

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *S.M. v. McNutt*, 2024 NSSC 17

**Date:** 20240116  
**Docket:** 451580  
**Registry:** Halifax

**Between:**

S.M.

*Plaintiff*

v.

Michael McNutt

*Defendant*

<b>Decision</b>
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**Judge:** The Honourable Justice John A. Keith

**Heard:** January 3, 2024, in Halifax, Nova Scotia

**Final Written  
Submissions:** January 3, 2024

**Counsel:** Michael Dull, for the Plaintiff  
J. Walter Thompson, K.C. for the Defendant  
(Not in attendance per instructions from client)

**By the Court:**

**INTRODUCTION**

[1] By Notice of Action issued May 20, 2016, the Plaintiff S.M. sued the Halifax Hawks Minor Hockey Association (“**Halifax Hawks**”) and Michael McNutt. On June 10, 2016, the Notice of Action was amended to add the Halifax Regional School Board (the “**School Board**”).

[2] The claim alleged that S.M. was sexually abused by Mr. McNutt in the 1980s. He is currently serving a lengthy prison sentence for sexually abusing young boys in the 1980s.

[3] During the relevant period of time, Mr. McNutt, was hockey coach and a substitute schoolteacher. The claims against the Halifax Hawks and the School Board raised questions as to their vicarious liability for sexual abuse committed by Mr. McNutt.

[4] On January 25, 2022, the actions against the Halifax Hawks and the Halifax Regional School Board were settled with the Plaintiff being paid a total of \$11,000.

[5] The claims against the Defendant Michael McNutt continued to trial which occurred on January 3, 2024.

[6] I am satisfied that:

1. Mr. McNutt was personally served with the claim; and
2. Mr. McNutt's solicitor of record was/is Walter Thompson, K.C..

[7] I am further satisfied that Mr. Thompson confirmed instructions from Mr. McNutt to neither participate further in this claim, present evidence at trial nor mount a defence at trial. As such, S.M.'s claims against Mr. McNutt were unopposed.

[8] Finally, at trial, S.M. confirmed that his claims were limited to non-pecuniary damages for sexual battery, pre-judgment interest and costs.

## **FINDINGS OF FACT**

[9] The plaintiff called only one witness at trial: himself. S.M. was a credible and candid witness. His memory was strong and detailed, despite the passage of time. He also recognized certain facts that were not always in his favour. For example, he did not hold Mr. McNutt responsible for every adverse or negative event in his life. He accepted a measure of individual accountability for certain reckless or lawless decisions in his life. Moreover, S.M. was fortunate to eventually find the strength and resilience to rebuild his life following the trauma associated with Mr. McNutt's abuse – although, as will be seen below, the journey towards some measure of peace was lengthy and difficult.

[10] Based on the evidence, I make the following findings of fact:

1. S.M. was born in Halifax, Nova Scotia on September 7, 1972.
2. S.M. was raised by his mother and never really knew his father;
3. S.M. grew up in Halifax. His childhood was largely untroubled and relatively ordinary, until Grade 6 when he moved to a junior high school where he met the Defendant, Michael McNutt;
4. Mr. McNutt was a substitute teacher at the junior high school. At the time, he was also a minor hockey coach and a baseball coach for boys in that area. Through these roles, Mr. McNutt gained access to his victims for effectively 12 months of the year. Other than parents, there are few beyond teachers and coaches:
  - a. upon whom we vest greater trust with children;
  - b. with whom we expect children will be safe;
  - c. to whom children seek guidance and protection; and
  - d. from whom we demand integrity and leadership.

It is equally difficult to understand the toxic opportunism required to pervert these positions of trust into an opening for sexual deviancy. Mr. McNutt clearly identified S.M. as a vulnerable target. Here, I note that

S.M.'s single mother did what she could but was equally compelled to work full-time to make ends meet. Thus, S.M. was alone for much of the day. In addition, S.M.'s only major male role model was an elderly grandfather who died when S.M. was young;

5. S.M.'s Grade 6 teacher left early in the school year. Mr. McNutt was appointed as S.M.'s full time teacher for the remainder of Grade 6.
6. During the summer between Grade 6 and Grade 7, Mr. McNutt began grooming S.M. for sexual abuse. Mr. McNutt lived in the neighbourhood, and he used that proximity to pick up young boys in his car for various recreational outings. As a teacher and a seemingly trusted and friendly adult, he would pick up neighbourhood boys in his car and treat them to fast-food at the local McDonald's and Harvey's. He would also take the boys swimming at Kearney Lake.
7. During these swims at Kearney Lake, Mr. McNutt began to escalate the grooming process through inappropriate touching introduced as massages that Mr. McNutt said were common among professional hockey players (i.e. persons whom the boys held in high regard). Mr. McNutt justified increasingly invasive "massages" by explaining that professional hockey players could select numerical rankings for their massages. A higher number signified increased amount of bodily

contact. So, for example, a “10” massage would be a shoulder massage while a “25” would be a full back massage. Over time, Mr. McNutt asked if S.M. wanted to move to a higher ranking of massage as a means to normalize sexually deviant behaviour and access more and more of the boy’s body. Eventually, on multiple occasions in Grade 7, Mr. McNutt would massage S.M.’s full body, including his penis.

8. One time, Mr. McNutt and S.M. drove alone to Kearney Lake for a swim. They returned to Mr. McNutt’s car to change out of their wet swimming trunks. Once naked, Mr. McNutt moved his leg over S.M.’s naked adolescent, still hairless legs. S.M. remembers the feel of Mr. McNutt’s hairy legs. Mr. McNutt then leaned over and performed oral sex on S.M. for a minute until S.M. expressed discomfort. Mr. McNutt stopped. S.M. remembers “feeling gross” (his words) and asking to leave immediately. On the drive home, Mr. McNutt treated S.M. to a meal at McDonald’s – attempting to bury his sexual depravity under a series of otherwise friendly gestures by a trusted adult.
9. Sometime later, during Grade 7, before hockey season began, Mr. McNutt helped S.M. purchase used hockey gear that his mother could not afford. This allowed S.M. to begin playing in the “house” league for a boys’ hockey team. The “house” league was comprised of teams

that only played one another in the Halifax area. More skilled hockey players were chosen to play on representative (or “Rep”) teams which would travel outside of Halifax to various tournaments around the Maritimes. Mr. McNutt coached a “Rep” team. Every once in a while, house league players were given the chance to travel with the Rep team to tournaments outside of Halifax. It was considered a privilege and a reward for improved play. Mr. McNutt exploited his position as coach and called S.M. up to play with the “Rep” Team at a tournament in New Brunswick. The “Rep” Team travelled by bus, and stayed at a hotel for two nights. S.M. was excited by the opportunity to play with the Rep team. However, Mr. McNutt did not actually place S.M. on the roster in any of the tournament games. As such, S.M. did not dress for any games and saw no playing time. Mr. McNutt chose S.M. for other reasons. In particular, he used the tournament as a ruse so that he could sleep in the same hotel bed as S.M. on the second night of the stay. During that night, Mr. McNutt again performed oral sex on S.M.. Mr. McNutt then attempted to force S.M. to perform oral sex on him. S.M. resisted and fled from the hotel room. He spent the rest of that night in the hotel pool area.

[11] The consequences of the sexual abuse on S.M. were serious and life-altering.

I make the following additional findings of fact:

1. After the winter of Grade 7 (and the hockey trip to St. John), S.M.'s interactions with Mr. McNutt were relatively infrequent. However, Mr. McNutt continued to teach at the same junior high school. So, throughout Grades 7 – 9, S.M. watched as Mr. McNutt continued to masquerade as a trusted person in a position of authority. S.M. made it through junior high school but for the 10 – 13 years following Mr. McNutt's abuse, confrontation, conflict, and criminality emerged as increasingly dominant features of S.M.'s life.
2. Following Mr. McNutt's abuse, he became understandably distrustful and disrespectful of teachers - and disinterested in school. His academic performance dropped.
3. By the time S.M. arrived at high school, he was already on a path that led him away from school and towards trouble. He was kicked out of a downtown high school in the first term of Grade 10. The next term, he enrolled in another downtown high school. He made it through Grade 10, but with difficulty and the experience was marred by various suspensions. He transferred to yet another high school (his third) for Grade 11 but dropped out in around 1988 when he was 16 years old.



4. At around this same time, he started using drugs. He did not progressively experiment with increasingly serious forms of drugs. He began by smoking crack cocaine with adults much older than himself; and quickly became addicted. He also drank to excess which led to reckless fighting and other criminal acts.
5. Even circumstances that superficially appeared positive were dimmed by darker circumstances. For example, after leaving school, S.M. began working at Halifax Waterfront through a contact at the Hiring Hall. However, that contact was neither a mentor nor especially concerned with helping S.M. find a productive career. Rather, he was a drug dealer who wanted S.M. to find an income and thereby repay an existing drug debt.
6. During this tumultuous period of his life, S.M. spent time at the Waterville Youth Centre for theft (shop lifting at a shopping mall). When he was 18 or 19 years old, he was convicted again of theft and incarcerated for a period of time at the Sackville Correctional Centre. He also began stealing drugs to sustain his addictions.
7. His criminal activities escalated to include car theft. He was then caught for breaking into a jewelry store in Prince Edward Island and sentenced to 30 months in federal prison on May 8, 1995, at the age of

22. Twenty days later on May 28, 1995, S.M.'s only child (a daughter) was born. S.M. would not be present for the first few years of his daughter's life.

8. He was released on day parole for brief period of time but soon breached his conditions. This time, he was sent to the basement of Dorchester Penitentiary.

[12] It was upon his committal to Dorchester Penitentiary that S.M. began to turn his life around. In an odd turn of phrase, S.M. described his imprisonment in the basement of Dorchester as "lucky" because the conditions were sufficiently bleak (and his release date sufficiently imminent) that he finally accepted the need to change. In September 1997, just after his 25th birthday, S.M. was released from prison and his life finally began to move in an upwards trajectory.

[13] After Dorchester, S.M. stopped using drugs and moved to Victoria, British Columbia to be closer to his daughter. He lived in Victoria between 2004-2005 when he held down several jobs. He recalled, with pride, returning to a sports clothing and equipment store in Victoria on a daily basis until the manager rewarded him with an opportunity for employment. From that point forward, S.M. employment prospects steadily improved. A year or so later, he was hired as the head of maintenance for an assisted living facility in Victoria.

[14] In 2005 or 2006 he returned to Nova Scotia to help care for his dying grandmother. He moved in with his mother and has lived with her ever since.

[15] Once again S.M. showed his capacity for survival and perseverance. He returned to work as a longshoreman on the waterfront. He then obtained work as a power line technician. Two years later, he returned to being a longshoreman.

[16] In 2010, S.M. started his own business. He works at this business for about 2 – 3 days a week which serves as an income supplement to his waterfront job.

[17] In terms of emotional relationships, S.M. has struggled in the past. He experienced difficulty forming emotional bonds. He describes two prior, long-term relationships as toxic, and he is currently estranged from his daughter. At the same time, the past conflict with his mother has resolved and he is currently in the third year of a relationship with a woman which he describes as good.

[18] Overall, following the sexual exploitation at the hands of Mr. McNutt, he fell into a mess of trouble with drugs, alcohol, and criminality. It would not have been difficult to remain permanently trapped in that world, but S.M. demonstrated resilience; discovered an ability to find his way through trauma; found long-term employment; and built a business on the side. This neither minimizes S.M.'s suffering nor implies that the ongoing effects of Mr. McNutt's abuse have miraculously vanished. The abuse S.M. experienced at the hands of Mr. McNutt

resulted in unresolved feelings of, anger; confusion; distrust of persons in authority; and difficulty establishing healthy relationships. However, his life has not been entirely defined by (or reduced to) the abuse he endured. S.M.'s work ethic, business savvy, and determination were not extinguished.

## **LIABILITY**

[19] Based on the evidence provided, I have absolutely no difficulty finding Mr. McNutt liable for sexual abuse causing S.M. pain and suffering in the form of general damages, as alleged.

[20] I recognize that the evidence at trial did not include cross-examination or independent expert opinion evidence or third-party evidence from family members, for example. Only S.M. testified. At the same time, the law is clear that the Court may recognize as a fact and accept as a legal conclusion, the destructive and profound impact of sexual abuse for the purpose of establishing liability. The absence of additional evidence (including independent expert opinion) is not an impediment to finding a sexual predator like Mr. McNutt liable for non-pecuniary damages. (*A.B. v Main*, 2023 NSSC 47 (“**A.B.**”) at paragraph 39)

[21] Having said that, the limited nature of the evidence in this case does impact the quantification of damages. I turn to that issue now.

## QUANTIFICATION OF GENERAL DAMAGES

[22] S.M. claims \$175,000 for general damages.

[23] The analytical framework for assessing non-pecuniary damages in these types of cases was developed in *G.(B.M.) v Nova Scotia (Attorney General)*, 2007 NSSC 27; aff'd 2007 NSCA 120 ("*G.(B.M.)*"). In this case, the Court of Appeal determined that an acceptable range of damages must first be determined (at paragraph 136). That range must 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 ...."

(*G.(B.M.)* at paragraph 136)

[24] After establishing an appropriate range for non-pecuniary damages, the Court places an award within that range, having regard to the more specific circumstances in the case at bar.

### **(a) General Comments Regarding the Range of Non-Pecuniary Damages**

[25] In determining the range of general damages and then placing the ultimate award within that range, the following preliminary comments are germane:

1. The Court adopts a “functional approach” whereby general damages serve the purpose (or function) of compensating victims of sexual abuse:
  - a. For the pain, suffering and loss of enjoyment of life caused by an actionable wrong; and
  - b. “... [T]o vindicate the victim’s dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts.” (*G.(B.M.)* at paragraph 132). This particular purpose (or function) is more unique to cases involving sexual abuse.
2. The following non-exhaustive list of factors which may be considered when developing general damages awards in cases of sexual battery:
  - a. The circumstances of the victim at the time of the events, including factors such as age and vulnerability;
  - b. The circumstances of the assault including their number frequency and how violent, invasive and degrading they were;
  - c. The circumstances of the defendant including age and whether they were in a position of trust; and

d. The consequences on the victim of the wrongful behavior including ongoing psychological injuries.

(*G.(B.M.)* at paragraphs 133 – 134)

3. These factors are not assigned predetermined values or plugged into a mathematical formula through which general damages are calculated. The nature and impact of sexual abuse may not be so precisely measured. The Court retains the discretion to weigh these factors in a fair, reasonable, and just fashion – having regard to the specific factual circumstances.
4. The physical severity of the sexual abuse is not the sole determining factor when assessing the psychological or emotional impact on the victim. In *A.B., Smith*, CJ wrote about the acutely damaging impact of sexual abuse on children and that there is not necessarily a direct correlation between the severity of the abuse and the impact on the victim. Similarly, in *R. v Friesen*, 2020 SCC 9 (“*Friesen*”), the Supreme Court of Canada stated the Courts “should not assume that there is any clear correlation between the type of physical act and the harm to the victim.” (at paragraph 142). The actual acts of sexual abuse and the degree of physical intrusiveness are clearly relevant; however, they are not the only factors taken into consideration. See, more

generally, paragraphs 142 – 146 of *Friesen*. I also note, in *obiter*, that these comments may equally apply to cases involving sexual abuse of vulnerable adults. In *S. (A.M.) v Wootton*, 2016 NSSC 351 (“*S.(A.M.)*”), Justice Warner considered a case where the owner of a horse stable sexually assaulted a young adult (23 years old) at the end of a trail ride. The Defendant knew the victim was depressed and vulnerable. Near the end of the trail ride, the Defendant ominously told the victim that he planned to assault her when they reached the barn. Upon their return, the Defendant wrapped his left arm around the victim’s neck and undid her belt. He ignored the victim screaming “no”; slid his hands down her pants; and inserted two fingers in her vagina. The decision clearly identified the shattering impact of the sexual abuse on an already fragile victim. Following the abuse, she attempted suicide. Expert opinion evidence from a clinical psychologist concluded that the victim with post-traumatic stress disorder the effects of which were “a very significant obstacle to the achievement of life goals and a sense of well-being.” (at paragraph 185). Justice Warner characterized the key elements of this case as involving “one time, not particularly invasive, but unjustified, sexual



battery that result in life-altering psychological effects” (at paragraph 198).

**(b) Determining an Appropriate Range of Non-Pecuniary Damages**

[26] In *G.(B.M.)*, the Court of Appeal confirmed the following two-step analysis:

1. “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.” (*G.(B.M.)* at paragraph 139). The process of separating and articulating important characteristics for the purposes of developing an appropriate range may be guided by the non-exhaustive list of relevant factors itemized above (i.e. circumstances of the victim; circumstances of the assault; circumstances of the defendant; and consequences on the victim).
2. Once the important characteristics are determined, the Court must then “review the cases of this sort and determine the range of awards which have been made.” (*G.(B.M.)* at paragraph 140)

The Ontario Court of Appeal adopted this analytical framework in *Zando v Ali*, 2018 ONSC 680 at paragraph 11.

[27] I pause here to offer two final observations:

1. The range of general damages for sexual abuse is based on the important factual characteristics selected by the Court. Those factual characteristics will often be unique to the case at bar. As such, there is no single range of general damages that is applied to every case, regardless of the facts. There will necessarily be a certain degree of variability between the facts among individual cases of sexual abuse. For example, there is no single range of general damages for every case which involves sexual abuse of children. The fact that the victim is a child is a relevant factor, but it is not the only relevant factor. A range based only on the fact that the victim is a child would simply be too broad to be meaningful. The present-day value of non-pecuniary damages for sexual abuse involving children range from \$40,000 - \$425,000 and perhaps higher. Consider, for example, the low end of the range in *A.B.* with upper end of the approximate present-day value for the range in *G.(B.M.)* and *M.(L.M.) v Nova Scotia (Attorney General)*, 2011 NSCA 48 (“*M.(L.M.)*”) Ultimately, the important factual characteristics should enable the Court to locate comparable jurisprudence sufficient to establish a reasonable range.

2. At the same time, the functional approach confirmed in *G.(B.M.)* resists a slide into arbitrariness and better ensures a degree of predictability by:
  - a. Creating a consistent analytical methodology applied to all assessments of non-pecuniary damages in cases involving sexual abuse; and
  - b. Imposing the discipline associated with identifying and reviewing comparator jurisprudence.

### **STEP 1: IMPORTANT FACTUAL CHARACTERISTICS**

[28] In my view, the important factual characteristics which guide the range of non-pecuniary damages in this case are:

1. *The Victim*: S.M. was a child;
2. *The Abuser*: Mr. McNutt exploited a position of trust and authority;
3. *Frequency*: Mr. McNutt sexually abused S.M. on multiple occasions over months – not years;
4. *Physical Nature of the Abuse*: The sexual abuse involved inappropriate touching and forced oral sex. It did not involve intercourse;

5. *Psychological Impact of the Abuse*: The sexual abuse humiliated, degraded, and debased S.M.; and
6. *Consequences*: The effects of the sexual abuse on S.M. were serious and traumatizing. However, S.M. found the capacity and eventually demonstrated the resilience to rebuild his life.

[29] In my view, these key facts are:

1. Not so general as to render any range so broad as to become effectively meaningless; and
2. Sufficiently specific to locate appropriate, comparator jurisprudence and develop a reasonable range of non-pecuniary damages.

**STEP 2: REVIEW OF JURISPRUDENCE TO ESTABLISH AN APPROPRIATE RANGE OF NON-PECUNIARY DAMAGES**

[30] The key, defining characteristics of a range are obviously the lower and upper limits of the range - determined based on the methodology described above.

[31] With respect to the upper limit, non-pecuniary damage awards in excess of \$225,000 are typically reserved for cases of where there is prolonged, severe and violent sexual abuse; ongoing access to the victim fettered only (or primarily) by the abuser's deviant inclinations; and understandably devastating consequences. I note the following cases:

1. In *B. (P.) v. B. (W.)*, 1992 CarswellOnt 708 , 1992 CanLII 7666 (Ont. Gen. Div.), a father sexually abused a daughter between the ages of five and 18. Non-pecuniary damages were set at \$175,000. Adjusted for inflation, the current value is estimated to be approximately \$325,000;
2. In *Y (S.) v. C. (F.G.)*, 1996 CarswellBC, 30 C.C.L.T. (2d) 82 1646 (BCCA), the Plaintiff was sexually abused by her stepfather from 7 – 14 years of age. The “incidents of abuse would occur from one to three times a week, generally at night in her bedroom. The abuse included pinching and twisting of the plaintiff's nipples, forceful and painful digital penetration of her vagina, lying naked on the plaintiff with his penis between her legs, placing her hands on his penis, and masturbating in front of her.” (para 18). The abuse was “unbearable” (at paragraph 57), and the impact was “horrendous” (at paragraph 55). The Court of Appeal concluded that awards in cases of similar abuse ranged from \$100,000 – \$175,000 (paragraphs 40 – 50). Adjusted for inflation, the present-day value of that range is estimated to be approximately \$175,000 to \$304,000. An award of \$250,000 would not have been “wholly out of proportion”. Involved expert opinion evidence as to the impact (at paragraph 18);

3. In *MacLeod v Marshall*, 2019 ONCA 842, the Plaintiff was a high school student at St. Charles College, a school run by the Basilian Fathers of Toronto. The Defendant was a Basilian priest. A jury found the defendant liable for sexually abusing the plaintiff more than 50 times while enrolled at the school. The jury awarded general damages in the amount of \$350,000 plus an additional \$75,000 in aggravated damages. The Defendant appealed to the Ontario Court of Appeal on issues other than the non-pecuniary award (i.e. past lost income; punitive damages; and pre-judgment interest);
4. In *W.C. v R.S.*, 2023 ONSC 4287, a teenaged plaintiff was repeatedly, sexually abused by her father's adult cousin for more than 4 years. The abuse included multiple incidents of sexual intercourse. Dineen, J. concluded that the defendant was "...more than twice her age who took advantage of his access to her residence and of her sexual inexperience and naivete." (at paragraph 33). Based on expert opinion evidence, the psychological consequences "harmed [the plaintiff's] psychological health and her family relationships and caused ongoing feelings of guilt and shame and difficulties with sexual intimacy." (at paragraph 38). The Plaintiff was awarded a total of \$275,000 in non-pecuniary

damages broken down as \$225,000 in general damages and \$50,000 in aggravated damages (at paragraph 39);

5. In *Lapointe v Labelle*, 2023 ONSC 470, the Plaintiff was a 13 years old runaway who was offered shelter by the Defendants, husband and wife. After taking her under their care, the Defendants sexually abused the Plaintiff for five years. The abuse included oral sex, vaginal sex and anal intercourse (at paragraphs 19 – 29). The Court quantified non-pecuniary damages at \$300,000 but applied a 25% reduction for pre-existing conditions as the Plaintiff had previously been subjected to sexual abuse by a brother-in-law and also by former foster parents (at paragraphs 12 – 18 and 92); and

6. In *G. (E.D.) v. Hammer*, 1998 CanLII 15064, (1998), 53 B.C.L.R. (3d) 89 (B.C. S.C.), a young indigenous girl was sexually assaulted approximately 20 times by the school janitor. She was 8 – 10 years old at the time. The Defendant/janitor would access the victim at school where, Vicker, J. noted, attendance was compulsory. The Defendant would bring the Plaintiff into a small storage room. During at least half of the encounters, the sexual assault included intercourse (at paragraph 18). An expert in psychology diagnosed the victim with PTSD and depression. Vickers, J. assessed non-pecuniary damages were set at

\$150,000, about \$255,000 adjusted for inflation. I note that this case was appealed to the British Columbia Court of Appeal (2001 BCCA 226) and then the Supreme Court of Canada (2003 SCC 52). However, the issues on appeal related to vicarious liability and joint liability among alleged multiple tortfeasors. The quantification of non-pecuniary damages was not in issue.

7. These types of awards were similarly captured in the range set by the Nova Scotia Court of Appeal in both *G.(B.M.)* and *M.(L.M.) v Nova Scotia (Attorney General)*, 2011 NSCA 48. In both of those cases, the plaintiffs were each being supervised by the same serial sexual predator masquerading as a probation officer, a public official in a position of trust. While under his authority, they were subjected to repeated abuse including anal rape. The attacks were serious affronts their dignity and personal autonomy. In both cases, the Court of Appeal confirmed a range of \$125,000 - \$250,000 for non-pecuniary damages. Adjusted for inflation, the present-day value of this range is estimated to be approximately \$170,000 - \$350,000 although the ultimate award was set at the lower end of the range (\$125,000 or \$170,000, adjusted for inflation). The important facts listed above regarding S.M.'s abuse are



not reasonably comparable to the facts which resulted in these higher non-pecuniary awards.

[32] I do not consider these more severe cases to be comparable and, as such, set \$225,000 as the upper limit of the range in this case.

[33] With respect to the lower limit, in *A.B., Smith*, CJ conducted an extensive review of the cases which fell within the lower end of the range for non-pecuniary damages for sexual abuse of children. Generally, speaking, these cases involved highly inappropriate, but not invasive, sexual contact. As well, the abusive acts were limited either in time or frequency. The range for non-pecuniary damages, adjusted for inflation, for these lesser forms of sexual abuse was about \$18,000 to \$125,000 (see paragraphs 52 – 53).

[34] I consider the important facts listed above regarding S.M.'s abuse to be more serious than those cases which resulted in non-pecuniary awards at the lower end of the spectrum. In my view, this distinguishing fact justifies increasing the lower limit for the range of potential non-pecuniary damages in this case.

[35] With certain qualifications described below, the following cases are more appropriate comparators for establishing the lower limit of the range:

1. In *D.M. v. W.W.*, 2013 ONSC 4176 (“**D.M.**”), a 12-year-old Plaintiff was on a family trip which included his 36-year-old maternal uncle. He spent one night alone in a hotel room with his uncle. Although the room included two beds, the uncle insisted that they sleep nude in one bed. The uncle first requested a massage which eventually escalated to touching the Plaintiff’s penis and fondling his genitals (at paragraphs 39 – 52). Based on expert opinion, the Court found that the effects of the abuse on the Plaintiff were much more significant and, in fact, included economic loss. In my view, these impacts were much more damaging than was the case for S.M.. The Plaintiff sought general and aggravated damages between \$75,000.00 and \$95,000.00. The court awarded general and aggravated damages of \$95,000.00 (\$118,537.08, adjusted for inflation)
2. In *B.N. v Anglican Church*, 2020 MBQB 2 (“**B.N.**”), the Plaintiff was 5 – 6 years old when he was sexually abused on two occasions by a local priest. The assaults were invasive. The first involved digital penetration. The second involved penile penetration (at paragraph 36). Relying on expert opinion, Menzies, J. determined that the Plaintiff suffered with ongoing anxiety and depressive symptoms (at paragraphs 326 – 328). Based on expert opinion, the Court concluded that the

victim suffered a moderate form of PTSD as a result of the abuse. In this case, I do not have any such expert opinion. In any event, the Court granted a non-pecuniary award of \$125,000 (at paragraph 61), estimated to be about \$141,000 adjusted for inflation.

3. In *CLH v KAG*, 2022 BCSC 994 (“*CLH*”), the Plaintiff was sexually abused by her brother on multiple occasions between the ages of 6 – 12. The abuse included digital penetration and partial vaginal intercourse. Based on expert opinion evidence, Veenstra, J. found that the Plaintiff suffered PTSD as a result of the abuse. The Plaintiff also became disabled and was eventually approved for CPP disability benefits (at paragraphs 108 – 114). The Court concluded that “the sexual assaults took place at a time when the Plaintiff was young and vulnerable. They occurred from time to time over a period of approximately six years. They have led to ongoing psychological injuries.” (at paragraph 343). The impact on the Plaintiff was described as exaggerated but substantial (at paragraph 346). The evidence in that case suggested much more serious abuse and ongoing impact than occurred here. The Plaintiff in *CLH* was awarded non-pecuniary damages in the amount of \$200,000.

4. In *A.B.*, referred to above, the defendant was found to have sexually assaulted the victim on numerous occasions. The victim was a child at the time of the sexual assaults and the defendant was in a position of trust (an adult neighbour entrusted with the care of a child). The important distinguishing features of the sexual abuse were:

- a. The Defendant exposing his erect penis to the Plaintiff and invited him to touch it;
- b. The Defendant putting his hand inside the victim's pants and touched his genitals. (*A.B.* at paragraph 16)

Smith, CJ recognized that these facts were less pronounced than in other cases which involved sodomy and penetration but, nevertheless, was "invasive and degrading" (at paragraph 61). Smith, CJ also concluded that the abuse "significantly affected the Plaintiff and caused him serious and prolonged psychological or mental injury. The Defendant's abuse had a profound effect on the Plaintiff and altered the course of his life." (*A.B.* at paragraph 48). Smith, CJ canvassed a number of comparable cases concluded that an appropriate present-day range for the sexual abuse in reasonably comparable circumstances was \$45,000 - \$167,000 (*A.B.* at paragraphs 51 – 53 and 72). Smith, CJ awarded non-pecuniary damages in the amount of \$110,000. In my

view, the nature of the abuse suffered by S.M. was much more serious although the impact may have been less. I also note that, similar to the case at hand, the Plaintiff in *A.B.* did not present any expert opinion evidence (see paragraphs 39, 41 – 42 and footnote 1).

[36] Having considered these cases, a range of non-pecuniary damages in the range of \$80,000 - \$225,000 is appropriate in the circumstances of this case.

[37] In terms of the lower limit, \$80,000 is higher than the lower end of the range in *A.B.* due principally to the much more invasive and degrading nature of abuse suffered by S.M.. This lower limit also reasonably compares with the non-pecuniary damages assessment in both *D.M.* and *B.N.*, cited above. Both involved abuse of children on a relatively lower number of occasions. Moreover, this lower limit takes into account differences in the severity (or invasiveness) of the sexual assault and also the aftermath, in term of consequences to the victim.

[38] As to the upper limit, I repeat that the process of developing an appropriate range is discretionary and it can be difficult to precisely compare degrees of abuse and suffering. However, as Smith, CJ stated in *A.B.* monetary damages “is one method of recognizing the harm that has been done” (at paragraph 1) and a \$225,000 upper limit is large enough to accommodate:

1. The sexual exploitation of children on multiple occasions but not as prolonged or frequent as those cases referenced in paragraph 33 above which resulted in much higher non-pecuniary awards;
2. Physical abuse which is not as horrific as those identified in paragraph 33 yet much more degrading, and invasive than was the case in *A.B.* and *CLH*, cited above;
3. Differences in the circumstances surrounding the abuser. For example, compare Mr. McNutt's role as a teacher and sports coach with *CLH* where the sexual abuse was perpetrated by an older brother or *A.B.* where the Plaintiff was sexually abused by a neighbour; and
4. Differences in the consequences associated with the abuse.

#### **PLACING S.M.'S NON-PECUNIARY DAMAGES WITHIN THE RANGE**

[39] In my view, S.M. is entitled to a non-pecuniary award of \$145,000. My reasons include:

1. S.M. was a young child at the time of Mr. McNutt's sexual battery. He was very clearly innocent; incapable of understanding let alone consenting to sexual contact; and vulnerable - particularly to a person such as Mr. McNutt who was not only his teacher but, as a hockey coach, also a mentor;

2. The sexual assaults on S.M. were invasive, degrading, humiliating, and much more serious than was the case in *A.B.* or *D.M.*. The exploitation of S.M. may be more reasonably compared to the facts in *B.N.*. There were two instances of Mr. McNutt imposing himself on S.M. and performing oral sex. While perhaps not as violent as what was seen in *BMG* which included anal rape, the depraved and corrupting nature of these acts should not be understated – particularly where an adult decided to gratify himself sexually at the expense of a young child who was tragically caught alone with this person and placed in a highly compromised position;
3. Mr. McNutt was very clearly in a position of trust. At all material times he was either S.M.'s teacher or his coach as, and such, could masquerade as a friendly and trustworthy person while pursuing young children such as S.M. to gratify his sexual deviancy.
4. I am satisfied that the impact on S.M. was serious and profound - certainly for the next 10 years of his life. There was nothing in the evidence to suggest that S.M.'s life was headed for disaster prior to meeting Mr. McNutt. I am satisfied the sexual abuse significantly contributed to his distrust of authority and his decision to quit school at an early age. Other negative events including drugs, alcohol, and

criminality quickly followed. Once such a young person is thrown into a negative downward spiral, it is difficult to recover and find a peaceful, stable life. At the same time, as Smith, CJ observed in *A.B.*, it is difficult to go back and make factual findings about what a plaintiff's life might have been like if the sexual assaults had not occurred (at paragraph 81). This is not an exact science. Moreover, I note the following additional problems or constraints:

- a. Additional evidence from other independent persons including relatives and experts would have been beneficial – particularly given that this is clearly a significant variable in the courts assessment of damages (see, for example, *D.M.*, *B.N.*, *C.L.H.*, *A.B.*, *Zando* and *S.(A.M.)*). For clarity, it is clear that expert opinion evidence may not be required to establish liability. However, additional evidence from independent persons other than the Plaintiff (including experts) does bear upon quantification of damages. The Court will still struggle to fashion a non-pecuniary award, but the absence of evidence made the task more challenging; and
- b. Based on the evidence before me, the consequences associated with the sexual abuse of S.M. were not as permanent as in,



for example, *D.M., B.N., C.L.H. or S.(A.M.)*. This may be attributable to S.M.'s resilience, business savvy, and strength of character. Nevertheless, it is a factor.

## **CONCLUSION**

[40] As indicated, I grant S.M. \$145,000 in general damages. In addition, I grant \$27,187 for prejudgment interest, calculated simply at a rate of 2.5% per year for 7 ½ years. From this, I deduct the \$11,000 in settlement funds previously received from the Halifax Hawks and the School Board. This results in a total non-pecuniary award of \$161,187.

[41] Finally, I award costs of \$14,563 comprised of \$12,563 under Tariff A, Scale 1 and an additional \$2,000 for one day of trial.

Keith, J.