SUPREME COURT OF NOVA SCOTIA
Citation: *A.M.S. v Wootton*, 2016 NSSC 351

Date: 2016-12-31
Docket: Ken No. 355330
Registry: Kentville

Between:

AMS

Plaintiff

v.

James Wootton and **Boulderwood Stables, a body corporate**

Defendants

Decision

Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 23 to 26, 2015 at Kentville, Nova Scotia
Counsel:	**Alison A. S. Morgan and Jeremy P. Smith**, for the plaintiff **J. Brian Church Q.C.**, for the defendants

By the Court:

Introduction

[1] On the morning of September 14, 2010, the plaintiff ("AMS"), then age 23 and in an emotionally unsettled state, attended the riding stables at Ardoise, Nova Scotia for a trail ride with the defendant ("JW"), then age 54, the owner of the riding stables (the defendant company).

[2] AMS and JW were alone at the ranch. She says that at the end of their ride, he led her into his home with his arm around her neck where he put his hand down her pants and digitally entered her vagina. She ran into a nearby bathroom, contacted her boyfriend at work and, when JW responded to the noises coming from the bathroom and opened the door, escaped and left the stables.

[3] The plaintiff, her parents, her then-boyfriend and an RCMP officer testified, with a psychologist giving factual and opinion evidence.

[4] The plaintiff says she was a victim of prior sexual assaults but had recovered. She says that since this assault she has been unable to obtain gainful employment, is afraid to be in public, or around men, and is unable to form relationships. A psychologist opined that she suffers from PTSD.

[5] JW testified and told a very different story. He denies an assault and says that their sexual contact was consensual. He challenges that anything he did caused the injury, loss or damage claimed by the plaintiff.

[6] The law relating to the tort of battery by reason of sexual assault is not in issue. Contested are the particulars of the touching between AMS and JW, which turn largely on credibility and reliability. If a sexual assault occurred, the extent of injury, the causation of injury, and quantum of the injury and damages are contested.

Part 1: Liability

The law of sexual assault

[7] The plaintiff writes in her pretrial brief, and the defendant does not take issue with, this statement of the law:

> Sexual assault is a form of battery: the intentional infliction of unlawful force on another. Although sexual assault is a codified criminal offence, when tried in civil court, the standard of proof for sexual assault in a civil context remains proof on a balance of probabilities. The role of the trial judge is to "scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred". (*FH v McDougall*, 2008 SCC 53 ("*FH & McDougall*")).

[8] In anticipation that the defendants would acknowledge some sexual touching but claim it was consensual and therefore not battery, the plaintiff further writes:

> Consent, whether express or implied, is a defence to battery including in sexual assault cases (*Norberg v Wynrib*, [1992] 2 SCR 226 ("*Norberg*"), at para. 26). In that case, Justice La Forest affirmed that consent must be genuine. It must not be obtained by force or threat, or given under the influence of drugs; furthermore, in a situation where one party has a feeling of constraint which interferes with their free will, there can be no genuine consent (paras. 26 to 27).

Analysis of law

[9] The Supreme Court of Canada has written two important decisions relevant to sexual assault.

[10] The majority decision in *Non-Marine Underwriters, Lloyd's London v Scalera*, 2000 SCC 24 (*"Scalera"*), is summarized succinctly by Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law, 10th Edition*, [Toronto: LexisNexis, 2014], beginning at para 2.32:

> A person who proves that the defendant made direct physical contact with her person makes her case for battery. The onus then shifts to the defendant to establish that the contact was neither intentional nor negligent; or that the plaintiff consented to the contact or that a reasonable person would think she had consented. This nominate tort protects the interest in bodily security from interference by others. It is sometimes said that the contact must be harmful or offensive, but this is misleading. By definition, any contact beyond the trivial contact that is expected in the course of ordinary life is *prima facie* offensive if it is non-consensual. Every person 'A body is inviolate. The tort protects the integrity of one 'A person and does not require proof of further injury.

[11] Consent is an issue in this action. The nature of consent was extensively explained and expanded upon by the Supreme Court of Canada in *Norberg* at paras. 26 to 41.

[12] The pre-*Norberg* approach to consent required that consent be genuine, that consent may be indicated by a failure to resist or protest, and that it must not be obtained by deceit, threats or the influence of drugs. In *Norberg*, the Supreme Court stated that this approach to consent is too limited. Consent is based on the concept that a person is presumed to have autonomy and a free will, but, in some circumstances, that autonomy and free will is compromised. A consenter's "position of relative weakness" can interfere with their free will; therefore, "our notion of consent must . . . be modified to appreciate the power relationships between parties" (para 27).

[13] Just as the doctrines of duress, undue influence and unconscionability protect the vulnerable in the contract and unjust enrichment matrices, our understanding of genuine consent in the tort, including the sexual assault, context recognizes the effect of an imbalance in the power relationship between parties on the issue of voluntariness – a necessary component of "genuine consent" (paras. 28 to 30). A fiduciary relationship is not a necessary ingredient for finding inequality in the power relationship (para 32). While the weaker party may retain the power to consent, the law provides relief based on social policy (para 34). The Supreme Court

writes that this inequality may arise in many ways, including where a person is "intellectually weaker by reason of a disease of the mind, economically weaker or simply situationally weaker because of temporary circumstances" (para. 33).

[14] The analysis of when the free will to consent is compromised by an overwhelming power imbalance is a circumstance that must be examined in detail on the facts of each relationship. It is contextual.

[15] Lynn M. Kirwin, *Canadian Civil Remedies for Torts in Novel Situations and Special Circumstances*, [Toronto: Carswell, 2012], beginning at p. 441, quotes from *Scalera* and *Norberg* for the proposition that the plaintiff in a sexual battery action makes her case by simply tendering evidence of physical contact of a sexual nature. It is actionable without proof of damage.

Burden of proof and consent

[16] Two very significant evidentiary rules differentiate the determination of sexual assault in the criminal versus the civil context.

[17] First, in a civil action, the claimant does not have to raise the issue of consent, disprove consent, or prove that there was no reasonable belief in consent (a concept not relevant to a civil claim). The evidentiary burden is to adduce evidence of consent; the legal burden to prove consent, on a balance of probabilities, lies with the defendant.

[18] The second difference arises from the Supreme Court of Canada decision in *FH v. McDougall*. There is only one civil standard of proof and that is proof on a balance of probabilities (even though the judge should be mindful of inherent probabilities or the seriousness of the allegations and consequences). In a civil action, the claimant need only prove the intentional application of force of a sexual nature to the one civil standard; that is, that it is more likely than not that intentional application of force of a sexual nature occurred. The claim is proven if the evidence is sufficiently clear, convincing and cogent to satisfy the balance of probability test.

[19] These two rules are in sharp contrast to sexual assault in the criminal context where the evidentiary legal burden and standard of proof as to the intentional application of force of a sexual nature, and as to whether the claimant consented to that force, or whether the defendant knew or ought to have known that the claimant did not consent, remain throughout on the Crown and where the standard of proof is proof beyond a reasonable doubt, as described in *R v Lifchus* [1997], 3 SCR 320 ("*Lifchus*").

Credibility and reliability

[20] To assist in the assessment of reliability and credibility of evidence, courts have approved several tools.

[21] For reliability, courts look at: (a) the accuracy and completeness of observations; (b) the circumstances of observations; (c) memory; and (d) the presence of collaborative or supporting evidence.

[22] As O'Halloran J. A. wrote in *Faryna v Chorny*, 1951 CarswellBC 133 (BCCA), ("*Faryna*") at paras. 9, 10 and 11:

> … Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, [relate to reliability.] … a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. … The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case …

[23] For credibility, courts look at: (a) honesty, (b) whether a witness has an interest in the matter or a motive to give certain evidence, (c) the consistency or inconsistency over time amongst a witness' different iterations of the facts, (d) internal inconsistencies in a witness' evidence, (e) consistency or inconsistency with other evidence, (f) demeanor, but considered with caution, and (g) the inherent reasonableness of the evidence, that is, whether it makes common sense.

[24] O'Halloran wrote in *Faryna*:

> If a trial judge's finding of credibility is to depend solely on which person he thinks he made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box … The real test of truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[25] It is not required that a trier of fact believe or disbelieve a witness' evidence in its entirety. On the contrary, a trier may believe none, part or all of a witness' evidence and attach different weight to different parts of it.

The evidence relating to liability

The plaintiff's mother

[26] AMS's mother testified. She worked outside the home. At about 9:30 a.m. on September 14, 2010, she received a telephone call from AMS that she was going for a ride at Boulderwood. At 12:20 noon she received a call from AMS' boyfriend asking where AMS was. He had received a text from her that she needed help. She called AMS on her cell phone, and AMS reported that she was sexually assaulted by JW, who inserted two fingers in her vagina. At about 1:00 p.m., she was able to leave her work, went directly to AMS' apartment, arriving at about 1:20. Sometime after 2:00 p.m., AMS arrived at her apartment, started crying uncontrollably, curled up in a fetal position and did not want anyone to touch her.

[27] AMS' father, who was also present at AMS' apartment, called 911. AMS told her story to the police. The police wanted AMS to attend at a detachment to give a video statement, but she did not want to leave her apartment. Apparently JW was charged criminally but in the winter, AMS' mother witnessed an interview between AMS, the police and the Crown, during which it was decided that because of AMS' mental state, they would not proceed with a criminal charge.

[28] AMS lived in her own apartment for about 1½ years. She moved in with her boyfriend for a short time, about July 1, 2011.

[29] While AMS had issues with depression before September 14, 2010, she had lots of friends, enjoyed riding, crafts and other activities. After September 14, 2010, she became very depressed and her social life dried up.

[30] Defence counsel did not cross-examine AMS' mother on issues related to liability. She was extensively cross-examined respecting her evidence relevant to damages.

The Plaintiff

[31] AMS testified. She was 23 in September 2010. She had completed Grade 12. She was working as interior designer until July 2010, when she lost her job due to depression and absenteeism.

[32] She is an advanced horseback rider. She had worked at another riding stable. When she felt bad, horseback riding made her feel comfortable. She and her sister had gone riding at Boulderwood since they were young children. She trusted JW and had a good relationship with him.

[33] She identified, and confirmed as true, a statement she had given to Constable Sutherland on September 16, 2010. It was a prior consistent statement. The statement was not admitted for the proof of its contents.

[34] AMS recalled calling JW the day before September 14th to arrange a ride. He offered her the option to ride with others at 1 p.m. Because she wanted to run the horse, she declined and JW booked her for an 11:00 a.m. ride.

[35] Because it was September, she dressed warmly: jeans over leggings, long johns, two sweaters and a helmet. She arrived early, parked in the lot to the right of the stables. She said she had difficulty remembering much of what happened after that. She saw no other cars in the parking lot. She went to the stables. Only she and JW were present.

[36] As was her practice, she (and JW) took their horses out of the stall, saddled them and got them ready to ride. She was not sure how long it took to get ready because she had not been riding for a while. They talked about her depression. She had been to her doctor the day before. JW asked if she was thirsty and went into the house to get her a bottle of Gatorade. She drank some of it. She noticed JW adjusting his pants, at his crouch, at lot. They left on the trail ride.

[37] As they rode, JW was talking and asking her questions. She could not hear all that he said because he was in front and the horses were running, but his comments included comments about her boyfriend and whether he could find her G-spot. When given an opportunity to refresh her memory from her statement to the police, she said that JW said that he was going to find her G-spot, and for her to think of it as a medical procedure, not a sexual thing. To her, this appeared as something that was not right. The ride went on for about an hour. At a certain point, they headed back to the farm.

[38] As soon as they crossed the highway, JW proceeded to tell her what he was going to do with her. He was going to find her G-spot. She started to cry and again she said her recollection was not clear. She was not sure if she put her horse in the stall as she was in a rush to leave. She remembers that she got her car keys from the tack room and headed for her car. She said that JW was with her the whole time and would not let her into her car to get her wallet to pay him. She grabbed her cell phone and he grabbed her out of the car and forcibly walked her into his house and locked the door.

[39] AMS said she was 5'2" tall and weighed 90 pounds; JW was much bigger. She was terrified. She thought he was going to kill her and chop her up 'like the pig farmer in Alberta' [sic]. He was breathing in her ear and smelling her hair with his left arm around her neck. With his other arm and hand, he started undoing her belt and went down her pants. He kept saying it was a medical procedure; she kept screaming "no". He inserted two fingers inside her vagina. She froze.

[40] When he removed his hand from inside her, she ran from the foyer to the bathroom. She turned on the taps so JW would not hear her contact her boyfriend for help. She tried to use the bathroom because she needed to. When she pulled down her underwear, she saw blood on her underwear and she thought she started to scream.

[41] She was referred to photographs of the words she texted to her boyfriend at the time but did not recall them.

[42] She said JW started banging on the bathroom door, telling her not to call the cops and asking who she was calling. He entered the bathroom. She did not know how. She thought she was cornered without an exit. She went through his legs, got her boots, ran out of the house to her car and drove down the driveway, where she "broke down", pulled over and called her boyfriend. He told her he was on his way and to meet him at the Irving Station near the Mount Uniacke exit. They met at the Irving and she gave him the gist of what happened. He told her to go back to her apartment and he left for Boulderwood. She called her mother, then drove to her apartment where her parents were waiting.

[43] AMS did not want her parents to come near her and she "crashed". She thought that she gave a recorded statement to Constable Sutherland the next day. (In fact, it was September 16th). Her direct evidence relevant to damages is reviewed later.

[44] AMS was cross-examined. She was asked what lead her to go to Boulderwood. She said she felt sad and depressed but riding made her happy. She was asked whether she was living with

her boyfriend ESJ at the time, she said she had only been dating him for six to eight months. They did not live together in his apartment until the next summer.

[45] She acknowledged that she had been fighting with him that day "like other couples", but in her opinion they were fine.

[46] She was shown an office record of her then family doctor (Dr. Graham). She did not recall attending at an appointment with Dr. Graham on September 14th, but acknowledged his notes that she was depressed, had suicidal thoughts, and was taking marihuana prescribed by Dr. Graham for her depression. She stated that she called JW the day before to arrange for a ride and had a long conversation about her depression.

[47] She arrived at the riding stables at around 10:45 a.m. She was wearing a sweatshirt, two shirts, leggings under jeans, and riding boots that had zippers, which were easily taken off and put on. She had chosen to go to Boulderwood to ride, rather than another riding stables because she did not get along, personality wise, with the owner of the other stables. Beside that, she trusted JW. He was a family friend and was nice to her and her family. She had never been in JW's house before. She recalled stating at her discovery and in a statement to police that JW said he knew about her situation and was going to help her, but had no recall on the stand about the content of the conversation.

[48] When she arrived at the riding stables, JW came out of his house. The first thing she saw was his dog. She went to the barn and got the horses ready. JW asked her if she was thirsty. She said no, but he went to the house and got orange Gatorade anyway, which he told her to drink.

[49] When asked about her evidence in direct that she saw blood on her underwear when she was on the toilet, she said there was no blood on her panties when she went to the riding stables. She had not had a period for years and had never bled from riding a horse or from any of the medication she was taking. Her only explanation as to how the blood that she saw in the bathroom got on her underwear was what JW did to her.

[50] When reminded of her discovery evidence, she recalled that JW was asking about her and her boyfriend ESJ. She only heard bits and pieces of it, as JW was riding ahead of her. She recalled JW talking to her about her G-spot. It was the first time he came across as creepy. She recalled that, on the way back to the barn, he talked about finding her G-spot and to think of it as a medical procedure. She acknowledged that she had not said in her discovery evidence that he told her on the trail ride what she was going to do to her.

[51] She was shown part of her boyfriend's statement to the police, in which he suggested that she had told him that she had agreed to stay for a second trail ride, entered the house voluntarily when he invited her to get something to eat, and he had grabbed her once she entered the house. She said that some of what ESJ said was a little off. She testified that she did not remember being happy to go on a second ride and did not willingly walk to his house. While she did not recall all the places where JW spoke about the G-spot, he did speak about it on the trail ride and she was sure he said it in the house.

[52] She disagreed with what was represented by counsel to be JW's evidence: that he had taken the time to tack the horses after they returned from the ride and she could have left. She said when she went to her car, he was immediately there - right behind her the whole time. She denied that he told her that travel writers were coming for a ride at 1:00 p.m. She did not recall him asking her in for a bite, but acknowledged that he asked if she wanted a chocolate bar. She denied the suggestion that JW walked her to the house without force or without his arm around her, or that she consented to him finding her G-spot.

[53] He would not let her get in her car. When they arrived at the house, he pushed her in from behind, locked the door, had her with his left hand and pulled down her pants with his right hand, while she said: no, no, no.

[54] She acknowledged that, in her discovery in 2013, she had said nothing about her fears that he would kill her and cut her up. She did not because it was only a thought in her head.

[55] She denied that JW showed her where the bathroom was. She did not recognize photos shown to her as representing the bathroom and ways to access it.

[56] When shown the photos of texts between her and her boyfriend, she acknowledged having texted him but she did not recall the contents, nor if she called or texted him from the bathroom.

[57] When she was in the bathroom, JW was outside telling her he hoped she was not calling the cops; that she was making him anxious. She did not know how he got in, but he opened the door. She knelt down and got out between his legs. She grabbed her boots, ran out of the house and walked fast to her car. He did not chase her out of the house, but said: "Please come back. Don't call the police. Please don't do this to me."

[58] When counsel again suggested that she consented to JW touching her, and he touched her on the outside of her pants, she replied that she made it clear for him not to touch her, and added: "Why would a 25-year-old want a 55-year-old to go down her pants?" When counsel suggested that it might have been exciting, her demeanor was visceral, and her verbal reply was that counsel's statement was disgusting.

[59] She was not familiar with a letter from Dr. Borst (her psychiatrist at that time) to Lloyd Tancock, Crown Counsel responsible for the criminal case against JW, in Tab 9 in the Joint Exhibit Book, which Book was entered by agreement for the truth of its contents, that Mr. Church suggested was the reason for the Crown dropping the criminal charge against JW. She thought it was her experiences, including her attempt to commit suicide by overdose on September 18, 2010.

[60] She was questioned as to why the record of her comments to the nurse wherein she reported that she had been sexually assaulted three days earlier included the words: 'no penetration'. She replied that she meant that JW's penis did not penetrate her, not that his two fingers did not penetrate her vagina.

The plaintiff's former boyfriend

[61] ESJ was AMS' boyfriend. Initially he was not certain when he met her, but eventually agreed that it was in or about May 2010. ESJ is now an independent vehicle sales person.

[62] About May 2010, he met AMS and they became romantically involved after two dates. They were not living together on September 14, 2010. After September 2010, they lived together for not more than 12 to 13 months before breaking up. At the time of his evidence, he had no relationship with AMS. He was subpoenaed to testify.

[63] ESJ described AMS, before September 14, 2010, as independent, outgoing, "really happy", "someone I wanted to be with at the time, a very good person in general". He said he and AMS had an amazing relationship for the four or five months before September 14, 2010.

[64] On September 14, 2010, he went to work in Dartmouth at 10:00 a.m. Shortly after noon, he received two texts from AMS. In the first, she asked for help; in the second, she asked for help and said she had been raped. He identified photographs taken at the police station on September 14th of text messages as some of the texts on his phone between him and AMS. He noted that the texts between 12:21 noon and 12:53 noon were missing.

[65] Shortly after the first text, he spoke on the phone with AMS. While on the phone with her, he heard, on her end of the call, banging on the door and someone saying in an angry voice: "Don't call the cops" and heard her tell him that he touched her. He said the call abruptly ended when he heard a crashing sound, as if the door was being forced open. He assumed JW had broken into the bathroom. He told his boss what happened and immediately left work to rescue his girlfriend.

[66] In his statement to the police given on September 14, which statement was admitted for the truth of its contents by agreement between the parties, he said that he called AMS' mother to find out where she was and then drove very quickly towards Boulderwood. On his way, by text from her, he learned that AMS had gotten away. She was waiting for him at the Irving Station at Mount Uniacke. He tried to comfort her for a few minutes. Believing that her father was on the way to get her, he got back into his car and drove to Boulderwood to 'cause JW harm'.

[67] When he arrived at the riding stables, he knocked on the front door of the house and got no answer. He searched the grounds and buildings, called for JW, but got no answer. No one appeared to be around. He saw a phone number on a sign on the property. He called the number, pretending to be a customer. JW told him that he was in Windsor getting feed, was on his way back and would be back in about a half hour.

[68] ESJ waited 20 or 30 minutes. JW did not arrive. A man and a woman arrived for a booked trail ride. While they were there, he called again, advising JW that his other customers were there. JW advised that he was on the way and would not be much longer. ESJ then got into an 'unpleasant' exchange with the customers and they left.

[69] After waiting for about an hour (as he recalled), ESJ again called JW. He asked where he was. By this point ESJ states that he spoke to JW in an unpleasant tone. JW replied that he was in the woods. ESJ asked why he was in the woods and was it normal for him to miss a scheduled appointment. JW replied that he was shooting insulin "just cause". In ESJ's witness statement he said that he asked JW what he was fearing for his life and JW told him that he had a lot of incidents. ESJ asked what he meant by incidents and if he wanted to lose all his property over this incident, and JW replied that "he might". ESJ says he asked whether it was enough to kill him and JW said maybe; to which ESJ replied "I hope so". JW then hung up on ESJ.

[70] ESJ called other times and JW did not answer. His last call from JW, was a repeat of the earlier call. JW would not tell him where he was in the woods. He believes he asked whether JW was prepared to lose everything, and told him he hoped he would end up in jail, to which JW replied: "I might".

[71] ESJ waited at the farm for what he believed was three or four hours.

[72] AMS' father had called the police earlier in the afternoon to report the incident. The police called ESJ while he was at Boulderwood and shortly after that, the police arrived at the stables. They told ESJ to leave and he went to the Windsor detachment with the RCMP, where they took a 'witness statement' from him.

[73] Tab 12 in the Joint Exhibit Book contains the officer's typed record of ESJ's statement. During this time, the police also took photographs of some of the texts on ESJ's phone. These are included in the Joint Exhibit Book at Tab 16.

[74] The officer's notes of ESJ's statement are a more detailed, but generally consistent, description of the events described by ESJ in oral testimony at trial. Generally, if admitted, prior consistent statements are only used to bolster a witness's credibility (Alan Bryant, Sidney Lederman and Michelle Fuerst, *The Law of Evidence in Canada*, 3d Ed. (Markham: LexisNexis, 2009) c. 7; however, as noted previously, these parties agreed in writing that "the documents contained in the Joint Exhibit Book are entered and may be considered by the court for the truth of their contents . . . [subject to] arguments regarding accuracy and weight."

[75] Tab 12 of the Joint Exhibit Book provides precise details of the time and length of the cellphone and text communications testified to by ESJ at trial. The court found ESJ's evidence credibility and straight forward, separate and apart from consideration of Tab 12, which exhibit does gives details that ESJ could not remember five years later.

[76] ESJ then described the significant changes in AMS' behaviour and mental health after September 14, 2010. She lived with him in his apartment for a while after September 14, 2010, but in the end, he could not handle her issues. He saw no end to her issues and "had to move on for his own benefit".

[77] ESJ was cross-examined. He acknowledged living with AMS at some point after September 2010 for at most 12 to 13 months. He acknowledged that he had kept in touch with her at times since they broke up in either 2011 or 2012.

[78] ESJ acknowledged that he did not call the police at first, because AMS' father had and because he wanted to cause harm to JW before the police were involved. He acknowledged that the police called him at the riding stables before he went to the police station and made his statement. He repeated that he arrived at the riding stables shortly after 1:00 p.m. He repeated much of his evidence given in direct about his search of the property. At one point a dog approached him and he "slugged" it. He repeated that in his first phone calls with JW, he pretended to be a polite customer for the purpose of luring him back to the property.

[79] ESJ's evidence was given in a straight-forward manner. I accept his evidence. It is credible. There was no appearance of collusion between him and AMS.

The plaintiff's father

[80] ABS is AMS' father. He went to work as a sale coordinator at RONA on September 14, 2010. Between 8:30 and 9:30 a.m. he received a call from AMS that she had finished her doctor's appointment, was on her way for a trail ride at Boulderwood and was looking forward to it. Horses made her happy.

[81] At 12:30 he received a call from his wife about the sexual assault and that AMS was on her way to the Irving Station at Mount Uniacke. He left work to meet AMS but could not find her. He then went to AMS' apartment, where he tried to speak to his very distraught daughter, called 911 and handed the phone to AMS.

[82] The rest of the day was a blur. The remainder of his testimony, direct and cross, was relevant only to the damage claim.

Constable Kendra Sutherland

[83] Constable Kendra Sutherland has been an RCMP officer for more than 17 years. On September 14, 2010, she was stationed at the Windsor Detachment of the RCMP in General Investigations.

[84] After receiving a request to obtain a statement from AMS, an alleged victim of a sexual assault, she contacted AMS' mother, who said that AMS was too upset to come to the detachment that date. Later, AMS' father called the detachment.

[85] On September 16, 2010, she took an audio statement from AMS. She observed AMS to be very emotional and had a lot of difficulty dealing with the event, and other things in her life.

[86] Constable Sutherland's involvement ended when she accompanied Crown Counsel to AMS' apartment to talk to her about why the Crown was not proceeding with criminal charges. The reason not to proceed was because of discussions with, and the letter received from AMS' psychiatrist (Exhibit 1, Tab 9, page 178), to the effect that it was not in the interests of AMS' well-being to move forward with the criminal charge.

[87] Constable Sutherland identified general occurrence reports ("GORs") prepared by the lead investigator and supplementary occurrence reports ("SORs") prepared by other officers of their activities in the investigation, as well as other types of statements, of all which are created in an electronic file system as the events occur or entered from notes as soon as an officer returns to the detachment.

[88] Constable Canning was the lead investigator. Exhibit 1 Tab 13 and Exhibit 7, which replaced page 3 of Tab 13, is her GOR entered September 14, 2010, including her phone call with AMS at 2:32; her phone call with ESJ at 2:45; her meeting with ESJ at Boulderwood at 3:15; and her involvement with returning with him to the detachment to obtain his witness statement.

[89] Exhibit 1 Tab 14, and Exhibit 8, which replaced page 2 of Tab 14, is Constable Bourque's SOR respecting his attendance at Boulderwood in respect of the search for and eventually finding, late on September 14, of JW, apparently unconscious in the woods.

[90] Exhibits 4 and 9 were replacements for the SOR prepared by Constable Goosen for the same search that extended late into the night (originally Tab 15).

[91] Exhibit 5 is the GOR of Constable Canning respecting JW's attendance at the detachment on October 14, 2010. It is a record of him being arrested, charged and given his rights; speaking to his lawyer and being interviewed, during which interview he first denied touching AMS then admitted to briefly touching her vagina inside her pants and underwear after she had asked him to do so. Constable Sutherland stated that she had monitored this interview and confirmed hearing the same admissions by JW. The statement of JW was not introduced in this trial.

[92] Constable Sutherland identified the photographs of some of the texts on ESJ's phone (Exhibit 6).

[93] She identified the can-say statement she took from AMS at her apartment on September 16, 2010 (Tab 11). She entered verbatim what was told to her by AMS in 'PROS', the same electronic filing system that contains GORs and SORs.

[94] She identified ESJ's witness statement of September 14 (Tab 12).

[95] Constable Sutherland was cross-examined. She did not know whether AMS' underwear was sent to the lab for examination; she was only assisting Constable Canning, who had control of the file. She was not aware whether the audio statement of AMS or the video statement of JW were transcribed. She stated that they were usually only transcribed if the Crown needed them for a criminal trial. She is only aware of the electronic recording of the can-say statements; she did not have access to the file to determine if a DVD of the video statement of JW exists.

The Defendant

[96] JW was 59 at the time of the trial; 54 in 2010. He lives at Ardoise, between Mount Uniacke and Windsor, where he runs the Boulderwood riding stables.

[97] He was born and raised in England. In 1979, he moved to Prince Edward Island, where he ran a dairy farm. In 1993, he purchased the defendant riding stable, which includes 250 acres with an extensive horse trail system.

[98] Despite uncertainty as to the times involved, his evidence is that he knew AMS since she was 11 or 12 years old, when her parents brought her and her sister riding. He was uncertain when he had last seen her at the riding stable before the incident in issue.

[99] AMS made an appointment to ride on Sunday – two days before September 14. During the call, she said she was not working and was a bit depressed. When she arrived two days later, she was crying. He understood she was having an argument with her boyfriend, because her boyfriend wanted her to move in with him and she did not want to.

[100] When she brushed her horse, she quickly calmed down. Horses have that effect. She was quite talkative. She signed the disclaimer in the tack room and they left on the trail ride.

[101] On the ride, he recalled that AMS said she liked interior decorating; he said that his daughter-in-law had done a staging course. AMS talked about her boyfriend and being scared to tell him that she did not want to move in with him. He said to keep playing him along and not to confront him.

[102] They went fairly fast for a really long ride. The ride took about an hour and ten minutes. AMS would be following him 15 to 30 feet behind him and not beside him.

[103] JW told her about a group of travel writers who were coming in the afternoon and, because she was having a really good time during the ride, he offered her to come along for free, to endorse his riding stable.

[104] He denied any discussion on the trail ride of a sexual nature or about her G-spot, but AMS had said that that sex was not going well with her boyfriend because he went to sleep.

[105] As they approached the barn, AMS still had a very good demeanour. She put her horse away, then she disappeared. He gave the horses hay and water. By then it was after 12:30 and, because of his diabetic condition, he had to eat before the 1:00 scheduled trail ride with the travel writers.

[106] AMS was really happy to go along on another trail ride. AMS was in the tack room on her phone. He invited her to the house to get some cheese or a chocolate bar. They went towards the house. He stopped to put wood on the fire in his work shop. AMS was ahead of him.

[107] JW was asked about Gatorade and said he did not keep or have any on the property. The Gatorade came with AMS and the bottle was in his home, undrunk, when he got out of the hospital.

[108] When they entered the home, and he was taking his boots off, he said:

> A: And, we went in through the house.
>
> Q: Right?
>
> A: I was taking my boots off and she … a- approached me, uhm, looked me right in the eye and I will admit, I touched her. It was uhm … As she came towards me she had … her buckle was undone and … My hand, I just put it out and I will say I did touch on her stomach.
>
> Q: Did you … Can you describe or tell the court what her body language was like when …?
>
> A: Well, she was looking me right at the eye and approached me. And I, as I say, I … I put my hand out, it was seconds, and then said: I need the washroom first.
>
> Q: So, where … where did your hand go? Which hand was it?
>
> A: Just above the pubic bone and it was my right hand.
>
> Q: Okay, and, uhm … did … was … did … [AMS] do anything with her hands?
>
> A: No, I … she … she, then, as soon as I touched her, she then said she needed the washroom.
>
> Q: Yes?
>
> A: So I removed my hand,
>
> Q: Yes.
>
> A: … showed her where the washroom was. She went in the bathroom. She's still in a great frame … she's still … lots of you know. She was not upset. She went in the bathroom.

[109] He then led her to the bathroom, went to the kitchen to wash his hands, checked his blood sugar level, took some insulin and started to eat.

[110] AMS, in the bathroom, started to make a lot of noise and screaming. At first he thought she was screaming because she was having a row with her boyfriend. He did not think that he had upset her by what he had done, so he continued to eat his lunch. He did not really listen until he heard the word "rape" being used, then he got worried. He went into the hallway and asked if she was okay. She eventually opened the door and came out.

[111] He was then asked whether he recalled any conversation at all taking place between him and AMS. He said:

> A: There was not much con- … There was not conversation. Uhm … She approached me, looked me right in the eyes and I was standing on … on that boot mat there.
>
> Q: You were standing on what?
>
> A: On … right on the power … the power outlet there, I was standing there.
>
> Q: Yes?
>
> A: And, as I say … my hand … I put my hand out. It was foolish, And … It was a very short touch. It … She then said: I need the bathroom. She's still looking me right in the eyes.

[112] His description of when AMS left the bathroom was:

> A: And I stood right back and she proceeded down the passageway. And, I shut the taps off. And I said: Hopefully you're not … you know … We don't need … You haven't been hurt, there's no reason to hurt us.
>
> Q: Right?
>
> A: And don't call, you know, the police and start a legal proceeding because … I mean, this is an expensive … game. I mean, when you get into any form of … I said, there's no way … that I have hurt you and …
>
> Q: Okay?
>
> A: by that stage, she just walked out. I didn't impede her at all.

He denied being in front of the bathroom door or that she crawled out of the bathroom through his legs or that he followed her. He just let her leave. He said: "... obviously I said, uhm, I hadn't hurt her … And I did hope that she wasn't going to turn around and hurt me, you know, by going to the police.

[113] His wife was in England on a trip and he called a friend to advise that he had "had a little trouble" and he wanted the friend to take care of the animals if the police came and picked him up. He said that he did not tell the friend about his "mistake".

[114] He then went to saddle the horses for the travel writers, expected at 1:00 p.m. When he was in the tack room, he saw a man across the yard, who turned out to be ESJ, causing damage to his house. He was really scared, so he wrote and left a short note on the tack room desk saying: "I've done nothing wrong. I love you.", then got into his truck and drove up into the woods to be safe and work out what to do.

[115] Shortly after, he was receiving phone calls on his cell phone. He did not answer them at first. The first phone message from ESJ was asking him if what he wanted was to lose his riding stables over this. He then received a phone message from the travel writer saying that ESJ was threatening to kill him.

[116] He left his truck and walked down another trail by some water. He decided that he was running out sugar and sat down to call 911, but did not do so because he believes he lost consciousness. He awoke from unconsciousness to answer another call from ESJ. He said that he was at the bottom of Fun Hill and was in trouble because of his low insulin level. He next recalled waking up in the hospital.

[117] He identified the note, marked as an exhibit, which he wrote and left in the tack room. He wrote the note because he was very scared seeing ESJ pounding on his house.

[118] He believed he was in the woods for about an hour. The last record of a call with ESJ was at quarter past two. He said he did not intend to kill himself when he went into the woods, explaining that if he had intended to do so, he would have gone to a place where his cell phone would not work.

[119] He denied discussing with AMS a medical procedure or that he would show her where her G-spot was. He said that she mentioned her G-spot once.

[120] He acknowledged going to her car before going to his house, but said he was eight to ten feet from her. He did not recall AMS recovering her keys from the tack room, as he was doing the hay and feeding the horses. He denied putting his arm around her to prevent her from leaving. He denied sniffing her hair. He said AMS would not have seen the bathroom from the foyer, except that he showed her where the bathroom was.

[121] He was again asked about the alleged assault:

> Q: And she says, in her testimony, that you held onto her and you … you groped her with two fingers in her vagina area?
>
> A: My fingers never went that low. She approached me. Her belt was already undone. She looked me right in the eye. And, my hand, for a moment, went on her belly, above the pubic bone, and, as soon as I responded, she said she needed the bathroom. There was no holding onto her.
>
> Q: Okay, what was her demeanour at that point?
>
> A: Great. Very friendly. Very, very happy. And she was … she was smiling. She was happy.
>
> Q: Okay. So, what, if anything, did you think then, when she went to the washroom?
>
> A: I thought: All was okay. I didn't … I obviously was upset that I had touched her. I admit that, I was … But I … It had stopped when she wanted to go to the

> bathroom. So, I figured, that just can't happen. That was dumb. But, I then washed my hands. Figured let's get on. Eat some lunch. Get on to take the next ride out.

[122] He repeated that AMS' screaming started after she had been in the bathroom for three or four minutes. When she left the bathroom, he was saying: "I don't need this.", "I haven't hurt you.", and she did not respond.

[123] JW was cross-examined.

[124] He answered yes when asked to confirm that in his direct evidence he said: he only touched AMS on the stomach; his fingers never went as low as her vagina; he touched above the pubic bone; he never penetrated her vagina; and she approached him. He was then shown a typed statement that he apparently prepared on his own in November 2010 (Tab 10 of the Joint Exhibit Book) and directed to this sentence: "I touched her on her belly and went down lower. I do not think I every penetrated her with my finger (I told the police I was not certain on this)". He acknowledged this quote from his prepared statement, made within two months of the incident.

[125] He acknowledged the reference in his statement to not being certain what he told the police in his statement to them on October 4, 2010. He acknowledged that he told the police he was not certain whether he penetrated AMS' vagina with his fingers, but now he says he did not. [The court notes Constable Sutherland's evidence as to what JW said about the incident when she monitored his statement to Constable Canning on October 4, 2010.]

[126] JW acknowledged that when AMS called to arrange the ride, she said she had been depressed and he told her that horses were therapeutic. He acknowledged that she was crying when she arrived at the riding stables.

[127] He acknowledged that in his direct evidence he testified that he did not have any Gatorade but that was not correct. He had a machine that dispensed Gatorade, but then added that he only dispensed red and blue Gatorade, not the orange Gatorade that she had.

[128] He acknowledged putting a hand on her shoulder in the barn before the ride started when AMS was crying. He acknowledged that in discovery he had not said that he went back to the car with her, talking to her, and had said that she had bent over in the car to get something from it.

[129] He acknowledged that when he drove into the woods and sat by a stream, he was working out what he was going to tell the police. He acknowledged that the calls from ESJ began at about 1:20 p.m. and that one could drive from his home to Main Street, Dartmouth, driving the speed limit, within 35 or 40 minutes, and even a shorter time if driving faster than the speed limit.

[130] He acknowledged that he took insulin both in the house before his lunch and "a small amount" in the woods. He insisted that although he took off into the woods, because he feared for his safety, he overdosed on insulin by accident and not intentionally.

[131] He acknowledged that in the recital of his "presenting issues" at the hospital to the social worker (Tab 19 of the Joint Exhibit Book, page 332) he did not say that he was alleged to have

committed a sexual assault or that he had touched AMS or that he had written the note left on the tack room desk.

[132] In his direct evidence, JW had said that he had washed his hands in the kitchen and was starting to eat when, after three or four minutes, AMS started screaming in the bathroom. He did not really listen until he heard the word "rape" being said, then he became worried. He was directed to his discovery evidence, in which he clearly stated that at no time had he heard any of the words spoken by AMS when she was in the bathroom or left the bathroom. Counsel read into the record his answer at discovery:

> A: It was not very intelligible. I didn't … I didn't pick up anything like words. It was just a lot of screaming. It's like how I would imagine it in a … you know, someone going into a total anxiety attack. I didn't really make out any words when she left the place either.

[133] He acknowledged that he had not said anything about hearing the word "rape" in his discovery; also, he had not mentioned anything about her saying the word "rape" in his statement to the police. He acknowledged that today in court was the first time he had indicated that he had heard her say the word "rape".

[134] He was then asked if he did not hear her say the word "rape" or "assault", why did he tell her, when she was leaving the bathroom, that he hoped that she was not going to call the police. He acknowledged that he had said to AMS that he hoped she would not call the police even though she had not said the words rape or assault on September 14.

[135] He acknowledged that he was very scared when he was in the tack room, watching ESJ shouting, kicking the house and pulling the light out. Despite that fear, he did not call the police, but rather wrote the note, jumped into his truck and drove into the woods.

Analysis

[136] I accept as credible, and for the most part reliable, AMS' evidence about the incident between her and JW on September 14, 2010. Her evidence conforms to the preponderance of probabilities; said differently, it makes sense.

[137] Her evidence was internally consistent. She acknowledged weaknesses in her memory of some particulars between her evidence in 2015 and the incident in 2010. She was responsive to questions, non-argumentative and gave her evidence in a direct manner.

[138] Much of her evidence is corroborated.

[139] I find that the partial record of the text exchanges between her and ESJ, photographed by the RCMP from ESJ's phone on September 14, shortly after the incident, are real and not fabricated. They include a text at 12:21, where she texted "help me". There is a gap between that and a text of 12:53 where she texted, "I ran, he wouldn't let me go and I busted into the bathroom and [he] said I better not be calling the cops. I'm bleeding and shaking".

[140] She was not clear between what she said on the phone to ESJ versus what was texted. I accept her evidence that there would have been no reason whatsoever for her to initiate consensual sexual contact from JW in the form of he touching her in the manner she described or even in the manner he alleges.

[141] ESJ was AMS' boyfriend at the time. He ceased being her boyfriend years before his evidence in this trial.

[142] It was apparent that over the five years since the incident, his memory of the particulars of the incident were not entirely clear; however, he gave a statement to Constable Canning of the RCMP shortly after 4:00 p.m. on September 14, 2010 about the events of the day. He confirmed this statement. His memory at trial was not as detailed as the details contained in his witness statement, marked as an exhibit as part of the Joint Exhibit Book for the truth of its contents.

[143] His verbal evidence contained the relevant and important basics of the events of September 14, 2010. His witness statement, which I accept was an accurate representation to the police at the time of the event, is consistent with his evidence and provides significant details. The witness statement caused the court to find his evidence credible.

[144] I was satisfied listening to the evidence of him and AMS that there was no collusion between them with respect to his evidence. His evidence is corroborated by the police investigation and by the text message his evidence corroborates the evidence of AMS.

[145] I find he was candid about his anger towards JW and his intent to hurt him on September 14th. His candidness added to his credibility. I accept his evidence as to the fact of the phone calls between him and AMS at about noon on September 14 and his subsequent telephone exchanges with JW.

[146] I prefer the evidence of AMS and ESJ to the evidence of JW.

[147] In contrast to the evidence of AMS and ESJ, the evidence of JW was internally inconsistent and was inconsistent with other prior statements by him. His evidence made no sense whatsoever.

[148] At trial, JW says when he was taking his boots off, AMS approached him, looked him right in the eye, with her belt buckle undone and without any conversation, he put his right hand out and touched her on the stomach – above the pubic bone, that then she said she needed to use the washroom and he said he stopped.

[149] Later in his direct, he said there was no conversation between them. He added: "it was foolish and it was a very short touch". Later in direct, when directed to her evidence that he had groped her with two fingers in the vagina area, he said that his fingers never went that low and that she was smiling and happy when he touched her. On cross-examination, he acknowledged that he had given a statement to the police [on October 14, 2010].

[150] He prepared his own written statement after his interview with the police (apparently about November 2010), which was included in the Joint Exhibit Book as Tab 10. His statement written to him was not consistent with his evidence. It reads in part:

> It was likely 12.20 likely later maybe 12.30 or even a little later. Entered the house and she made a direct invitation to touch her, I said are you sure she replied affirmatively. I very gently touched her loosening her belt on her jeans again asking are you sure again affirmative. I touched her on her belly and went down lower. I do not think I ever penetrated her with my finger (I told Police [I] was no certain on this) she told me she needed to use the bathroom. I released her immediately. She went to the bathroom and turned the taps on full.

[151] This statement is entirely inconsistent with his trial evidence.

[152] Equally significant, Constable Sutherland testified that she monitored JW's interview with Constable Canning, when he gave a statement at the detachment on October 14, 2010. Constable Sutherland's evidence, upon which she was not cross-examined, was that JW initially denied touching AMS, then admitting to briefly touching her vagina, inside her pants and underwear, after she asked him to do so.

[153] JW's evidence at trial, that without conversation between them, AMS approached him with her belt undone, effectively inviting him to touch her and that he briefly touched her on the stomach is not only inconsistent with his prior statements and all the other evidence before me, but it also makes no common sense.

[154] I do not believe JW.

[155] There were other inconsistencies. His statement at trial that when he heard AMS say the word "rape", when she was screaming in the bathroom, is inconsistent with his discovery evidence that he could not make out any intelligible words when she was screaming in the bathroom.

[156] His evidence that he hoped that she was not going to hurt him by going to police makes no sense, except in the context that he knew he had sexually touched her without her consent.

[157] JW's evidence that when he was in the tack room and saw a young man pounding on his house and yelling, he wrote the strange note, ran to his truck and drove into the woods, where he sat by a stream; it makes no sense. If a young man was pounding on his building and yelling, and it was making him afraid, a common-sense reaction would have been to call the police. His failure to do so makes no sense, except in the context that he had sexually assaulted AMS and knew that the young man was her boyfriend. At that time, when he says he saw the young man, was before ESJ found a phone number and started calling him.

[158] JW's conduct, after the sexual assault, is consistent with a non-consensual sexual assault and inconsistent with a consensual touching of a very brief nature to the stomach as described by JW.

[159] I find as a fact that JW took advantage of AMS, who he knew was depressed and vulnerable, and sexually assaulted her in the manner described by her. The tort of sexual battery is proven. Boulderwood Stables, a body corporate, is liable for the wrongdoing of JW. JW was the operating mind of Boulderwood Stables; his wrongdoing is Boulderwood's wrongdoing by reason of its vicarious liability for the actions of JW.

Part II: Damages

Submissions

[160] The plaintiff seeks non-pecuniary damages of $140,000 (inclusive of aggravated damages) and punitive damages of $20,000.

[161] For the general principles for damages respecting sexual battery (including aggravated damages), she cites extensively from *G(BM) v Nova Scotia*, 2007 NSCA 120 ("*G(BM)*"). This decision focused on the functional approach to assessment of non-pecuniary damages, the relevant factors in fashioning a non-pecuniary award, the acceptable range for damages, and the placement of the particular incident within that range.

[162] Decisions cited by the plaintiff as being comparable to the matrix in this case include: *KT v Vranich*, 2011 ONSC 683 ("*KT")*; *Evans v Sproule*, 2008 CarswellOnt 8753 ("*Evans*"); and, *A(TWN) v Clarke*, 2003 BCCA 670 ("*A(TWN)*").

[163] Counsel for the plaintiff acknowledges that two prior sexual assaults against the plaintiff, one when she was 13 and the other a few years before this event, are relevant. However, she refers the court to the difference between the thin skull rule and the crumbling skull doctrine as described in *Athey v Leonati* [1996], 3 SCR 458 ("*Athey*"), at paras. 34 and 35. She submits that the "thin skull" rule (not the crumbling skull analysis) applies; that is, that the tortfeasor is liable for the plaintiff's injuries even if they are more severe than anticipated because of a pre-existing condition.

[164] Respecting punitive damages, the plaintiff cites *Whiten v Pilot Insurance*, 2002 SCC 18 ("*Whiten*") for general principles; *H(C) v H(M)*, 2005 SKQB 193 ("*H(C)*") for the proposition that civil sexual assault cases do not usually involve awards of punitive damages where the defendant has already been punished by the criminal process; and, *Norberg supra* for the review of the punitive damage range (which counsel says was $10,000 to $40,000, adjusted for inflation to $15,000 to $61,000).

[165] Counsel refers the court to the *KT* decision and the *Evans* decision, in which punitive damage awards were $25,000 (now inflation adjusted to $29,000 and $27,000 respectively).

[166] The defendants agree that *G(BM)* sets out the proper general principles and the functional approach to assessing non-pecuniary damages. Counsel submits that the range for non-pecuniary damages is $10,000 to $100,000. His only case reference is to a 1992 New Brunswick decision, *HR v FM*, 1992 CarswellNB 147 (NBQB) ("*HR*"), where the award was $8,000.

[167] Defence counsel submits that the plaintiff's pre-existing, persistent and troubling psychological condition, that involved many years of counselling, should result in damages being at the lower end of range. He suggests a range of $15,000 to $40,000, the range in an analogous case not involving a sexual assault, *Smith v Stubbert*, [1992] CarswellNS 250 (NSCA) ("*Smith*").

[168] The defendant claims that the single incident of touching, where JW complied with the plaintiff's request to stop, does not warrant punitive damages. In the alternative, if it does, the appropriate range is $15,000.

Evidence

[169] For the last four years, since her break up with ESJ, AMS has resided in her parent's home. Her mother has to stay with her all the time. Her only day off is on Wednesdays, from 8:00 to 1:00 p.m. AMS is suicidal. Her mother testified that she lost her daughter on September 14, 2010.

[170] In cross-examination, she acknowledged the other incidents that would have affected AMS' mental health. These included a good friend dying from a drug overdose about three days after September 14, 2010; her grandfather's death in August 2006; and, the loss of her job in July 2010.

[171] She stated that AMS now works for about one-hour per week as a fitness instructor and as a distributor, recruiting consultants to sell a cosmetic line. This work is carried out from home.

[172] She recently had a boyfriend, but it only lasted a short time. Usually AMS keeps the drapes in her room closed and relies upon her mom to do the cooking and housework. She is presently on new medication, doing much better. She, at the moment, does not have suicidal thoughts on a daily basis.

[173] AMS' medical records, contained in Joint Exhibit Book, Tabs 2 to 9, were admitted for the truth of their contents. They show:

1. The plaintiff being admitted to the emergency department for an overdose on February 19, 2008. The records note the death of her grandfather a year earlier as well as anxiety attacks and depression.

2. A referral for assessment in January 2010 because of persistent panic attacks and worsening depression with some suicidal ideation.

3. An assessment on September 7, 2010, for fibromyalgia symptoms and a recommendation that an application be made for use of medical marihuana.

4. An EHS and Capital Health Emergency Report of September 18, 2010. AMS had apparently intentionally overdosed.

5. A hospital report and assessment of December 30, 2010, when her parents brought AMS to the hospital because of her strong thoughts of ending her own life before the new year. Basically, she was out of control.

6. An emergency admission report of March 7, 2011, reporting that AMS had been found in a vehicle on a bridge waiting to jump off and end her life because of an argument that day with her psychologist.

7. The family doctor's running note from about 2006, evidencing depression.

[174] AMS described her conditions post-September 14, 2010. She says she blocked herself off from the world, including her father and all older male figures. She acknowledged having suicidal thoughts. She stayed in her apartment writing and painting on the walls to get her feelings out. She has been seeing psychologists and counsellors ever since September 2010.

[175] She acknowledged two prior sexual assaults, but said she had gotten past them. The first was at a party, when she was a preteen, and an 18-year-old "played around on top of her vagina". The second was when she graduated from Compu College at age 20 and went to what she thought was going to be a party at the home of a 34-year-old friend. There was no party; she was alone; she believes her drink was spiked and she was assaulted while unconscious.

[176] Since 2010, she had had really bad nightmares and lost a lot of friends. Her boyfriends do not last long as she has no sex drive. She broke up with ESJ because she would see JW's face whenever she woke up in bed with him.

[177] On cross-examination, she was questioned about the medical records showing her state of depression before September 14, 2010, including, in particular, the loss of her job in July 2010. She was cross-examined about her last meeting with Dr. Borst (who she says told her she was hopeless) and her going to the MacDonald Bridge to end her life that day. She was further cross-examined about the two prior sexual assaults.

[178] She acknowledged that she taught a fitness class for one-hour a week and was a distributor for a cosmetic company called Arbonne, for which she had attended two conventions in Calgary and Las Vegas in relation to that work. She was shown Facebook images and acknowledged that she was positive about herself on those pages.

[179] AMS' father spoke about the change in AMS after September 14, 2010. Before that date, his wife would check up on AMS a few times a week and he would talk to her on the phone regularly. Afterwards, they received frequent calls in which she was screaming that she did not want to live anymore.

[180] The primary damages witness was Dr. Richard G. MacGillivray, a clinical psychologist. His qualifications to give opinion evidence on the subject matter of his report were admitted. His report is Tab 1 of the Joint Exhibit Book.

[181] Dr. MacGillivray reviewed AMS' medical history, assessed her current status, and described the effects of the assault on her mental health and well-being. This included AMS' own descriptions of how she was a changed person; her social withdrawal and isolation; her withdrawal from intimacy with men and mistrust and fear; her anxiety attacks and suicidal ideation.

[182] Dr. MacGillivray administered psychological tests and determined that AMS suffered from PTSD, which he linked directly to the assault of September 14, 2010. He had previously carried out testing for PTSD when he assessed AMS in 2008 in respect of another assault and determined that she had not met the criteria for PTSD at that time.

[183] He described PTSD as follows:

> PTSD is a disorder in which one develops a characteristic pattern of symptoms in the aftermath of exposure to one or more traumatic events. The symptoms include pervasive intrusions, persistent avoidance of stimuli, negative alterations in cognition and mood and marked alterations in arousal and reactivity, in each case associated with the trauma event(s), with symptom duration of at least one month, clinically significant distress or impairment in function, and the absence of an alternative medical condition or substance effects to which the condition could be attributed.
>
> …
>
> There is, in my opinion, unambiguous evidence of PTSD in the above diagnostic procedures, including interview and psychometric self-report as well as the clinical record, and there is persuasive evidence to conclude that this condition arose from the sexual assault on September 14, 2010.

[184] Dr. MacGillivray described the PTSD as severe, and there was no indication of a substantial improvement in her condition since its onset after September 14, 2010. He states that the results of the PTSD diagnostic tests reinforce the impression of significant impairment in important areas of function secondary to PTSD. He says her condition does not appear to have remitted or to have substantially improved; these symptoms are disabling and likely to preclude a return to work in any significant capacity without significant clinical improvement. He found that the PTSD is likely to have presented more obstacles to the development of a meaningful, intimate attachment. He noted her fear, aversion and avoidance of men.

[185] He concluded his opinion with the following description:

> In my opinion, it is very likely if not conclusive that [AMS] was a person who had considerable difficulty with emotional resilience even before the alleged assault in 2010, and who suffered significant mental health challenges including depression, panic disorder and BPD. Nevertheless, the abrupt degree of emotional duress and evident interference in her capacity to carry on with her life goals and to manage her symptoms, in the aftermath of the assault suggests that PTSD suffered as a result of the alleged assault is a very significant obstacle to the achievement of life goals and a sense of well-being.

Analysis

[186] Justice Cromwell laid out the facts (a non-exhaustive list) relevant to determining non-pecuniary damage awards on the basis of sexual battery as follows:

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

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

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

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

The appropriate range of non-pecuniary damages

[187] I agree with the plaintiff that, in *B(GM)*, Justice Cromwell articulately set out the nature of non-pecuniary compensation, the rationale for the application of the functional approach to sexual battery cases, the factors to be considered, the determination of an acceptable range of damages, as well as how to place an award within that range. I incorporate the whole of his analysis, beginning at para. 121.

[188] While the Court of Appeal's role in *B(GM)* was to determine, by application of the factors, whether the trial judge's award - in that case of $125,000 in 2007, was within the appropriate range, my task is to first determine the range based upon the facts in this case as found in similar decisions, and second to apply the factors to make a fair award within the range.

[189] The court in *B(GM)* wrote that the range is determined by:

1. Identifying the important characteristics of the case to define what other decisions should be considered; and,

2. Determine a range based on damages awards in similar cases.

[190] The Court of Appeal found that the two decisions relied upon by the trial judge in *B(GM)* justified a range between $125,000 and $250,000 for cases similar to those with the factors found in *B(GM)*. This was in 2007 dollars. The Court of Appeal noted that the Supreme Court of Canada decision in *Blackwater v Plint*, 2005 SCC 58 ("*Blackwater*"), and a British Columbia Court of Appeal decision, also justified a broad range, into which the *B(GM)* circumstances fell.

[191] In this case, the plaintiff advanced two decisions, whose facts and factors are similar to the circumstances in this case: *KT supra*, a 2011 decision awarding $125,000 and *Evans supra*, a 2008 decision awarding $150,000.

[192] Applying the four non-exhaustive factors, enumerated in *B(GM)* and in *Blackwater*, to the circumstances of this case, I draw the following conclusions:

First factor: AMS was a physically small and young person (but not a child) who, to the knowledge of JW, was a vulnerable person. Taking advantage of her obvious state of depression made JW's conduct more aggravating and blameworthy.

Second factor: The fact that it was a one-time event and, in comparison with many other decisions, less invasive, makes JW's conduct less blameworthy than many reported decisions.

Third factor: JW was 30 years older than AMS. While he was not in a formal position of trust, he took advantage of the trust that AMS placed in him. It is important that there is no rational explanation for his conduct other than simple selfish, callous lechery. This is an aggravating circumstance.

Fourth Factor: Based both on the anecdotal evidence and, more particularly, on the opinion of Dr. MacGillivray, it is clear that JW's assault caused AMS's PTSD. AMS' mental health was already suffering from depression and other incidents, but she was not suffering from PTSD. This assault was a dramatic invasion of AMS' personality, autonomy and personal integrity. As described by Dr. MacGillivray, AMS and her parents, it was easy to conclude that the impact on her was severe, genuine and not exaggerated. The caselaw describes the fourth factor as often the most important factor in determining the range and quantum of damages. The severe impact on AMS is a serious aggravating factor in this case.

[193] Counsel have raised the issue of causation in relation to damages (as opposed to liability). This issue deals in particular with the application of the thin skull rule and the crumbling skull rule to the evidence in this case.

[194] Lynn M. Kirwin, *Canadian Civil Remedies for Torts in Novel Situations and Special Circumstances*, [Toronto: Carswell, 2012], at pp. 426 to 428, sets out an articulate summary of the law respecting causation that includes reference to the *Blackwater* case involving sexual battery. I incorporate her analysis.

[195] The crumbling skull rule provides that the wrong-doer need not compensate for damage that would have occurred without the wrongful act or for debilitating effects from other causes that would have occurred anyway. Beginning at p. 427 Kirwin writes:

> In *Athey v Leonati*, Major J. said:
>
> > Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury.
> >
> > It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury … As long as a defendant is part of the cause of the injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability

> because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.
>
> At the root of the inquiry is a proposition that a tortfeasor must put the victim into the position in which he or she was before the tort was committed: the "original position". At this point, the "thin skull" and the "crumbling skull" rules may apply. The first, the so-called "thin skull rule", is that wrong-doers take their victims as they find them. Even though the injury from the wrongful act is greater because of the pre-existing injury, a wrong-doer is, nonetheless, responsible for the loss. The second, the "crumbling skull rule", is that wrong-doers need not compensate for the damage that would have occurred without the wrongful act. The defendant must compensate for the damages it actually caused, but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the defendant need not put the plaintiff in a position better than his or her original position. If there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award.

[196] On the evidence of this case, it is clear that AMS had serious depression issues before September 14, 2010; however, the evidence of Dr. MacGillivray is that the PTSD and its debilitating affects were caused by the event of September 14th. In my view, there is no evidence to support application of the crumbling skull rule in this case. If there had been a claim for future lost earnings, the crumbling skull rule may have impacted the contingency part of the analysis.

[197] Based on the assessment of the relevant factors for the assessment of non-pecuniary damages in this case, I conclude that the *KT* and *Evans* decisions contain similar circumstances to those in this case and are the most appropriate cases placed before the court to determine the appropriate range of damages.

[198] My estimate of the present-day value of these awards is $135,000 and $185,000 respectively. A general reading of the case law respecting sexual battery cases suggests that the range for one time, not particularly invasive, but unjustified, sexual battery that result in life-altering psychological effects is wider than the assessments in these two cases; however, *KT* and *Evans* are likely in the middle of the range for matrices similar to those in this case.

[199] The plaintiff seeks $140,000 for non-pecuniary damages. I conclude that her claim is likely at the lower end of the range in current dollar value for sexual battery of the nature and with the effects in evidence in this case. The court therefore awards general, non-pecuniary damages, inclusive of aggravating damages, of $140,000, as claimed.

Punitive damages

[200] The plaintiff claims punitive damages of $20,000.

[201] In *Whiten*, the court set out a number of principles for punitive damage assessment as follows:

1. Punitive damages are not to be restricted to certain categories but in rationally determining the circumstances that warrant damages beyond compensation;

2. The general objectives of punitive damages are punishment, deterrence and denunciation;

3. Criminal law is the primary vehicle of punishment and punitive damages should be resorted to only in exceptional cases;

4. The court should relate facts of a particular case to the underlying purposes of punitive damages and implement the lowest award required to further the objectives of the law;

5. It is rational to use punitive damages where compensatory damages would amount to nothing more than a license to earn greater profits with the disregard of the rights of others;

6. Punitive damages do not have to be fixed by ration to compensatory damages;

7. The overall award should be rationally connected to the objectives for which the damages are awarded.

[202] In *Norberg*, a non-violent assault by a doctor in a position of authority, described as outrageous, drew a $10,000 award. On the appeal to the Supreme Court of Canada, the Court in 1992 reviewed and confirmed a range for punitive damages in cases like this as $10,000 to $40,000.

[203] In *Evans* (2008), where the defendant was convicted criminally and fined $1,000, the civil court awarded $25,000 on the basis that the criminal penalty was not a sufficient deterrent.

[204] In *KT* (2011), the court awarded punitive damages of $25,000.

[205] Where the wrongdoing constitutes a crime – as in this case, and the defendant has been punished in the criminal system, it is rare that there is justification for further punishment. In this case, JW escaped punishment in the criminal system.

[206] Sexual battery is an intentional tort; this sexual assault was not an accident or the result of recklessness or carelessness. JW attempted to minimize his physical invasion of a vulnerable victim. He accepts no responsibility for it.

[207] There is no justification or excuse advanced by JW that can diminish the deliberate, selfish, and callous invasion of AMS' integrity and personality.

[208] We generally are aware of the consequences of physical injuries. We generally are not nearly as aware of the devastation and debilitation caused to a victim's mental health by the kind of deliberate act that JW imposed upon AMS in this case.

[209] To bring a better awareness of the seriousness of the psychological harm that is inflicted by sexual battery, there is a necessity for a punitive damage award.

[210] In 1992 the Supreme Court of Canada suggested that the bottom end of the range for punitive damage awards was $10,000. Twenty-four years later, that is surely the equivalent of at least the $20,000 that the plaintiff in this case claims.

[211] In my view, JW's assault on an obviously vulnerable victim, was so callous and outrageous that it merits punishment. Punitive damages are awarded in the amount of $20,000.

Other damages : Prejudgment Interest and Costs

[212] Exhibit 2 sets out the subrogated claim by the financial services branch of the Department of Health and Wellness for payment of hospital and medical costs on behalf of the plaintiff. The claim, as of November 20, 2015, was $15,994.86. That amount is awarded as special damages.

[213] The plaintiff claims prejudgment interest and costs. If the parties are unable to agree upon prejudgment interests and costs within the next 30 days, then the court will receive written submissions on both within the next 60 days.

Warner, J.