NOVA SCOTIA COURT OF APPEAL

Citation: *L.M.M. v. Nova Scotia (Attorney General)*, 2011 NSCA 48

Date: 20110531
Docket: CA 325126
Registry: Halifax

Between:

L.M.M.

Appellant

v.

The Attorney General
Representing Her Majesty The Queen
in Right of the Province of Nova Scotia

Respondent

Editorial Notice

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

Restriction on publication: Pursuant to s. 486.4 of the *Criminal Code*

Judges:	MacDonald, C.J.N.S.; Saunders and Oland, JJ.A.
Appeal Heard:	April 4, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed in part without costs, and cross-appeal is dismissed without costs, per reasons for judgment of MacDonald, C.J.N.S., Saunders and Oland, JJ.A. concurring.
Counsel:	Mark T. Knox, for the appellant
	Glenn R. Anderson, Q.C., Terry Potter, and Cory Roberts (articled clerk), for the respondent

486.4 (1) **Order restricting publication – sexual offences –** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(I) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(I) to (iii).

Reasons for judgment:

OVERVIEW

[1] Representing a dark chapter in this Province's history, probation officer Cesar Lalo used his position of power to sexually abuse his young clients. He left a trail of destruction throughout the 1970's and 1980's. The appellant LMM is one of his victims. He sued the Province which admitted liability for Lalo's actions. Justice Heather Robertson of the Supreme Court of Nova Scotia was tasked with assessing damages. She awarded LMM $125,000 for pain and suffering and $250,000 for lost wages.

[2] LMM now appeals to this court asserting that the award is too low. In the process, he challenges the judge's refusal to admit his expert evidence. The Crown cross-appeals asserting that the wage loss aspect of the award is too high. For the reasons which follow, I would allow the appeal, in part, and dismiss the cross-appeal.

BACKGROUND

LMM's Life Before Lalo

[3] LMM was born in September of 1973. His mother was only 19 at the time and on her own. So his grandparents reared him until the age of 9, after which time his mother took him. He has no relationship with his natural father.

[4] LMM's life with his mother was difficult. She had six other children from her relationship with one JG who, while not technically living with them, was around a lot. When he was younger, LMM reported having been physically abused by JG. However, as an adult looking back, LMM now sees this as a legitimate form of discipline. Yet, the Crown asserts that JG (as opposed to Lalo) could very well have been responsible for many of LMM's ongoing problems as an adult.

[5] In any event, the family was crowded into a three bedroom apartment. They were poor and sporadically LMM would live with extended family members to relieve the pressure. This meant being shuffled from school to school. He failed grade 5 and from then on gained a reputation of being a disruptive child.

[6] LMM began to steal at the age of 8 which elevated to breaking and entering at the ages of 9 and 10. This disruptive behaviour continued but, given his young age, it was often dealt with informally by the authorities. However, by the age of 13, he was placed under a formal probation order and, tragically, into Lalo's perverse clutches.

Lalo's Abuse

[7] Although LMM's evidence was a little vague on this point, the trial judge found that the abuse began when he was 13:

> ¶170 Victims of sexual assault when testifying of the events that occurred when they were children, often skew the dates and the courts are used to this. In this case, LM remembers the first assault took place at the Family Court on Devonshire Avenue, "the old *." This site opened as a Family Court in the fall of 1986, so LM had just turned 13 when the assaults began.

[8] Here are the details of this abuse in LMM's own words:

> A. I was sitting there reading a Probation Report and -- the next thing I knew he just unbuttoned my shirt and just started touching me and stuff like that.
>
> Q. Is -- where -- where does this occur?
>
> A. In -- in the -- in the old school. In my old school, Richmon -- in Richmond.
>
> Q. Okay. Did it -- did it become the Family Court building?
>
> A. Yes, it turned into the Family Court -- the Court, yeah.
>
> Q. Okay. Okay. And was this the first time you had ever seen him for probation or was it the second or third time or how would you describe this?
>
> A. I don't know, it might have been like the sixth or seventh maybe -- or seventh, eighth, I don't know.
>
> . . .

A. Yeah, he started rubbing on my chest and stuff like that and –

Q. Right.

A. -- and then that's -- I think that's where it ended that day.

. . .

A. The next -- the next time it occurred was in his office again. He would -- he would -- that's when he would -- put his hands down my pants and basically fondled me -- he was fondling me and stuff like that and just asked me did I like it and stuff like this.

Q. Uh-huh. Okay. All right. Just you and him in the office –

A. Yes, sir.

Q. -- and nobody else there.

A. Yeah.

Q. All right. Okay. And just go forward to the next -- next type of activity.

A. Then the next time it was basically -- you know, he asked me to fondle him in his -- in -- in -- in his pants. Like he pulled out -- he pulled out his shirt -- and basically just asked me to fondle him in his pants and I did.

Q. Okay. Next?

A. That went back and that happened probably -- I don't know, a couple of other meetings and then it went from that to -- he gave me oral -- oral -- um -- I don't know what you call it -- oral sex, I guess and that was -- and then the next time it went from me doing it to him and you know it went back and forth and then that went on probably -- I don't know about five -- five times -- at that stuff and you know playing with each other, stuff like that then -- and then the time up on Fort Needham –

[9] This progressed to attempted anal sex:

Q. Okay.

A. -- he -- he was -- made me give him oral -- oral sex again and then he shoved his finger up my ass -- and -- my buttocks -- or anal -- whatever -- and I just -- and that was the last time there.

[10] This type of abuse continued until LMM was 16 with Lalo taking advantage whenever he had LMM alone:

Q. Okay. How -- how frequently did these activities occur?

A. From when -- when they started -- probably, you know, every second time I'd go see him or something -- you know. Sometimes it would be back to back and sometimes he would skip -- you know, the opportunity was -- would arise, you know -- that -- no -- cause I remember there was a secretary outside of this office -- a ways over. She was probably about ten feet from the door. Sometimes she wasn't there and I don't know -- it was -- you know that I was going up at dinner time or whatever -- but sometimes she wasn't there and then George -- George MacDonald's office was next door to -- to -- next door to his -- to his office basically, right, so -- you know, if the opportunity arose basically now when I look back at the situation you know he took advantage of me every time -- basically if no one wasn't around -- that's when he would basically you know take advantage of me and abuse -- torture me, abuse me -- whatever you want to call it.

[11] When asked when it all ended, LMM said:

A. I can't explain that. I -- I probably -- you know, I think I was around my 16th birthday and I didn't have to go see him no more. That's probably what it was, you know.

Q. Okay.

A. So -- and you know when I left that day he knew I was upset -- crying -- like I was -- because I was crying before I even got out of the car, type-of-deal, right? And I don't know -- now me being a man, I don't know if he got scared at the time, or whatever and he just -- I -- I think I -- he just cancelled all the appointments or whatever. I know I never seen him I don't think after that.

[12] Not surprisingly, LMM was too afraid and embarrassed to resist this victimization or to report it to others:

Q. And I'm wondering if you -- if you said something to him -- if you told him, you know, "I enjoy this." "I hate this." Did you say anything to him?

A. No, I just -- I -- he always threatened me, my family and everyone else, so I never had no choice in the matter.

Q. Uh-huh.

A. Threatened to send me to Shelburne, threatened to hurt my brothers and sister -- and my mother -- whoever.

Q. When you say, "Threatened to send to send you to Shelburne." -- it sounds self-explanatory, but tell -- tell me about that.

A. Well, he'd tell me if I didn't participate in what he -- you know -- what he was doing, then I would go to Shelburne and he knew people down there that could beat me -- beat the shit out of me. He used to refer to how small I was and say, "Look how -- " -- you know -- basically, "I'll send you there and you won't like it down there.", he said --, "And you might not come back." -- right -- so -- that was enough for me.

Q. Okay.

A. On top of threatening my -- you know, my little sisters and brothers and stuff like that -- and he knew that I -- he knew that I loved them more than anything, right -- so he would threaten them, threaten my mother, grandmother.

Q. Okay. And in terms of telling other third persons -- your mother, grandmother, grandfather, Aunts, Uncles --

A. No.

Q. -- [J.G.]?

A. No. Did I tell [J.G.] what was happening to me?

Q. Yeah.

A. No, I didn't sir.

Q. Okay. All right. Did you tell any of those people what was going on?

A. No, I didn't, no.

[13] In fact, it was not until ten years later, in 1996, that LMM, as an adult, found the courage to disclose. He was motivated by another victim who had come forward with his personal and tragic story about Lalo:

> A. Oh, that was in the Correctional Center. I was there and I was watching the news and the next thing you know a thing come -- come on about some other guy that was being abused by him and then that's when I -- you know, I said this is my chance. You know, I got the courage from seeing buddy, I guess -- from seeing buddy on t.v. and you know he was by a pond -- and walking around a pond and I said, you know –
>
> Q. I'm sorry, he's doing what?
>
> A. He was -- oh, I think it was at the Dartmouth duck pond where they done the taping.
>
> Q. Oh, okay.
>
> A. I remember seeing a pond in back and -- yeah, and then after that I think I called the RCMP from the Correctional Centre.
>
> Q. Right. There's a statement somewhere dated February 1996 -- about –

The Judge's Decision

[14] The judge was initially called upon to address the Crown's challenge to LMM's proposed expert, retained to link Lalo to LMM's adult life of crime and addiction. Psychologist Jason Roth's report came under fierce attack by the Crown, aided by its own expert psychologist, Professor James Alcock.

[15] It turns out that, among other things, Mr. Roth relied heavily upon psychological testing that he did not perform and in fact was not qualified to analyse. As well, his only subjective assessment resulted from his counselling sessions with LMM.

[16] In the end, the judge was concerned enough to exclude this testimony:

> ¶124 Nevertheless, I am left with the Roth report tendered on behalf of the plaintiff that is, in my view, seriously flawed. In methodology alone, I accept

> Professor Alcock's judgment that this report does not meet the standards of expertise the Court must require.

[17] Nonetheless, in assessing general damages for pain and suffering, the judge concluded without the benefit of an expert that the abuse LMM suffered at Lalo's hands had a deep and lasting impact on LMM's life:

> ¶219 In the film the "Sliding Doors," two parallel lives of the heroine are examined, one where she gets through the closing doors of the subway train, and the other, where by a split second she fails to get on the train. Similarly with LM there are two life sequences. The real life of today, having endured the event of Cesar Lalo, and what may happen in the future as a result of this event and the hypothetical or other life LM may have lived had he not had such a damaging encounter with Cesar Lalo. In the sliding doors analogy the Court attempts to quantify the difference between the two life patterns and reflect the difference in value between the two, with the hopeful goal of quantification moving beyond a global sum award, a difficult task in the present circumstances.
>
> ¶220 So I have examined these two life patterns. There is no doubt in my mind that the Lalo "event" generated a significant and lasting change in LM's life plan. And I have asked myself what was the hope and promise of his life before Lalo. Could he have lived even a conventional or somewhat normal life, but for this event? Will he ever get back on the track his life might have taken but for this event? What is the long-term difference between the life he has today and one he might have had, if the probation officer he met was an honourable and decent man. LM's life changed dramatically for the worse after he passed through that sliding glass door into Caesar Lalo's "care" at the age of 13.
>
> ¶221 On the balance of probabilities, I find a significant causal connection between the sexual abuse LM suffered and his incapacity to get on with life and become a productive member of society.
>
> ¶222 I accept LM's evidence as credible and a truthful explanation given today through adult eyes of the painful events of his childhood.

[18] Likewise, on the wage loss claim, the judge accepted that these assaults negatively affected LMM's ability to earn in the past and will continue to do so in the future:

> ¶236 I also accept that he is psychologically impaired by reason of the sexual abuse he suffered at the hands of Cesar Lalo. While I do agree that there could be some possible damage as a result of physical abuse suffered in the earlier years of his life, I believe that the sexual assaults have substantially interfered with his ability to earn an income, past or future.

[19] However, instead of carrying out a detailed calculation of the wage loss claim, she settled for a global amount:

> ¶247 Nevertheless, considering the evidence before me, there is some basis upon which to suggest that LM could have had a plausible income or career path, but for the assaults by Cesar Lalo. His career path is not entirely speculative.
>
> ¶248 In my view, this is a circumstance where a global award for damages is appropriate. I am taking into consideration certain negative contingencies, as well as the real possibility of future rehabilitation and adjustment to a more fulfilling and productive life, although I do not believe he will ever achieve a full recovery from the psychological injury he sustained. LM has suffered various physical injuries in the past, as previously outlined. I accept that his back injury may have resolved, but his failure to recover completely from his broken leg or to pursue physiotherapy at the time has negatively impacted on his future income.
>
> . . .
>
> ¶255 With these uncertainties and contingencies, I find there is an insufficient basis upon which to make a precise forecast of lost future earing capacity.

[20] In the end, the judge awarded:

> ¶256 Therefore, in all the circumstance I make a global award of the sum of $250,000 for past and future loss of income, and the sum of $125,000 in general damages for non pecuniary loss.

[21] Finally, while LMM advanced a claim for the cost of future counselling, this was not addressed in the judge's ultimate award.

[22] I now turn to the issues.

THE ISSUES

[23] LMM lists the following grounds in his notice of appeal:

1. that the learned trial judge erred in not admitting the report of the appellant's psychologist;

2. that the learned trial judge erred in assessing general damages;

3. that the learned trial judge erred in assessing past and future lost income;

4. that the learned trial judge erred in not assessing a fit and proper figure for the cost of future care (for counselling);

5. that the learned trial judge erred in proposing that a structured settlement would be ordered, if sought by either of the parties; and

6. such further and other relief as this Honourable Court deems appropriate.

[24] As noted, in its cross-appeal, the Crown asserts that the wage loss award is too high. Therefore, with LMM abandoning his appeal regarding the proposed structured settlement, I would distill the issues as follows:

a. Did the judge err in refusing to admit LMM's expert evidence? (LMM's ground #1)

b. Is the general damages award appropriate? (LMM's ground #2)

c. Is the wage loss award appropriate? (LMM's ground #3 and the Crown's cross-appeal)

d. Should the judge have awarded damages for the cost of future counselling? (LMM's ground #4)

[25] I will now address each issue in order.

ANALYSIS

The Roth Report

[26] I begin by addressing the standard upon which we should review the judge's decision to exclude Mr. Roth's report and supporting evidence.

[27] The judge witnessed first hand the Crown's attack on this proposed expert evidence. She heard hotly contested evidence and comprehensive submissions. In the end she made a judgement call involving an exercise of discretion. Therefore, in my view, her decision to exclude this evidence is entitled to deference. For example, in **R. v. D.D.**, 2000 SCC 43, McLachlin, C.J. (albeit in dissent) said this about a trial judge's decision to include or exclude expert evidence:

> ¶12 The application of the four *Mohan* criteria is case-specific. Determinations of relevance and necessity, as well as the assessment of whether the prejudicial effect of the evidence outweighs its probative value, must be made within the factual context of the trial. As Sopinka J. said of relevance in *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 370, the inquiry "is very much a function of the other evidence and issues in a case". Taking into account the other evidence, the issues and her knowledge of the jury, the trial judge determines what are the live issues in the trial and whether the evidence will be necessary to enable the jury to dispose of them.
>
> . . .
>
> Finally, the trial judge may be in the best position to determine whether the probative value of the evidence is outweighed by its prejudicial effect on the trial. The trial judge knows the issues, the evidence and the jury and is charged with the ultimate responsibility of running a fair trial.
>
> ¶13 *For these reasons appellate courts owe deference to decisions of trial judges to admit or reject expert evidence*: *F. (D.S.)*, supra; *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717. See also *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (C.A.); *R. v. Villamar*, [1999] O.J. No. 1923 (QL) (C.A.), and *R. v. C. (G.)* (1996), 110 C.C.C. (3d) 233 (Nfld. C.A.). This does not preclude appellate review. Where the record clearly does not support a finding of admissibility on the basis of the *Mohan* criteria, the Court of Appeal may rule that the evidence should not have been admitted. However, the case-specific nature of the inquiry means that an appellate court cannot lay down in advance broad rules that particular categories of expert evidence are always inadmissible. Such a categorical approach would undermine *Mohan*'s requirement of a case-by-case analysis of the four applicable criteria.
>
> [Emphasis added.]

[28] Furthermore, Major, J. (for the majority) agreed that a certain level of deference was called for:

> ¶47 I agree with the Chief Justice that some degree of deference is owed to the trial judge's discretionary determination of whether the *Mohan* requirements have been met on the facts of a particular case, but that discretion cannot be used erroneously to dilute the requirement of necessity.

[29] See also **R. v. Bonisteel**, 2008 BCCA 344 at paras. 69 to 71 and **R. v. Abbey**, 2009 ONCA 624 at para. 97.

[30] I now turn to the merits of LMM's submission on this issue.

[31] There is no doubt that Mr. Roth's report was seriously flawed. The judge raised numerous concerns:

> ¶125 Mr. Roth's reliance on others who are familiar with psychometric testing required, at the very least, proper attribution. But, in addition, as Professor Alcock stated:
>
> > What is so important, then, is that the psychologist who interprets the test be very familiar with the problems and pitfalls of testing, and be very experienced in the use of a particular tests (sic) themselves. Psychologists are directed by their codes of ethics and by their professional bodies to ensure that they employee (sic) only those tests for which they have appropriate training, knowledge and experience.
> >
> > Further, no test is to be used in isolation. That is, one cannot and must not interpret a test without taking into consideration the circumstances of the particular individual who has been tested. Thus, it would be irresponsible for one individual to administer a psychological test and interpret that test without having conducted a detailed clinical interview of the testee. Similarly, it would be irresponsible for a clinician to use test interpretations provided by another psychologist who had no detailed knowledge of the testee.
>
> ¶126 This process of proper test administration and informed interpretation simply did not occur.
>
> ¶127 I accept that Mr. Roth's piecemeal approach to this assignment did not produce a result upon which the Court could rely with the appropriate degree of confidence.

> ¶128 Although it is clear to me that Mr. Roth's efforts were sincere, I agree with Professor Alcock. There is a significant distinction between the trained counsellor, such as Mr. Roth and the trained clinician, skilled in administering psychological testing and diagnosing psychopathologies.
>
> ¶129 I was less concerned than Professor Alcock, that Mr. Roth did not give proper consideration to all of LM's childhood experiences. It was clear from his evidence that he was aware of and did consider all of LM's background and the early physical abuse he suffered at home. It is fair to say, however, that he did not sufficiently deal with this issue in his report, so that it may appear he lacked balance or was overly eager to assist LM.
>
> ¶130 I accept Mr. Roth's evidence that this assignment came at a difficult time in his personal life, when he had family illness to attend to and was away, during the period when the report required his full attention.
>
> ¶131 In coming to this decision on the voir dire that the Roth report and the evidence in its support is inadmissible, I have considered the plethora of cases on the subject of admissibility of expert reports.

[32] As well, in its factum, the Crown, supported by the record, highlighted a host of problems too lengthy to itemize but which it summarized as follows:

> ¶96 Mr. Roth was not a clinical psychologist and did not have experience using or interpreting psychological tests. His testimony revealed several other significant shortcomings of his qualifications and methodology. He said that he was not familiar with a distinction between a counselling psychologist and a clinical psychologist. He said that he did not perform a complete psychological assessment; which would have included an assessment of other events in LMM's life. He acknowledged that there was no pre abuse score when asked about the opinion in his report stating that the variance between the pre and post abuse scores demonstrated the intensity of distress and psychological damage. He said that he had concerns about the truthfulness of what LMM said. He agreed that the Court could be misled by his report. He overstated the degree of certainty of his opinion and said that he should have written another report in 2009:
>
> . . .
>
> ¶97 Additional shortcomings of Mr. Roth's qualifications and methodology were revealed during the testimony of his colleagues, whose opinions on psychological tests he included in his report. He edited their opinions regarding psychological tests without expertise in the tests. He was unaware that their

> opinions were based, in part, on their clinical observations and knowledge. He did not report the tests showed that LMM might be exaggerating and that the tests have limitations: ...

[33] This litany of shortcomings, in my view, more than justifies the judge's decision to exclude this evidence. It was her call and I defer to her resolution of this issue. I would, therefore, dismiss this ground of appeal.

[34] That said, LMM should not be overly disappointed with this result. I say this because, as noted, the judge nonetheless ruled in LMM's favour without the benefit of this expert evidence. In other words, excluding this evidence did not prevent the judge from finding that the Lalo assaults contributed to LMM's problems as an adult. It simply meant that she had to do so without the benefit of an expert.

[35] I now turn to the general damages award, again beginning with the appropriate standard of review.

The General Damages Award

[36] In **Nova Scotia (Attorney General) v. B.M.G.**, 2007 NSCA 120, this court considered the general damages award of another Lalo victim. There we discussed the standard upon which such an award should be reviewed. Again we called for deference, restricting our interference to errors in principle or "wholly erroneous estimates":

> ¶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.

[37] Thus, it is not for us to impose what we would have ordered. See John Sopinka, *The Conduct of an Appeal*, 2nd ed. (Markham, ON: Butterworths Canada Ltd., 2000) at pp. 61-62:

> The general terms of the test for appellate review of a judge's assessment of damages is found in the judgment of the Supreme Court of Canada in *Woelk v. Halvorson*, in which McIntyre J., speaking for the Court, stated:

> It is well settled that a Court of Appeal should not alter a damage award made at trial merely because, on its view of the evidence, it would have come to a different conclusion. It is only where a Court of Appeal comes to the conclusion that there was no evidence upon which a trial judge could have reached this conclusion, or where he proceeded upon a mistaken or wrong principle, or where the result reached at trial was wholly erroneous, that a Court of Appeal is entitled to intervene. [...]

The Supreme Court of Canada confirmed in *Watkins v. Olafson*, the requirement that a manifest error be shown before an appellate court may intervene in a trial judge's assessment of damages. In *Watkins*, the Court overturned the decision of the Manitoba Court of Appeal and restored the judgment of the trial judge in respect of various heads of damages in a personal injury action. McLachlin J. (as she then was) speaking for the Court, stated:

> In the absence of error and in the face of evidence supporting the trial judge's conclusion, it was not appropriate for the Court of Appeal to substitute its view for that of the trial judge.

[38] Here LMM attacks the award on two fronts. Firstly, he asserts that the judge erred in principle by misstating the appropriate range for this type of inquiry. Secondly, he asserts that, in any event, the award is simply too low. I will now consider each assertion in order.

Did the Judge Err in Principle?

[39] In **B.M.G.**, *supra*, this court agreed with the trial judge that the appropriate range for general damages involving this type of victimization should be from $125,000 to $250,000:

> ¶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.
>
> . . .
>
> ¶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. ...

[40] Here at the outset of her analysis, the judge correctly identified this range:

> ¶143 With respect to general damages the trial judge in **G.(B.M.)**, *supra*, noted at that the appropriate range is between $125,000.00 and $250,000.00.

[41] Yet later in her judgment, the judge mistakenly referred to the ceiling as $150,000:

> ¶226 I agree with the trial judge in **G.(B.M.)** that the range for general damages in a case of this nature is between $125,000 - $150,000 [sic].

[42] This, according to LMM, represents an error in principle. Respectfully, I think not. I say this because the judge was keenly aware of the **B.M.G.** decision and everything it stood for. After all, it involved another Lalo victim. Quite properly, it guided her throughout. She quoted from it extensively. Therefore, in my view, her reference to a $150,000 ceiling, having already identified the proper figure, is more likely a clerical mistake as opposed to an error in principle. In any event, the

judge's ultimate award under this heading was still within the correct range, albeit at its base.

Was the Award Inordinately Low?

[43] Furthermore, this award, in my view, was not inordinately low. I say this for the following reasons. First of all, it is not as though the judge glossed over LLM's injuries. Quite the opposite. Instead, she expressed empathy for LMM and found his evidence to be "compelling" and its effect "palpable". As well as the judge in Lalo's criminal trial, she was abundantly familiar with the devastating impact on Lalo's victims:

> ¶164 LM was asked by his counsel to detail the nature of the assaults for the Court. I had as the trial judge in Cesar Lalo's trial on these charges heard LM testify once before.
>
> ¶165 On both these occasions he cried throughout this portion of the evidence. His testimony is compelling and the painful effect of these assaults is palpable.

[44] Furthermore, her analysis was comprehensive:

> ¶166 He described how he thought he was 11 years old of age and that it was the fifth or sixth time he had seen Cesar Lalo. On the first occasion Cesar Lalo opened LM's shirt and began rubbing his chest. He remembered they were in the old *. The next time he saw Cesar Lalo, Cesar Lalo put "his hand down my pants and fondled me and asked how I liked it and stuff like that."
>
> ¶167 On the next occasion, Cesar Lalo had LM fondle him. LM said this mutual fondling occurred at a few more meetings, then Cesar Lalo performed oral sex on him and he was asked to give Cesar Lalo oral sex. He testified that the oral sex happened perhaps five more times.
>
> ¶168 The assaults finally culminated in an incident in Cesar Lalo's car at *. LM had managed to leave the Shelburne School for Boys a day early and the school called for his return. His evidence is that Caesar Lalo said he would be responsible for him. Caesar Lalo took LM to *, a park in north end Halifax, in his car. LM was reading his probation report. Caesar Lalo wanted oral sex, as he demanded on many previous occasions. Caesar Lalo opened his shirt and pants and was rubbing him, but for the first time this activity ended when "he shoved his finger up my ass, my buttocks."

> ¶169 LM described how he jumped out of the car and ran toward *, but sat on the top of the stairs leading to the park and cried uncontrollably until someone "took me home to my mother." He testified she wanted to know what was wrong but he would not tell her.

[45] In fact, when LMM was short on detail, the judge showed empathy, concluding that it was just too painful to relive the events:

> ¶175 In my view, these are truthful and literal answers to questions asked. However, this is not the extent of his evidence. LM is very guarded and often does not speak more fully of these events. When he does, he is very emotional, very angry and often in tears.
>
> ¶176 His counsel had to press him to address the effect of these assaults. Haltingly he responded:
>
> > I knew I was hurt ... and something in my mind ...
> >
> > I didn't know what sex was. I was just a kid. I thought he was doing me a favour not sending me to Shelburne and abusing me.
> >
> > I have flash backs ... the hurt ... my bum. I used to get a pain in my bum. I had a fissure in my bum, but always had flashbacks to Lalo.

[46] The judge took time to highlight Lalo’s power over a vulnerable young boy:

> ¶178 It is important to note that Cesar Lalo was a probation officer, an officer of the Family Court, who exercised ultimate power over LM. He was in a position of trust. LM was a 13-year old who sought out a big brother:
>
> > The Court: Did you ever get a big brother?
> >
> > Mr. M: No I didn't ... Yes, I wanted one ... wanted to get one for years ...
> >
> > The Court: How come you didn't get one?
> >
> > Mr. M: I still don't know. I don't know, like you know um, I think I was on the waiting list and then ... 16 and you don't get one like that and all the guys in the neighbourhood actually staying out of trouble had a big brother type of deal.

¶179 Instead, LM got Cesar Lalo. The fall out was demonstrated in his attitude toward authority and a significantly worsening school performance. He testified:

> I just didn't like uh you know after the abuse and stuff I just um uh I just had no respect for any of the teachers and nothing like that right. Um, just you know, before that, it's relatively document that I had respect for everyone and then as soon as the abuse started I guess I felt that I was getting the bad end of the stick ... even as youth I realized this stuff shouldn't be happening to me. I use to take my anger out on other people I guess.
>
> I was never disrespectful. Like a couple of incidents like I already said like I um got in an argument with, well basically not an argument I would you know I was mad and I would say something disrespectful to my mother and I um but besides like the few incidents that I had yeah, me and my mom (inaudible).

¶180 There are also many references in the pre-sentence reports and in early psychological evaluations to his being a good boy at home who tries to co-operate with his mother. LM testified that his mother did a good job raising his siblings and tried to keep him out of trouble. She relied on the support of the Family Court and Cesar Lalo, to help her son.

¶181 To achieve LM's compliance, Cesar Lalo used threats. LM testified:

> He threatened me, my family and everyone else so I never had no choice in the matter. He threatened to send to me Shelburne, threatened to hurt my brothers and sisters and my mother, whoever ... If I didn't participate in what you know, what he was doing, then I would go to Shelburne and he knew people down there that could beat me, beat the shit out of me. He referred to how small I was and would say how, you know, basically - I'll send you there and you won't like it down there. He said to me you might not come back. Right, so that was enough for me. ...
>
> I wasn't a violent person then. I didn't want to go to jail. Lalo told me if I ever go to Shelburne I would never get out ... that I'd probably die there.

[47] Furthermore, the judge found that Lalo exacerbated LMM’s addictions:

¶182 LM testified that he drank a few beers and smoked marijuana before Cesar Lalo began abusing him. He ran with older kids from his neighbourhood who were often in trouble.

> ¶183 But the evidence is very clear that after the sexual abuse began his drug use worsened. LM testified to the general use of crack cocaine and other drugs in *, but I do not think it is right to assume that LM would inevitably go down this road, even if Cesar Lalo had not entered his life. After all, his siblings also lived in * and they did not. LM testified when he was "11 or 12 or something like that ... I just drank a couple of beers and I was drunk right ... ." He testified because he was a little guy it did not take much to get him drunk or high.

[48] Then, in linking Lalo to LLM's many problems as an adult, the judge highlighted the positive aspects of his childhood:

> ¶212 I do not reject his evidence concerning the effect the sexual abuse he suffered had on his life as untruthful, simply because LM is an admitted liar and a thief, a position the defence has urged the Court to adopt.
>
> ¶213 LM has a drug addiction. He commits criminal acts in furtherance of that addiction, not an unfamiliar reality before our courts. Nor are drug addictions as the fallout of sexual abuse. Nor can I simply accept that his life was on a trajectory of drug addiction and crime before he met Cesar Lalo, due to his difficult early circumstances.
>
> ¶214 His early life was not all bad. In part he had a normal and happy childhood. He testified:
>
> > My mother tried to keep me grounded and away from trouble.
> >
> > My gran loved me to death and didn't want me to leave but said, well she's your mother.
>
> ¶215 He rode horses in * with his granddad. He played lots of sports and was on the * football team in the * of Halifax at age 11 and 12.
>
> ¶216 I have no illusion that life in public housing with his mother in * was an easy life, or without bad influences, but it is also apparent from the record that his mother tried to help him and cooperated with the Atlantic Child Guidance in the assessment process. She also managed to do well by her other children.

[49] Finally, as noted above (repeated for ease of reference), the judge clearly favoured LMM's theory of the case when laying the foundation for an appropriate general damages award:

> ¶217 The analogy used by Professor Ken Cooper-Stevenson of "the sliding glass doors" applies to the circumstances of this case. Professor Stephenson wrote of the"sliding doors" and "back to the future" in valuing alternative life patterns.
>
> ¶218 I began this decision by saying the task was to look at LM's life before and after the event of meeting and subsequently being abused by Cesar Lalo.
>
> ¶219 In the film the "Sliding Doors," two parallel lives of the heroine are examined, one where she gets through the closing doors of the subway train, and the other, where by a split second she fails to get on the train. Similarly with LM there are two life sequences. The real life of today, having endured the event of Cesar Lalo, and what may happen in the future as a result of this event and the hypothetical or other life LM may have lived had he not had such a damaging encounter with Cesar Lalo. In the sliding doors analogy the Court attempts to quantify the difference between the two life patterns and reflect the difference in value between the two, with the hopeful goal of quantification moving beyond a global sum award, a difficult task in the present circumstances.
>
> ¶220 So I have examined these two life patterns. There is no doubt in my mind that the Lalo "event" generated a significant and lasting change in LM's life plan. And I have asked myself what was the hope and promise of his life before Lalo. Could he have lived even a conventional or somewhat normal life, but for this event? Will he ever get back on the track his life might have taken but for this event? What is the long-term difference between the life he has today and one he might have had, if the probation officer he met was an honourable and decent man. LM's life changed dramatically for the worse after he passed through that sliding glass door into Caesar Lalo's "care" at the age of 13.
>
> ¶221 On the balance of probabilities, I find a significant causal connection between the sexual abuse LM suffered and his incapacity to get on with life and become a productive member of society.
>
> ¶222 I accept LM's evidence as credible and a truthful explanation given today through adult eyes of the painful events of his childhood.

[50] In short, the judge was keenly aware of LMM’s suffering when she assessed general damages. Her analysis was comprehensive and sympathetic.

[51] Thus, having laid such a solid foundation, can it be said that the judge was wrong in the amount she ordered? I think not. After all, she witnessed this victim

tell his story. She saw the demeanor and sensed the emotion. We did not. We have only words upon a page.

[52] Furthermore, general damages awards are the product of a judgement call that is in many ways arbitrary by nature. Of course, in theory they are designed to restore the victim to pre-injury status. However, for general damages, money is often a poor substitute. In my view, this is especially true for victims of sexual abuse. In other words, do we really think that money could restore someone's dignity; could erase the horrible memories? Yet, however inadequate, monetary compensation is the blunt instrument we have at our disposal. Therefore, we must ask: "In whose hands is this blunt instrument most effective?" In the trial judge's, obviously. After all, she witnessed the evidence first hand. In other words, her award was within the appropriate range and ought to be respected by this court.

[53] Finally, **B.M.G.**, *supra*, can offer some limited guidance on this issue. There, BMG was also awarded $125,000 in general damages for injuries suffered at the hands of Lalo. This court summarized the injuries as follows:

> ¶115 The judge ... 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.
>
> . . .
>
> ¶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.

[54] Of course, it is difficult to compare one victimization to another let alone the effects on individual claimants. However here it can be instructive because we have the same perpetrator assaulting boys of a similar age in similar circumstances. BMG endured a variety of similar assaults up to and including anal rape. Therefore, it cannot be said that LMM's award for an identical amount is so low as to require our interference.

[55] For all these reasons, I would dismiss this ground of appeal.

The Wage Loss Award

[56] The judge awarded LMM a global amount of $250,000 for past and future lost wages. As with the general damages award, the judge is, again, entitled to deference. Therefore, short of an error in principle, we will not interfere unless the award is so inordinately high or low that it represents "a wholly erroneous estimate".

[57] Yet here, neither side is satisfied with this award. For LMM it is too low, not because of an error in principle, but, essentially, because it represents merely one half of what BMG was awarded under this head. He explains it this way in his factum:

> ¶82 Unlike **G.(B.M.)** (supra, who never filed an income tax return, and was awarded $500,000.00 for lost income), the Appellant received "T4" slips and had filed income tax returns. (Case on Appeal, Volume 6, Tab "A", pp. 1370-1391)
>
> . . .
>
> ¶85 Due to emotional upset or drug use, the Appellant failed at maintaining consistent employment in the workplace.
>
> ¶86 Although his work record can be described merely as "spotty" or "sparse", characterizing the Appellant as (simply) lazy or uninterested would be incomplete and unfair. Instead, his difficult personality and drug use are related to his mental health difficulties caused, it is submitted, by Lalo's abuse.

[58] Yet for the Crown, this award is too high. In its factum, it highlights LMM's illicit income as a thief:

> ¶12 LMM considers himself a well known thief. He has been stealing since he was 8 years old, a period of almost thirty years. He had an outstanding theft charge at the time of the trial and gave no indication of any intention to stop. He did not disclose how much money he has made over the years or how much he might make in the future by stealing. [LMM testimony, Appeal Book, volume 2 at 420-21, 423-24]
>
> ¶13 With respect to the amount of income he makes from stealing, LMM told a Community Services worker in December 2003 that it was "lots": [Records, Appeal Book, Volume 7 at 1220]
>
> > [He] was working at his first job as a *, and states that he was having a very hard time financially as he is used to having lots of money from stealing ...

[59] The Crown also relies on the exclusion of Mr. Roth's evidence to assert that there was no medical basis for LMM's asserted inability to work. It explains in its factum:

¶15 Prior to the community college course, he highlighted the communication and social skills he would bring to employment in his Resume. [Resume, Appeal Book, Volume 7 at 1145-46]

¶16 His Resume also set out his employment between 1991 and 2002. [Resume, Appeal Book, Volume 7 at 1145-46]

¶17 He testified that he worked in 2002, took the * course from September 2002 to June 2003 and was employed until he broke his leg in October 2003. [LMM testimony, Appeal Book, Volume 2 at 550-51] [Records, Appeal Book, Volume 7 at 1207-10]

¶18 On March 24, 2004, Dr. G. reported that LMM was unable to work due to the leg injury. [Assessment, Appeal Book, Volume 7 at 1198-1200]

¶19 LMM has not worked since the injury, although he has looked for * jobs. [LMM testimony, Appeal Book, Volume 2 at 550-51, 694-99] [Records, Appeal Book, Volume 7 at 1207-10]

¶20 The only medical opinions addressing the issue of disability on psychological grounds are those of his family doctor, Dr. S. G., who, on March 21, 2007 and March 25, 2008, reported "with treatment, will be employable after one year or longer." [Assessment, Appeal Book, Volume 7 at 1201-06]

¶21 There is no medical opinion that LMM was unable to work due to psychological reasons prior to Dr. G.'s Assessment on March 21, 2007. [Assessment, Appeal Book, Volume 7 at 1201-06]

¶22 There is no medical opinion on the subject *after* Dr. G.'s Assessment of March 25, 2008. [Assessment, Appeal Book, Volume 7 at 1201-06]

¶23 Although LMM testified that he would like to own his own * business, he did not say when he intended to return to *ing trade. [LMM testimony, Appeal Book, Volume 2 at 400]

[60] Respectfully, on this issue, both parties are inviting us to review the record and to simply impose what we would view as an appropriate award. As I have noted, that is clearly not our function. Specifically, it does not help LMM to compare his award to that of BMG. As this court said in **B.M.G.**, there is no range for this type of award as there is for general damages. Instead, wage loss awards

represent pecuniary losses which must be calculated based on the evidence presented for each individual claimant:

> ¶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.

[61] Nor does it help the Crown to assert that the award must be reduced due to a lack of expert medical evidence. This did not prevent the judge from making factual findings about what she believes is an appropriate amount. As this court said in **B.M.G.**, it involves fundamentally a factual evaluation of how much a victim's earning capacity has been impaired by the injury:

> ¶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.

[62] In this case, I acknowledge that the calculation was particularly challenging. This is because, unfortunately, LMM had little or no track record to serve as guidance. Therefore, this "calculation" appears more like conjecture. This, in my view, is all the more reason to rely on the trial judge who has witnessed and weighed the evidence first hand.

[63] Furthermore, the judge gave this issue careful consideration and she was fully aware of the task at hand:

> ¶147 There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income." This point was discussed in *Exide Electronics Ltd. v. Webb* (1999), 177 N.S.R. (2d) 147, where Freeman J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in a situation where a plaintiff can return to work, but with "a disability that restricts the scope of other employment that might become available in the future." By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbott v. Sharpe*, 2007 NSCA 6, Saunders J.A. said, at para. 156: "... this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income." In my view "loss of earning capacity" is the relevant approach in the present case.
>
> ¶148 Loss of future earning capacity need not be proven on a balance of probabilities. The plaintiff is required to establish that
>
> > ... future loss of earning capacity is a real possibility and that there is a reasonable chance it might occur. Hypothetical events are to be given weight accordingly to their relative likelihood, and a hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. (*Remedies in Tort* at 27:63.3)
>
> ¶149 Upon identifying the plaintiff's source of income, the court should consider what the projected income would have been had the injury not occurred. In considering possible changes in income level, courts will take into account such factors as "promotion, demotion, career change or withdrawal from the workforce." In order to determine the likelihood of such events, "the court will usually look at the individual's field of work, his temperament, education and ability, marital status and the general economic conditions." It has been said that "the court must take into account the particular abilities and temperament of the plaintiff in an effort to predict his capacity to overcome his disability and function effectively in the workplace." *Remedies in Tort 27:67-68.*

[64] As well, the judge recognized the challenges with causation for this type of injury:

> ¶153 It has been said that cases of historic sexual assault present significant challenges to a court in determining issues of causation. In *Blackwater v. Plint, supra*, at para. 74, calculation of damages for sexual assault was complicated by two other (statute-barred) sources of trauma: trauma suffered in his home and trauma for non-sexual abuse and deprivation. McLachlin C.J.C. said, for the court at para. 74:
>
> > ... In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: ...
>
> ¶154 The authors of *Remedies in Tort* state that loss of future earning capacity "should be calculated on the basis of the degree that the abuse suffered contributed to the lack of education, training and work experience." They call for certain assumptions to be made, including assumptions about the victim's likely education level, occupation and the date of entering the workforce. They also suggest considering any possible improvement in earning capacity on account of counselling and family support. *Remedies in Tort* at 27:74.2

[65] The judge then applied the appropriate principles to the task at hand. Again, her analysis was comprehensive. For example, she considered LMM's actuarial calculations but found them to be too speculative. Instead, as noted, she reasonably preferred a global lump sum amount representing a diminishment of earning capacity. She compared his drug use before and after his encounter with Lalo. She compared his problems with the law before and after his encounter with Lalo. She considered his problems with his stepfather, JG, and how they may have contributed to his troubles as an adult. In short, the judge, in my view, considered all the relevant criteria in arriving at this award.

[66] For all these reasons, I cannot say that it represents a "wholly erroneous estimate". I would dismiss these grounds of appeal.

The Cost of Future Counselling

[67] LMM in his testimony expressed a desire to continue counselling with Mr. S. C., a professional that he trusted:

> A. Yes, and then I went and got help from S. C., and like I said, that was probably, out of everyone I ever seen in my whole life, he was probably the most effective.
>
> MR. KNOX: Okay, good.
>
> Q. And if you had the opportunity to follow through with him and do -- do any type -- any type of additional therapy is that something you'd want to do or --?
>
> A. That's -- well, that's where I'm going to go back to do my -- the rest of my -- you know to -- to do -- do my therapy –
>
> Q. Okay, good.
>
> . . .
>
> Q. Okay. In terms of moving forward, Mr. Murphy, you said you'd like to continue to see Mr. C.?
>
> A. Yes, sir.
>
> Q. What -- what else do you want to do? I mean what -- where -- where do you want to be in a year or five years or ten years?
>
> A. Well, as difficult as it seems, I want to try to be a normal member of society and just, you know, continue on from like when I was ten riding my horses out at my grandmother's, live my life, loving -- like before I used to -- you know. I remember as I kid I used to say, "I love this place." And just, you know, now it's totally opposite, right? So I just want to get back to that and realize that, you know, just -- just one person -- it's hard to realize, but my mind -- I'm trying to get my mind to realize that, you know, I can't forever blame the world, but it's just I never had the help to convince me that, you know, the world ain't guilty of all this. It's just -- you know. So I'd -- I'd like to, you know, own my own -- * company -- or, you know, if I get the good help that I need I might even go back to be a lawyer -- try to practice to be a lawyer.

[68] In oral submissions, LMM’s counsel asked for relief under this heading:

> There's also the issue of damages in the sense of additional therapy. And Mr. Alcock didn't want to opine on that. Mr. Roth did, I asked him about that. And he said things like get a young therapist, not someone who's not too old because this is going to be situation that could last awhile. And he told us about a facility, a good facility apparently in Ontario called Homewood, and he said the cost for that is $30,000 plus follow up. He didn't identify that, the cost of follow up at Homewood.
>
> He did talk about therapy, and he said that, you know, once a week or twice a week, so he talked about $200 or $400 a week. He said 50 weeks of it, he said -- he's ball parking here but he said three years of therapy.
>
> And I don't know if one does take once a week or twice a week, but if he's going to therapy once a week for three years it's $30,000.
>
> If he's going twice a week it's $60,000, and if you go in between it's $45,000, so he needs help.

[69] In reviewing the evidence, the judge on two occasions acknowledged LMM's intention to continue such therapy:

> ¶58 And lastly, LM testified he received the most help in 2006, from a psychologist S. C., whose style was interactive and required to do assignments (homework). He felt he made progress with him and would seek further treatment in the future from him if it were funded.
>
> . . .
>
> ¶250 LM is well aware of his current addiction issues and acknowledges he may now benefit from future counselling. He has even identified psychologist S. C., as someone with whom he made progress.

[70] However, in her ultimate decision, the judge made no further reference to this claim. In order words, she neither accepted nor rejected it.

[71] Yet the Crown, in its factum, says that when the decision is read as a whole, the judge implicitly rejected this claim:

> ¶118 The Learned Trial Justice did not make an award of damages for cost of future care.

> ¶119 The evidence on the issue was sparse. Mr. Roth's evidence was excluded. LMM testified that he was "going to go back" to counselling. [LMM testimony, Appeal Book, Volume 2 at 389] There was no evidence of any particular plan or arrangement to obtain counseling.
>
> ¶120 This Court, in Maritime Travel v. Go Travel Direct.Com, 2009 NSCA 42 at para. 57, held that the trial justice's reasons were sufficient where, read as a whole, her reasons articulate the bases, legal and factual, on which she founded her decision. [TAB 2]
>
> ¶121 Read as a whole, the Learned Trial justice's reasons articulate the bases for not awarding cost of future care.
>
> ¶122. It is submitted that the Learned Trial Judge did not err in not awarding damages for cost of future care.

[72] Respectfully, when I read the judge's decision as a whole, I reach a different conclusion. It strikes me that the judge acknowledged this claim but simply, by oversight, neglected to deal with it. Certainly when she acknowledged LMM's desire to seek counselling she took no issue, nor did she interject when counsel raised it in submissions. In short, the judge spent a great deal of effort assessing the main general damages and wage loss claims and, in my view, this aspect of LMM's claim simply fell between the proverbial cracks. Furthermore, it is trite to say that failing to make an award for a claim that is otherwise valid represents reversible error.

[73] However, the more challenging question is what we should do about this error. For example, we could remit the matter back to the trial judge to assess an appropriate amount or we could set out a figure based on the limited record detailed above. Given the lengthy ordeal that this litigation has represented for all involved, the interests of justice command that we deal with it.

[74] Therefore, returning to the record, I note that this claim has two aspects: the cost of residential care and the cost for future counselling. Yet the judge acknowledged only LMM's intention to follow up on future counselling with Mr. C. and not counsel's request for the costs of residential care. In fact, LMM did not even say that he wanted to attend a residential facility. Therefore, in my view, it would be appropriate to cover only the projected costs of future counselling.

[75] What, then, would represent an appropriate figure for this loss? Mr. Roth offered the only evidence on this point and that was in the context of a *voir dire*, where the Crown's challenge to his expertise was successful. However, I am not satisfied that the judge meant to exclude this discrete aspect of Mr. Roth's evidence. Instead, the thrust of her ruling was to exclude the evidence dealing with the causal connection between LMM's many problems and Lalo's victimization. Therefore, to avoid further litigation, I am, reluctantly, willing to consider what Mr. Roth said about the costs of future counselling. Specifically, he offered:

> A. In terms of the therapy, if it were $200 -- or $400 a week, times 49-50 weeks a year, times three years and then reduce that figure some. Add inflation, I have no idea what one would come up with.
>
> THE COURT: How much did you say a week? How much did you say a week?
>
> A. I say if it's $200 an hour –
>
> THE COURT: Times two –
>
> A. Times two hours a week.
>
> THE COURT: Times 52, times three years.
>
> A. Say 50 weeks a year.
>
> THE COURT: Yeah, all right, times three years?
>
> A. Times three years, and then cutting down. And indeed, one may be cutting down before three years. I don't know. But I would suspect that [L] would benefit from ongoing life-long touching base with the therapist, with the safe person, the person who could reaffirm, reinforce, recalibrate the changes in growth and learning that he would have gained. I don't see this as being something where he's graduated and he's gone. If he's graduated and he's gone, I would be concerned that there would be an increased chance that he would slip up again.

[76] I note particularly Mr. Roth's response to the judge's questions. He estimated a cost of $400 a week ($200 per hour x 2) for 50 weeks a year or $20,000 per year. Furthermore, he estimated this need for three years (which I will assume takes into account positive and negative contingencies) or $60,000. He then indicated that

there may be a “cutting down” before three years although “[L] would benefit from ongoing lifelong [therapy] ...”. Therefore, setting off the reference to “cutting down” against the reference to “lifelong” needs and the potential impact of inflation, I would award $60,000 under this head.

[77] In completing this calculation, I am well aware of its evidentiary and mathematical shortcomings. I would not want this outcome to in any way signal a relaxation of the required standards for proof of damages. I am satisfied that this bare bones record coupled with the unique and tragic circumstances of the matter are sufficient to support the award. I am reminded of McLachlin, J.’s (as she then was) comments in **R. v. O’Connor**, [1995], 4 S.C.R. 411 at para. 193, “what the law demands is not perfect justice, but fundamentally fair justice”.

DISPOSITION

[78] I would therefore allow the appeal in part by ordering the Province to pay LMM an additional $60,000 and would dismiss the cross-appeal. Given the mixed result, I would not order costs.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Oland, J.A.