overview:

[6] The fact of the Lalo assaults on B.M.G. was not in dispute at trial. The critical question facing the trial judge concerned their impact. How would B.M.G.'s life from age thirteen on likely have been different if Lalo had not assaulted him? In approaching that question, the trial judge made two critical findings of fact.

[7] First, the judge made strong findings of credibility in B.M.G.'s favour. The judge duly considered the Province's attack on B.M.G.'s credibility noting, for example, that B.M.G. had, in the past, lied to health care professionals, employers and prospective employers. The judge concluded that these falsehoods, many of which dated to the period when B.M.G. was between 18 and 20 years of age, had little bearing on the credibility of the 43 year old individual who testified at trial. In the judge's view, much of B.M.G.'s evidence had been substantially corroborated by other evidence: reasons para. 21. The judge concluded, after a careful assessment of a number of relevant considerations, that B.M.G. "... did his best to give accurate and comprehensive evidence" reasons para. 62.

[8] Second, the judge firmly rejected the appellant's central contention, the proposition that the assaults had little if any impact on B.M.G.'s education and career. The impact flowed, the Province argued, more from B.M.G.'s abusive home life. The judge did not agree. He found that to accept that contention he "... would have to conclude that the Lalo assaults constituted a momentary transient unpleasantness without any long-lasting psychological impact in BMG's life ...". Such a conclusion, he found, "... would ignore the psychological evidence and common sense." The judge was "... satisfied that BMG's victimization by Lalo ... left him with an overwhelming sense of hopelessness, distrust and confusion." As a result, the judge was not surprised "... that [B.M.G.] kept running away for the next twenty years of his life": reasons para. 162.

[9] With those two findings in mind, I return to an overview of the facts. The judge outlined the background to the case in paragraphs 3 - 40 of his reasons for judgment. What follows is only a brief summary.

B. The three phases of B.M.G.'s story:

[10] B.M.G.'s is an unusual story which is divided into three main parts. The first extends from the mid 1970s to the late 1980s when B.M.G. was between roughly 12 and 25 years of age. This period takes him from a young boy in an unhappy and abusive home, through to a young teen who was the victim of sexual assaults, including anal rape, by Lalo, through to a young man, sometimes using false names, constantly on the move, seemingly running from his past. The second period, from the late 1980s to the late 1990s, sees B.M.G settle down with his partner, but living under a false name and not yet having disclosed the abuse or otherwise confronted his past. The final period starts in 1997 when his identity is discovered. He then discloses the abuse, testifies against Lalo at a criminal trial and, finally, seeks the redress for Lalo's abuse that is the focus of the appeal.

[11] Born in April of 1963, B.M.G. was adopted, along with his sister, into a well-to-do family. His young days were relatively normal. But from the age of seven on, he faced physical and mental abuse at home. This, the judge found, took a significant psychological toll, leading to feelings of inadequacy and lack of self confidence: reasons para. 156. B.M.G. coped with this by running away, although in his early years, he did not get very far and was returned home within a day or two: reasons para. 8.

[12] At about age 12 in early 1976, he was taken out of the public school system in Halifax and sent to an independent boarding school in New Brunswick. He ran away from the school. He went to Ontario, seeking his adoptive mother who had been divorced from his adoptive father and had suffered serious mental problems. He was returned to the school but only stayed until around October of 1976, his Grade VIII year. He ran away again and returned to Halifax. His father refused to let him come home, so he lived in a rooming house and attended school for a few months.

[13] He got into trouble with the law and in January of 1977 was placed on probation. At this point, B.M.G. was both physically and emotionally vulnerable: he had frequently run away from home because he could not otherwise cope with the abuse perpetrated by his stepmother and father. As the judge put it, "[i]t was in that fragile psychological state that B.M.G. was delivered to [his probation officer,] Lalo": reasons para. 161.

[14] Lalo, of course, was an authority figure. To B.M.G. at the time, he was a big man, a powerful authority and a very imposing figure. That Lalo was in charge had been made clear to B.M.G. Both the court and his father had said so in no uncertain terms. Lalo reinforced this message on their first two meetings. He "read the riot act" to B.M.G.: Lalo, not B.M.G.'s father, was now in control of his life. Lalo's message to B.M.G. was simple: "You will do what I want you to do."

[15] What Lalo wanted was for B.M.G. to submit to sexual abuse. And he did. Between the end of January and the beginning of April of 1977, at four of their weekly meetings, Lalo sexually assaulted B.M.G. It would take B.M.G. twenty years before he could reveal the abuse to anyone who would listen and believe him.

[16] B.M.G. described the first assault in these words:

> A. I recall that he brought me into his office and made me sit in the chair, and we just sat there and talked for a while, and he wanted me to lay down on the floor, and he was talking to me, and I did lay down on the floor. And he had this thing about rubbing my chest, and he was rubbing my crotch through my clothing and asked me if it felt good and what I thought of that and things of that nature.
>
> . . .
>
> A. I was scared. I was just scared. I was very - - very concerned.

[17] B.M.G. testified that he tried to tell his father about the abuse, but sex was a taboo subject in the house and he did not know how to bring it up.

[18] At the next meeting, Lalo's assaults progressed to oral sex. B.M.G. felt helpless to stop it:

> A. ... it progressed. He had me on the floor again, and he pulled my trousers down, and he'd rub my crotch, and again, talking to me the whole time, and he'd be rubbing my chest, and you know, he basically started performing oral sex on me.
>
> Q. Okay. And did you do anything to stop Mr. Lalo?

A. No, I didn't. ... I didn't really think that I could. I didn't know how to approach it. I didn't know how to deal with him. He was such a big - - you know, embarrassment maybe. You know, I figured if he's happy, well then everything is going to be good for me and - - I think embarrassment was a big big part of it on my part.

[19] At the next meeting, Lalo again performed oral sex on B.M.G. But this time, Lalo also wanted B.M.G. to perform oral sex on him:

A. ... And he wanted me to perform [oral sex] on him, and I refused, and you know, I wanted to run, I wanted to get up and get out of there, but again, I mean, like, what am I going to do? Where am I going to go? How am I going to deal with that? I just - - I couldn't deal with it as a kid.

...

Q. ... What were your - - what was your thought process in this - - these subsequent meetings that you've talked to His Lordship about? ...

A. You know, again, the big thing was embarrassment, and you know, like, how do I deal with this? Like, do I just let it continue? Do I - - nobody would believe me if I told them because I had lied prior to that to my parents. And I just didn't feel - - you know, when I told my dad that, you know, things were going on down there, he said, "You're a liar. Don't ...". You know, "Don't give me that . . ." you know "... crap." And just - - he just didn't believe me. He didn't believe anything I had to say to him.

[20] At the next meeting, Lalo again performed oral sex. Then, as B.M.G. lay on his side on the floor of the probation office, Lalo anally raped him:

A. ... I went down there and once again ended up - - it was later in the day, that last meeting, because it was almost dark or very close to dark. ... he had me on my side, and he had this tube, this - - , like, a toothpaste tube with cream of some kind in it, and he was using it on himself and at the same time he was rubbing it in between my legs - - between my buttocks, and he put his penis in between my buttocks and he would just go back and forth in there like that, without penetrating me at first. And you know, just kept talking to me, and he'd rub my chest and - - and then just at some point, he just penetrated me, and you know, just moving slowly back and forth and back and forth and then it was over, and you know, he pulled my pants back up and talked to me and asked me about what just happened,

did I like it or was it good for me or did it feel good or - - and I - - I believe that's the time he drove me home. He actually took me out into the parking lot and got in his vehicle and took me home.

[21] B.M.G. described feeling scared and confused after this.

Q. ... do you recall what you were feeling at the time?

A. I was scared. I was really scared because I just didn't - - I didn't - - I wasn't really - - I didn't know what had just happened. Like, it was like - - you hear about what sex is when you're a little kid, and you know, you imagine what it's like and you imagine, you know, people together having sex, and then just, boom, just like that, it's you know, well that's what just happened. ...

[22] He also described the scene at home of his step-mother making him wash over and over again his own underwear, soiled by faecal matter, blood and Lalo's semen:

Q. And why were you going to wash your underwear?

A. They were dirty.

Q. And what were they dirty with?

A. My own, you know, faecal matter, and his sperm. And I - - I was bleeding and ... You know, she [i.e., his stepmother] just - - she accused me of defecating in my own pants, and she saw enough of the underwear that she know that there was faecal matter in my pants, but at the same time, you know, I already had them in the sink and I was already trying to clean them, and she says, "Good, you're cleaning them. You're gonna keep cleaning them." And you know, I'd be there under the tap washing these underwear out. ... And I was basically locked in the basement. She says, "You're not coming upstairs until those are clean." And then, I don't know, an hour later, she'd come down, and you know - - you know, by that time, you know, I thought they were clean, and you know, "Oh no, not clean enough. Keep going." Clean them some more. And then a little while later, she'd come down again and look at them and "Oh, not clean enough." Keep going. And I'm not sure, three or four or five hours maybe, but it was nighttime - - it was late at night before I got to get out of that basement over that.

[23] B.M.G. described how he later had been forced to sit at the family dinner table with Lalo:

> A. ... I came down into the floor with the kitchen and the living room on it. There he was. He was right there. And I was informed that he'd be staying for dinner.
>
> Q. Okay. And how did that make you feel Mr. [B.]?
>
> A. I was ready to jump out the window. I was ready to - - I just wanted to flee.
>
> Q. And why?
>
> A. I just had one of those bad bad feelings about the situation. I didn't know what the reason would be that he would be there, and it really scared me.
>
> Q. Okay. Did you have dinner that night?
>
> A. Yeah, I'm sure I did. I think I had to sit there with him and have it - - or across from him or beside him or whatever.

[24] In early April of 1977, B.M.G. was sent to the Shelburne School for Boys. He completed Grade VIII. He ran away and was recommitted. He was released in April, 1978, but remained in a group home because his family would not take him back.

[25] In the fall of 1977, B.M.G. had started a two-year * course (**editorial note-removed to protect identity*) but in June of 1978 he ran away to find his mother. As the judge put it:

> [13] ... He never returned to school again and consequently never completed the *course. He was not welcome in his mother's home. At 15 years of age, he was clearly on his own. BMG considered himself a fugitive with no where to turn. So began almost twenty years of living under different aliases.

[26] Between running away from Shelburne in the spring of 1978 and finally settling down somewhat in the late 1980's, B.M.G. was essentially on the run. He worked in a variety of fields in many places in Canada and, at times, in the United States. In describing why he ran, crisscrossing the country, getting jobs to get

enough money to buy some groceries, B.M.G. testified that he felt "... sort of like a fugitive ... because when the people that are supposed to help you hurt you, it doesn't give you much faith that things are going to turn out for the best." He said:

> ... throughout my life, you know, I've always had a problem with I couldn't do anything for any amount of time because I was always afraid that, "Oh, I'm gonna get caught," or you know, if - - like, the SIN number issue, you know. I didn't understand how that all worked when I was younger, and I always thought, "Well, you know, they're going to send in my paperwork or whatever, and I'm going to be discovered, and I'm going to be carted away again, so I better leave before that happens.
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> ...
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> ... for a long time, I sort of felt dirty, for lack of a better term. I just - - I just felt that I was - - I was used goods or I was - - I don't - - I was just - - I just wasn't the same as most people.

[27] Between the spring of 1981 and the winter of 1983, B.M.G. was admitted to psychiatric care on several occasions at various places in Canada. He did not disclose the sexual abuse to his care-givers. In the spring of 1981, he was found to be "tortured by a perpetual feeling of depression and inadequacy". Psychological testing in the summer of 1981 revealed that B.M.G. had a "fragile adjustment ... characterized by emotional overcontrol, poor empathy, a tendency to externalize blame and repressed anger and hostility." In late 1982, he felt that his actions were under the control of others and he had been suicidal. At age 19, he was found to have three sorts of conflict which were causing him inner turmoil. One of these concerned his own identity and sexual orientation. As the psychologist put it (and of course with no knowledge of the sexual abuse by Lalo):

> ...Whether he has homosexual tendencies, fears of being homosexually raped, or is mainly confused about his sexual identity, is unclear. However, whatever the specific nature, sexual concerns are a major issue for [B.M.G.]. ... There are indications that the extent of this turmoil could reach prepsychotic proportions. ...

[28] In the late 1980's, B.M.G. met his partner and settled in northern Manitoba. She did not know his true identity or about his past. B.M.G. worked steadily at various jobs and, with his partner, bought a house and built a cabin. He eventually

opened his own * shop (*editorial note- removed to protect identity*) in the Northwest Territories.

[29] In 1997, B.M.G.'s business arrangement with another man in the Northwest Territories went sour. The RCMP were called in to investigate. B.M.G. finally had no choice but to disclose his real name. He ultimately made a complaint to Halifax police about Lalo's assaults and started his civil action.

C. The effect of the assaults:

[30] At trial, B.M.G. was asked about the effects of the assaults on him. He answered that his lack of formal education was the thing that always bothered him and that he knew he had lost the chance to go to school and to establish a career as a young man:

> A. The ability to live the life that at least I thought was supposed to be my life - - my school, or my schooling, my respect, my sense of respectability amongst people that should be my peers. Education has been the thing that always bothered me.
>
> Q. And why is that?
>
> A. Because I didn't have that plaque on the wall, I didn't have that document, I didn't have the - - you know, I couldn't look somebody in the eye and say, "Well, I'm an 'X'", whatever 'X' may be, and say, "Look, see, I'm an 'X'. I'm certified to do this. I'm certified to do that." You know, I just - - I - - you know, the whole authority thing scared me to the degree that I never considered, you know, just dropping what I was doing at the time and "Okay, I'll go back to school and I'll get certified in this, that or the other," because I just didn't - - I just didn't think it would be possible for me to do that. I just - - but the big thing is, you know, I just - - I couldn't respect myself almost. I just couldn't - - I may not be putting that the right way, but I just - - I didn't know how to get around. Like, up until '97, I seriously thought that, you know, if the RCMP got a hold of me, that's it, I'm going away, they going to lock me up and - - now, that might have been from my lack of understanding of how the legal system worked, but that is truly how I felt.

[31] At trial, Dr. Hayes, a psychologist who had assessed B.M.G. in 2003, offered the opinion that there had been "powerful negative emotional sequelae

associated with the sexual abuse" which had resulted in a "marked disturbance on his life" and had led to a "loss of educational, social, and vocational opportunities." His view was that B.M.G.'s condition was consistent with "exposure to an extreme traumatic stressor" and that "[f]amily discord and alienation" would not produce this condition.

III. ISSUES:

[32] On appeal, the Province makes three main points. It submits that:

> the judge was wrong to find that it was vicariously liable for Lalo's conduct;
> the judge erred in admitting and in weighing the expert evidence; and
> the judge's assessment of damages was inordinately high.

[33] On the cross-appeal, B.M.G. submits that:

> the judge was wrong to dismiss his claims in negligence and breach of fiduciary duty against the Province; and
> the judge should have awarded punitive damages.

IV. ANALYSIS:

A. The Cross-Appeal:

[34] On the cross-appeal, B.M.G. says that the judge was wrong to dismiss his negligence and breach of fiduciary duty claims against the Province. B.M.G. also submits that the judge erred in one aspect of his analysis of the vicarious liability issue.

[35] For the reasons that follow, I would not interfere with the judge's conclusions and would dismiss B.M.G.'s cross-appeal.

1. Breach of fiduciary duty and negligence:

(a.) The judge's decision and cross-appellant's position:

[36] The judge dismissed B.M.G.'s negligence and breach of fiduciary duty claims against the Province. The judge concluded that the Province had a duty of care under negligence law as well as fiduciary obligations. However, he found that the Province had been unaware of the probation officer's activities and had not breached any duty by failing to be aware of them. The judge rejected B.M.G.'s contentions that the Province knew or ought to have known that Lalo was abusing children (Reasons para. 101) and that it had been careless in its review of the probation officer's qualifications. He similarly found that the evidence did not support B.M.G.'s claim of breach of fiduciary duty.

[37] B.M.G. challenges the judge's critical findings that the Province did not and could not reasonably have known what the probation officer was up to at the time he was assaulting B.M.G. and that it did not fail in its duty of loyalty to the children under its supervision. B.M.G. submits that the trial judge erred in reaching these conclusions because he misapprehended and ignored some evidence, rejected some testimony he ought to have accepted and failed to draw adverse inferences against the Province from the absence of documentation and its failure to call a witness.

(b.) Standard of review:

[38] All of these points relate to the judge's factual findings. Such findings are reviewed on appeal for "palpable and overriding" error. We may intervene only if the judge made a clear error that affected the result: **Housen v. Nikolaisen**, [2002] S.C.J. No. 31 (Q.L.), [2002] 2 S.C.R. 235; **Davison v. Nova Scotia Government Employees Union,** 2005 NSCA 51, 231 N.S.R. (2d) 245, [2005] N.S.J. No 110 (Q.L.) (C.A.) at paras. 62 - 64.

(c.) Analysis of the cross-appeal issues:

[39] B.M.G. asked the judge to infer that the Province knew or suspected something was wrong with Lalo, but failed to investigate or supervise him adequately. B.M.G. argued that these failures showed that the first duty of loyalty was to protect the government from embarrassment rather than to protect children

on probation from abuse. B.M.G. pointed to two matters in support of his position.

[40] First, B.M.G. submits that the judge failed to infer that the Province either suspected or was actually aware of Lalo's abuse. This inference should have been drawn, B.M.G. says, from the unexplained transfer of Lalo in 1975, the absence of documentation about it and the failure of the Province to call as a witness an official who was likely involved. B.M.G. also says that the judge misapprehended or otherwise mishandled the evidence of various witnesses in relation to the transfer.

[41] Second, B.M.G. relies on evidence that Lalo was known to have assaulted another boy, J. G., in 1976 and that the Province was aware of this. He submits on appeal that the judge erred by rejecting Mr. G.'s evidence.

(i.) The transfer - adverse inferences:

[42] B.M.G. contended that Lalo had been transferred because the Province was aware of or suspected he had abused children under his supervision. The judge concluded that the evidence did not support this view, saying that the inferences B.M.G. urged him to draw were speculative. He concluded that, in light of all of the evidence, an adverse inference could not be drawn from the absence of an explanation for and relevant documentation concerning the transfer:

> 103 The Plaintiff also urged me to find that Lalo was transferred to the Halifax Family Court in 1975 because he had been involved in inappropriate conduct with one or more of the wards on his caseload in Dartmouth. There is no evidence that such was the case. Counsel argued that document disclosure from the Defendant offers no explanation for Lalo's transfer. He argued that a transfer in the ordinary course would be documented.
>
> 104 In addition, Counsel argued there was no documented evaluation of Lalo from his district supervisor for the period starting in July 1974 to the date he is transferred in Halifax, May 12, 1975. Counsel says the lack of documentation, Lalo's transfer and the missing evaluation is highly suspicious and that an adverse inference ought to be drawn from the lack of documentation. Inferences, negative or otherwise, cannot be drawn from mere suspicion. To hold otherwise would be to equate inferring with speculating. There is simply no evidence to support an adverse inference in this instance.

> 105 In short, there is no evidence from which one might infer that the Defendant could have reasonably foreseen that Lalo would abuse the children on his caseload. I am satisfied that the claim of negligence is not supported by the evidence.
>
> (Emphasis added)

[43] It is not for us on appeal to second guess that assessment on appeal. There is no error of legal principle or any clear and determinative error of fact in the judge's assessment of this issue.

[44] The same may be said, in my view, of the judge's refusal to draw an adverse inference from the Province not calling Joan MacKinnon as a witness. She had been the regional administrator for the Department of Social Services at the time Lalo was transferred. B.M.G. submits that the Province had indicated that Ms. MacKinnon would be called. We are also told that B.M.G. had discovered Ms. MacKinnon, had subpoenaed her to give evidence, but in the end did not call her. The judge did not err in refusing to draw an adverse inference from the Province's failure to call a witness which B.M.G. had discovered and subpoenaed but did not call.

(ii.) The transfer - Mr. Joseph MacKinnon:

[45] B.M.G. submits that the judge erred in his interpretation of Mr. Joseph MacKinnon's evidence. The judge found that Mr. MacKinnon believed that Lalo's transfer to Halifax had been routine and assumed that it had been part of a staff shuffle arising from the opening of an office in Sackville. B.M.G. says that this misstates Mr. MacKinnon's evidence and that he, in fact, testified that it was possible that Lalo had been transferred because of problems with his caseload and could not say whether or not the transfer was related to the opening of the Sackville office.

[46] I cannot accept B.M.G.'s position on this point. The judge fairly summarized Mr. MacKinnon's evidence and grasped its essence. The judge said in his reasons that "... as far as MacKinnon was concerned, the reason for Lalo's transfer ... was routine. Mr. MacKinnon recalled that at the time there had been a new district office opened in Sackville which required the Department to redeploy staff throughout the region. He assumed that Lalo's transfer was part and parcel of

this redeployment." (Reasons para. 87) This is a fair summary of Mr. MacKinnon's evidence and certainly does not display any clear and determinative error in the judge's assessment of that evidence. Mr. MacKinnon made it clear that he did not remember why Lalo had been transferred, but that in conversation with other retirees, he recalled the opening of the Sackville office. As he said in his testimony, he simply thought that the transfer might have been part of the redeployment resulting from the opening of that new office. He was clear and consistent in his testimony that he did not remember why Mr. Lalo had been transferred and that he was aware of no difficulties with him that led to the transfer. The judge did not err in his appreciation of Mr. MacKinnon's evidence.

(iii.) Previous assault by Lalo on J. G.:

[47] B.M.G. claimed that the Province had been aware that Lalo had assaulted another boy, J. G.. B.M.G.'s position is that the judge was wrong to reject Mr. G.'s evidence. I disagree.

[48] J. G. is a life-long criminal. He testified that while he was on probation in 1976, Lalo had rubbed his leg and asked him if he had ever had sex with a man. He claimed that his rejection of Lalo caused a commotion, that Mr. MacDonald (another probation officer) and a police constable had rushed into the room and that he told Mr. MacDonald what had happened. Mr. G. claimed, and Mr. MacDonald confirmed in his evidence, that Mr. G. had been transferred to Mr. MacDonald from Lalo's caseload.

[49] The judge did not believe Mr. G.'s evidence. Mr. MacDonald, who testified that he had been suspicious of Lalo, did not recall this incident. The judge reasoned that Mr. MacDonald would have remembered the incident, if it had occurred, because of his suspicions of Lalo: reasons, paras. 75 - 77.

[50] B.M.G. says the judge made inconsistent assessments of Mr. MacDonald's evidence and failed to appreciate that his testimony corroborated Mr. G.'s. Respectfully, I cannot agree.

[51] The judge accepted that Mr. MacDonald had heard rumours about Lalo's conduct and had, in effect, "spied" on him for a number of weeks before being satisfied that there was nothing untoward in his conduct. It is true, as B.M.G.

points out, that the judge had reservations about Mr. MacDonald's evidence that he had heard rumours about Lalo from Mr. LaChance (who denied having heard any) and had reported the rumours to Mr. McCarron (who had no recollection of hearing them). The judge, however, was simply sceptical about Mr. MacDonald's memory of the source of the rumours and to whom he reported them, not about whether Mr. MacDonald had suspicions of Lalo. The judge's scepticism on those points does not at all undermine his conclusion: Mr. MacDonald, because of his suspicions about Lalo, would have remembered the G. incident had it occurred. The judge did not make inconsistent assessments of Mr. MacDonald's evidence or make any clear or determinative error in rejecting Mr. G.'s evidence.

(iv.) The duty of loyalty:

[52] Mr. MacKinnon, a senior official at the relevant time, testified that he attempted to resolve complaints without going outside the Department. B.M.G. submits that this "startling admission", as B.M.G. describes it, should have led the judge to conclude that the Department's loyalty was to the government and not to the children under supervision.

[53] This ignores some of the rest of Mr. MacKinnon's evidence. He was clear that if he had become aware of serious misconduct " ...then of course [he would have taken] action against the employee...". The judge made no clear and determinative error by failing to refer to Mr. MacKinnon's evidence about a preference for resolving complaints in-house or in failing to draw the inference from it that B.M.G. says ought to have been drawn.

(d.) Conclusion respecting negligence and breach of fiduciary duty:

[54] In my respectful view, all of B.M.G.'s attacks on the judge's findings of fact must be rejected. The judge did not err in concluding that the evidence did not support findings of negligence or breach of fiduciary duty against the Province.

[55] B.M.G.'s cross-appeal also seeks to uphold the judge's imposition of vicarious liability on other grounds. As I would uphold the judge's imposition of vicarious liability for the reasons he gave, it is not necessary for me to address B.M.G.'s submissions on this point in the cross-appeal.

2. Disposition of the Cross-appeal:

[56] I would dismiss the cross-appeal.

B. The Appeal:

1. Vicarious liability:

(a.) Judge's reasons and appellant's submissions:

[57] The judge found that the Province, although free of fault, was vicariously liable for Lalo's wrongful acts. The term "vicarious liability" refers to situations in which the law holds one person, who is free of personal fault, responsible for the misconduct of another: John G. Fleming, *The Law of Torts*, 9th ed. (North Ryde, N.S.W.:L.B.C. Information Services, 1998) at 409.

[58] Canadian law uses a "significant connection" test to decide whether an employer should be vicariously liable for intentional and unauthorized wrongs by its employees. Vicarious liability generally will be appropriate in relation to acts by an employee " ... where there is a significant connection between the creation or enhancement of a risk [by the employer's enterprise] and the wrong that accrues therefrom, even if unrelated to the employer's desires ...": **Bazley v. Curry**, [1999] 2 S.C.R. 534 at para. 41. This significant connection test identifies situations in which the broad policy objectives of imposing vicarious liability – the provision of an adequate and just remedy and deterrence of wrongful conduct – will be served.

[59] The judge found that the required significant connection was present in this case and that imposing vicarious liability served the ends of providing a remedy to B.M.G. and deterring wrongful conduct. He correctly relied on the relevant factors set out by the Supreme Court in **Bazley**. In that case, the Court set out a non-exhaustive list of factors to guide the inquiry as to whether the required significant connection exists in situations in which an employee has committed an intentional tort, such as the sexual assault committed by Lalo in this case. Those factors (which I will refer to as the **Bazley** factors) are:

(1.) the opportunity that the enterprise afforded the employee to abuse his power;

(2.) the extent to which the wrongful act may have furthered the employer's aims; ...

(3.) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(4.) the extent of power conferred on the employee in relation to the victim; and

(5.) the vulnerability of potential victims to wrongful exercise of the employee's power: **Bazley**, para. 41.

[60] The appellant does not take issue with the judge's statement of the legal principles. It submits, however, that he erred in applying the evidence to the first and third of the **Bazley** factors and in concluding that imposing vicarious liability would serve the policy goal of deterring future misconduct. In my view, these submissions must be rejected.

(b.) Standard of review:

[61] The appellant's challenge to the judge's application of the evidence to the legal principles raises a question of mixed law and fact. That sort of question is reviewed on appeal for palpable and overriding error unless the alleged error may be traced to an error of law which, of course, is reviewed for correctness: **Housen v Nikolaisen**, **supra** at para. 36.

(c.) The first **Bazley** factor — opportunity:

[62] The appellant submits the judge erred in finding that its probation service afforded Lalo the opportunity to abuse his power. It says that the office arrangements for probation officers gave them little opportunity to engage in inappropriate contact with the young people they were supervising. Probation officers shared offices, the offices had windows and there were other people around during normal office hours.

[63] These submissions must fail, however, because they do not take into account other important facts which the judge properly considered. The judge found that probation officers had significant independence and broad discretion in carrying out their responsibilities. This included the discretion to meet alone and after hours with young persons: reasons, para. 127. He also found that Lalo took advantage of this independence and discretion in order to molest B.M.G. Significantly, the judge concluded that Lalo's assaults on B.M.G. occurred after other staff had left for the day: reasons, para. 43. In short, the Province's probation service gave Lalo independence and discretion in carrying out his duties and these enabled Lalo to assault B.M.G. repeatedly.

[64] There is no palpable and overriding error in the judge's consideration of the factor of opportunity.

(d.) The third **Bazley** factor — intimacy:

[65] The judge found that Lalo's wrongful acts "... were strongly related to the psychological intimacy inherent in his role as a probation officer..." and that this "... psychological intimacy encourages victim's submission to abuse and increases the opportunity for abuse...": reasons para. 145. The role of a probation officer, the judge concluded, is to perform a rehabilitative function which involves discussing intimate details of the young person's thoughts or experience. In performing this role, Lalo was "keenly aware" of B.M.G.'s situation that made him an "ideal target" for his depredations: reasons para. 129. The judge also found that Lalo stood in a special position of trust with respect to the children on his caseload including, of course, B.M.G.: reasons para. 147.

[66] The appellant attacks these conclusions primarily on the basis that the term "intimacy", as it is used in the list of factors set out in **Bazley**, refers to physical intimacy. Physical contact with a child, the appellant submits, was not part of a probation officer's job. The appellant asks us to conclude, therefore, that the judge's findings of psychological intimacy and trust were not germane to consideration of "intimacy" in the **Bazley** sense.

[67] I cannot accept this submission. In my view, it is founded on a misconception about the law. Intimacy in this context is not limited to physical intimacy. The Supreme Court made this clear in **John Doe v. Bennett**, [2004] 1

S.C.R. 436, S.C.J. No. 17 (Q.L.), noting that "... psychological intimacy encourages victims' submission to abuse and increases the opportunity for abuse ...": para. 29.

[68] There was no reviewable error in the judge's consideration of this factor.

(e.) The policy consideration of deterrence:

[69] After the judge reviewed each of the **Bazley** factors relevant to the case, he returned to the broad question of whether imposing vicarious liability would further the underlying policy objectives of compensation and deterrence. His conclusion was that imposing liability would provide effective compensation and deter future wrongdoing as it would provide motivation to prevent similar conduct.

[70] The appellant challenges the conclusion in relation to deterrence. It submits that the policy goal of deterrence is not served by imposing liability on an enterprise, such as a probation service, that serves a necessary public purpose and that cannot reasonably avoid the risks inherent in providing the service. There was no evidence, it submits, that there was any reasonable prospect of change or of a possibility of reducing the risk of harm. The judge's error in his consideration of deterrence, it is argued, should result in the finding of vicarious liability being set aside.

[71] In my respectful view, these submissions are based on three misunderstandings about the role of the policy consideration of deterrence in deciding whether to impose vicarious liability. The appellant's submissions incorrectly assume that deterrence must be served in every case before vicarious liability may be imposed, they fail to appreciate the role of deterrence in the **Bazley** analysis and they ignore general, as opposed to specific, deterrence.

[72] First, I disagree with the appellant's submission that if the policy justification of deterrence is weak, it follows that vicarious liability should not be imposed. In my view, the imposition of vicarious liability does not require that in each case the policy of deterrence would be served by doing so.

[73] This view is supported by the fact that the vicarious liability doctrine does not rest on any single policy rationale; rather, as LaForest, J. said in **London Drugs Ltd. v. Kuehne & Nagel International Ltd.**, [1992] 3 S.C.R. 299 at p. 336, "the vicarious liability regime is best seen as a response to a number of policy concerns." It follows that a particular policy concern, such as deterrence, may not strongly support imposition of liability in each case.

[74] This is also clear in para. 37 of **Bazley**. The Chief Justice described in that paragraph the underlying policies as "allocation of the consequences of the risk [i.e. fair compensation] and/or deterrence." They may therefore be alternative rather than cumulative considerations. Similarly, in **John Doe v. Bennett, supra**, the Chief Justice made it clear that deterrence is a consideration, not a requirement:

> 20 ... Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer. This is necessary to ensure that the goals of fair and effective compensation and deterrence of future harm are met: *K.L.B., supra*, at para. 20.
>
> (Emphasis added)

[75] It follows that, contrary to the appellant's submission, vicarious liability may be appropriately imposed even if the policy justification of deterrence is not strong in the particular case.

[76] Second, the **Bazley** factors identify situations in which imposing vicarious liability serves the underlying policy objectives of fair compensation and deterrence. This is clear in **Bazley** itself, where the Chief Justice, speaking for a unanimous Court, said:

> 37 Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise

> creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.
>
> (Emphasis added)

[77] The threshold for imposition of vicarious liability for intentional torts in cases not governed by authority is the significant connection test. The question is whether the employer, ".... however innocently, [has] introduced the seeds of the potential problem into the community, or aggravated the risks that were already there ... if its enterprise *materially* increased the risk of the harm that happened.": **Jacobi v. Griffiths**, [1999] 2 S.C.R. 570 at para. 67. The strength of the underlying policy considerations of compensation and deterrence in the particular case will influence how strictly the significant connection test will be applied. However, even where the policy basis for imposing vicarious liability appears weak in a particular case, vicarious liability may nonetheless be imposed provided that the **Bazley** factors are applied with "appropriate firmness.": **Jacobi** at para. 78 (emphasis added).

[78] Here, the judge, in my view, applied the significant connection test with appropriate strictness. All of the relevant factors pointed to the existence of that significant connection. As the judge summed it up, "The ... operation of a probation service substantially enhanced the risk which lead to the wrongs [B.M.G.] suffered. It provided Lalo with great power in relation to the vulnerable victims (including B.M.G.) and with the opportunity to abuse that power. A strong and direct connection is established between the conduct of the enterprise and the wrongs done to [B.M.G.].": reasons, para. 146. The fact that all of these considerations pointed unambiguously to the required significant connection provided a basis to conclude that the underlying policy objectives of compensation and deterrence were appropriately served by imposing vicarious liability.

[79] Third, the appellant's submission wrongly focusses only on specific deterrence of the particular defendant. The way the judge phrased his conclusion respecting deterrence may have invited this approach. However, and with respect, this is too simplistic an understanding of deterrence as an underlying policy goal.

Deterrence must be understood not only in specific, but also, in general terms. As the Chief Justice put it in **John Doe v. Bennett** at para. 20: "The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future." (emphasis added). Just as deterrence is not the only policy to be considered, the specific deterrence of the particular defendant is not the only aspect of deterrence that is relevant. The broader impact on all "such persons" may be taken into account.

[80] I disagree with the appellant's submission that there must be evidence before the court showing that, at the time of trial, changes to the operation which could reduce risk remain to be made. Deterrence in this context is not simply concerned with the employer's systems and policies, but also with their enforcement on a day-to-day basis: **Bazley** at para. 33.

[81] In my view, the judge did not err in finding that the policy consideration of deterrence would be served by imposing vicarious liability on the Province for the on-the-job conduct of its probation officers in the circumstances of this case.

(f.) Conclusion concerning vicarious liability:

[82] I would dismiss the Province's appeal from the judge's finding that it was vicariously liable.

2. Expert Evidence:

[83] The judge permitted B.M.G. to call two expert witnesses to give opinion evidence, Dr. Charles Hayes and Ms. Cara Brown. The appellant says that the judge erred by failing to properly evaluate the admissibility of this expert evidence and by admitting and giving it undue weight. For the reasons that follow, I disagree.

(a.) Dr. Hayes:

(i.) The appellant's position:

[84] The appellant called no expert evidence at trial, choosing instead to try to exclude or discredit B.M.G.'s expert evidence. The judge found these efforts to have been monumentally unsuccessful. On appeal, the appellant advances much

the same arguments as found so little favour with the trial judge, contending the judge failed to properly evaluate the admissibility of this evidence. The core of this submission is the contention that Dr. Hayes' opinion was based on a factual picture that was so incomplete and at variance with the trial evidence that it was of no value. The judge failed, the appellant submits, to evaluate the sufficiency of facts on which Dr. Hayes relied.

[85] I cannot accept these submissions. I agree that the judge did not address all of the aspects of the legal test for admissibility in a rote-like fashion. However, once the appellant's central contention about the facts was disposed of – and the judge dealt with that in detail – it is apparent that the evidence readily meets the test. The judge carefully considered the differences between the facts as he found them and the facts as Dr. Hayes understood them when formulating his opinion. The judge concluded the differences were not so fundamental as to deprive Dr. Hayes' evidence of real value. Rather than excluding the evidence, the judge properly took those differences into account in assessing the weight he gave to it.

(ii.) Dr. Hayes' evidence:

[86] Dr. Hayes, a psychologist of some 30 years experience, was called to opine on two matters: the current level of B.M.G.'s psychological health and the likely *sequelae* from the sexual assaults. In his written report, Dr. Hayes noted that " ... considerable psychological turmoil and fear is generated through rape..." and that "Mr. Lalo not only raped [B.M.G.] but ... also used intimidation and anger to further control the boy. These additional negative emotional features would likely have the effect of heightening [B.M.G.'s] emotional reactions."

[87] Dr. Hayes concluded that: (1.) there had been a "marked disturbance of [B.M.G.'s] life" because of the symptoms flowing from the sexual abuse; (2.) B.M.G. "remains haunted by his past"; (3.) he continues to experience some of the typical symptoms associated with the experience of an extreme traumatic stress; and (4.) "family discord and alienation would not produce such symptoms". Dr. Hayes elaborated on these conclusions in his oral testimony, noting that both a traumatic abusive situation in the home and the sexual abuse by Lalo could contribute to the symptoms.

(iii.) The judge's decision:

[88] The judge addressed the admissibility of this evidence in two places, during the qualification phase of the testimony at trial and in his written reasons following trial.

[89] During the qualification phase of Dr. Hayes' testimony, the appellant objected to his qualifications to opine on causation. The objection was based on the argument that causation depends on the subjective reporting of the patient as to the triggering event. The judge, who of course was aware that the facts about the abuse by Lalo were not disputed, overruled that objection. He reasoned that "diagnosis and causation are inextricably linked and it would really not be possible for [Dr. Hayes] to give opinion evidence on diagnosis unless he could get into causation because ... as I understood one of the first things you have to do is identify the triggering event in order to make the diagnosis."

[90] In closing submissions at trial, the appellant argued that Dr. Hayes' testimony did not meet the threshold admissibility requirements of relevance and necessity. This argument primarily was that the facts on which Dr. Hayes reached his opinion were both incomplete and inaccurate. The judge considered and rejected this argument in his written reasons. He concluded that he was "... satisfied that Dr. Hayes had enough information, along with the well recognized tests he administered, to enable him to render his professional opinion. To the extent that the information was misleading or incomplete, the issue is weight and not admissibility." (Reasons para. 94)

(iv.) Analysis of appellant's submissions:

[91] On appeal, the appellant mainly repeats the arguments made at trial, adding that the judge failed to carry out the required admissibility analysis because he did not make explicit rulings that the evidence met the legal requirements for admission.

[92] I turn first to the required admissibility analysis. Expert opinion evidence is admissible if it meets the four criteria set out in **R. v. Mohan**, [1994] 2 S.C.R. 9. The evidence must be relevant. This is assessed by considering its logical relevance as well as balancing its costs and benefits to determine whether its value is outweighed by countervailing considerations. The evidence must also be

necessary in the sense that ordinary persons are unlikely to form a correct judgment on the matter without the assistance of an expert. In addition, evidence cannot be necessary if it does not meet a standard of threshold reliability. The evidence must not be excluded by any other exclusionary rule and be given by a properly qualified expert.

[93] The appellant submits that the judge failed to analyze the admissibility of Dr. Hayes' evidence according to the **Mohan** criteria. While the judge did not work through the **Mohan** factors as a checklist, he adverted to the appellant's central contention that Dr. Hayes did not have an adequate factual basis to reach an opinion worth considering. I will return to that point in a moment. In my view, once that factual argument is disposed of, it is apparent that the other **Mohan** requirements were satisfied in the circumstances of this case.

[94] There is no argument that the evidence should have been excluded under some other exclusionary rule. As for the requirement for a properly qualified expert, the judge rejected the appellant's challenge to Dr. Hayes' qualifications and did not err in doing so. Turning to necessity, Dr. Hayes administered a battery of psychological tests and reviewed previous psychiatric and psychological notes concerning B.M.G. An untrained person is unlikely to draw the correct inferences from this information. The expert testimony was in that sense necessary. As the judge noted, the tests that were administered were "well-recognized" and there is, in my view, nothing in the record to suggest that Dr. Hayes' evidence did not meet the required standard of threshold reliability.

[95] The appellant's objections on the basis of relevance, necessity and reliability are simply other ways of making the point about the allegedly inadequate factual basis of Dr. Hayes' opinion: the inadequate and incorrect facts relied on by Dr. Hayes make his evidence insufficiently relevant to be necessary or, with respect to causation, reliable. To address this contention, it will helpful first to set out the applicable principles and then to evaluate the appellant's submissions in detail.

[96] Experts may testify about all of the facts they rely on in reaching their opinions. The fact-finder, however, must take care to distinguish between facts recounted by the expert in order to set out the basis of the opinion and facts which have been proven to exist. The trier of fact may only rely on the latter. (There is a distinction in this regard between evidence that an expert obtains and acts on

within the scope of his or her expertise and evidence that an expert obtains from a party about a matter directly in issue, but I do not think this is particularly relevant to the issues at hand: **R. v. S.A.B.**, [2003] 2 S.C.R. 678 at para. 62.)

[97] An expert's reliance on such things as unproven facts obtained from a party about matters directly in issue may adversely affect the weight given to the evidence. When there is no evidence to prove the facts on which the expert relies, the opinion is entitled to no weight and should be excluded as irrelevant: **R. v. Lavallee**, [1990] 1 S.C.R. 852 *per* Sopinka, J. at pp. 898-900. These situations, however, will be rare. Unless the opinion is based entirely on suspect, unproven facts, the question generally will be the weight of the evidence, not its admissibility. As Sopinka, J. observed in **Lavallee** at p. 900:

> ... it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. In this respect, I agree with the statement of Wilson J. at p. 896, as applied to circumstances such as those in the present case:
>
> > ... as long as there is some admissible evidence to establish the foundation for the expert's opinion, the trial judge cannot subsequently instruct the jury to completely ignore the testimony.
> > ...
>
> (Emphasis added)

[98] In my view, this principle is important in considering the appellant's submission concerning the factual basis of Dr. Hayes' report. This was not a case in which there was no admissible evidence reflecting the facts on which Dr. Hayes relied. Rather, it was a situation in which his opinion relied on many facts, some of which were proved and others of which were not. Further, there were additional facts of which he was not aware. Thus, as set out by Sopinka and Wilson, JJ. in **Lavallee**, the matter was "purely one of weight." The judge approached Dr. Hayes' evidence in precisely that manner and, in my view, did not err in doing so. I will refer briefly to the appellant's specific submissions on this topic.

[99] Dr. Hayes, says the appellant, was not aware of the magnitude of the turmoil in B.M.G.'s family and school life before he encountered Lalo, of B.M.G's educational attainments or his high-functioning in adulthood and of his reported

drug or alcohol abuse. The appellant's position at trial and on appeal is that Dr. Hayes did not know these things because B.M.G. did not tell him; instead, B.M.G. "directed the focus away from the family and towards Lalo."

[100] The judge flatly rejected the appellant's contention that B.M.G. had set out to deceive Dr. Hayes in this way. The judge said:

> (Reasons, para. 93)
>
> ... I do not accept, however, that the history BMG gave to Dr. Hayes was calculated to deceive. BMG's perception was that Dr. Hayes was hired to assess the impact of the Lalo assaults. Accordingly, BMG focussed [*sic*] on the Lalo assaults.
>
> (Reasons, para. 98)
>
> I do not think that BMG set out to deceive Dr. Hayes but clearly BMG's focus was the preparation of this lawsuit and therefore the events involving Lalo.
>
> (Reasons, para. 99)
>
> Quite aside from preparation for the lawsuit, BMG would naturally emphasize what had to have been by far the most traumatic experiences of his young life.

[101] These are findings of credibility which are accorded great deference on appeal. The appellant has shown no basis to interfere with them.

[102] The appellant's approach to this issue seems to me to overlook the obvious but critically important points that Lalo's abuse, including anal rape of B.M.G., was not in doubt and that Dr. Hayes was of the view that such abuse would be sufficient in itself to result in the symptoms picture that emerged in his assessment. As the judge put it in his consideration of the fact that Dr. Hayes was not fully aware of the B.M.G. abusive home life, that matter "... pale[d] by comparison to being anally raped by a person such as Mr. Lalo": reasons para. 99.

[103] The appellant submits that Dr. Hayes was misinformed about the extent of B.M.G.'s use of alcohol or drugs. The judge carefully considered this argument and the evidence and made findings of fact that were virtually identical to the facts relied on by Dr. Hayes: reasons para. 39. As for B.M.G.'s educational attainments

and vocational opportunities, the judge took into account in weighing Dr. Hayes' evidence that he had not been fully aware of the extent to which B.M.G.'s schooling had been compromised prior to the events with Lalo and undertook a detailed review of B.M.G.'s vocational history: reasons, paras. 99, 24-40. The judge concluded that these matters went to the weight of Dr. Hayes' testimony and not to its admissibility. He did not err in doing so.

[104] The question of relevance, as the appellant notes, includes both logical relevance and a "cost benefit analysis": **R. v. Mohan**, **supra** at pp. 20-21; **Bellam v. Li**, [2002] N.S.J. No. 284 (Q.L)(S.C.); **R. v. K.A.** (1999), 45 O.R. (3d) 641 (C.A.); application for leave quashed [2000] S.C.C.A. No. 16. The "cost-benefit" analysis required by the **Mohan** test is one of balancing. The list of factors provided by Charon, J.A. (as she then was) in **K.A.** is helpful in this regard. As she wisely pointed out at para. 76, this balancing process is necessarily case specific; the probative value of proposed evidence and its potential prejudicial effect can only be assessed in the context of a particular trial. Admissibility in this respect is not a matter of precedent.

[105] Having reviewed the record, I do not accept that the judge erred either in his understanding of the legal principles or in his application of them to the evidence. He paid careful attention to the differences between the facts Dr. Hayes relied on and the facts as they appeared at trial. He placed Dr. Hayes' evidence in the context of all of the evidence at trial. There is no basis to interfere with the balance the judge struck in this case.

[106] While it might, in hindsight, have been better had the judge elaborated further on his conclusions about admissibility, the appellant's submissions that this evidence should have been excluded because it did not meet the requirements of relevance, necessity and reliability are not supported by the record and must be rejected. The judge dealt in detail and correctly with the appellant's central contention concerning the factual basis of Dr. Hayes' evidence. The judge did not err in admitting it or in assessing its weight.

(b.) Cara Brown:

[107] Ms. Brown is a forensic economist. Her qualifications to give evidence about the quantification of loss of income claims were (and are) not disputed. She

filed a written report and testified about what B.M.G.'s loss of income would be based on various assumptions about his career path and his actual earnings.

[108] The appellant objected to her testimony at trial on the basis that it was neither relevant nor necessary because some of "... the key assumptions for that opinion tie right back into the problematic opinion and report of Dr. Hayes..." and there was "... no indication [B.M.G.'s] level of education was impacted by the assaults." The judge addressed these submissions in his written reasons. He concluded that "[i]n light of [his] acceptance of Dr. Hayes' findings, the Defendant's objection largely disappears."

[109] On appeal, the appellant repeats the submissions it made at trial, adding the complaint that the judge did not evaluate the relevance or necessity of the evidence. I do not agree, for two reasons.

[110] First, the judge did not rely to any extent on Ms. Brown's opinions or calculations. Rather, he simply took some of the Statistics Canada data and calculations that she presented as a rough starting point for assessing B.M.G.'s loss of income claim. Even the appellant recognizes how little use the judge made of Ms. Brown's evidence, noting in its factum that he made "... little or no use of it ...".

[111] Second, I agree with the judge that his rejection of the appellant's objections to Dr. Hayes' opinions largely disposed of the objections to the factual basis of Ms. Brown's report and testimony. The appellant's main point was and is that Ms. Brown based her calculations on the assumption that the Lalo assaults had serious and lasting impact on B.M.G.'s income and income potential. The judge found that was the case. It follows that Ms. Brown's evidence, while using a number of assumptions which the judge did not accept, was sufficiently responsive to the facts as the judge found them. As a result, the substance of the appellant's objections failed. Once again, the appellant chose not to adduce any expert economic evidence of its own.

[112] The appellant submits that Ms. Brown's calculations "appear to have *distorted* the magnitude of the trial judge's "fair and reasonable award" for loss of income." (Emphasis in original) This is a curious submission in light of the appellant's view that the judge made little or no use of these calculations. In any

event, I see nothing in the judge's reasons to support this position. The judge concluded, on all of the evidence, that the Lalo assaults had a substantial impact on B.M.G.'s education and career path. He then used some of the information provided by Ms. Brown as a starting point to assist him in translating that finding into a dollar amount. Whether the award is wrong, either because the judge erred in drawing the inference of causation or because the amount is inordinately high, are questions I will address later in my reasons. I do not accept the proposition that the large numbers in Ms. Brown's report, in some unexplained manner, infected the judge's assessment of the claim.

(c.) Conclusion about expert evidence:

[113] In my view, the judge did not err in his admission or use of the expert evidence.

3. Damages - Non-pecuniary loss:

[114] The appellant attacks the judge's award of damages for non-pecuniary loss. It is submitted that the judge identified the wrong range of damages and that, as a result, his award is so inordinately high as to be wholly erroneous. I cannot agree.

(a.) Trial judge's decision and appellant's submissions:

[115] The judge awarded non-pecuniary damages, including aggravated damages, of $125,000.00. He determined that the appropriate range of such damages in this case was between $125,000.00 and $250,000.00. He found that the Lalo assaults caused and continued to cause a marked disturbance in B.M.G.'s life. The judge said:

> 171 The impact of the Lalo assaults on BMG is impossible to measure with precision. In particular, the impact on a 14 year old child of being anally raped by a fully grown man defies assessment. As I have noted above, Dr. Hayes, the psychologist, made a diagnosis of "Post Traumatic Stress Disorder in partial remission. Chronic". Dr. Hayes noted that despite the sexual abuse, BMG has a good ability to function but suffers from some alienation.
>
> 172 As I have also noted, Dr. Hayes determined that the abuse BMG experienced at the hands of Lalo would be sufficient in itself to result in the symptoms seen on his assessment. Dr. Hayes noted that BMG continues to suffer

> from the intrusive and avoidant components of PTSD to this day. BMG's symptoms are, according to Dr. Hayes, "clearly chronic". Dr. Hayes says that BMG remains haunted by his past and continues to have self-esteem concerns. The symptoms of PTSD have caused a marked disturbance in BMG's life. I am satisfied that they continue to do so. Despite Dr. Hayes' opinion, I believe that some of BMG's psychological difficulties are partly attributable to his abusive home life.
>
> 173 On the other hand, BMG has not suffered some of the more debilitating consequences seen in some of the cases. For example, he does not suffer from erectile dysfunction nor has he succumbed to substance abuse.
>
> 174 I have also considered that Lalo was in a position of trust at the time the sexual assaults occurred. A further aggravating factor would be the age difference, that is, a mature adult male versus a 14 year old child victim. The assaults in question were of relatively short duration but the nature of the assaults (especially the anal rape) is an obvious aggravating factor.

[116] The appellant submits that the judge erred in setting the appropriate range of damages and says that instead, that range should have been between $50,000.00 and $75,000.00. The appellant also attacks the judge's reliance on Dr. Hayes' report in the assessment of non-pecuniary damages.

[117] I have addressed the judge's reliance on Dr. Hayes' report earlier. The question now is whether the judge erred in assessing non-pecuniary damages at $125,000.00 because he applied the wrong range of damages and awarded an excessive amount.

(b.) Standard of review:

[118] The judge's assessment of non-pecuniary damages may only be set aside or varied on appeal if he erred in legal principle or arrived at an amount that is so inordinately high that it is a wholly erroneous estimate of the compensation to which B.M.G. should be entitled: see, e.g. **Nance v. British Columbia Electric Railway**, [1951] A.C. 601.

(c.) Non-pecuniary damages - the range:

[119] The appellant complains that the damages awarded are excessive, are outside an acceptable range and that the judge identified the wrong range of damages. To

address this submission, it will be helpful first to review the principles relating to non-pecuniary damages in cases of this nature, the factors relevant to determining an appropriate range of damages and then to return to the question of whether the judge identified an appropriate range of non-pecuniary damages in this case.

(i) General principles:

[120] In my view, we should take a functional approach to the assessment of non-pecuniary damages in cases of sexual battery. This approach takes account of the capacity of the award to provide solace for the victim, to vindicate the victim's physical autonomy and dignity and, through an award of aggravated damages, to take account of the humiliating and degrading nature of the defendant's conduct.

(ii.) The nature of non-pecuniary compensation:

[121] Non-pecuniary damages are not compensatory in the usual sense; they do not attempt to compensate for the loss of something with a money value: see, e.g. **Lindal v. Lindal**, [1981] 2 S.C.R. 629. Instead, the damages provide some substitute for what has been lost even though what has been lost cannot be valued meaningfully in financial terms. It is in that sense that they are compensatory.

[122] In this lies the inherent difficulty of assessing non-pecuniary damages. Money is no meaningful substitute for the loss of such things as dignity, personal autonomy, self-esteem and self-confidence. That might lead to two quite different approaches to assessing non-pecuniary damages. One would be to say that the attempt to put a money value on such things is simply futile and should be abandoned. No money should be awarded because what has been lost is not capable of being measured in money. However, and contrary to that view, it might be said that no amount of money, however large, would be enough to provide a substitute for losses of this nature. It might follow that only very substantial awards could properly recognize the reality of the loss. This dilemma was eloquently expressed by (then) Justice Dickson in **Andrews v. Grand & Toy Alberta Ltd.**, [1978] 2 S.C.R. 229 at 261:

> ... There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.

The learned judge continued that: "[t]he award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. ...".

(iii.) Towards a functional approach:

[123] The law has resolved this dilemma in personal injury cases by taking a functional approach to the award of non-pecuniary damages. This approach requires that non-pecuniary damages serve an identifiable, rational purposes, such as providing alternative sources of satisfaction or solace: see, e.g. **Lindal** at p. 638; **Abbott v. Sharpe**, 2007 NSCA 6, [2007] N.S.J. No. 21 (Q.L.)(C.A.) at paras. 118 - 125. The amount of the award, therefore, does not depend alone on the seriousness of the physical injury. It must take into account the extent to which the award will serve some rational purpose in the particular circumstances of the victim. As was said in **Thornton v. Board of School Trustees of School District No. 57 (Prince George)**, [1978] 2 S.C.R. 267 at 284, an award must be adjusted "... to meet the specific circumstances of the individual case."

[124] One must, of course, be very careful in transplanting the damages principles relating to personal injuries suffered in accidents to the injuries suffered in sexual battery. Nonetheless, it seems to me that the broad outlines of the functional approach ought to be applied to awarding non-pecuniary damages in cases of this nature: see, for example, **Doe v. O'Dell** (2003), 230 D.L.R. (4th) 383 (Ont. Sup. Ct. J.) at paras. 276 - 277. In applying the functional approach, one must have due regard to the nature of the injury and the purposes of a non-pecuniary award in relation to that injury.

[125] The main heads of non-pecuniary loss in traditional personal injury actions are pain and suffering, loss of expectation of life and loss of enjoyment of life. The functional approach requires that non-pecuniary damages be measured in part by their capacity to provide solace or substitutes for these losses.

[126] In other contexts, non-pecuniary damages serve other or additional purposes. In defamation cases, for example, general damages vindicate the victim's reputation, thereby affirming to the community the victim's personal privacy and dignity: **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R. 1130 at para. 166. Defamation, after all, is not simply an attack on a person's good reputation.

As Cory, J. put it in **Hill** at para. 121, "... The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity." It follows that one function of the non-pecuniary damages award in defamation is to demonstrate that those rights are deeply valued and have been vindicated.

(iv.) The function of non-pecuniary damages in sexual battery cases:

[127] In the context of sexual assault and battery, the cases have recognized that there are fundamental, although intangible, interests at stake: the victim's dignity and personal autonomy. Thus, the award of damages should take a functional approach in relation to these interests in addition to the more familiar ones of pain, suffering and loss of enjoyment of life.

[128] There is no doubt that sexual battery constitutes a deep affront to the victim's dignity. In **Norberg v. Wynrib**, [1992] 2 S.C.R. 226 at 265, LaForest, J. echoed the words of Cory, J. in **R. v. McCraw**, [1991] 3 S.C.R. 72 that "[i]t is hard to imagine a greater affront to human dignity than non-consensual sexual intercourse." To the same effect, Cory, J. said in **R. v. Osolin**, [1993] 4 S.C.R. 595 at 669, that "[i]t cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence .... It is an assault upon human dignity."

[129] The law also recognizes one of the purposes of the law of battery is to protect the individual's physical autonomy. As McLachlin, J. (as she then was) observed in **Non-Marine Underwriters, Lloyd's of London v. Scalera**, [2000] 1 S.C.R. 551 at paras. 10 and 14, battery is a violation of the victim's right to exclusive control of his or her person. The battery constitutes a violation of the victim's bodily integrity and the loss is identified with the victim's personality and freedom. Most importantly, victims of such attacks, and "... those who identify with them tend to feel resentment and insecurity if the wrong is not compensated.": para. 14.

[130] It follows from this, in my view, that an important function of the non-pecuniary damage award in a case of sexual battery is to demonstrate, both to the

victim and to the wider community, the vindication of these fundamental, although intangible, rights which have been violated by the wrongdoer.

[131] Another important aspect of the non-pecuniary damages award in sexual battery cases is the element of aggravated damages. As LaForest, J. said in **Norberg** at p. 263, " ... [a]ggravated damages may be awarded if the battery has occurred in humiliating or undignified circumstances." These damages are compensatory and are assessed "taking into account any aggravating features of the case and to that extent increasing the amount awarded." An award of aggravated damages must consider not only the effect of the wrong on the victim, but the nature of "... the entire conduct of the defendant...": **Hill** at para. 189. (I should add that there has been no suggestion in this case that aggravated damages arising from the nature of the wrong-doer's conduct may not, in a sexual battery case, be awarded against a party who, like the Province in this case, is vicariously liable for that misconduct: see, for example, **Doe v. O'Dell** at para. 279).

[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.

(v.) Factors to be considered:

[133] The courts have developed a non-exhaustive list of factors which may be considered in fashioning a non-pecuniary damages award in cases of sexual battery. These factors assist in making an award that serves the proper functions of non-pecuniary damages in sexual battery cases.

[134] The Supreme Court in **Blackwater v. Plint**, [2005] 3 S.C.R. 3 at para. 89 approved the factors consider by the trial judge in that case: **W.R.B. v. Plint**, [2001] B.C.J. No. 1446 (Q.L.)(S.C.) at para. 398 *ff.* These include:

> 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.

[135] Consideration of these factors, in my view, will assist in determining an appropriate amount of non-pecuniary damages to serve the functions of providing solace for the pain, suffering and loss of enjoyment of life flowing from the assaults, of demonstrating vindication of the victim's rights of personal dignity and individual autonomy and, with regard to aggravated damages, of appropriately recognizing the humiliating and undignified nature of the defendant's conduct.

(vi.) Determining an acceptable range of damages:

[136] All of that said, an acceptable range of damages must be identified. Recognizing that any figure will of necessity be "arbitrary or conventional", it must also be "fair and reasonable, fairness being gauged by earlier decisions." (**Andrews** at 261; see also **Blackwater** (SCC) at para. 89). Thus, the assessment proceeds by what has been referred to as a "horizontal comparison", that is, by determining from the case law a range of acceptable awards and then placing the present case within that range.

[137] That brings me to the appellant's argument in this case. Its position is that the judge erred in relying on the two cases he did, **Doe v O'Dell, supra** and **J.R.S. v. Glendinning** (2004), 237 D.L.R. (4th) 304, [2005] O.J. No. 285 (Q.L.) (Ont. Ct. J.) in setting the appropriate range of damages.

[138] How does the court determine an appropriate range of damages?

[139] First, the court must identify the important characteristics of the case in order to define the types of cases that should be considered in establishing the range. The judge here looked to cases of severe and continuing abuse, often of a child by an adult in a position of trust and which caused or contributed to extended,

ongoing negative effects on the victim. That, in my view, was the appropriate sort of case with which to compare this one. The abuse here extended over a period of weeks, included anal rape, was committed by a probation officer on a child under his supervision and was found to have resulted in and to continue to contribute to a marked disturbance in B.M.G.'s life.

[140] The second step is to review the cases of this sort and determine the range of awards which have been made. In my view, the analyses in the **O'Dell** and **Glendinning** judgments amply support the conclusion that the range in these sorts of cases is roughly between $125,000 and $250,000. In **O'Dell**, Swinton, J. referred to awards in cases of ongoing sexual abuse ranging from $85,000 to $200,000 in the years 2001 - 2003. In **Glendinning**, Kerr, J. reviewed a number of authorities and concluded that in 2004 dollars the range was between $125,000 and $250,000.

[141] A range in this area is also supported by the judgment of the Supreme Court of Canada in **Plint**. The Court upheld the trial judge's award of non-pecuniary damages, including aggravated damages, of $145,000 (in 2001; approximately $160,500 in 2006 dollars). The Court noted that the trial judge had "... referred to numerous decisions of a similar nature, in order to arrive at a fair figure." (para. 89). It is instructive to briefly review the circumstances in **Plint** and to note the range of damages identified by the trial judge in that case.

[142] In **Plint**, the judge found that the victim had been assaulted on "somewhat more than" the four specific occasions which he described in testimony. The four assaults about which there was specific evidence included three occasions on which Plint, a dormitory supervisor in a residential school, made the victim perform oral sex on him and an incident in which Plint performed anal intercourse. These assaults were accompanied by physical violence including punches to the stomach and blows to the head. The victim was about eight years old when the assaults started and they continued until he left the school at age 12. They caused the victim physical and emotional pain.

[143] The trial judge, Brenner, C.J.S.C., canvassed the damage award decisions in British Columbia and elsewhere. Writing in 2001 and relying on 1998 decisions, he concluded that the "high end" of awards for combined non-pecuniary and aggravated damages was in the area of $175,000 to $185,000. (Adjusted to 2006

dollars from 2001 dollars, this range would be roughly $194,000 to $205,000; adjusted from 1998 dollars, it would be roughly $209,500 - $221,500). The judge referred to **S.Y. v. F.G.C.** (1996), 26 B.C.L.R. (3d) 155 (C.A.) which reduced to $250,000 a jury award involving hundreds of incidents of sexual abuse over seven years by a man of his stepdaughter. At the other end of the range, the judge referred to cases involving one or two incidents of sexual assault which attracted awards in the $75,000 to $85,000 range in the late 1990's, which if adjusted to 2006 dollars, would be roughly in the $90,000 to $100,000 range.

[144] A number of the other decisions I have reviewed refer to **S.Y.** and it too is helpful in setting a range of damages. After an extensive review of the British Columbia decisions, the Court concluded that in 1996, the range of damages was between $100,000 and $175,000, which in 2006 dollars would be roughly between $122,000 and $214,000.

[145] The analysis in all of these decisions supports the broad range of damages adopted by the trial judge in this case.

[146] Both the **O'Dell** and **Glendinning** cases make it clear that many factors come into play in determining where any particular case may fall within the range of cases involving severe and continuing abuse of a child which has ongoing negative affects on the victim. Taking all of the circumstances into account, the awards in **O'Dell** and **Glendinning** were assessed near the top of the range. That they were, however, does not support the appellant's position that the range identified in those cases for severe and ongoing sexual abuse is not the proper range to consider here. It supports only the view that the award in this case should be placed nearer to the bottom than to the top of the range. And that is exactly what the judge did by fixing the award at $125,000.

[147] The appellant submits in its factum that the judge erred in relying on **O'Dell** and **Glendinning** because "[t]he circumstances [in those] cases are not comparable to B.M.G." I do not agree as, in my view, there is a fundamental difficulty with this submission. It is that the judge did not rely, as the appellant submits, on the damage awards to the claimants in the particular circumstances of those two cases as setting the range. Rather, the judge relied on the analysis in both cases of what constitutes the range of damages. As he said, these cases "identified" the appropriate range: reasons, para. 170..

[148] The appellant refers to three cases in which the number of incidents of abuse was comparable to that inflicted on B.M.G. in this case: **V.P. v. Canada (Attorney General)**, 1999 SKQB 180; **Curran v. MacDougall**, 2006 BCSC 933; **H.L. v. Canada (Attorney General)**, 2005 SCC 25, [2005] 1 S.C.R. 401 . These three cases, submits the appellant, establish a range of $35,000 to $60,000 for cases consisting of two to four acts of sexual abuse. (The appellant, however, submitted in oral argument that the appropriate range for this case is $50,000 to $75,000.) I do not agree that these cases are helpful in setting out a range for the present case.

[149] In the **V.P.** case, the abuse consisted of touching, fondling and ejaculating between the victim's legs. There was no attempted intercourse and the assaults occurred on three occasions within less than a one month period. The award in 1999 was $35,000 (which adjusted for inflation would be roughly $41,000 in 2006 dollars). In the present case, the abuse occurred over a somewhat longer period and included anal rape. **V.P.** is not of much assistance in establishing a range of damages for the present case.

[150] In **Curran**, a prison guard performed oral sex twice on a young adult inmate. The trial judge described the assault as at "the lesser end of the spectrum": the abuser stopped after the victim reacted negatively, there was no ejaculation, no penetration and the abuse did not continue over time: at para. 115. The victim submitted that the appropriate range was between $60,000 and $80,000. The court awarded $50,000 but reduced this amount by $10,000 to account for the victim's pre-existing and intervening disabilities. The judge in the present case did not err, in my view, in finding **Curran** of little assistance in establishing the appropriate range of damages in the present case.

[151] In **H.L.**, the victim was subjected to acts of masturbation on two occasions and to requests for sexual favours by the supervisor of an after school boxing club. The trial judge, in 2001, awarded a total of $80,000 (roughly $89,000 in 2006 dollars) for non-pecuniary and aggravated damages. The award was upheld by the Court of Appeal and was not the subject of the subsequent appeal to the Supreme Court of Canada. In the present case, my view is that the judge did not err in finding that the range of damages for the abuse suffered by B.M.G. in this case had a higher starting point than the damages awarded at trial in **H.L.**

[152] In my view, the judge did not err in his assessment of the appropriate range of damages for repeated abuse, including anal rape, over several weeks by a probation officer on a young teen under his supervision that had ongoing negative effects on the victim. Nor do I think it can be said that the judge's award for non-pecuniary loss at the low end of that range was a wholly erroneous estimate. The assaults, the judge found, had been a serious interference with B.M.G.'s enjoyment of life, a serious affront to his dignity and personal autonomy and the conduct of Lalo, a public official in a position of trust, had been humiliating and degrading.

[153] I would dismiss the appeal in relation to the non-pecuniary damages awarded at trial.

4. Damages - Past and Future Loss of Earnings:

[154] The appellant attacks the judge's award of past and future income loss, submitting that nothing should have been awarded. The appellant says, first, that the judge was wrong to find that the Lalo assaults caused a significant loss of past and future income. Second, the appellant submits that the judge's damage award for these heads of damage was excessive. I reject both contentions and I will deal with them in turn.

(a.) Damages - Causation:

(i.) Standard of review:

[155] The appellant says that the judge's finding of causation is not supported by the evidence. This is a question of fact. Appellate intervention is only permitted if the appellant persuades us that the judge made a clear and determinative error in his assessment of the evidence in relation to causation: **H.L., supra**; **M.B. v. British Columbia**, [2003] 2 S.C.R. 477 at para. 54.

(ii.) Legal principles:

[156] Although the applicable legal principles are not in dispute, it will be helpful to briefly review them to set the context for the appellant's submissions.

[157] "Causation," said Sopinka, J., "is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim ..." for purposes of establishing liability: **Snell v. Farrell**, [1990] 2 S.C.R. 311 at p. 326. This relationship exists where the plaintiff proves that it is more likely than not that the defendant caused or contributed to the injury.

[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.

[159] It is important to distinguish between causation in relation to liability and causation in relation to damage assessment. With respect to liability, the principle is that the defendant is liable if his or her wrongful acts were a cause of injury even though they were not the only cause. The principle with respect to damages is that the defendant is not responsible for injury or loss that the plaintiff would have suffered even absent the defendant's wrongdoing. This was discussed by the Chief Justice in **Plint**:

> 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*. ...
>
> (Emphasis added)

(iii.) Did the judge err in finding a causal link?

[160] The appellant's argument focusses on causation in relation to damages. In effect, the submission is that the judge ordered the appellant to pay damages that B.M.G. would have suffered anyway as a result of his abusive home life. The appellant submits that in drawing the conclusion of a causal link between the Lalo assaults and B.M.G.'s loss of earnings, the judge "ignored conclusive and relevant evidence that the Lalo assaults did not have any financial or educational impact on

B.M.G. and misunderstood and drew erroneous conclusions from the reports and testimony of Dr. Hayes and Cara Brown."

[161] I cannot accept these submissions.

[162] The judge found that B.M.G. was a "classic crumbling skull situation": reasons para. 156. This is a shorthand reference to two principles of causation as it relates to damages. The first, the so-called 'thin skull rule', is that wrong-doers take their victims as they find them. Even though the injury from the wrongful act is greater because of the pre-existing injury, the wrong-doer is nonetheless responsible for the loss. The second, the 'crumbling skull' rule, is that a wrong-doer need not compensate for damage that would have occurred without the wrongful act. I refer again to **Plint**:

> 79 ... the defendant takes his victim as he finds him - the thin skull rule. Here the victim suffered trauma before [the assaults]. The question then becomes: what was the effect of the sexual assaults on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.
>
> 80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.
>
> (Emphasis added)

[163] The judge carefully considered these principles, determined that the appellant must not be held responsible for B.M.G.'s losses which were attributable to other factors, and did his best on the evidence to assess damages accordingly.

[164] The judge had "... no doubt that the Lalo assaults have had a significant financial impact upon B.M.G.'s earnings..." and that "[t]hey will continue to have an

impact upon his future earnings": reasons para. 183. He carefully reviewed the evidence and made clear findings of fact which support these conclusions.

[165] The judge took into account B.M.G.'s evidence, the report and testimony of Dr. Hayes, the psychological testing and the various medical records. He addressed the appellant's contention that the Lalo assaults had no impact on B.M.G.'s education or career. The judge found that "... B.M.G.'s psychological and educational advancement was substantially affected by the sequelae of the Lalo assaults": reasons para. 158. He rejected, in emphatic terms, the Province's argument that had the Lalo assaults not occurred, B.M.G.'s history, his story and work history would be unchanged. He dismissed this view as being contrary both to the psychological evidence and common sense: reasons para. 159 - 160. The judge found on the contrary that "but for" the Lalo assaults, B.M.G. would at some point have at least received his high school equivalency and successfully completed some form of trades training. This, the judge concluded, would have given B.M.G. more employment opportunities at an earlier age and significantly enhanced the income he had earned in the past and would be capable of earning in the future: reasons para. 163.

[166] The judge also considered the impact of the severe physical and emotional abuse he had suffered at home on B.M.G.'s education and career. He recognized and took into account, that even without the assaults by Lalo, B.M.G. would not likely have completed his schooling by the time that most adolescents his age would have done so: reasons para. 157. He concluded that B.M.G.'s pre-existing "condition" brought about by the physical and mental abuse he suffered at home, even without the Lalo assaults, would have detrimentally affected him in the future. On the other hand, the judge also concluded that B.M.G.'s circumstances at the time made him particularly vulnerable to the effects of Lalo's assaults. He found that B.M.G. "was delivered to Lalo" in a physically and emotionally vulnerable state: reasons para. 161.

[167] I have already dealt with the judge's handling of the reports and testimony of Dr. Hayes and Ms. Brown. In my view he did not make any reviewable error in his assessment of that evidence. The judge accepted Dr. Hayes' fundamental conclusion that the highly traumatic Lalo assaults had resulted in a "marked disturbance" in B.M.G.'s life. He also found B.M.G. himself to be a credible witness.

[168] The judge's reasons show that he appreciated the essentials of the evidence, that he carefully considered the appellant's submissions and that he reached different

conclusions on the evidence than those advocated by the appellant. In doing so, the judge made no reviewable error in his assessment of the evidence or in concluding that the Lalo assaults had been shown to have been likely to have had substantial impact on B.M.G.'s educational attainments and career development.

(b.) Amount of Damages:

[169] The judge awarded a total of $500,000 for both past and future income loss (inclusive of prejudgment interest on the past loss component). The appellant says this is a wholly erroneous estimate of B.M.G.'s loss. I do not agree.

(i.) Standard of review:

[170] As noted earlier, we cannot intervene on appeal absent a legal error or an award that is so excessive that it is a wholly erroneous estimate of B.M.G.'s loss.

(ii.) Legal principles:

[171] Two legal principles are important here. The first is concerned with certainty of damages and the second with the pecuniary nature of the award for past and future loss of income.

[172] The principles concerning certainty of damages deal with the quantification of a loss proven to have been caused by the wrongdoer's acts. If the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it does not excuse the wrong-doer from paying damages which can be proved. Even though the amount is difficult to estimate, the court must simply do its best on the evidence available: S.M. Waddams, **The Law of Damages**, 2nd ed. looseleaf (Toronto: Canada Law Book Ltd., 1991) at para. 13.30. This is often summed up by saying that difficulty of assessing damages is no bar to their recovery.

[173] This principle is dramatically illustrated in the context of an award for future loss by **Arnold v. Teno**, [1978] 2 S.C.R. 287 at 328 - 332. The infant plaintiff, as a

result of the defendants' negligence, had been seriously injured when she was four and one half years of age. There was no issue about causation: it was clearly proved that the defendants' negligence had caused the injuries which in turn caused an inability to work. The difficulty was in quantifying the extent of the resulting loss. Estimating the young plaintiff's likely loss of future earnings was said to be "pure guesswork"; the Court found that there was "no guidance whatsoever" in determining the amount to be awarded. The Court, however, attributed to her a life-time income half way between the amount of social assistance and her mother's income as a teacher.

[174] In the present case, the judge was convinced that the Lalo assaults had caused a substantial interference with B.M.G.'s ability to earn income in the past and with his capacity to earn income in the future. For reasons I will discuss shortly, the nature of this loss and the particular circumstances of the case made estimating the amount of that loss an inexact science to say the least. The judge was required to do his best on the evidence presented.

[175] The second legal principle is that an award for past and future income loss is a pecuniary award; the award is for losses that are financial in nature and may be measured in money. As Professor Waddams has pointed out, both the pre-trial and post-trial awards are directed to valuing the impairment of the plaintiff's earning capacity: S.M. Waddams, s. 3.360. What is being compensated is the impairment of a capital asset, the capacity to earn. This asset is valued on the basis of what the plaintiff would have earned had the injury not occurred: **M.B., supra**, at paras. 47-48. The difference between pre-trial and post-trial losses is that, in many cases, the pre-trial portion of the award may be measured more precisely because it is based on knowledge of what happened rather than, as is the case of the future loss, prediction about what will happen.

[176] It is important to understand that the loss of earning capacity award is fundamentally different from the award for non-pecuniary losses. The non-pecuniary damages, as discussed earlier, are awarded in relation to losses that are not financial in nature and cannot really be measured in money. A non-pecuniary award, as we have seen, is determined by placing a particular victim and set of circumstances within a range of conventional and, in a sense, arbitrary awards as determined largely by precedent. In contrast, a pecuniary award on account of past and future income loss is concerned with the financial loss the victim has shown he or she has experienced and will experience as a result of the wrong. Unlike in the case of non-pecuniary

damages, there is no "range" for awards of pecuniary damages; decided cases do not provide benchmarks as to an appropriate range of pecuniary damages for loss of past income or income earning capacity. The amount of the award is determined by the extent of the financial loss as disclosed in the evidence in each case.

[177] The award in this case is unquestionably substantial. The question, however, is not whether it is outside some acceptable range of damages, but whether it was an appropriate award in light of the evidence accepted by the judge in the particular, and I would add, unusual circumstances of this case.

(iii.) The judge's award:

[178] The judge awarded $500,000.00 for B.M.G.'s past and future income loss. Although he set out the various factors he considered in reaching this amount, he did not attempt to itemize the award. He was not able, on the evidence, to make any precise findings of fact about B.M.G.'s actual earnings from the time of the assaults to the date of trial or about his precise earnings in the future. However, the judge did make several critical findings, which I will review very shortly, bearing on the major factors that would determine the amount of compensation. To put his award in context, however, it is first helpful to look at the estimates provided by the economist, Ms. Brown, in relation to both past and future income loss. The judge awarded just under one-half of the amount estimated by Ms. Brown.

a. Ms. Brown's calculations:

[179] Ms. Brown attempted to estimate B.M.G.'s loss of past earnings. She examined two scenarios: his earnings as if the Lalo assaults had not occurred (the "without incident" scenario) and his actual earnings (the "with incident" scenario). The difference (adjusted to take account of interest) was her estimate of past income loss.

[180] For the "without incident" scenario, she assumed that B.M.G. would have graduated from high school at the normal age and begun to work at a commensurate wage quite shortly thereafter. This produced a figure of $720,608. For the "with incident" scenario, Ms. Brown made certain assumptions about what B.M.G. actually earned prior to trial, arriving at a figure of $300,170. The difference, adjusted to take

account of interest, was her estimate of past income loss resulting from the Lalo assaults. The figure was $636,100.

[181] She went through a similar exercise for future loss. She projected future earnings with and without the assaults and, by subtracting them and adjusting the result to reflect the present value of future losses, arrived at an amount of $458,454.

[182] Her estimate of past and future loss was arrived at by adding the past and future estimates, resulting in a total of $1, 094, 554.

[183] Her calculations were as follows:

Summary of Estimates
high school graduate
v. present career path

	WITHOUT Incident	WITH Incident	Potential Income Loss
Potential Income:	[1]	[2]	[3] = [1] - [2] (Inclusive of PJI to DOV)
Date of interruption to date of valuation	$720,608	$300,170	$636,100
Date of valuation to retirement age (present value)	$640,695	$182,241	$458,454
TOTAL potential income	$1,361,302	$482,411	$1,094,554

iv. The judge's finding - past loss:

[184] In many cases, determining the amount of an award for loss of earnings before trial is relatively straight forward. If a person was earning $500.00 per week before an accident and was unable to work for ten weeks as a result of the injury, the starting point for quantifying the loss is simple arithmetic. An award in these types of cases will be itemized and capable of quite precise calculation. It is relatively simple to calculate where there is an earnings history and the precise extent of the impact of the wrong on past earnings is clear. However, the loss is still the impairment of earning capacity.

[185] This case, however, has nothing in common with cases in which there is a pre-injury record of earnings and a clearly defined impact of the injury on those earnings. Determining B.M.G.'s past loss of earnings was no simple matter and certainly not something that could be done with anything approaching scientific precision. Given the young age at which the assaults occurred, there was no pre-trial earnings history to guide the assessment of the financial impact of the assaults on B.M.G.'s earning capacity or earnings. In short, there was no pre-assaults earnings history. Given the nature of B.M.G.'s employment before trial and the dearth of records relating to it, even estimating his actual earnings after the assaults posed a significant challenge. In light of those aspects of the situation that confronted the judge, his decision not to attempt to quantify the pre and post assault income loss separately or to set out an itemized calculation of them is, to my mind, perfectly understandable. While normally a fuller breakdown of the award is expected, that would have been an artificial exercise here.

[186] It is helpful now to look at the judge's factual findings in relation to past loss and to contrast them with the assumptions made by Ms. Brown in arriving at the estimates I have just outlined.

[187] With respect to what B.M.G. would have earned but for the assaults, this turned on what the judge described as "many imponderables": reasons para. 182. It is noteworthy that the judge's findings of fact in this regard were quite different from the assumptions made by Ms. Brown. In particular, he reached a different conclusion as to when B.M.G. would have completed high school but for the assaults and appears to have placed little weight on Ms. Brown's attempt to reconstruct B.M.G.'s actual past earnings.

[188] The calculations on Ms. Brown's table assumed, as I have noted, that B.M.G. would have completed high school around the usual age and started to earn the commensurate wage almost immediately. The judge, however, was not persuaded this was the correct assumption. He found that but for the Lalo assaults, B.M.G. would "at some point have attained high school equivalency...". (emphasis added) The judge noted, as the evidence and legal principle required, that even before the assaults, B.M.G. had significant difficulties with his schooling. He concluded that "[i]t is more likely that, even without the assaults by Lalo, B.M.G. would not have completed his schooling by the time that most adolescents his age would have done so": reasons para. 157. However, the judge also concluded that B.M.G. would have gone on with his education so that he "... likely would then have gone on to trades training": reasons para. 184. In short, the judge found that B.M.G.'s education, and consequently his earnings, would have been achieved later than Ms. Brown had assumed but also that his earning potential was higher than Ms. Brown assumed because he would have eventually completed trades training rather than stopping at the end of high school. The judge also noted that Ms. Brown's calculations were based to the extent possible on Nova Scotia data but that this was a conservative approach given his conclusion that B.M.G. would not necessarily have confined himself to Nova Scotia: reasons para. 181.

[189] As for his actual earnings, B.M.G. had worked at scores of different jobs in different places over nearly 30 years. He had not filed tax returns. Virtually no records of his earnings existed. The judge, while satisfied that B.M.G. had made every effort to provide a full picture and to obtain what documentation there was, nonetheless recognized that determining what he had actually earned was fraught with difficulty. It is also apparent that the judge was not impressed by Ms. Brown's attempts to itemize B.M.G.'s past earnings. He noted that the calculation of past income was "based upon incomplete records and arbitrary projections": reasons, paragraph 185.

v. The judge's findings - future loss:

[190] With respect to future earnings, Ms. Brown's projections were based on the assumption that B.M.G.'s earnings would remain below – substantially below – that of a high school graduate. The judge did not accept that assumption. He found that B.M.G. "has the ability to surpass the average income level of high school graduates

in the future": reasons para. 186. This, of course, would significantly reduce the amount of future loss compared to that calculated by Ms. Brown. The judge also properly took into account that the impact of negative contingencies such as job loss, unemployment or injury are difficult to evaluate and that B.M.G. could have mitigated his loss by making better use of his inheritance money, a sum of nearly $200,000, which he had obtained around 1997: reasons para. 186. These considerations would further reduce the award.

(c.) Summary of Conclusion Concerning the Appeal:

[191] While the judge did not itemize the award, he made clear findings of fact on the critical elements affecting it and awarded half of what Ms. Brown calculated using her assumptions. In my view, in the virtually unique circumstances of B.M.G.'s situation and given the judge's clear findings of fact on the various points that affected the assessment of damages, I cannot say that the figure of $500,000 was a wholly erroneous estimate.

5. Conclusion respecting appeal:

[192] I would dismiss the appeal.

V. DISPOSITION:

[193] I would dismiss the appeal with costs fixed in the amount of $10,000 plus disbursements. I would dismiss the cross-appeal without costs.

Cromwell, J.A.

Concurred in:

Saunders, J.A.