IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *H.N. v. School District No. 61 (Greater Victoria),* 2024 BCSC 128

Date: 20240129
Docket: S210115
Registry: Victoria

Between:

H.N.

Plaintiff

And

The Board of Education of School District No. 61 (Greater Victoria), William Haisell and James Gordon Kalyn as Executor and Trustee under the Last Will and Testament of Gary John Redgate, Deceased

Defendants

Ban on Publication pursuant to Order of October 16, 2023, regarding information which would identify the plaintiff.

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:	S.L. Kovacs M.K. Hogan
Counsel for the Defendants, the Board of Education of School District No. 61 (Greater Victoria) and William Haisell:	R.J. Harper E. Abdjalieva
Counsel for the Defendant, James Gordon Kalyn as Executor and Trustee under the Last Will and Testament of Gary John Redgate, Deceased:	J.A. Bloomenthal B.T. Macleod
Place and Dates of Trial:	Victoria, B.C. October 16–20, 23–27, and 30, 2023
Place and Date of Judgment:	Victoria, B.C. January 29, 2024

Table of Contents

Introduction

[1] In this trial, H.N. seeks compensation for the sexual abuse perpetrated against him by Gary Redgate, a volunteer tutor at H.N.'s elementary school in 1999–2000.

[2] H.N. is now 35 years old. He has persevered admirably through the consequences of what occurred and built a good life for himself with the help of those closest to him. The evidence is clear, however, that he has suffered the types of harm often associated with such events—psychological harm that persists throughout childhood and steals much of a person's youth and innocence, and long-term harm that remains a heavy burden throughout adulthood *(R. v. Friesen*, 2020 SCC 9, para. 80).

[3] Mr. Redgate died in 2023 before the trial commenced. His Estate does not contest its liability for his actions. It joins issue only on the assessment of H.N.'s damages for his pain and suffering, loss of earning capacity, cost of future care, and for punitive purposes.

[4] H.N. also claims against the Board of Education of School District No. 61 in vicarious liability, both for Mr. Redgate's abuse and for the alleged negligence and breach of fiduciary duty of William Haisell. Mr. Haisell was H.N.'s grade six teacher who arranged his tutorials with Mr. Redgate.

[5] For the reasons that follow, I fully accept H.N.'s evidence regarding the abuse he suffered and its terrible effects upon him. H.N. is awarded damages of $2,338,241 against Mr. Redgate's Estate.

[6] H.N.'s claims against the School District in vicarious liability are dismissed. Regarding vicarious liability for Mr. Redgate's abuse, under the governing case law from the Supreme Court of Canada, the abuse was insufficiently connected to any risk created by the School or its representatives. Essentially, this is because Mr. Redgate's abuse occurred, not during the tutorials organized by the School, but at

Mr. Redgate's home in visits arranged between Mr. Redgate and H.N. and his family.

[7] Regarding vicarious liability for Mr. Haisell's conduct in organizing and overseeing the tutorials, I find that Mr. Haisell breached none of his legal duties to H.N. Mr. Haisell arranged the tutorials for H.N. at the School in good faith, with H.N.'s best interests in mind, and in consultation with H.N.'s parents. He had known Mr. Redgate over many years as a good teacher with a long, unblemished career. On the evidence, neither Mr. Haisell nor anyone else at the School had reason to suspect that Mr. Redgate posed any threat to H.N.

The Parties

[8] As mentioned, H.N. is now 35 years old. He lives in the Lower Mainland with his fiancée and young son.

[9] Mr. Redgate taught in the Greater Victoria School District for 35 years, from 1962 until his retirement in 1997. Before his death in 2023, he did not participate in the proceedings due to his compromised mental state. His estate is represented by its executor and trustee, Mr. Kalyn, who did not testify at trial.

[10] Mr. Haisell taught in Ontario from 1962 until 1979 when he joined the Greater Victoria School District. He taught in Victoria from 1979 until his retirement in 2020. In addition to his teaching positions, he served as a principal and vice-principal.

[11] The Board of Education of School District No. 61 is headquartered in Victoria and operates elementary schools throughout various neighbouring municipalities. It is governed by the *School Act*, R.S.B.C. 1996, c. 412. It operates the elementary school in Victoria that H.N. attended during the events in issue.

Facts

Family Background

[12] H.N. testified and called as witnesses his fiancée J.T., his mother D.T., and his twin brother S.N. Their evidence was virtually unchallenged.

[13] H.N. and his four siblings grew up with their parents in a close, supportive family in Victoria. H.N. and S.N. described fond memories of an active, happy childhood.

[14] H.N. recalled his love of reading from an early age, particularly science fiction and fantasy. He relished elementary school and remembered being slightly embarrassed in grade five when his teacher, in front of the class, commented on his positive attitude towards all aspects of school life. He was active in team and individual sports. S.N. described his brother as a kind, imaginative, and smart child, who was passionate about many things, particularly school and reading.

[15] D.T. described H.N. and S.N.'s love for school when they were young. They both loved to read. She felt that, as fraternal twins, the way in which they were most alike was as smart, keen learners. D.T. and her husband took education seriously. She herself completed a master's degree when the boys were in grade six, which the whole family celebrated.

Mr. Haisell and Mr. Redgate

[16] Mr. Haisell and Mr. Redgate met in 1969, when they taught at the same school for a year or so. They became friendly and played cards during lunch hour.

[17] From 1984 to 1991, they were reunited at another elementary school. Mr. Redgate taught grades two and seven and worked in the library. Mr. Haisell taught grade six. They renewed their card games. Mr. Haisell saw Mr. Redgate teaching in the library, and viewed him as a focused, attentive and articulate teacher and a good staff representative.

[18] In 1991, Mr. Haisell left for another school. They stayed in touch and grew closer when Mr. Redgate's wife became ill. Mr. Haisell played cards with the couple around once a month for a couple of years, and he and Mr. Redgate went to brunch and worked on crossword puzzles. When Mr. Redgate's wife died near the end of 1994, Mr. Haisell felt that her death hit Mr. Redgate hard, and for a time thereafter they saw each other almost weekly.

Mr. Redgate's Tutorials

[19] In the 1999–2000 school year, H.N. was 11 years old and in grade six. Mr. Haisell was his grade six teacher.

[20] Sometime between December and February, H.N. began writing a novel about a fictional universe where young heroes saved the world. S.N. testified to being amazed and excited by his brother writing a novel.

[21] D.T. recalled discussing the book with Mr. Haisell. She knew Mr. Haisell from the previous year, when he taught S.N. in grade five. She thought he might also have previously coached the boys' school soccer team. D.T. and Mr. Haisell discussed their mutual impression that the grade six classes were not challenging enough for H.N. Given his academic strength, they both thought a tutor to help with the book was a good opportunity for H.N. to benefit from an enriched learning environment.

[22] Mr. Haisell thought of Mr. Redgate as a good candidate to be the tutor. He saw Mr. Redgate as a highly experienced, strong teacher, skilled at language arts, and with time to assist H.N. on his writing project. He felt this interesting project, with a strong, enthusiastic student like H.N., would be positive for Mr. Redgate too while he continued to deal with his wife's death.

[23] D.T. recalled Mr. Haisell explaining that the School did not have the resources for a tutor, but that he had a friend, Mr. Redgate, who had taken early retirement from teaching and whose wife had died. He suggested asking Mr. Redgate, to come into the School to help H.N. with the novel, and D.T. agreed.

[24] D.T. recalled meeting Mr. Redgate as the tutorials were being organized. Her evidence was that she found him friendly and enthusiastic about tutoring H.N. She thought having a retired teacher help in this way was a good thing for H.N. She felt Mr. Haisell had made a good choice and it was kind of him to have arranged a tutor.

[25] H.N. testified that he recalled Mr. Haisell introducing him to Mr. Redgate as the tutorials were being organized. Mr. Redgate struck him as knowledgeable and a bit standoffish in the manner of some teachers.

[26] Mr. Haisell's evidence was that he discussed the tutoring arrangement with the School's principal, Mr. Merv Campbell, and another teacher at the School who knew H.N. and Mr. Redgate, and both thought it a good idea. Mr. Haisell testified that there were six or seven other teachers and staff at the School who knew Mr. Redgate from his years teaching in the district.

[27] Mr. Campbell also testified. He was the principal at the School from 1996 to 2002 and is now retired. He described Mr. Haisell as a teacher of integrity who was respected by staff, worked well in the classroom, and had a sterling reputation. He did not specifically recall H.N. or his family. Nor did he have a good recollection of Mr. Haisell asking him about Mr. Redgate tutoring H.N., but he saw a reference to it when reading Mr. Haisell's file in preparation for trial.

[28] From late 1999, or early 2000, until the end of the school year in June 2000, H.N. and Mr. Redgate met once a week during English class to work on H.N.'s story. They went to an empty classroom for around 40 minutes to review drafts, with Mr. Redgate assisting with editing, grammar, and structure. In his spare time over the rest of the week, H.N. continued writing his story.

[29] Beginning in March 2000, H.N. began to also go to Mr. Redgate's house. The first visit was to help with some yard work. Subsequent visits involved working on H.N.'s book, discussing other books that Mr. Redgate gave H.N. to read, watching movies, playing cards, or working on projects like building a bird house. They corresponded by e-mail, which included exchanging chapters of H.N.'s book.

[30] The visits to Mr. Redgate's house were arranged between Mr. Redgate, H.N., and his parents. D.T. recalled, for example, the first visit being arranged for H.N. to help pick up branches in Mr. Redgate's yard. The visits were recorded by D.T. in the family's kitchen calendars, which she used to keep track of their busy schedules.

The calendars were put in evidence. They showed H.N. going to Mr. Redgate's home around 10 to 15 times per year from March 2000 until March 2005, with a total of approximately 50 visits. Only two of the visits— in March and April 2000— occurred while H.N. was still in grade six and attending the tutorials at school with Mr. Redgate. The rest occurred after the grade six school year when the tutorials had ended.

[31] H.N. needed to be driven to and from Mr. Redgate's house, and so Mr. Redgate and H.N.'s parents organized the driving between them. D.T. recalled speaking with Mr. Redgate from time to time in front of their homes during drop-offs and pick-ups. She recalled the visits to Mr. Redgate's as involving the same activities that H.N. described – working on H.N.'s story, reading and discussing books, watching movies, and working on projects.

[32] D.T. and H.N. recalled that, for a time around the spring of grade six, Mr. Redgate came to watch H.N.'s sporting events and sometimes chatted with his parents on the sidelines. Eventually, D.T. thought that was too much. She raised it with Mr. Haisell who said he would speak with Mr. Redgate. Mr. Redgate soon stopped attending.

Mr. Redgate's Abuse

[33] In his testimony, H.N. described Mr. Redgate's physical advances as incremental. Initially at the School, he sat across the table from H.N. while they worked. Soon he came to sit next to H.N., and then moved close enough for their arms to occasionally touch. H.N. recalled that Mr. Redgate hugged him once at the School, on a special occasion like a birthday. At the time he thought it strange, like a nice thing but in the wrong place.

[34] At Mr. Redgate's house, they worked in the kitchen dinette or in the office where there was a computer. There too, Mr. Redgate sometimes sat close enough for their arms to touch. Mr. Redgate began to hug H.N. in the doorway when it was time to leave.

[35] After grade six ended in June 2000, Mr. Redgate and H.N. met only at Mr. Redgate's house. The writing of H.N.'s novel was mostly completed by around that time. As it came to an end, Mr. Redgate became increasingly attached and infatuated. He was adamant that he wanted the relationship to continue, and they met at his house to continue playing cards, watching movies, discussing books and working on the occasional project.

[36] Mr. Redgate became more affectionate, friendly, and complimentary. He began to refer to H.N. as his best friend and a great force of positivity and happiness in his life. In his testimony, H.N. explained that, although he never shared these feelings, he reciprocated because he felt responsibility and pressure to keep Mr. Redgate happy.

[37] Sometime after H.N.'s book was published in December 2000, while H.N. was in grade seven, Mr. Redgate began saying that without H.N. in his life he would have nothing to live for. Soon, he began making threats of suicide. H.N. testified to recognizing, in retrospect, that he was continuously manipulated by Mr. Redgate into feeling badly for him and trying to help him.

[38] H.N. recalled Mr. Redgate once calling him at home, drunk and upset, and threatening to end his own life. H.N. begged him not to. After the call, D.T. saw H.N. crying. He told her of Mr. Redgate mentioning suicide. In her testimony, D.T. recalled this episode. She recalled telling H.N. that Mr. Redgate should not be speaking to a young boy like that and she might call Mr. Haisell about it. She said that H.N. begged her not to say anything. She decided to wait and see if anything similar occurred again, which from what she could tell it did not.

[39] Mr. Redgate began telling H.N. about his sexual experiences. H.N.'s evidence was that this started around the same time he was awakening to his own sexuality, including speaking with his friends about sex, and so he felt perhaps these discussions were just something similar.

[40] Next, Mr. Redgate began to express romantic feelings and ask if they were reciprocated. Mr. Redgate's goodbye hugs started to include kisses which then became kisses on the lips that lingered. Understandably, H.N. could not be precise about many aspects of the chronology, but he believed this began around grade seven. In cross-examination, he agreed that the physical abuse at Mr. Redgate's house began sometime after his grade six year was over.

[41] Mr. Redgate then asked to explore physical things with H.N., which developed to the point that he would have H.N. lie on top of him. Mr. Redgate told H.N. this released the pressure of trying other sexual acts that he wanted to do. H.N. could not estimate how many times this occurred. Sometimes Mr. Redgate wore sweatpants and was erect, which H.N. found disgusting. Mr. Redgate said he wanted to show H.N. his penis and did so at least once.

[42] On one occasion, Mr. Redgate had H.N. kneel across him while he put his hands down the back of H.N.'s pants and squeezed his buttocks. H.N. testified to feeling completely frozen. Afterwards, Mr. Redgate said that H.N. not telling him to stop was a signal from God that his attraction to H.N. was permissible. Other times, he told H.N. he was ashamed but could not control himself because H.N. was so special. Later he began to fixate on oral sex, and would ask H.N. frequently if he could perform oral sex on H.N., which H.N. refused and never occurred.

[43] H.N. recalled feelings of guilt and discomfort because what was occurring seemed so wrong. He tried to put things off by saying "not now" or that he "did not think so". When the abuse did occur, he mentally withdrew or shut down. When made to lie on Mr. Redgate, he tried to think of it like "a hug on the ground".

[44] H.N. and Mr. Redgate played squash together at a local club, which Mr. Redgate used as an opportunity for further abuse. The family calendars indicated eight squash games between September 2003 and February 2004. When alone in the communal showers, Mr. Redgate complimented H.N.'s body and private parts and said they aroused him. He changed his clothes where H.N. could see him and sometimes became aroused and made sure that H.N. could see this. H.N. felt

their squash games were a trap for this sort of abuse, but he continued to feel responsible to ensure no harm came to Mr. Redgate or that he was tempted to end his life.

[45] When H.N. reached around age 15 or 16, the abuse finally came to an end. H.N. was old enough to tell Mr. Redgate that the “door was closed”. At the same time, Mr. Redgate was becoming less interested now that H.N. was older.

[46] In 2006, H.N. graduated from high school. At this point, their communications waned and ended for good in 2008. H.N. recalled that one day Mr. Redgate called and left a message, which H.N. did not return. They never spoke again. Later, H.N. found a package at his door containing one of his shirts and his runners.

H.N.’s Schooling

[47] Throughout elementary school, H.N. achieved virtually straight “A”s. In middle school and high school, however, he lost much of his interest in school and learning despite enjoying it so much when he was younger. He felt nothing positive about the book he had written. Discussing it caused him to panic and shut down because it was entangled with Mr. Redgate’s abuse and the associated pressures to shield their relationship.

[48] He continued to socialize with the academically strong students he knew from elementary school, but also fell in with what he described as a group that was into drugs and not friendly or supportive. He recalled feelings of being shut down, social fear, and general discomfort. He felt he was drifting with no clear path. In his romantic relationships during high school, he found himself unable to be present or engage emotionally.

[49] D.T. described H.N. in these years as losing his enthusiasm, putting in minimal effort and being less focused. S.N. described being confused in grade eight when his brother became less engaged in school, struggled with homework, and his grades fell. He felt H.N. did the bare minimum, particularly in classes like math and

science, whereas S.N. continued his outstanding academic record. He was surprised by how reckless H.N. became with marijuana.

[50] Approaching graduation in the spring of 2006, H.N. lacked motivation and goals and was not applying himself. Having always assumed he would attend university, he felt it “slipping through his fingers”. Feeling lost after graduation, he travelled in Asia for six months. He testified that, looking back now, his behaviour was reckless—crashing motorbikes, using alcohol and drugs, and seeking ill-advised sexual encounters without any emotional connection.

[51] While H.N. was away, D.T. registered him for the upcoming fall semester at the University of Victoria. In her testimony, she explained that he seemed unhappy and she hoped that this might spark his interest and revive his desire for education. When that did not happen, she was disappointed and began to worry about what he would do.

[52] On his return in 2007, H.N. spent a year studying part-time at the University of Victoria. He still felt emotionally detached. Though manifesting outward stability, he felt his emotions were tamped down and sometimes felt angry and out of control. His romantic relationships suffered.

H.N.’s Business

[53] In the winter of 2010, H.N. went to Oregon to work as an apprentice for a small bike-building company. He learned to weld and fabricate bicycles. After a few months, he returned to Victoria and pursued further welding training.

[54] He worked various welding jobs, eventually joining an artistic metal company where he worked for a year or two until it went out of business from financial difficulties. He decided to take over its work-space and began his own welding business as a sole proprietorship. Initially, he did basic jobs such as car mufflers, fence panels, and hand railings. Once the business was better established, he gravitated to more creative, artistic metal work.

[55] H.N. struggled with the pressure of his growing business and the associated responsibilities and workload. He recalled once crying uncontrollably into his welding face shield. Recognizing the need for help, he began counselling in 2014. He recalled crying uncontrollably once again, while filling out the intake form, because of what he was confronting.

[56] Since July 2016, H.N. has operated his business through a company of which he is the sole owner and managing director. His products have received industry recognition for their quality and beauty.

[57] In the early years, he worked over 80 hours a week. In his testimony, he said he responded to the stress and challenges of the business by shutting out everything else and focusing entirely on work. He avoided conflict, which created its own problems. He fell behind on billing and realized he was too focused on pleasing clients instead of being pragmatic. He came to learn that his business suffered when he could not emotionally deal with situations. He hired a project manager to help with those parts of the business that he found particularly difficult.

H.N.'s Personal Life

[58] H.N. and J.T.'s relationship began in 2014 and they have lived together since 2017. As mentioned, they have a young son and are engaged to be married.

[59] J.T. is a social worker, working with academic and civil rights organizations. She described H.N. as a kind, gentle, creative, and motivated person. She also described times in their relationship, however, when he put up walls between them and withdrew. For example, as they prepared to move in together, he suddenly pulled away and became "chaotic". She felt she had to push to make it happen, almost like she was trapping him. She described a similar chaotic and disturbing situation when he moved his business into a larger space and when their son was born.

[60] At times, she has found communication difficult due to tunnel vision and barriers that made H.N. hard to reach. She described how he was initially afraid for them to be all alone with their baby because it was all so new.

[61] When H.N. decided to pursue this litigation, he knew he must tell the rest of his family what had happened to him. He found this terribly difficult. D.T. and S.N. described H.N. telling them in the fall of 2020. S.N. testified that it was the worst day of his life. It came like a thunderbolt and he felt shock and anger. D.T. also testified that the news came as a shock. In H.N's teenage years, she saw him lose focus and become less happy, but she did not see red flags. Learning what actually occurred has tainted how she sees her family's history and her children's childhood.

[62] H.N. has come to a good place in his life. He has a loving, stable relationship with J.T. and their son, and testified to the strength he receives from them and from his business. With the help of counselling, he has come to understand what he went through and who he is, and to see opportunities for joy and meaning. He testified to feelings of empowerment from bringing others to account for the abuse he suffered.

[63] But difficulties remain. He continues to avoid certain types of conflict, to the detriment of his business and other aspects of his life. Unwelcome reminders of what occurred can be triggered by everyday things that he associates with Mr. Redgate, such as seeing the type of car he drove or smelling a similar after-shave. The lack of self-control when such things occur take him to a dark, frustrating place and divert him from being able to live life as he would like.

[64] H.N. testified that his low moods now occur less than monthly, although in the past six months they have been pronounced and somewhat debilitating. He described regular therapy as essential to his well-being. He plays soccer, does yoga, runs and cycles. He sleeps well but sometimes wakes up in panic or distraught, particularly when under stress or feeling emotional. On the advice of Dr. Lu, whose evidence is discussed below, he recently reduced his drinking to modest amounts.

[65] H.N. sees university as an opportunity that passed him by. He plans to focus on his business, which provides a direction he wants to pursue rather than run away from. At work, he still has difficulties connecting with people. He described this as a particular problem in 2018, for example, when he was struggling and feeling somewhat paralyzed. He believes this explains the decreased sales and net losses that year.

Expert Evidence on Child Sexual Abuse

[66] Dr. Shao-Hua Lu, a psychiatrist at Vancouver General Hospital, was called by H.N. as an expert in forensic psychiatry and addictive medicine. He wrote two reports, dated October 13, 2021 and June 11, 2023. He conducted a mental status examination and a psychiatric interview, and reviewed H.N.'s medical history and records. Dr. Lu's diagnosis and prognosis were not challenged by the defendants and I accept them.

[67] Dr. Lu diagnosed H.N. as having post-traumatic stress disorder ("PTSD") from childhood sexual abuse. He testified that this is often a more complex and all-encompassing disorder than adult PTSD because the damage occurs before a person's brain development, personality, and resilience are fully formed. He opined that H.N. may also have generalized anxiety disorder associated with his PTSD.

[68] Dr. Lu's prognosis changed between his two reports because of H.N.'s reported improvements by the time of the second assessment. Dr. Lu nevertheless remained cautious. As explained in his testimony, in his opinion it is difficult to anticipate how H.N. will cope and progress in the long term. His second report describes it this way:

> For many, with chronic PTSD, there are fluctuations in symptoms and presentations. It is still too early to know if his current period of relative stability is sustainable. Even with his current stability, he should have access to psychological therapy indefinitely, if he needs support during any period of increased stress or demands. His long-term prognosis has somewhat improved compared to the 2021 assessment. However, due to his childhood abuse, he has long term indefinite risk that cannot be fully anticipated.

[69] Dr. Lu found H.N.'s clinical symptoms consistent with the long-term impacts of child sexual abuse. Regarding H.N.'s self-description of avoidance, isolation, indecision, loss of trust in himself and others, and internal irritability, Dr Lu wrote:

> Childhood abuse, sexual or psychological, can have lasting physical, emotional, and cognitive impacts on the victim. The adverse impacts of childhood abuse can persist for decades, well into adulthood, affecting all aspects of one's daily life.

[70] Dr. Lu described Mr. Redgate's manipulation of H.N. this way:

> Mr. Redgate used the threats of suicide to manipulate [H.N.]'s behaviours. Mr. Redgate had used the threat of suicide to hold [H.N.] hostage. As a young person, however intelligent, he would have limited capacity to deal with these types of psychopathic behaviours. His interaction with Mr. Redgate would have direct negative impacts on his ability to develop trust and emotional maturity. It is not surprising that [H.N.] describes long-standing efforts to avoid emotional and other conflicts.
>
> …
>
> The whole time, [H.N.] wanted to make sure Mr. Redgate didn't kill himself and to fend off the sexual advances. He even said to Mr. Redgate that maybe in the future he could be sexually interested. This was his way to buy time. …

[71] Dr. Lu wrote this about the long-lasting effects of childhood sexual abuse:

> Childhood abuse, sexual or psychological, can have lasting physical, emotional, and cognitive impacts on the victim. The adverse impacts of childhood abuse can persist for decades, well into adulthood, affecting all aspects of one's daily life. It has been established in psychiatric literature that childhood abuse is a major risk factor for the development of posttraumatic stress disorder (PTSD), addiction and other serious psychiatric illness. Victims of childhood sexual abuse have higher incidents of mood and anxiety disorders, addiction, personality disorders, general health concerns, and suicide. Childhood abuse is associated with negative education, economic, and social outcomes. Childhood abuse can cause cognitive changes due to the chronic elevated stress and autonomic dysfunction.
>
> … In short, every facet in a person's life can be adversely and potentially permanently affected by the cumulative negative consequences of childhood sexual abuse. [H.N.] describes these features and experiences.
>
> …
>
> Collectively, [H.N.]'s abuse leaves an indelible mark on his emotional, psychological, moral, cognitive, and personality development. [H.N.] describes a loss of trust and self-confidence for much of his life. He describes a lifelong pattern of indecisiveness, a lack of personal agency, and anger in response to authority. His emotional expression has been affected. He used

> emotional isolation and avoidance as a way to manage the lingering aftermaths of his years long abuse.

[72] H.N. also called Dr. Elizabeth Jeglic, a psychology professor with particular expertise in child sexual abuse and child sexual grooming. Her evidence was unchallenged by the defendants and I accept it. Her opinions included that Mr. Redgate's actions, as described by H.N., exhibited numerous aspects of sexual grooming.

[73] She described sexual grooming as:

> … the deceptive process by which an offender skillfully manipulates a potential victim, significant adults in the child's life and the community to perpetrate sexual abuse and prevent detection ...

[74] She described the five overarching stages which may be involved in this complex process, all of which Mr. Redgate engaged in as described by H.N.:

- Victim selection;
- Gaining access and isolation;
- Trust development;
- Desensitization to sexual content and physical contact; and
- Post-abuse maintenance behaviours.

[75] Dr. Jeglic wrote this about the role of Mr. Haisell and the School:

> Because the introduction of Mr. Redgate to H.N was initiated by Mr. Haisell and the administration at [the] School, Mr. Redgate was able to access H.N, gain his trust and that of his parents, and begin desensitizing H.N. to physical contact.
>
> Consequently, Mr. Redgate was able to further isolate H.N. from his parents and guardians by continuing their editing sessions and "friendship" to his private residence, where he continued to sexually groom H.N…. before the alleged sexual assaults and batteries began.

Analysis

Credibility

[76] The defendants did not challenge the credibility or reliability of the evidence from H.N. or his family members, which in my view was a correct approach. I accept all of H.N.'s evidence about the material issues in the case.

[77] H.N. was a clear, thoughtful, and careful witness. He readily conceded what he could not recall, and made admissions against interest such as having no history of panic attacks or self-harm and no diagnosis of clinical depression.

[78] He made reasonable concessions about the success and future potential of his business, and offered little if any speculation about what his path might have been had these events not occurred. He was forthright about the happiness and stability that he has found, while continuing to experience some pronounced low moods particularly in the last six months due to the impending trial. He agreed he had not missed work due to his struggles, though he felt there had been many wasted days.

[79] There was nothing in the testimony of D.T., S.N. or J.T. to raise any questions about the credibility or reliability of their evidence.

[80] H.N.'s counsel argued that some of Messrs. Haisell and Campbell's evidence should be rejected as not credible or reliable. I disagree as I found them both credible witnesses and generally accept their evidence. They were both forthright and responsive in cross-examination and readily agreed to numerous inferences put to them about things that might have occurred if they had no specific memory to the contrary.

[81] Messrs. Haisell and Campbell's evidence was not entirely reliable but only in the sense that, after all these years, there was much they could not recall or be precise about. That is to be expected particularly when the events in issue were not particularly noteworthy to them at the time.

[82] I disagree with H.N.'s counsel that Mr. Haisell's credibility was impeached in cross-examination. The main examples relied on were, first, that at trial he said by 1999 Mr. Redgate had recovered from the death of his wife in the sense that he appeared to be his "normal self". Whereas in discovery, he described him as still "a bit needy". This is a collateral issue about a subject matter that is often vague and difficult to describe, as Mr. Haisell himself said in his discovery evidence. I find no

material discrepancy in this evidence and certainly nothing that undermines Mr. Haisell's credibility.

[83] The second alleged impeachment concerned whether there were staff at the School who could have provided H.N.'s tutoring. In discovery, when asked if he explored the possibility of librarians, teachers, or aides, Mr. Haisell said he "did not remember doing anything much." In cross-examination, he said he made inquiries within the School about help for H.N. before suggesting Mr. Redgate. Again, I am unconvinced there is a material discrepancy regarding this collateral issue. Mr. Haisell's answer at trial might be taken as a reference to general discussions with Mr. Campbell and the other teacher who knew Mr. Redgate, as opposed to specific investigations of librarians or other staff. Overall on this issue, I accept Mr. Haisell's evidence that, whatever the extent of such discussions or investigations, at the time he was familiar with the resources at the School and was confident there was no one to provide these tutorials on a regular basis.

[84] The third alleged impeachment was that, in discovery, he said there were parent-teacher interviews with H.N.'s parents while Mr. Redgate was tutoring and they expressed no concerns about the arrangement. At trial, Mr. Haisell said he could not recall such interviews but assumed they occurred. To the extent there is a discrepancy, it is of the type often seen in trials regarding the difficult distinction between believing something must have occurred, based on one's recollection of other events and context, versus having a specific recollection of it occurring. Also, in my view, this too is a collateral issue. D.T.'s evidence was that she was consulted about, and agreed with, the tutorials which she thought were a good idea, and that she was introduced to Mr. Redgate whom she liked.

[85] Regarding Mr. Campbell, H.N.'s counsel pointed to a discrepancy in his evidence regarding whether Mr. Haisell consulted him about the tutorials. In examination for discovery, Mr. Campbell could not recall this consultation and so thought it had not occurred. At trial, he testified to a vague recollection of Mr. Haisell approaching him with the idea of a retired colleague coming to the School to help a

student with writing a novel. He testified that this recollection was prompted by reading Mr. Haisell's teacher evaluation reports in preparation for trial which included a reference to the tutorials. He testified that he expected he would have told Mr. Haisell to follow regulations, involve the student's parents, and prepare a plan for making it work. As counsel for the School District pointed out, it is not unusual for witnesses to recall some additional details as they prepare for trial—as D.T. did, for example, regarding one of her discussions with Mr. Haisell. I accept Mr. Haisell's evidence that a conversation along those lines did occur and I accept that Mr. Campbell had a vague recollection of it prompted by reading school files prior to trial.

Is the Estate liable?

[86] Before his death, Mr. Redgate did not participate in these proceedings due to compromised mental capacity in his later years. While the Estate did not formally admit H.N.'s allegations of assault and battery by Mr. Redgate, it did not contest his evidence of what occurred.

[87] I accept all of H.N.'s evidence about the abuse he suffered. As there is no evidence that could establish a defence for Mr. Redgate's sexual assault and battery, the Estate is liable for the damages he caused.

[88] The Estate raised a limitation period defence against part of H.N.'s damages. While accepting that H.N.'s claims for damages from Mr. Redgate's sexual abuse are not time-barred under the *Limitation Act*, S.B.C. 2012, c.13, the Estate argued that his claims for mental suffering caused by conduct other than sexual abuse—such as from Mr. Redgate's threats of suicide—were time-barred. The Estate argued that the appropriate end date for such damages was two years after 2015, 2015 being when H.N. was in a position to fully appreciate what had occurred with the benefit of counselling.

[89] I do not accept the Estate's argument. On the evidence, Mr. Redgate's threats of suicide and other psychological manipulations were inseparable from his sexual abuse in that they were his method and means to groom and control H.N. for

that purpose. They are thus exempted from a limitation period under s. 3(i)-(k) of the *Act*.

[90] This finding is supported by the opinion evidence of Dr. Jeglic. As mentioned above, her report defined sexual grooming as "the deceptive process by which an offender skillfully manipulates a potential victim, significant adults in the child's life, and the community to perpetrate sexual abuse and prevent detection." She opined that the threats and encouragements Mr. Redgate used to make H.N. feel responsible for his well-being, and to keep him from telling anyone what was occurring, were of a type commonly involved in the complex process of sexually grooming a victim for sexual abuse.

Is the School District vicariously liable for Mr. Haisell's conduct?

[91] During the trial, H.N. discontinued his case against Mr. Haisell personally. He did so because, under ss. 94(1) and (2) of the *School Act*, to establish Mr. Haisell's personal liability, H.N. must prove Mr. Haisell's "dishonesty, gross negligence or wilful misconduct".

[92] However, H.N. does seek to establish the School District's vicarious liability for Mr. Haisell's negligence and breach of fiduciary duty as its employee. Under s. 94(4) of the *School Act,* s. 94(1) does not absolve a school board from vicarious liability arising from a tort committed by an employee for which the board would have been liable had s. 94(1) not been in force.

[93] I find the School District is not vicariously liable for Mr. Haisell's conduct because Mr. Haisell did not breach his duty of care or his fiduciary duty to H.N. at any point, including when selecting, organizing and overseeing Mr. Redgate as a tutor for H.N. at the School.

[94] I accept Mr. Haisell's evidence that his primary reason for suggesting Mr. Redgate as the tutor to help H.N. with his book was because he thought H.N. would benefit from this enriched academic experience and that Mr. Redgate was a good candidate for the role. Mr. Haisell also hoped that the arrangement would be

positive for Mr. Redgate, but I accept his evidence this was a secondary consideration and not what gave rise to the idea of the tutorials in the first place. This finding is supported by the evidence from both Mr. Haisell and D.T. that their initial discussions were about the idea of a tutor to help with H.N.'s book for his academic enrichment. Only after they had agreed to this plan did Mr. Haisell suggest Mr. Redgate for the role.

[95] I find that Mr. Haisell had good reason for suggesting Mr. Redgate as the tutor and no reason for concerns. Mr. Haisell had known him for decades as a colleague and friend. His impression after all that time was that Mr. Redgate was a good teacher with no issues of concern. There was nothing in the evidence to cast doubt on the reasonableness of that assessment at the time. To the contrary, Mr. Redgate's human resource services records were put in evidence, indicating an unblemished professional record after 35 years teaching in Victoria. Mr. Haisell knew that Mr. Redgate had gone through a difficult time after the death of his wife, but there was nothing in the evidence to suggest that should have caused Mr. Haisell any concern that Mr. Redgate posed a threat to H.N.

[96] I accept Mr. Haisell's uncontradicted evidence that: (a) five or six other teachers and staff at the School knew Mr. Redgate from his years of teaching; (b) there was no other viable option within the School to provide these personal tutorials on a regular basis; and (c) he discussed the arrangement with Mr. Campbell, and another teacher at the School who knew of H.N.'s writing ability, and both agreed it was a good idea.

[97] I do not accept H.N.'s argument that Mr. Haisell breached his duties by allowing the tutorials to be one-on-one in an empty classroom. I find this was not a breach of the duty of care for the same reasons that it was not a breach to select Mr. Redgate as a tutor in the first place—namely, his long, unblemished teaching career and Mr. Haisell having known him as a solid teacher and friend for many years. I also accept Mr. Haisell's evidence that he checked in on the two of them a few times to see how things were going and never saw anything untoward, though

his opportunities to do so were limited because he was teaching the rest of the grade six class at the same time.

[98] Additionally, there was no evidence to suggest that, in 1999–2000, allowing a retired teacher such as Mr. Redgate to meet in a classroom with a grade six student for one-on-one tutorials during school hours was contrary to school policy or generally avoided by reasonable administrators or teachers in British Columbia.

[99] H.N. argued that Mr. Haisell breached his duties by not investigating matters when learning that H.N. was meeting with Mr. Redgate in his home. Mr. Haisell recalled Mr. Redgate at some point advising him that he and H.N. were occasionally doing so because the use of his computer and printer was moving the work along faster. Mr. Haisell recalled understanding that H.N.'s parents were aware of these visits.

[100] I do not find any breach of Mr. Haisell's duties from not investigating this situation further. Nothing in the evidence suggested any reason for Mr. Haisell to have been concerned about this arrangement, given his justified confidence in Mr. Redgate and the fact that H.N.'s family was involved. Nor was there anything in the evidence to suggest that, at the time, a reasonable teacher in British Columbia would have investigated such an arrangement further in such circumstances.

[101] H.N. argued that Mr. Haisell should have been suspicious about Mr. Redgate's explanation about meeting at his house to use the computer and printer because the School also had a computer and printer. I find no reasonable basis for Mr. Haisell to have been suspicious about this. The evidence was unclear about whether the School's computer and printer were available for this tutorial use. I accept Mr. Haisell's evidence that he thought they were not available. Mr. Campbell's evidence was that at that time students "probably" had access but only with supervision. He was not asked specifically if they could have been used for these tutorials. In any event, there was no good reason for Mr. Haisell to doubt that it was efficient and convenient to use the equipment at Mr. Redgate's, or for this explanation to have raised concerns about something untoward.

[102] H.N. relied on Mr. Campbell's evidence that, if he knew of a student regularly going to a teacher's home for tutorials, he would have wanted to investigate, and that leaving a child alone with a volunteer was to be avoided. That evidence, however, was given in response to very general questions, which did not refer to the important specific circumstances in this case. In my view, the answers did not suggest such avoidance or investigations would have been warranted if the student's parents, who were known to the School, were in control of these visits, and the volunteer was a retired teacher with an unblemished record and well-regarded by teachers at the School.

[103] In sum, all indications to Mr. Haisell at the time were of this being a legitimate, safe arrangement between H.N.'s family and Mr. Redgate, giving rise to no cause for concern. I find no evidence to suggest Mr. Haisell departed in any way from being a reasonably careful and prudent teacher who had H.N.'s best interests top of mind. I therefore find that Mr. Haisell did not breach his duty of care or fiduciary duty to H.N.

Is the School District vicariously liable for Mr. Redgate's abuse?

[104] In my view, the Supreme Court of Canada's decision in *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 1999 CanLII 693, addresses circumstances similar enough to this case to be a governing precedent, establishing that vicarious liability is not made out against the School District in the circumstances of this case because there was an insufficient connection between any risk created by the School's tutorials and Mr. Redgate's abuse of H.N.

[105] The Supreme Court released *Jacobi* in conjunction with Justice McLachlin's (as she then was) decision for a unanimous Court in *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692. Both cases addressed institutional vicarious liability for sexual assault of children.

[106] *Bazley* established that vicarious liability should be understood to reflect what it called the "enterprise theory" of vicarious liability. This theory's rationale is that a party who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public.

[107] In *Bazley*, the owners of a non-profit, residential care facility for young, troubled children were held vicariously liable for sexual abuse committed by one of their employees in the home. Justice McLachlin held that the fundamental question was whether the wrongful act was sufficiently related to the conduct authorised by the employer to justify imposing vicarious liability (para. 41). This would generally be the case where there was a significant connection between the employer's creation or enhancement of the risk and the wrongdoing. On the enterprise theory, once engaged in a business, it is fair that the employer be made to pay for the generally foreseeable risks of that business. Understood in this way, vicarious liability would serve the policy aims of providing an adequate remedy and deterring the risk.

[108] *Bazley* established a two-part test for vicarious liability, reflecting this enterprise theory of liability:

i. Was the relationship between the tortfeasor and the person against whom liability is sought sufficiently close to make a claim for vicarious liability appropriate?

ii. If so, was the tort sufficiently connected to the tortfeasor's assigned tasks to be regarded as a materialization of the risks created by the enterprise?

[109] The questions are related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

[110] Vicarious liability was found in *Bazley* because the residential facility fostered a quasi-parental relationship between its employees and the children under their care, with all of the authority and intimacy of such relationships. The intimate contact went as far as bathing the children and putting them to bed. In these ways, the defendant "materially increased the risk of the harm that ensued" (paras. 43, 58).

Jacobi v. Griffiths

[111] Following the principles established in *Bazley,* by a 4–3 majority the Court in *Jacobi* found the Vernon Boys' and Girls' Club not vicariously liable for the acts of an employee that took place in the employee's home outside working hours.

[112] The children, aged 11 and 13 at the time of the events, came forward many years later and the employee ultimately pleaded guilty to these and other offences.

[113] The employee was the Club's program director. His role was largely to organize recreational activities. He supervised and participated in club activities and was expected to develop friendships with the members and further the Club's objectives of promoting the positive behaviour, health, social, educational, vocational and character development of the boys and girls.

[114] The two children lived at home and used the Club after school and on the weekends for sports and other activities. The employee used his opportunities at the Club, and at Club activities, to become friendly with them. His course of criminal conduct grew step by step from that friendship, and his eventual sexual abuse occurred away from the Club and outside its working hours, except for one incident of sexual touching of the girl in the Club's van.

[115] For the majority, Justice Binnie found the Club not vicariously liable because the abuser's misconduct was too remote from the employer's enterprise. It was not enough that his employment in the Club allowed the opportunity for him to make friends with the children who became the victims of his sexual abuse.

[116] Justice Binnie summarized the "enterprise risk" approach to vicarious liability established in *Bazley* as follows:

> 42 In [*Bazley*], this Court endorses the "enterprise risk" approach to vicarious liability. Thus at para. 31 McLachlin J. explains, "[t]he employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss." The touchstone of "fairness" in this context depends not on "foreseeability of risks from specific conduct, but . . . foreseeability of the broad risks incident to a whole enterprise" (para. 39). Finally, "there must be a <u>strong connection</u> between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer <u>significantly</u> increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks" (para. 42) (first emphasis [in *Jacobi*]; second emphasis [in *Bazley*]).

> 43 It is important to be precise about the characteristics of the particular enterprise at issue in this appeal. The Club provided the employee with an opportunity to meet children, as does any organization that deals with children. The Club authorized Griffiths to develop a rapport with these children. This again is inevitable in any such enterprise. The Club offered recreation in a public setting (as opposed to the privacy of Griffiths' home) in group activities with other persons including children and volunteers whose continuing presence would have been fatal to Griffiths' personal agenda. Griffiths had no job-created authority to insinuate himself into the intimate lives of these children. Unlike [*Bazley*] the enterprise here had only two employees and its emphasis was on developing (horizontal) relationships among the members, not (vertical) relationships to persons in authority.
>
> [Emphasis in original.]

[117] Justice Binnie reviewed the applicable case law from the perspective of the enterprise risk theory. He concluded that the leading cases did not support the imposition of vicarious liability because of an insufficiently strong connection between the type of risk created by the employer's enterprise and the assault.

[118] He found the case law displayed a "strong reluctance" to impose vicarious liability on an employer for employee sexual abuse because of the disconnection between such deeply personal and abhorrent behaviour and the performance of an employee's duties. He saw this as reflecting the approach established in *Bazley* whereby "'mere opportunity' to commit a tort, in the common 'but-for' understanding of that phrase, does not suffice […] to impose no-fault liability".

[119] Moreover, he said, such job-created opportunity was often still insufficient even when accompanied by "privileged access" or "job-created excuse for intimate access". Generally speaking, such circumstances were "an insufficiently strong connection" between the type of risk created and the actual assault to warrant the imposition of no-fault liability (paras. 45–51). Mentoring and being a role model were also insufficient: "I do not accept that an enterprise that seeks to provide a positive role model thereby encourages intimacy. Nor do I believe that 'mentoring', as such, puts one on the slippery slope to sexual abuse" (para. 82).

[120] What the cases usually did require to establish the necessary strong connection was "job-created power and intimacy" over the victim. Justice Binnie

described this as the “potent combination” creating parent-like relationships, which attracted vicarious liability in child abuse cases in settings such as the residential care facility for young children in *Bazley*, and in orphanages, wilderness group homes, and foster homes. Though this parent-type relationship was not necessary for vicarious liability for child abuse, it was the relevant source of “strong connectedness” for circumstances such as in *Jacobi* (paras. 58–64).

[121] Regarding policy considerations, Binnie J. found that non-profit organizations should be entitled to rely on the “strong connection test” because of the weakness of policy justifications between their enterprise risk and a sexual assault (para. 78). He explained the connection between the enterprise risk theory and policy considerations this way:

> 67 The “enterprise risk” rationale holds the employer vicariously responsible because, however innocently, it introduced the seeds of the potential problem into the community, or aggravated the risks that were already there, but only if its enterprise *materially* increased the risk of the harm that happened. Once materiality is established under the “strong connection” test, the imposition of no-fault liability is justified under the second phase of the analysis, as set out in [*Bazley*] (para. 41) by policy considerations, including in particular:
>
> (a) Compensation; and
>
> (b) Deterrence.

[122] Regarding compensation, Binnie J. said the “strong connection” test limited the ability of the court to reach into an employer’s deep pocket simply because it was there, and despite the understandable desire to see victims of such abuse fully compensated. Further, regarding a non-profit entity such as a boys and girls club or a school, the employer did not operate in a market environment and had little or no ability to absorb the cost of such no-fault liability by raising prices to consumers in the usual way to spread the true cost of “doing business (para. 71).

[123] Regarding deterrence, Binnie J. said that there may be “little an employer can do” to deter such conduct in its employees if the possibility of lengthy jail sentences was insufficient (para. 73). Regarding public schools in particular, he pointed out that, although a school board has capacity for loss-spreading and deterrence

management, widespread vicarious liability created a risk of permitting teachers to interact with students only on “the most formal and supervised basis” (paras. 73–77).

[124] When applying this analysis to the facts in *Jacobi*, Binnie J. identified five factors for assessing whether a strong connection existed because an employer had materially enhanced the risk of an employee’s intentional tort (para. 79):

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer’s aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer’s enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee’s power.

[125] As he described it, the key to deciding *Jacobi* was that the Club’s enterprise—offering group recreational activities for children in the presence of volunteers and other members—afforded the employee only a “slight” opportunity to abuse whatever power he may have had. The progression from the Club’s program to the sexual assaults “was a chain with multiple links”, none of which could be characterized as inevitable or natural.

[126] He described the chain this way, much of which in my view is applicable to Mr. Redgate’s tutorials at the School (para. 80):

> (1) The Club provided Griffiths with the opportunity to work with children.
>
> (2) While it was undoubtedly part of Griffiths’ job to develop a positive rapport with the children, the relationship envisaged by the Club had no element of intimacy comparable to the situation in [*Bazley*].
>
> (3) While Griffiths might come into occasional physical contact with children by reason of his job, e.g., steadying a child on a piece of gym equipment, the authorized “touching” had no more to do with parenting, nurture or intimacy than could be said of a normal adult reaching out to steady a child who, e.g., tripped over a carpet.
>
> (4) Griffiths enticed each child to his home to cultivate a one-on-one relationship. The Club activities did not require the Program Director

> to be alone with a child off Club premises and outside Club hours. Such a practice was explicitly prohibited after 1988.
>
> (5) Griffiths established his own bait of home attractions, such as video games, that had nothing to do with Club activities. It was not part of his job to entertain children at home after hours.
>
> (6) Unlike the situation in [*Bazley*], the appellants' mother was a parental authority interposed between the assailant and his victims. She gave permission to the children to go to Griffiths' home. No doubt, knowing of Griffiths' job at the Club, she did not regard him as a stranger or as a threat. Nevertheless, it must have been evident to a reasonably cautious parent that Griffiths' home entertainment was not part of the Club's program.
>
> (7) Once the children were drawn into his home-based activities, Griffiths gradually increased the level of intimacy, initially with Randy and subsequently with Jody, in terms of banter and sexually suggestive talk. This was not only unauthorized, it was antithetical to the moral values promoted by the Club.
>
> (8) Eventually, when Griffiths saw his chance, he committed the assaults.

[127] Justice Binnie held that, where the chain of events included such independent initiatives on the part of the employee for his personal gratification, the ultimate misconduct was "too remote from the employer's enterprise" to justify vicarious liability (para. 81).

[128] On this point, he adopted the following from our Court of Appeal in *Bazley* (30 B.C.L.R. (3d) 1, 1997 CanLII 10834 (C.A.)), which in my view is directly applicable to the facts in our case (para. 83):

> Where, for example, a teacher uses his or her authority to develop a relationship with a pupil in his or her class and then abuses that relationship by approaching the child at a park during the summer holidays, it may be said that by employing the teacher and giving him or her some authority (albeit not parental authority) over the child, the teacher's employer "made the wrong more probable". But it is likely vicarious liability would not be imposed on the employer given the absence of a close connection between the teacher's duties and his or her wrongful acts. To put the matter another way, the fact that the teacher took advantage of his opportunity at the school to develop a relationship with the child is not enough: something more is required — a close connection between the teacher's duties and his or her wrongful acts — to render the school board liable without proof of negligence or other fault on its part.
>
> [Emphasis added in *Jacobi*.]

[129] Finally, for the one act of sexual touching which occurred in the Club's van, Binnie J. found no liability because it was a minor and incidental part of the defendant's sexual predation outside of Club facilities and hours (para. 84).

[130] I turn now to apply the two-part test for vicarious liability established in *Bazley*, with the benefit of the analysis in *Jacobi* of how it applies in circumstances similar to this case.

Was Mr. Redgate's relationship with the School sufficiently close for vicarious liability?

[131] Regarding Mr. Redgate, who was a volunteer rather than an employee, the School District concedes vicarious liability for his conduct during the tutorials at School, but not for his conduct outside of the School. I agree with that analysis.

[132] An organization's responsibility and control over its operations do not diminish when it employs volunteers (*Bazley*, at para. 52). Thus, vicarious liability for a volunteer turns on whether the relationship between the entity and the wrongdoer is sufficiently close to justify the imposition of liability on the entity.

[133] The only relationship the School had with Mr. Redgate was when he tutored H.N. at the School during English class. In this role, he was doing something authorized and controlled by the authorities at the School and for the School's benefit, and therefore could attract vicarious liability to it.

[134] When meeting with H.N. at his own home, however, Mr. Redgate was not doing so for the School in any sense. The School's authorities, i.e., Messrs. Campbell and Haisell, did not authorize, organize, facilitate, control or benefit from these meetings at Mr. Redgate's house. They were tutorials and visits organized by Mr. Redgate, H.N., and his family for their own purposes and without School involvement.

Was Mr. Redgate's abuse sufficiently connected to his role for the School for vicarious liability?

[135] Justice Binnie's majority judgment emphasizes the importance of precision about the characteristics of the particular enterprise at issue, and the associated risks the employer reasonably believed it was introducing into the community. It is these sorts of broad risks it may reasonably have contemplated and for which it may reasonably be held responsible (para. 53).

[136] For the same reasons as in *Jacobi*, there is nothing approaching the "strong connection" that must exist between what the School was asking Mr. Redgate to do (i.e., the risk created by the employer's enterprise) and Mr. Redgate's wrongful acts. In my view, it cannot be said that the School significantly increased the risk of the type of harm that actually occurred (*Jacobi*, at para. 42).

[137] The arrangements for H.N. to visit Mr. Redgate's house for academic and social activities is what gave rise to the serious risks that ultimately materialized. These arrangements were made entirely between Mr. Redgate, H.N., and H.N.'s parents. Representatives of the School played no role in organizing or carrying out that arrangement.

[138] *Jacobi* makes clear that Mr. Redgate's role as tutor at the School having created the opportunity to commit his abuse, or manipulate or cultivate an improper relationship, is not the *strong* connection required for vicarious liability (paras. 45–52, 78).

[139] Following the approach in *Jacobi*, the progression from the School's program to the sexual assaults "was a chain with multiple links", none of which could be characterized as inevitable or natural:

i. As in *Jacobi*, the opportunity for abuse created by the School was "slight".

> The School provided Mr. Redgate with the opportunity to work with H.N. one-on-one in a classroom. The tutorials were during school hours. The school secretary knew where they were. Someone could have come in at any time,

and Mr. Haisell did check in occasionally. There was no evidence of the classroom door being closed.

ii. As in *Jacobi*, an enterprise that seeks to provide a positive role model, mentoring or rapport does not thereby encourage intimacy (para. 82).

While part of Mr. Redgate's role might have been to develop a positive rapport with H.N., the relationship envisaged by the School had no element of intimacy comparable to the situation in *Bazley*.

Mr. Redgate was not placed in a position of trust regarding H.N.'s care, protection, or nurturing, as in a foster or group home or school dormitory situation. The arrangement involved even less intimate contact or closeness than the recreational facilities and outdoor outings of the Boys' and Girls' Club in *Jacobi*.

iii. As in *Jacobi*, whatever power Mr. Redgate used to accomplish his criminal purpose for personal gratification was "neither conferred by the [School] nor was it characteristic of the type of enterprise which the [School] put into the community" (paras. 83–84).

The relationship envisaged by the School contained virtually no element of job-created power, authority, or influence over H.N., and even less so than in *Jacobi*.

In *Jacobi*, Binnie J. found the Club did not confer any meaningful "power" in circumstances where the children were free to walk out of the Club and went home to their parents at night (para. 83). In my view, the same applies here.

Mr. Redgate's role for the School involved no expectation of physical contact or being alone with H.N. outside the School or outside school hours.

Mr. Redgate's role was to help H.N. organize and edit his story. I accept Mr. Haisell's uncontradicted evidence that H.N.'s work on the book was not part of the curriculum or his English grade. The evidence suggested no disciplinary power.

iv. As in *Jacobi*, H.N.'s vulnerability was limited because his parents were interposed between H.N. and Mr. Redgate.

H.N. lived at home with his parents. They were aware of, and involved in, the tutorials at the School. They permitted H.N. to go to Mr. Redgate's home, understanding that these visits involved activities that were not part of what the School had arranged.

v. As in *Jacobi*, Mr. Redgate established his own "bait of home attractions", such as books, movies, and projects that had nothing to do with his role at the School (para. 80).

vi. As in *Jacobi*, once H.N. was drawn into his home-based activities, Mr. Redgate gradually increased the level of intimacy and eventually, when he saw his chance, committed the assaults.

[140] For a similar application of *Jacobi,* see *A.B. v C.D.*, 2011 BCSC 775, where the school district was found not vicariously liable for sexual abuse by a teacher of a high school student at the school. The teacher taught the student in grade 10 and they became close. He did not teach her in grade 11, although they spent time together at school discussing her studies and plans. He taught her again in grade 12 and she spent her spare period in his classroom, where often it was just the two of them. Seven incidents of sexual touching occurred in November–March of her grade 12 year. The all took place at the school.

[141] Relying on *Bazley*, Justice Gray found the school not vicariously liable for the following reasons:

a) While Board EF gave CD opportunity to spend time with AB, this opportunity was modest. The contact arranged by Board EF was for group teaching, with some opportunities for individual work around class hours and during spare periods. This is not a case of overnight visits or a case where there was intimate physical care such as bathing.

b) It would not further the aims of Board EF for CD to touch AB sexually.

c) The relationship between an English teacher and a student is not inherently intimate. The teaching of English can involve discussing issues of sexuality and life, but that does not inherently lead to physical intimacy. Students and teachers can share interests in many subjects, including music, sports, and science. That does not inherently lead to physical intimacy.

d) The power conferred by Board EF on CD was to provide grades, and maintain classroom discipline.

e) AB's vulnerability in the situation was limited, because there were many teachers and administrators available, and AB was under the care of her parents.

[142] H.N. relied on *C.O. v. Williamson*, 2020 ONSC 3874, where a school district was found vicariously liable for abuse by a teacher of a high school student that occurred when driving her home from a band trip and practices, as well as once in his office at school. The decision relies on *Bazley* but does not mention *Jacobi*.

[143] In my view, *C.O.* is distinguishable because the teacher was found to have intimacy and power over the student, conferred by the school board due to the school's approval of: his role as band leader, teacher, mentor, and counsellor; his leading student band trips to New York; his in-office individual testing; and his personal transport of students home from school and school-related activities (paras. 52–61).

[144] Finally, I find that H.N.'s parents did not rely on the School when establishing their own arrangements with Mr. Redgate. D.T.'s evidence was that she never had concerns about the visits to Mr. Redgate's home, as it seemed to be a positive thing for H.N., who seemed happy to go. From her conversations with Mr. Redgate, she found him to be kind, complimentary, and encouraging about H.N. Given he was a retired teacher, it made sense to her that he was interested in helping as that had been his profession. In cross-examination by counsel for the Estate, she agreed with the suggestion that she felt she could trust Mr. Redgate because he was introduced through the School. I give that little weight, however, because it was not something of prominence when she explained the situation in her own words in direct examination.

[145] Regarding the arm-touching and single hug that happened at the School, if those were assaults then, following *Jacobi*, I find the School not vicariously liable because these were certainly "a minor and incidental part" of Mr. Redgate's sexual predation outside of school facilities and hours.

Damages Assessment

Key Findings

[146] For purposes of assessing damages, I make the following findings about what has befallen H.N due to the events in question, based on my acceptance of the evidence of H.N., his family members, and the two experts:

i. H.N. was a happy child. He was an outstanding, enthusiastic student who loved learning and school. He was a particularly proficient reader and writer. What befell him undermined his profound enthusiasm for such things.

ii. The sexual abuse described in paras. 33–46 above spanned approximately six years. It included the psychological manipulations and emotional abuse described therein.

iii. The abuse caused H.N. to suffer from complex, chronic PTSD. It changed the arc of H.N.'s life and left an "indelible mark" (to use Dr. Lu's phrase) on his emotional, psychological, moral, cognitive, and personality development.

iv. Since adolescence, he has struggled with feelings of being lost and unmotivated. Emotionally, at times he has felt depressed, angry, lost, or shut down. Major developments or decisions have led to chaotic emotions, lack of self-confidence, indecisiveness, or avoidance (particularly conflict avoidance). Triggering memories lead to feelings of negativity and loss of self-control. He uses emotional isolation and avoidance to manage the lingering aftermaths of his lengthy abuse.

These self-descriptions in H.N.'s evidence are fully supported in Dr. Lu's report as recognized effects and symptoms of PTSD from childhood sexual abuse.

v. If not for the events in issue, it is very likely H.N. would have obtained an undergraduate university degree and there is a real and substantial possibility that he would have gone on to obtain a post-graduate degree or degrees, such as perhaps a master's or law degree.

I base this on the findings above about his passion for learning and superlative academic performance before the events in question befell him.

In the "About the Author" section of his novel, he wrote that perhaps he wanted to be a lawyer. At trial he said that, at the time, that seemed an interesting idea. Through high school and beyond, he remained interested in being a professional writer but, in retrospect, he feels that path just drifted away from him.

vi. H.N. has demonstrated significant resilience.

At trial, he presented as an intelligent, articulate, stable, and insightful person, who knows he has the love and support of those closest to him. He has the good fortune of a supportive, loving partner, with whom he has a young child, and a close, supportive family. He is committed to continuing with counselling, which has been invaluable to his progress. He has kept himself in good health, including by exercise and reducing his alcohol consumption to the occasional glass of wine.

vii. H.N. has built a business that expresses his creative, artistic side and brings him pride and satisfaction.

viii. In terms of prognosis, I accept Dr. Lu's unchallenged evidence as follows.

> The duration and impact of his symptoms are uncertain.
>
> Childhood abuse can have lasting physical, emotional, and cognitive impacts on the victim. H.N. therefore has long-term indefinite risk that cannot be fully anticipated. Fluctuation in his psychological symptoms and presentations are to be expected, especially as he explores his past.
>
> Over the past two years, H.N. has been through a period of relative stability, but it is too early to know if these improvements are sustainable. His future risk is largely contingent on a successful integration of his past, present, and future perspectives.
>
> What occurred is likely to have some indefinite and unforeseen impacts on his personal and occupational choices. As he explores his past, he is expected to have fluctuating psychological symptoms. He is expected to be overprotective of his children.

Non-Pecuniary and Aggravated Damages

[147] H.N. seeks an award of $550,000, which is approximately $100,000 beyond the upper limit for non-pecuniary damages set by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd.,* [1978] 2 S.C.R. 229, 1978 CanLII 1. The parties agreed that the limit does not apply in cases of sexual assault.

[148] The defendants argue for an award of $100,000–$150,000. They say that, while comparing cases of this sort is a difficult and unpleasant task, the scope and severity of these circumstances fall at the lower end of the awards they rely on which range from $70,000–$400,000 (adjusted for inflation).

[149] Generally speaking, non-pecuniary damages compensate for pain, suffering, disability, and loss of enjoyment of life. Key considerations for assessing compensation include: age, nature of the injury, severity and duration of pain and disability, emotional suffering, and impairment of life, lifestyle, relationships, and physical and mental abilities (*Stapley v. Hejslet*, 2006 BCCA 34, paras. 45–46, leave to appeal ref'd [2006] S.C.C.A. No. 100).

[150] In cases of sexual abuse, additional factors meriting particular consideration are the:

i. circumstances of the victim at the time of the events, including factors such as age and vulnerability;

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

iii. circumstances of the defendant, including age and whether he or she was in a position of trust; and

iv. consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

Anderson v. Molon, 2020 BCSC 1247, para. 213.

[151] The assessment must be fair and reasonable between the parties. It should be measured against awards in comparable cases and appropriate to the seriousness of the injuries in the plaintiff's specific circumstances. Generally, a plaintiff's stoicism should not reduce the award.

[152] Aggravated damages augment non-pecuniary damages when the unlawful acts involved humiliating or undignified circumstances. In *Anderson,* para. 212, Justice Crossin described aggravated damages as follows, quoting from *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282, 1990 CanLII 5402 (C.A.):

> … [T]hey are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant … that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life … It is, of course, not the damages that are aggravated but the injury. …

[153] H.N. relies primarily on the following non-pecuniary damages awards as useful comparables.

[154] In *Anderson*, the plaintiff received $275,000, which included a 10-15% reduction for a prior condition. She was 70 at the time of trial. While in her late 20s, she was employed as an elementary teacher in a Catholic school. She had a sexual relationship for a few months with the assistant pastor, which was found to be degrading, exploitative and an abuse of power. Justice Crossin said the assaults

caused “serious psychological harm” that “had a profound effect upon the plaintiff’s psychological well-being” and caused her “pain, anguish, grief, and humiliation. It deeply affected her self-confidence. She has carried these wounds throughout her life.”

[155] In *MacLeod v. Marshall,* 2019 ONCA 842, a jury awarded the plaintiff $425,000. In high school, she had been abused more than 50 times by a priest. The Court of Appeal decision cited by the plaintiff provides little detail regarding the plaintiff’s circumstances.

[156] In *Waters v. Bains,* 2008 BCSC 823, the plaintiff was awarded $325,000 ($445,000 adjusted for inflation). Aged 50 at trial, from ages eight to 18 she was sexually assaulted by her uncle in horrific and prolonged ways. Justice Morrison described the grievous harm she suffered in this way:

> [92] The plaintiff’s problems are many. First and foremost, she has suffered a loss of innocence and the loss of a normal childhood and adolescence. She suffers from low self-esteem, is unusually tearful and apologetic, suffers serious mood swings, and feelings of anxiety and depression. She has a distrust of people, difficulties with sexual relations, and suffers from flashbacks to the male defendant’s abuse when she has had sexual relations with her husband in the past. She has had problems with her marriage and childrearing, and has suffered the shame and humiliation that victims of sexual abuse are known to suffer. She feels the loss of an extended family. And, as Dr. Brownstein stated, “she lives with a daily level of distress that I would rate as moderate to severe.”

[157] In *S.Y. v. F.G.C*. (1996), 26 B.C.L.R. (3d) 155, 1996 CanLII 6597 (C.A.), at para. 59, the Court of Appeal reduced a jury award from $350,000 down to $250,000 (or $490,000 in current dollars). The plaintiff had been repeatedly sexually, physically, and verbally abused by her stepfather from ages seven to eighteen. She was 36 years old at the time of trial, and the effects on her continued to be devastating and profound.

[158] The Estate referred to a number of older cases, from 1996–2003, ranging from $70,000–$445,000 (in current dollars). All involved terrible violence and a high severity of abuse. See: *S.Y. v. F.G.C*.; *M. (L.N.) v. Green Estate*, [1996] B.C.W.L.D.

462, 1996 CarswellBC 23 (S.C.); *E.P. v. J.E.S*., 2002 BCSC 588; and, *S.A.D. v. E.E.P. Estate*, 2003 BCSC 1535.

[159] The Estate also relied on the more recent cases of *C.M.A. v. Blais*, 2022 BCSC 214 and *C.L.H. v. K.A.G*., 2022 BCSC 994, both of which bear important similarities to this case.

[160] In *C.M.A*., Chief Justice Hinkson awarded the plaintiff $250,000 for sexual assaults that commenced when she was 10 or 11 and continued into her teenage years. The defendant was a close friend of the plaintiff's father, and was 20 years older than her. The assaults involved frequent touching, including massages, kissing, at least one incident of digital penetration, and other invasive sexual conduct. He gave her alcohol, drugs, and money as a form of grooming her to submit to his sexual advances.

[161] Chief Justice Hinkson cited expert evidence about the nature and extent of the plaintiff's injuries from the abuse:

> [58] …
>
> In terms of her PTSD symptoms … she experienced symptoms consistent with a clinical diagnosis of PTSD for a number of years prior to going into residential alcohol treatment in 2019. The PTSD symptoms included: intrusive thoughts of the sexual assault; flashbacks; nightmares; psychological distress and physiological reactivity when triggered by reminders of the sexual assault; chronic use of alcohol to numb negative emotional states and memories related to the sexual assault; behavioral avoidance of older men; strong negative beliefs and mistrust of others; perceiving the world as dangerous; frequent feelings of fear about running into the abuser again; feelings of guilt for not speaking out sooner about the sexual assault; feelings of anger about how the sexual abuse negatively affected her life; hypervigilance to her environment; and difficulty concentrating. [Her] PTSD symptoms were not solely related to the sexual assault when she was 10-years-old, but also related to the years after the assault in which the man who abused her was around her home all the time and she lived in constant fear that he would rape her. It appears that some of [her.] PTSD symptoms (e.g., reexperiencing symptoms) waned for approximately 20 years when she lived in Nanaimo and did not see the man who assaulted her during that time. However, her

> > PTSD symptoms were re-triggered and exacerbated in 2015 when she saw him for the first time in decades.
> >
> > …
> >
> > [She] experienced an onset of depression symptoms in her teenage years, likely secondary to PTSD symptoms associated with the sexual assault, parental neglect and increasing alcohol use. She experienced chronic depression symptoms off and on over the years since she was a teenager and this was documented in clinical records, in addition to her self-report. [Her] Major Depressive Disorder symptoms included depressed mood, reduced interest and participation in almost all of her usual activities, increased appetite and disordered eating, sleep problems, reduced energy and motivation, concentration difficulties, feelings of worthlessness and guilt and suicidal ideation and self-harming behaviors (e.g., cutting).
>
> …
>
> [83] I find that but for the sexual assaults and battery, the plaintiff would not have suffered from PTSD, depression, anxiety, periods of self-mutilation, and feelings of humiliation, embarrassment, lack of self-worth, and low self-esteem to the extent that she did. However, I am not convinced on a balance of probabilities that but for the sexual assaults and battery, the plaintiff would not have struggled with alcohol and substance abuse.

[162] In *C.L.H*., Justice Veenstra awarded $200,000. The assaults occurred when the plaintiff was between six and 12 years old. They were perpetrated by her brother, who was four years older. They involved sexual touching, including digital penetration, the brother masturbating in front of her, and one incident of partial penile penetration. At trial, the plaintiff was in her mid-50s. Due to the abuse, she suffered anxiety, depression, nightmares, flashbacks, and insomnia. In arriving at his award, Justice Veenstra took into account that the perpetrator was a child when he committed the assaults, but held that this did "not justify an award significantly below the range identified in the cases" (para. 345).

[163] Counsel for the School District pointed to *C.O.,* in which the Ontario Superior Court of Justice awarded $300,000 in 2020. At 16, the plaintiff endured around 10 incidents of highly invasive and degrading abuse by her music teacher. She had suicidal ideations, nightmares, flashbacks, began drinking and skipping classes and her grades deteriorated. She soon married a much older man, and the court

accepted the expert evidence that this was “due or at least contributed to” by the impact of the abuse (para. 155). She was physically and mentally abused in that marriage. Aged 54 at trial, she continued to suffer “many significant emotional and psychological problems”, including constant depression, which was sometimes severe and disabling to the point where she could not leave her room “for very extended periods of time”, self-harm, anxiety and low self-esteem (paras. 157, 164).

[164] In final argument, counsel recognized the upward trend in these awards, such that recent decisions may be of more use. In that regard, I note that because of the upward trend in awards for pain and suffering in personal injury cases, the Court of Appeal recently declined to rely on non-pecuniary damages cases decided more than 10 years ago (*Valdez v. Neron*, 2022 BCCA 301, para. 58; *Callow v. Van Hoek-Patterson*, 2023 BCCA 92, paras. 16–18). I therefore do not take into account the older cases which the parties referred to.

[165] In my view, the plaintiff’s cases of *Waters, S.Y.* and *C.O.*, as indicated in the descriptions above, involve more severe consequences that this case in terms of the factors referred to above.

[166] The most comparable cases are the recent decisions of this Court in *Anderson*, *C.M.A.* and *C.L.H.* As I read *C.L.H.*, it bears important similarities to this case in terms of the factors to be considered, though there was some reduction for the perpetrator’s youth at the time of the incidents. In *C.M.A.*, the overall circumstances appear somewhat worse in that the defendant introduced the plaintiff to drugs and alcohol at a young age, and she appears to have suffered from more extensive psychological difficulties as a result of her PTSD than has befallen H.N. in this case, as reflected by her self-harming, suicidal ideations, and fears. In *Anderson,* the consequences for the plaintiff’s life seem more severe and long-lasting, as H.N. certainly appears to be on a better path.

[167] Using these comparable cases as a guide, in my view an award of $225,000 is fair and reasonable compensation for H.N.’s pain and suffering and aggravated damages caused by Mr. Redgate.

Loss of Earning Capacity

Accounting Evidence

[168] Mr. Sergiy Pivnenko was called by H.N. as an expert in labour economics, to provide statistically-based estimates of lifetime earnings for males in British Columbia who attained master's or doctorate university degrees. The data was gathered from Statistics Canada 2016 and 2021 Censuses and the 2011 National Household Survey. His evidence was not challenged by the defendants and I accept it.

[169] His report estimated the income stream associated with obtaining a master's degree in 2013 (after four years of undergraduate and two years of graduate work), or a doctorate degree in 2016 (after four years of undergraduate and five years of graduate work). These dates coincide with H.N. turning 25 and 28. His estimates were adjusted to reflect census values for contingencies such as labour force participation rates, unemployment rates, and part-time work factors. His future value projections are based on the trial date to age 70, but application of the market contingencies reduced the potential period of future labour force involvement to an expected age of retirement at 66 (Pivnenko, page 6). They also included a 10% increase for the estimated average value of employer contributions to non-wage benefits, based on Statistics Canada surveys for British Columbia.

[170] His projections of past earnings in his Table C were:

i. $878,400, past earnings with a master's from January 1, 2013 to trial; and

ii. $670,600, past earnings with a doctorate from January 1, 2016 to trial.

[171] Regarding future losses, Mr. Pivnenko estimated the present value of the future earning streams for males in British Columbia with the benefit of such degrees, and including the same market adjustments as described above for his past loss estimates.

[172] His Table C estimates of future earnings were:

i. $3,261,500, present value of future earnings with a master's from trial to 2058; and

ii. $3,581,600, present value of future earnings with a doctorate from trial to 2058.

Past Loss Assessment

[173] H.N. seeks $150,000 for past loss of earnings capacity. He compares: (a) his actual personal earnings of $589,839 from 2013 to trial, with (b) Mr. Pivnenko's $878,400 estimate for males with a master's degrees for the same time period.

[174] The defendants argue for no award. They submit that, on the evidence, H.N. has earned more to date than the average male with a master's or doctorate degree because he was in the workforce as opposed to pursuing these degrees.

[175] Damages for past loss of earning capacity compensate for the value of the work that H.N. would have performed, from the time of the abuse until trial, but could not because of his injuries from the abuse. H.N. must establish, on a balance of probabilities, a causal connection between his injuries and the loss claimed. Mere speculation is insufficient.

[176] Past events must be proven on a balance of probabilities and, once proven, are treated as certainties. Hypothetical events—such as what would have happened without the impugned conduct—and future events must be proven as real and substantial possibilities, and then damages are assessed based on their relative likelihood (*Hartman v. MMS Homes Ltd*., 2023 BCCA 400, para. 64).

[177] Regarding what H.N. actually earned pre-trial, I start with Mr. Pivnenko's Table A, which shows the total income reported on H.N.'s personal tax returns from 2006 to 2022 was $714,241. As I understood H.N.'s evidence, he also received non-wage benefits from his company from 2016–2022, which Mr. Pivnenko estimated at 10% of earnings. Based on the figures for 2016–2022 on Table A, I estimate this to be worth approximately $37,000. This brings his estimated total earnings for 2006–2022 to $751,241. To bring this up to the trial date of October 2023, I add 75% of his

average annual personal income in Table A for 2020–2022, which is $36,981, for a total of $788,222.

[178] The defendants argue this amount should be augmented by his company's positive retained earnings in some years. However, this is contradicted by Mr. Pivnenko's Table B, which shows a negative overall closing balance for the company from 2017–2021. As Mr. Pivnenko's report says, the company incurred net losses from the 2017/18 to 2019/20 tax years. Given that the evidence did not include the company's financial statements for 2022, I make no adjustment for retained or negative earnings.

[179] In terms of what H.N. would likely have earned without the events in issue, in my view, as explained in the future loss assessment, there are various real and substantial possibilities of roughly equal likelihood, most of which involve six or more years of university.

[180] I therefore find the reasonable comparator is the mid-point between Mr. Pivnenko's estimates in Table C for past earnings from a master's and doctorate, which is $774,500 for 2013 to trial. If H.N. had pursued this route, he would very likely have worked part-time during the seven years in university from 2006–2012, while also incurring the costs of tuition. To account for these considerations, I will increase the $774,500 to $850,000, as the estimated total value of work H.N. would have performed from 2006 until trial without the events in issue.

[181] Based on these estimates and considerations, I therefore award H.N. $62,000 as a fair and reasonable estimate of past loss of earning capacity, based on $850,000 of estimated "without-events" income and $788,222 estimated "with-events" income.

Future Loss Assessment

[182] H.N. seeks damages for future loss of earning capacity of $3.5 million. The defendants argue for a nominal award. They say it is entirely speculative whether

the events in question caused H.N. to make a different career choice than he might have otherwise.

[183] Future loss compares the claimant's likely future working life with and without the incident. If a claimant establishes a real and substantial possibility of a future income loss, then the court must measure damages by assessing the likelihood of the event (*Rab v. Prescott*, 2021 BCCA 345, para. 28).

[184] In *Rab,* this was explained as a three-step process (para. 47):

a) Does the evidence disclose a potential future event that could give rise to a loss of capacity;

b) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss to the plaintiff; and

c) What is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[185] I agree with H.N. that, based on the evidence from him, his family members, and Dr. Lu, the events in issue disclose a real and substantial risk of future financial loss. In my view, what occurred very likely kept him from pursuing a university education, including the real and substantial possibility of a master's or professional post-graduate degree. I base this on the findings above about his passion for learning and superlative academic performance before the events in question befell him. Not having earned these degrees creates a real and substantial possibility of future financial loss.

[186] Regarding the estimate of H.N.'s "with-events" future earnings, in final argument both sides used projected estimates of approximately $90,000 annually, based in part on H.N.'s evidence that he believes $100,000 is achievable from his business with some organizational changes.

[187] I accept $90,000 as a reasonable estimate of H.N.'s annual future earnings. I base this, firstly, on H.N.'s evidence about his own expectations. Based on Mr. Pivnenko's Tables A and B, his total personal income, combined with the closing balance net losses in the company, averaged well below $90,000. However, the

evidence provided reason to expect that amount to climb. H.N.'s evidence indicated he learned some hard but valuable business lessons in the past few years, which caused the company's income to drop significantly in 2018 and 2020. Improvement is seen in 2021 which was by far the business's best financial year. Also, the company has paid $90,000 annually for a business manager to perform roles that H.N. has found difficult, which may be an example of potential organizational changes that could reduce expenses in the future.

[188] The parties disagree about contingencies applicable to this $90,000 estimate. H.N. argues for a 20% negative contingency based on Dr. Lu's prognosis and the volatility of the business. The defendants argue for a 20% positive contingency to reflect H.N.'s energy and talents.

[189] In my view, the $90,000 figure already reflects appropriate positive contingencies for H.N.'s energy and talents, given that it is a higher figure than the business has historically achieved.

[190] I agree with a 20% negative contingency for: (a) the volatility of the business (which is evident in its financial results and commented on by Mr. Pivnenko) and the financial vulnerability this creates; and (b) the risks described by Dr. Lu of fluctuation in symptoms and uncertainty in sustainable stability.

[191] Applying a 20% discount to $90,000 results in $72,000. To calculate the present value of those future earnings, I will use the cumulative values from Mr. Pivnenko's Table 3, to age 66, which is a present value multiplier of $23,928. I select 66 years of age because this corresponds with the effective age of retirement in Mr. Pivnenko's future income projections. This provides an estimated present value of "with-events" future income of $1,722,816.

[192] Turning to what might have been H.N.'s "without-events" future income, this is obviously difficult to conceive because the events in issue knocked him off course so significantly and so young.

[193] To repeat Mr. Pivnenko's Table C calculations of the present value of future earnings to an expected age of retirement of 70 (with statistically average discounts for negative contingencies reducing this to the equivalent of retiring at 66):

i. $3,261,500, for a master's degree; and

ii. $3,581,600, for a doctorate degree.

[194] Additional present value figures provided in the evidence were:

iii. $1.69 million for a professional writer;

iv. $8.00 million for a lawyer (3rd quartile);

v. $2.07 million for the current business; and

vi. $6.10 million for S.N. as an economics professor.

[195] H.N. supports an award of $3.5 million by pointing to the $6.1 million present value of his brother's estimated future income to age 70, as a professor in a leading Canadian university's economics department. When added to H.N.'s projected future "with-events" earnings of $1,722,816, this would bring him to around 86% of the $6.1 million figure.

[196] I do not accept S.N.'s career path as a helpful comparable. There was nothing in the evidence to suggest that H.N. might have pursued a career as an academic in economics. The evidence was that, from a young age, H.N. was inclined to reading and writing and S.N. to math and science.

[197] H.N. also argues for $3.5 million based on that placing him roughly with the lawyer in the third-quartile of earnings, but discounted by 25% for the possibility that he would have chosen a less remunerative path. H.N.'s counsel argued that his abilities and character call for such an approach. I do not think the evidence supports such a high likelihood that H.N. would have pursued a legal career.

[198] Doing the best one can with the evidence about H.N.'s personality and talents, both before and after these events, in my view there is a real and substantial

possibility, and roughly an equal likelihood, that H.N.'s "without-events" path might have been any one of (i)–(v) above.

[199] His academic strength, penchant for education, and writing abilities made each of (i)–(iv) real and substantial possibilities. Pursuing a master's or doctorate degree were real and substantial possibilities because of his passion and skill for academics. Regarding being a professional writer, which is an outlier on the low earnings side, this was a real and substantial possibility based on his having written a book at such a young age, and his evidence that he remained interested in that path at the end of high school, but drifted away from it. Regarding being a lawyer, which is an outlier on the high earnings side, this was a real and substantial possibility because he expressed an interest in it from a young age, and it suited his academic strength and talents for reading, and writing. Given his strengths, the third quartile of earners is a good comparable and also appropriately adjusts the overall outcome upwards somewhat to reflect the financial potential of his intellectual and academic strengths and passion.

[200] Regarding (v), in my view there is also a real and substantial possibility that, even if his love of education had not been undermined by these events, he might still have found a career similar to the one he has chosen which suits his creative side.

[201] Assuming an equal likelihood of all five career paths, this results in an average present value of approximately $3.72 million of "without-events" future earnings. This is $1,997,184 more that the present value of his estimated "with-events" future earnings of $1,722,816.

[202] In my view, $1.997 million represents a fair and reasonable award for H.N.'s future loss of earning capacity.

Cost of Future Care

[203] H.N. seeks $95,000 for future care, being the present value of 15 counselling sessions/year over 50 years. The defendants argue for $47,500.

[204] H.N. is currently meeting with a counsellor monthly. I accept his evidence that psychological therapy has been “invaluable” to his improvement and stability, and Dr. Lu’s recommendations that he should continue with counselling indefinitely to minimize the risk of a deterioration of his psychological symptoms and seek more frequent treatment during times of increased symptoms, stress, or demands. I also accept that $200 per session is a reasonable estimate given the evidence of current session costs of $165.00 plus GST.

[205] In my view, however, it is too speculative to expect H.N. will need, or use,15 annual sessions for 50 years. In my view, half of that amount is more realistic and so he is awarded $47,500.

[206] I note here that the Estate argued that H.N. failed to reasonably mitigate his damages by not continuing counselling from 2015–2021. I do not accept that argument based on the law set out in *Chiu v. Chiu*, 2002 BCCA 618, at para. 57.

[207] The Estate did not establish that H.N. acted unreasonably in eschewing counselling in those years. H.N.’s evidence that his subsidized counselling sessions were used up and he faced financial constraints was not challenged. Further, on the evidence, facing up to, and coming to terms with, what occurred was obviously a difficult process and the evidence does not provide a basis to find that H.N. was unreasonable for stepping away from counselling at that time. Finally, and most importantly, the Estate provided no evidence of the extent, if any, to which his damages would have been reduced by such counselling.

Punitive Damages

[208] Punitive damages are an exceptional remedy. The purpose of punitive damages is to punish and deter a defendant for misconduct that is malicious, oppressive, or high-handed.

[209] The key principles were summarized by Justice Watchuk in *West Bros. Frame & Chair Ltd. v. Yazbek*, 2019 BCSC 1844 at paras. 223–224:

> [223] Punitive damages are unlike any other form of damages. Their purpose is not to compensate, but to punish. Similar to a criminal penalty, punitive damages are driven by a logic of retribution, denunciation and deterrence.
>
> [224] …Punitive damages should be awarded to deter conduct only if compensatory damages are insufficient to do so.
>
> [Citations omitted.]

[210] H.N. seeks punitive damages against the Estate of $500,000. He does not seek such damages against the other defendants because there is no evidence of them displaying any reprehensible conduct deserving of such damages (*Blackwater v. Plint*, 2001 BCSC 997, rev'd on other grounds 2005 SCC 58).

[211] The Estate resists punitive damages. It says that, Mr. Redgate having died, no punishment or specific deterrence can be achieved, and general deterrence is not served in circumstances of sexual abuse which is already a serious crime.

[212] H.N. does not contest the absence of punishment or specific deterrence as achievable, given Mr. Redgate's death (*K.I.M. v. Perri Estate*, [2001] O.J. No. 1691, 2001 CarswellOnt 1618, at para. 103). He argues however for punitive damages for purposes of general deterrence.

[213] H.N. provided no cases awarding punitive damages against an estate in these circumstances. He relied primarily on *Anderson*, where $250,000 was awarded against the perpetrator, and *MacLeod* where the jury awarded $500,000 against Basilian Church (in circumstances of an official cover-up of the abuse).

[214] The Estate argues that all the general deterrence one might hope for already exists in the criminal law and social stigma for these crimes. That same point was made in *Jacobi*, where Binnie J. said:

> 73 As to the nature of the conduct, an employee who commits a sexual assault is committing a crime. Society has already placed a high deterrence factor on such conduct: the tortfeasor can face up to ten years in jail for sexual assaults (*Criminal Code*, R.S.C., 1985, c. C-46, s. 271). There may be little an employer can do in reality to deter such conduct in its employees if the possibility of ten years in jail is not sufficient.

[215] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the Supreme Court of Canada's leading case on punitive damages, Binnie J. said for the majority:

> 94 … Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. …

[216] That courts must ensure their sentencing for the crime of sexual abuse of a child clearly communicates the high priorities of denunciation and deterrence was a key message in the Supreme Court of Canada's decision in *Friesen,* where the Court said:

> [105] Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (*M. (C.A.)*, at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)*, at p. 250; *Rayo*, at para. 104). As L'Heureux-Dubé J. reasoned in *L.F.W.*, "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting *L.F.W. (C.A.)*, at para. 117, per Cameron J.A.).

[217] In my view, this is not an appropriate situation for punitive damages. Punishment and specific deterrence cannot be achieved because Mr. Redgate is dead. As for general deterrence, our society already imposes an extremely high level of general deterrence against this terrible type of crime, both in terms of the criminal law and civil damages. It therefore seems unrealistic to expect that an award of punitive damages in this case would serve general deterrence.

Conclusion

[218] H.N. is awarded the following against Mr. Redgate's Estate:

Damages	Amount
Pain and Suffering and Aggravated	$225,000
Past Earning Capacity	$62,000 (plus pre-judgment interest)
Future Earning Capacity	$1,997,000
Future Care	$47,500
Special Damages (by consent)	$6,741
Total:	**$2,338,241**

[219] H.N.'s claim for punitive damages against the Estate is dismissed, as are his claims against the School District. As mentioned, his claims against Mr. Haisell personally were withdrawn during trial.

[220] The parties requested the opportunity to address costs after receiving this decision. If costs cannot be resolved by agreement, a brief case management conference should be scheduled to discuss the process for their determination.

"Coval J."