

SUPREME COURT OF NOVA SCOTIA

Citation: *L. M.M. v. Nova Scotia (Attorney General)*, 2010 NSSC 44

Date: 20100205

Docket: Hfx No. 150594

Registry: Halifax

Between:

L. M. M.

Plaintiff

v.

A.G.N.S.

Defendant

Restriction on publication: Section 486 C.C.C. (Sexual Assault)

Judge: The Honourable Justice M. Heather Robertson

Heard: April 27, 28, 29 and 30; May 4, 5 and 7; June 8, 10, 11, 12, 23, 24, 25 and 26, 2009, in Halifax, Nova Scotia

Written Decision: February 5, 2010

Counsel: Mark T. Knox, for the plaintiff
Glenn R. Anderson, Q.C. and Terry Potter, for the defendant

Robertson, J.:

INTRODUCTION:

[1] The plaintiff asks the Court to assess the damages he suffered as a result of the sexual abuse he encountered at the hands of his probation officer, Cesar Lalo (“Lalo”). Lalo was tried by a jury and found guilty of two counts of sexual assault contrary to ss. 246.1(1)(a) and 271(1)(a) and unlawfully committing an act of gross indecency, to wit, oral sex, with the victim, contrary to s. 157 of the *Criminal Code of Canada*. He received a five year sentence of incarceration with respect to these offences.

[2] In the province’s amended defence, filed on August 1, 2008, the Province of Nova Scotia has acknowledged that it is vicariously responsible for the crimes of Cesar Lalo, which were suffered by the plaintiff.

[3] The indictment set out the time frame of these events: October 27, 1983 to March 28, 1989 (between the ages of 10 to 15 years); the years during which LM met with Cesar Lalo in his capacity as a probation officer. However, for the purpose of these proceedings, the Crown admits liability for a later time frame in which offences are said to have occurred from November 1986 to June 1988 from age 13 to 15 years.

BACKGROUND:

[4] Who LM was before he met Cesar Lalo and who he became after his contact with Lalo is the significant issue in this trial.

[5] LM was born on September *, 1973. He is now 35 years of age. He is not married, but has a son from a relationship he had when he was 16. His son lives in and attends post secondary school in the *.

HIS FAMILY:

[6] LM’s mother SM was single and 19 years of age when he was born. His biological father was LC, but was never a part of his life. Unable to care for him at this stage of her life, S sent L to live with his grandparents JM and EH at * in B,

Nova Scotia. He did not reside with his mother until the age of 9 or 10, when she insisted upon his return.

[7] By then his mother, who resided at * in Halifax, had other children fathered by JG. JG did not officially live with SM as he had another family, but he stopped in often and lived there on the weekends.

[8] Although L has six siblings, he lived with the eldest four in his mother's three bedroom apartment at *, when not with other relatives.

[9] They were T (now 34), who resides in * and is a *; M (age 32) who is at home with young children living in * with her husband who owns a *; J M (age 31) of Dartmouth, a carpenter; and SM (age 29) of * who runs an *.

[10] The youngest two siblings, with whom L did not live are G and SM (ages 19 and 17), who attended * High School until May of this year.

[11] It was LM's evidence that none of his siblings have criminal records.

HIS EDUCATION:

[12] His school attendance shows the tumult of his young life as he attended many schools. The school records often record his address as *, but he explained in testimony that his mother's * address was necessary, so she could receive social assistance for him, even if he might be living with aunts or uncles. He testified that his aunts took him in to help his mother after he had lived the early years of his life with his grandparents. His aunts and uncles therefore treated him like a little brother.

[13] His testimony and the school records reveal what schools he attended, some more than once. The neighbourhood of the school often coincided with the address of his grandparents, aunts or mother. When he moved in with another family member he often attended a new school, sometimes in mid year.

[14] He lived for a significant period with his Aunt PM first on * Street, then on * Street. When she moved to *, he had to return to his mother. LM's evidence was that he did not live with his mother much more than two to three years in total. He

also lived with his Aunt Y on * Avenue and his Uncle E in * at various times. When PM returned to Halifax he again lived with her.

[15] At Tab 2 of Exhibit 1 Volume 1 of the evidence, the school year, grade and teacher and number of days he attended can be ascertained.

[16] On October 30, 1978, he transferred into a Halifax school, B*, after having first attended A* elementary school, while he lived with his grandparents at *.

| | | |
|--------------------|----|--|
| 1978 - 79 - Age 5 | B* | 143 days - 1 st Grade |
| 1979 - 80 - Age 6 | B* | 149 days - 2 nd Grade |
| 1979 - 80 | C* | 23.5 days - 2 nd Grade |
| 1980 - 81 - Age 7 | C* | 171.5 days - 3 rd Grade |
| 1981 - 82 - Age 8 | B* | 173.8 days - 4 th Grade |
| 1982 - 83 - Age 9 | C* | 74 days - 4 th Grade then transferred to |
| 1982 - 83 | A* | Balance of - 4 th Grade |
| 1983 - 84 - Age 10 | D* | 160 days - Grade 5 - not promoted |
| 1984 - 85 - Age 11 | D* | 156 days - Grade 5 |
| 1985 - 86 - Age 12 | D* | 154 days - Grade 6 |
| 1986 - 87 - Age 13 | D* | 61/115 days - Grade 7 |
| 1987 - 88 - Age 14 | E* | Grade 8 |
| 1989 - 90 - Age 15 | F* | |

[17] The records also show that he attended G* High School in 1991 - 1992 at Grade 10 level, then transferred in April 1992 to H* High School. He did not

graduate from Grade 12, but later attained a Grade 12 education level through the GED programme.

[18] His school reports are revealing. They show him to be an average student in the early years 1979 - 1983. His marks are satisfactory or better and he graded each year.

[19] In June 1983, his records from A* grade him with a "B" (= very good) for classroom conduct "which includes participation in class, discussion, cooperation, attentiveness, enthusiasm, work habits and overall enthusiasm." The teacher did comment, "although he tends to speak out in class."

[20] On his return to D* in the fall of 1983 (age 10) he began Grade 5. This coincides with his first encounter with his probation officer, Cesar Lalo, although as noted the actual sexual abuse by Lalo is said to have occurred a little later, at ages 13 to 15.

[21] L failed Grade 5 at D* and later, when promoted, to Grade 6 was exhibiting a behaviour disorder. He was not focussed on his studies, tended to be disruptive in class, skipped school frequently and generally garnered poor reports from this time forward.

[22] Later his schooling was interrupted by stays at the Shelburne School for Boys, a six-day remand in September 1987 (at age 13), and a sentence of 15 days in May 1988. From March 1989 to October 1989, LM was sentenced to six months in Waterville, not yet 16 years of age. He was sentenced to Waterville in 1990 for a further period of eight months. These incarcerations do coincide with the period of sexual abuse and with Cesar Lalo's threats that LM could and would be sent to Shelburne.

EARLY CRIMINAL RECORD AND INCARCERATION:

[23] LM first got in trouble at age eight or nine. The records from the Department of Social Services and Department of Community Services, the Youth Court of Nova Scotia and the Nova Scotia Department of Justice are shown at Tabs 5-7 of Exhibit 1, Volume 1, of the evidence and also gleaned from LM's evidence at the trial of Cesar Lalo, which is before the Court.

[24] His first encounter with the law was October 3, 1981, theft contrary to s. 294(b) from Eaton's. LM was then age eight. However, LM was too young to be charged. His evidence was that he hung around with older kids, who were shoplifting and encouraged him to do so as he was small and fast and could assist them in this pursuit.

[25] At age nine, December 1, 1982, he pled guilty to a break and enter contrary to s. 304(1)(a) of the *Criminal Code*, at Dave's Bottle Exchange on August 25, 1982. LM was nine years of age. He was placed on probation.

[26] LM's evidence at trial and in this proceeding, is that of a slightly bizarre event where an older person encouraged him and a young friend to enter Dave's Bottle Exchange, and while they were in there, the police came to the site because the older man was standing on the roof with something like a bottle of fuel lit by a flaming rag.

[27] On October 27, 1983, LM was charged with a break and enter into C*. He testified that in the summertime, he and a few friends had simply climbed through an open window into the school. They were then discovered inside the building. He was ten years of age. He was placed on probation to the end of June 1984. Throughout 1983 - 1984, there were a few other theft related matters for which he was "cleared by police and comp" as being under aged.

[28] LM attended Family Court on both Agricola Street and Quinpool Road, which predated the Court's relocation to Devonshire Avenue in the fall of 1986.

[29] The Court takes judicial notice of the operation of the *Juvenile Delinquents Act*, which allowed informal intervention in a young person's life before the age of ten, by having them attend at Family Court to speak to an authority figure and receive some early reprimand and guidance without the necessity of formal court documentation, except for information kept on small filing cards, some copies of which are before this Court. Formal probation orders signed by the offender and the probation officer do not appear before 1987.

[30] On January 27, 1987, he was charged with possession of stolen property of under \$1000.00, pled guilty and was placed on formal probation to September 1, 1987. He was age 13.

[31] Throughout the summer of 1987, there were three more theft related charges and the first recorded probation order, dated September 16, 1987. This is the first recorded instance where Cesar Lalo together with LM signed the probation order.

[32] In October 1987, LM was charged with failure to comply with a probation order dated September 16, 1987. The complaint was laid by Cesar Lalo. LM had then just turned 14 years of age.

[33] On March 29, 1988, he was charged with breach of the *Young Offenders Act*, for failure to attend school and given 40 hours of community service at Veith House. He was 14 years of age.

[34] On May 24, 1988, following another theft, LM was sentenced to 15 days custody in the Shelburne School for Boys and a further 12 months of probation. This related to a theft that occurred in New Glasgow from an A & A Records Store. He was then 14 years of age.

[35] By March 1989, LM's criminal conduct had escalated. He was then age 15 and was charged with possession of a weapon, assault, and theft under \$1000.

[36] On July 9, 1990, at age 16 he was charged with assault causing bodily harm and theft under \$1000.

[37] On August 13, 1990, LM was charged with obstructing a police officer, another assault, causing a disturbance and mischief with damage under \$1000. He was then 17 years of age.

[38] On February 9, 1992 at the age of 18, LM was charged with careless use of a firearm.

[39] LM also committed some criminal offences in his adult years, largely property related (theft, mischief and fraud), a few charges of violence ("threats") and causing a disturbance, as well as driving offences (driving without a license) which have resulted in his lifetime ban from operation of a motor vehicle. There are no charges since 2003.

EARLY PSYCHOLOGICAL ASSESSMENT:

[40] LM was seen by the Atlantic Child Guidance Centre between 1983 - 1990. In particular, he was assessed by John Swayne, Ph.D., excerpts of whose reports follow. He was also seen by Michael Leiter, Ph.D., a psychologist at Acadia University who worked with young offenders at the Nova Scotia Youth Centre, as well as David Dinning, Ph.D.

[41] He was later assessed in 1990 by Dr. Rhodri Evans, a psychiatrist at the Nova Scotia Youth Centre and was seen frequently by Dr. Brian MacInnis, M.D., who wrote seeking help for the psychological problems LM presented with.

[42] These reports are in evidence. It is interesting to note at no time did LM reveal the sexual abuse by Cesar Lalo. Absent that revelation you can see that these professionals are dealing with a disturbed youth and are seeking explanations for his behaviour.

[43] It is not unusual for a young person to not reveal sexual abuse. It has been observed by the courts and many health care professionals that children who are victims of sexual abuse do not reveal the abuse for many reasons, including guilt, embarrassment, fear of not being believed, and an inability to deal with the emotional impact of the abuse in the teen years of their lives.

[44] Nevertheless, these reports shed some light on LM's life while he was within the youth criminal justice system of the day.

[45] It is interesting to note that the request for an assessment by the Atlantic Child Guidance Centre came from Dalhousie Legal Aid, where a student lawyer, Brian Vandigans, was representing LM for his property offences for which there were several trial dates pending. L was then age 13 when, on 6 August 1987, Mr. Vandigans wrote:

Should have an assessment ... can't get through to him - he's out of control - but can't get him to respond - I want to avoid him going to Shelburne - he's a real mess - he must have something wrong with him that I can ascertain (?) Not for purposes of litigation (what for?) ... would like to find him a rehabilitation programme.

[46] The Atlantic Child Guidance Assessment Report of October 30, 1987, where LM was seen by John Swayne, Ph.D., reveals:

2. **PROBLEMS** (For each, include onset, attempted solutions and results.)
 - 1) L has a history over several years of getting into trouble, including a break and enter at 8 yr, and a series of shoplifting episodes (cigarettes, watches, clothes etc.). He has also been suspended from school for fighting on a number of occasions. Dalhousie Legal Aid lawyer wants an assessment to see if mental health involvement would be of help.
 - 2) As a child L was always quiet, very close to his mother. Over the past couple of years he has been more and more under the influence of older peers. His mother feels that this is the cause of his delinquences. She has tried "to get the truth out of him" but he lies often, and doesn't like to talk much.
 - 3) Since his last offence about 8 months ago L's behaviour has shown some improvements - no further shoplifting, behaviour at school is better, he's been following curfews, talking a bit more, acknowledging his own capabilities rather than blaming others. This may indicate some maturing process which needs to be recognized and strengthened (sic).

Individual dynamics: personality and temperament.

L presents as sullen, somewhat defensive, and uninvolved. However, one gets the sense that he would like to do better. He appears to get very little support or role - modelling for more acceptable behaviour within the home.

Family reports of child's strengths and weaknesses.

At time he can be very considerate and helpful.

Other (Diet, sleeping, hygiene, performance of chores, etc.)

Does a number of chores on his own - makes and changes his own bed, cooks, helps with things when asked. Mother does most of it. When in trouble he keeps things to himself. (Emphasis added)

...

Mood and Affect.

Presented as defensive adolescent, not defiant or oppositional. Not an angry, explosive boy and rarely argues with his mother. He cried several times when his grandfather died, and would like his mother to give him a hug or kiss from time to time, (privately of course).

Interviewer's Observations of Mother.

Mother is originally from *, left home at 15 years, never got along with her own mother, but was close to her father (E) who died suddenly in July 1986 of massive coronary (L was present). Is not working out of the home, hates living at * and rarely goes out except in Bingo. Only has one friend in the area. Is emotionally distant but recognizes the importance of love and contact with her children. Ms. M lives common-law with a "violent man" who is jealous about her going out or having friends.

[47] Dr. Rhodri Evans reported on June 22, 1989 and provided the following psychiatric assessment. It is interesting to note that again in this interview LM is referencing the physical abuse he suffered at the hands of his stepfather, who physically disciplined him, but not the sexual abuse by Cesar Lalo, which he did not reveal.

June 22, 1989

Psychiatric Assessment - LM

Thank you for asking me to see this fifteen year old boy who has been a resident of the Nova Scotia Youth Centre for the past 3 months, serving a 7 month sentence. He was sent here for threatening with a deadly weapon and also faces 2 charges of Breach of Probation and Theft.

Mr. M has several concerns, including his tendency to get into fights and arguments in the unit and is subject to feeling of anxiety much of the time. Further to this, he has talked to Dr. MacInnis about his problems with drug abuse.

L has seen psychiatrists previously through the Halifax branch of the Atlantic Child Guidance Centre, largely on account of tendency towards anti-social behaviour. I am not aware of any family history of psychiatric disorder. He tells me that his physical health is good.

As mentioned above, he has a history of substance abuse with frequent use of hashish, cocaine, LSD and alcohol. He informed me that he stole to get access to drugs.

This young man is a native of Halifax and was living in * together with his mother and 4 younger half-siblings prior to his admission here. His biological father deserted his mother in his infancy and he has no contact with him. He had a negative experience with his mother's boyfriend who sired her 4 younger children. By L's account, he was abusive towards him physically, frequently strapping him and often leaving him in isolation in a room for days at a time without food. L is a student in grade 8 at * School in Halifax. He told me that he was a poor student and had been to "every school in Halifax". He has repeated grade 5 and grade 7. He is a good athlete by his own account and plays high school football and hopes to gain a scholarship somewhere.

Psychiatric Assessment - LM

Mental status examination reveals a youth of mixed race who related in a very anxious manner. He avoided eye contact throughout the interview and was very fidgety and restless. He had a good sense of humour when engaged and related as being a very pleasant, if dependent, young man. He gave a far more full account of himself and particularly his own personal feelings than a fifteen year old normally would suggest and that he has a tendency towards dependence. He spoke with evident discomfort about his abusive experiences as a child. He denied persistent depressed mood and neurovegetative signs. He describes free floating anxiety without panic attacks. There is some social anxiety and evidently some sensitivity towards criticism and failure. He has markedly low self-esteem. He has difficulty in handling angry feelings. He impresses as being a boy of approximately average intelligence, but may have had some difficulties in concentration and certainly has problems in impulse control.

This young man's difficulties have several basis, including the following: (1) sensitive, anxious personality traits, which can in part be contributed to his desertion by his father and his experience of abuse as a child; (2) his chronic drug abuse; (3) his poor impulse control, which may be a result of an attention deficit disorder.

It is difficult to assess this boy in the office. I would be grateful for further information about his level of functioning on the unit and I would be grateful if you could get the information from the Atlantic Child Guidance Centre. I would appreciate Dr. Dinning seeing this young man and assessing him as a candidate for some kind of psychotherapeutic experience, assuming that his experience of

abuse is a significant factor. There is no indication for medication at the present time, but I would like to see him in approximately 6 weeks.

Dr. Rhodri Evans

RE/rh

[48] The therapy assessment intake at the Nova Scotia Youth Centre was performed by Dr. David Dinning on July 6, 1989. Once again, LM did not reveal the sexual abuse.

Therapy Intake Assessment

M, LM

D.O.B.: September *, 1973

Date Seen: July 6, 1989

Young Offender M is a fifteen year old boy of mixed race who was referred for assessment for psychotherapy by Dr. Rhodri Evans. Young Offender M has been a resident at the Youth Centre for the past three months and apparently has had some previous problems adjusting to his unit and getting along with other Young Offenders. He also gave Dr. Evans a history of having been physically abused by his mother's boyfriend.

Presenting Problem: Young Offender M described himself at present time as either being irritable and quick tempered with others or depressed. He relates these problems to his family situation, particularly to the fact that he was physically and emotionally abused by his mother's boyfriend. He also attributes the fact that he became involved with drugs and criminal activities in large part to this abusive situation.

History of Present Problem: Young Offender M reported that he began experiencing abuse when he was seven or eight years old and in about grade four or five in school. It was at that time that his mother began living with the man who sired Young Offender M's two younger sister's (sic) and a younger brother. He reported that this man would beat him with a belt (to the point of leaving large welts on his back and legs) and would also lock him in his room for extended periods of time without food. He said that his mother was able to do little because she and the man were not on good terms themselves and would frequently argue. After a period of time the youth began staying away from home, he would

frequently stay with an aunt or with some other relative or just on the street. Spending so much time away from home led to his beginning involvement in drugs and this led to criminal activities to obtain drugs. He also began doing poorly in school and not attending classes on a regular basis. At the present time it may be that there is some underlying depression, temper problems, and low self-esteem which can be attributed to this abusive situation.

History of Drug Abuse: Young Offender M readily admits to regular use of hashish, alcohol, and more recently cocaine. He has also used LSD on several occasions but said that he does not like the effects of that drug.

Previous Psychiatric History: Young Offender M apparently has had some contact with the Atlantic Child Guidance Centre in Halifax, N.S., he was unable to give the name of the therapist with whom he met at that facility. He reports having met with him only three or four times over the past year and a half or so. Information about his contact with that facility has been requested.

Family Information: Young Offender M is the oldest of five children, he has three younger sisters and one younger brother. He and his next youngest sister were each sired by a different man. Young Offender M never knew his biological father who left his mother before he was born or shortly thereafter. The other three children in the family were sired by the boyfriend who Young Offender M says abused him.

Young Offender M's mother is a single parent and the other children live with her. Prior to his incarceration Young Offender M was living with his aunt and in considering returning to that arrangement when he is released.

Legal History: Young Offender M apparently has an extensive legal history, his current seven month sentence is due to a neighbourhood racial incident in which he was charge with threatening with a deadly weapon and making verbal threats. He also has two charges of breach of probation and a charge of theft that are awaiting court. He expects his totally time to amount to perhaps twelve to fourteen months.

Mental Status: Young Offender M is medium built boy of medium height who is fifteen years of age and appears to be about his stated age. He was open and friendly during the interview and related well. He seems to have some insight into his situation and problems and also seems to be motivated to work on them. He impresses me as having a considerable amount of underlying depression to which he himself admits, he denies his suicidal ideation or intent at the present time, he does say that he has thought of suicide in the past but knows that he would not do it.

Recommendations: Young Offender M is willing and seems motivated to meet for regular sessions of psychotherapy. I will begin seeing him on a weekly basis next week.

Dr. David Dinning
Psychologist

[49] In September 1990, Dr. Brian MacInnis, M.D., referred LM to Dr. Rhodri Evans for assessment. Dr. Evans had seen LM on previous occasions. On September 7, 1990, she noted:

The past history and developmental history is noted on the file.

Mental status examination reveals a man of mixed race who related in a rather shy manner avoiding eye contact. He looked downcast throughout the interview and radiated an aura of unhappiness. He described a predominantly depressed mood with diurnal variation. His sleep is disturbed at initial and late insomnia. His appetite is reduced and he feels that he has lost weight, although he has not been weighed recently. his (sic) energy is diminished. His thinking is depressive and he has no vision of the future. He has experienced suicidal ideation although he has not had any firm thoughts of acting on this. I was unable to detect any evidence of phobia. There are no hallucinations or delusions. He impresses being a boy of approximately average intellect.

I think this young man is suffering with a depressive disorder and would benefit from the introduction of anti-depressant medications. I will start him on Imipramine, 50 mg. H.S. initially, increasing to 100 mg, H.S. after five days. If there has been no therapeutic response and no significant side effects after ten days, Dr. MacInnis, could increase the medication to 150 mg. H.S. I would like to see this boy again in approximately three weeks. Perhaps, the staff would arrange for him to come to my office to be reviewed.

[50] LM subsequently refused to take his medications.

[51] On November 20, 1990, Dr. Michael Leiter reported:

CASE REPORT

LM - November 20, 1990

L and I met for approximately one hour. He brought up the subject of his refusal to take his medications early in the session. L indicated that he had stopped taking his medication as a way to irritate the staff. He stated that he was not having any adverse effects from the drugs and that he did believe that the drugs were doing him some good. Since ceasing to take the drugs on the 11th of November, L has had a number of reactions which may or may not be attributable to the abrupt end of the antidepressant. An alternative explanation may be a stress reaction of some kind. In any case L has experienced a skin rash including large pimples and what appears to be an allergic reaction. He stated that he has not had such skin problems before. Secondly, L is physically agitated. He fidgets often during his conversations and his voice and a distinct quaver to it. His voice has previously had this quality but it is much more pronounced these days. L remarked that various people had noted these physical reactions on his part. In terms of psychological reactions L noted that over the past ten days he has felt more lethargic and that he has had less initiative than he did for the previous months. While he does not report any depression per se, he does note that at night he is worrying a bit more and becoming more despondent. I requested the nurse to arrange for another consult with Dr. Evans about a decision to terminate or reinstate these medications. I also discussed with L his capability of regularly taking these medications after being released from the Centre (L is scheduled by January 18). L was unable to give a definite answer on whether or not he would be able to continue a medication regime.

Otherwise L indicated that he was finding life on 1B to be fairly comfortable. He was glad to be free of the social pressures of the unit and was pleased that he was making so much progress with his correspondence courses. We discussed his plans for after his release from the Centre. He sees anger control and substance abuse control as being the major issues that he will have to address. We reviewed the status of his approaches to these problems and defined some potential problem areas.

Michael P. Leiter, Ph.D.
Psychologist

[52] And on November 27, 1990, Dr. Leiter noted:

CASE SUMMARY

I have seen LM on seven occasions since July of this year. He was seen previously by Dr. Dinning at this facility. L and I met for individual therapy sessions for 45 minutes to an hour in length. He was involved in a variety of educational and vocational programs at the Centre during his sentence and participated in the life of the units.

L was consistently co-operative with the therapy sessions. He was concerned about a number of areas in his life and was willing to discuss them in detail. L is capable of expressing his thoughts and feeling directly. While at the Centre, L complained of depression including disruption of sleep patterns, loss of appetite, and suicidal thoughts. He responded fairly well to medication. He stated that his recent refusal to take his medication was more tied to rebelliousness on his part than with any problems with the particular medication.

In addition to discussing his feelings, our sessions focussed on L's strategies for anger control and on his relationships with other people, both at the Centre and at home. L finds himself in confrontations with other people quite frequently. Many of his problems with the law have arisen from these confrontations escalating into full fledged assaults. Within these strict controls on aggression exercised here at the Centre L has been able to stay out of fights for the past six months. I expect that he will require active assistance in controlling his aggression after being released. On a cognitive level, L understands the consequences of his aggression, but he can still be carried away in the heat of an actual confrontation.

L has the capacity for maintaining caring relationships with other people. He has difficulty in tolerating opposition from others. when (sic) things do not go his way in a relationship, he tends to feel slighted and hard done by. He then reacts by withdrawing from the relationship and stating that he does not care about the other people. This pattern seems evident in his relationship with his girlfriend as well as relationships with other Young Offenders at the Centre. I believe L would benefit from general assistance in dealing with the social relationships as well as specific help in working through relationships in his family, both with his mother and his son.

I hope this information helps you in your work with L. If I can be of additional assistance, feel free to contact me.

Michael P. Leiter, Ph.D.
Psychologist

MPL/tla

[53] LM finally revealed he was sexually abused by Cesar Lalo in 1996, when he made a statement to Constable Halliday of the Halifax Regional Police, who was investigating Cesar Lalo. He was further assessed and in receipt of the treatment after that date.

[54] In 2004, LM sought counselling from Ms. Linda DeBaie, a psychiatric social worker, who saw L for eight sessions. Her report dated August 28, 2005, prepared for LM's solicitor, is before the Court. Her fees were paid by the Department of Justice Victim's Services Counselling Program. She outlined his reported difficulties:

1. Re-experiencing of the sexual abuse on a daily basis
2. Nightmares of being sexually abused
3. Difficulty sleeping
4. Paranoia
5. Difficulty trusting others
6. Difficulty with intimate relationships
7. High level of Arousal especially anger
8. Avoidance of any reminders of the sexual abuse
9. Withdrawal from friends and family
10. Difficulty concentrating
11. Substance abuse
12. Conflict with the law
13. Anxiety and Panic
14. Self esteem issues
15. Hyper vigilant
16. Racing thoughts

[55] She concluded as follows:

Mr. LMM is a 31 year old single man with a 15 year old son. He presents as an articulate young man who has struggled with early childhood sexual abuse. This abuse has left a significant impact on this young man with several years in conflict with the law, difficulty forming attachments with others and living in fear that others are judging him. Although he wants to move ahead with his life, shame and low sense of self have influenced his life choices. The impact of sexual abuse by a trusted authority figure has impeded Mr. M's chances of developing safe and trusting relationships. It has also made it difficult to pursue higher education or gainful employment. He has little resilience to criticism from others about his abilities to do a job.

Mr. M is experiencing symptoms consistent with people who have been sexually abused. A referral to a psychiatrist to diagnosis these symptoms would be appropriate.

The length of time to resolve this issue before the courts is impeding Mr. M's ability to move ahead. He has goals for the future that include training and employment. He has a great deal of insight into his troubled past and does not want to repeat those same mistakes. Given the opportunity and continued work on the symptoms that have created difficulty for Mr. M, there is hope this young man can take charge of this life and be the person he aspires to be.

[56] During this time, LM was assessed by the Mental Health Program of Capital Health, in Halifax. The report of Marie Angelopoulos Ph.D., dated April 17, 2004, is revealing. It notes:

History of Presenting Illness/Problems:

Mr. M reported that he has been very anxious, tense, "hyper", and irritable for the past 3-4 months. He has not been leaving the house frequently, and when he does, he often gets suspicious, angry, and verbally aggressive with strangers when they look at him. He noted that his anxieties have gotten worse since he hurt his knee 4 months ago while working as a plumber. He is now on social assistance, and he is applying for other plumbing jobs.

Mr. M described a long history of traumatic experiences. He stated that he was repeatedly physically abused by his step-father, starting when he was 5 or 6 years old. Reportedly, he has had nightmares since age 6. He noted that he still needs to cover his head in bed and to leave the light on in order to go to sleep. In addition, he stated that he started urinating in bed when he was 8 or 9, and that he still does this on occasion.

Mr. M also described several sexual assault experiences from his probation officer between the ages of 11 and 13. He noted that he was not affected by these experiences at the time, but that he developed considerable anxiety when he testified in court against this probation officer recently. As this case has been getting report coverage on the radio, Mr. M believes that many people, including strangers that he sees on the street, know about his sexual abuse. Due to this belief, he often gets suspicious and angry at strangers. He reported that he frequently “zones out” and has out-of-body experiences, and has an increased heart rate almost constantly. He noted that he relies on marijuana daily in order to calm himself down.

Mr. M described a long history of problems with the law. Reportedly, he has been in jail 8 times, starting when he was 15 years old. His longest incarceration was for 18 months. He has never been sent to a federal prison. He said that his offenses have included theft, assault, and driving dangerously.

Mr. M stated that he came from a very poor, disadvantaged family, and that he had to take on many responsibilities because he was the eldest child. He noted that he started robbing businesses as a child (age 7) in order to provide money for his family. Reportedly, his mother did not approve of these activities, but she needed the money, so she did not attempt to stop Mr. M. In addition, Mr. M noted that he was praised by his friends for his illegal activities, and that he received little praise for anything else (e.g., his scholastic performance).

Mr. M noted that he does not have much social support. He said that his main supports are himself and his marijuana. ...

Clinical Impression:

Mr. M presents as an anxious and irritable individual, as evidenced by his rapid speech and shakiness. His anxiety is of such severe intensity that he rarely leaves his house. His use of marijuana has apparently increased in an effort to cope with his escalating anxiety. Indeed, he noted that he was using marijuana before coming in for our appointments. His recent court testimony and the radio coverage of this court case have apparently re-activated the memories of his traumatic childhood experiences. He has little social support, if any. Notably, Mr. M missed two of our scheduled appointments, and indicated that he has a court date scheduled for the end of March 2004, with potential incarceration.

Diagnosis:

- Axis I - Posttraumatic Stress Disorder
Substance Use Disorder
- Axis II - deferred
- Axis III - recent knee injury, which reportedly hinders his ability to work as a plumber
- Axis IV - little perceived family support, unemployment; legal issues
- Axis V - 50

Treatment Plan:

Mr. M was offered roughly 20 sessions of out-patient follow-up by Psychology. A predominantly CBT approach for PTSD will be offered. Goals for psychotherapy will include increasing coping skills (e.g., relaxation strategies, anger management), reducing substance abuse, and exploring any guilt or shame that he may have regarding his reported sexual abuse. Given Mr. M's inconsistent attendance at appointments thus far, his potential to engage in therapy may be limited.

[57] As expected LM did not follow up on these sessions. He did however testify that he attended every scheduled meeting with Linda DeBaie because they connected and she was a nice lady. However ultimately he testified he did not like her style "I would just sit there and spill my mind out to her and there was no, like well, you know, I don't, comeback. I think she was the one who told me to get on medication and stuff like that."

[58] And lastly, LM testified he received the most help in 2006, from a psychologist Steve Cann, whose style was interactive and required to do assignments (homework). He felt he made progress with him and would seek further treatment in the future from him if it were funded.

Medical Evidence of More Recent Injuries

[59] LM's general medical records reveal that he had a head injury from an automobile accident in * in 1994. A 1995 hospital notation references facial weakness and his family doctor notes (1995) he complained of headaches after the accident.

[60] In 1999, LM suffered a back injury, in an automobile accident, and re-injured his back in a 2000 slip and fall. Other hospital records in 1995-1996 also note back injuries.

[61] More recent records, 2000-2001 note chest and abdominal pain associated with drug ingestion.

[62] On October 31, 2003, LM broke his leg, playing football. This last injury has possibly impacted his ability to work due to his failure to attend physiotherapy as directed by his physicians.

THE EXPERT EVIDENCE:

DSM Diagnosis of LM:

[63] Jason Roth saw the plaintiff at the request of counsel and accepted an engagement to prepare a report for the Court on the psychological impact of the Lalo abuse upon the plaintiff. Mr. Roth understood that his report would be a substantial consideration in proving the plaintiff's case for damages against the province.

[64] Plaintiff counsel asked the Court to qualify Jason Roth “an expert in the field of psychology” and receive his report into evidence. The defence objected to the acceptance of this report after it had received the scrutiny of their own expert Professor James Alcock. A *voir dire* was held.

[65] Jason Roth is a psychologist, registered with the Association of Psychologists of Nova Scotia. He has thirty years experience in the field in what is essentially a counseling practice. His full résumé is before the Court.

[66] Mr. Roth interviewed the plaintiff on three occasions in May and June 2007, twice alone and once in the presence of his colleague Ms. Carol Shirley, who also took notes and wrote up a summary of the interview on that occasion. Mr. Roth also conducted a very extensive historic document review of the records provided to him by plaintiff's counsel, which are before the Court in evidence.

[67] In his report, Mr. Roth first set out the factual context of LM's life and addressed the early psychological intervention, which I have already extensively reviewed.

[68] Mr. Roth's report has been criticized by defence counsel, and the defence expert Professor Alcock, for not giving enough consideration to LM's early run-ins with the law (ages 8 - 12) and the effect of his poor home life, and for over-emphasizing the sexual abuse by Cesar Lalo, in concluding that LM is largely damaged by reason of the sexual abuse. This over-emphasis, they suggest amounts to a confirmation bias, that sexual abuse leads to serious psychological harm, which they argue is not necessarily the case, and at any rate is over-emphasized by Mr. Roth.

[69] Mr. Roth did chronicle LM's early years and the behaviour problems he demonstrated after moving to * Public Housing with his mother. He also noted the early physical abuse by his stepfather JG.

[70] Mr. Roth, I believe rightly reflected on the escalating nature of LM's criminal behaviour after Cesar Lalo began abusing him and using threats of being sent to Shelburne to secure sexual favours.

[71] Mr. Roth notes that despite psychological interventions, made absent the knowledge of any sexual abuse, these psychologists relied to some extent on LM receiving further guidance and counsel within the youth justice system. Quoting Dr. Swaine:

It would appear that there is continued potential for growth and improvement provided he is able to receive support and guidance (from the courts, his family and this clinic) and is also given opportunities to interact with his community in order to benefit from the guidance.

[72] He notes that Dr. Dinning seemed willing to attribute some of LM's difficulties on his use of hashish, alcohol and even cocaine.

[73] He notes that LM explained probably for the first time, how and why his behaviour escalated, when he made a statement to the Murphys (gentlemen who were investigators looking into Lalo abuse claims in the 1990's). LM explained his

“probation violations” as attempts to get away from Lalo’s sexual advances and demands. He stated in his February 21, 1996 disposition:

About a month after this happened, during one of my visits, Cesar (sic) asked me to go underneath his desk. I knew what was going to happen, but I was too scared not to do it. Cesar would threaten me with the fact that if I didn’t do what he told me, he would send me to Shelburne and this was a place I didn’t want to go. After I was under the desk I realized that he had his penis out and I performed oral sex on him in his office. One of the things he did for me was write on my probation order that I wasn’t recommended to go to Shelburne. He did this numerous times for me ...

After the sex got this far advanced, I became very uncomfortable and started skipping my visits to Cesar’s (sic) office. He didn’t like this too much because he breached my probation. After my probation was breached the court sent me to Shelburne for 15 days.

[74] Mr. Roth then states:

Mr. M’s anti-social behavior worsened as time went on. In June 1989, two months after he was sentenced to the Waterville Youth Centre, psychiatrist Rhodri Evans interviewed Mr. M and noted, “Young Offender M described himself at present time as being either being irritable and quick tempered with others or depressed ... he related in a very anxious manner. He avoided eye contact throughout he interview and was very fidgety and restless ... He describes free-floating anxiety without panic attacks. ... He has markedly low self-esteem. He has difficulty in handling angry feelings. He impresses as being a boy of approximately average intelligence, but may have had some difficulties in concentration and certainly has problems in impulse control.

[75] Mr. Roth’s implication that these interventions were not confronting LM’s real problems seems obvious.

[76] Mr. Roth notes that even after Dr. Dinning reported in July 1989, he agreed to see LM on a weekly basis thereafter.

[77] Mr. Roth notes:

Dr. Dinning met weekly with Mr. M over the next two months.

There appeared to be some improvement in his anger management. A frequent theme in Dr. Dinning's notes was Mr. M's sense of powerlessness and helplessness in his attempts to have his concerns and requests taken seriously by the legal authorities. It was these same legal authorities who repeatedly returned Mr. M to Mr. Lalo's supervision.

[78] Mr. Roth then states:

Mr. M's 1990 psychological records reveal that his psychological condition deteriorated. Mr. M appeared to have become increasingly defiant and uncooperative. Psychiatrist Brian MacInnis noted on November 13, 1990 "there appears to be a depressive illness". Psychologist Michael Leiter speculated one week later about the possibility of "a stress reaction of some kind", observing that Mr. M "fidgets often during his conversations and his voice had a distinct quaver to it. His voice had previously had this quality but it is much more pronounced these days." There were frequent behavioral citations, episodes of self-mutilation and several instances where emergency psychiatric intervention was required.

Mr. M's struggles and psychological condition appears to have continued to worsen over the ensuing years. The sexual abuse that he endured has remained in the forefront of his awareness. Mr. M notes in this aforementioned 1996 disposition,

I have had many bad days after all this abuse and think of it often. I dream about this a lot. I am not a fruit or queer, but sometimes I find myself looking at men's asses. I have beaten up women for no reason at all and have difficulty in relationships with them. I have used drugs and alcohol to get rid of the memories. I moved away to * to try and forget about the abuse and I had forgotten some of it, but when I came back here, the memories started flooding back and that is why I am talking to you today, so I can really be done with this man.

[79] Mr. Roth then appears to accept LM's account of the years following his disclosure of the sexual abuse in 1996.

Despite his hope that by coming forth he would be able to "be done with" Mr. Lalo, any sense of psychological closure remains elusive. In the twelve years since Mr. M made his dispositions, he continues to be obsessed with Mr. Lalo. Mr. M perceives himself as "being less of a man" because of what he did with Mr. Lalo and condemns himself for having gone along with Mr. Lalo's demands. He has been unsuccessful in his attempts to control his anger and finds himself often lashing out at people. Lacking any strategy for anger management, Mr. M generally does not venture out in public out of a fear that he will lose control and

hurt someone. A once positive relationship with his grandmother has withered and Mr. M finds himself feeling both undeserving and untrusting of anyone who seeks to be close to him. He has been unsuccessful in any attempt to maintain an intimate relationship. Mr. M's major source of comfort and escape is alcohol and non-prescription drugs. He fears that were he to stop escaping in this manner, his anger would overwhelm him and he might seriously injure either himself or someone else. Mr. M has been unable to maintain employment and has been fired from every job he had due to his either being drunk, "high", or aggressive. His intense outbursts of anger are fueled by and reflect feelings of paranoia and wild mood swings. Mr. M is prone to episodes of intense suicidal ideation and generally suffers an intense fear of abandonment even as his actions and behavior challenge any attempt to maintain a relationship with him.

[80] It is clear to me that these first six pages of Mr. Roth's report are born of his 30-years of counselling practice, his ability to listen, his ability to draw out LM, his ability to show empathy, to synthesize all of the details of LM's difficult life and form opinions as to the consequences of these experiences.

[81] It may be that Mr. Roth has focussed on the more serious criminal conduct and "acting out" after the Lalo abuse began. But, on all of the evidence before me, I find it difficult to accept that LM was on a career path of a hardened criminal following his early encounters with the Youth Court, at ages 8 - 12, as the Attorney General seems to suggest.

[82] He was in trouble early on but it is more than likely, that had he met a good probation officer, who could have helped him through these early years, these behavior problems might well have resolved.

[83] In short, I do not find Mr. Roth's recitation of LM's young life to be completely unbalanced.

[84] However, where Mr. Roth's report falls seriously short is in the process of diagnosis.

[85] Mr. Roth also caused a battery of tests to be administered to LM by his colleagues, Ms. Carol Shirley and Dr. Lori Secouler-Beaudry, who are registered psychologists in the province of Nova Scotia.

[86] The tests administered were the Minnesota Multiphasic Personality Inventory (MMP1-2); Symptom Checklist-90-R; Trauma Symptoms Inventory

(TSI); and use of the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (DSM-IV-TR).

[87] Unfortunately, Mr. Roth did not give attribution in his report for the work of his colleagues, nor did he include a statement of their qualifications or curriculum vitae.

[88] Mr. Roth explained in his testimony that he relies on others in his practice to perform psychometric testing. He testified that having found his own opinions as to the problems LM presented he wanted some independent advice.

[89] He did testify that after the second and third interviews, he needed to come up with a diagnosis and referenced page 2 of his notes. He used the DSM-IV-TR, using the diagnostic criteria to see if it fit or did not fit his analysis to that point.

[90] His evidence was that more tests were required to elicit more information and arrive at a diagnosis.

[91] Mr. Roth testified “I don’t think my self capable of administering a MMPI.” His view was that the tests should be administered independently, then the information should be brought together to make a diagnosis. He felt that scoring the tests blindly was important so there would be no bias and he could then use the results to reinforce his opinion. Mr. Roth felt that as he was coming to court he wanted some objective data beyond what he might have to say. He agreed in cross examination that he does not use the tests, does not pretend to understand them and cannot explain them. He upheld the view that having colleagues assist as they did was a common practice in Nova Scotia.

[92] Clearly Mr. Roth could not speak to the tests personally. Over the objection of defence counsel I ruled that the Court would hear *voir dire* evidence from Carol Shirley and Dr. Lori Secouler-Beaudry, for the limited purpose of their explanation of the administering the tests but not for their expert opinion as to the diagnostic result. These two witnesses supported Mr. Roth’s methodology and his diagnosis.

[93] Mr. Roth’s evidence was that having reviewed the results of the tests administered and having been in some conversation with his colleagues about the results, he was in a position to form a diagnosis.

[94] He noted in discussion:

In 1987, Mr. M was diagnosed as having a *Conduct Disorder (#312.81)*. The psychologist's review of the assessment made by psychologist Dr. John Swaine suggests that at that time, the severity of Mr. M's disorder was "Mild". Dr. Swaine was optimistic about "*a growing process of maturity in L*" and felt that individual psychotherapy or family counseling was not needed. Instead, he stated, "*It would appear that the present situation in which clear curfews and expectations (sic) along with support and reasonable consequences for L's behavior is an ideal one*".

With the benefit of hindsight, Dr. Swaine's optimism was sadly misguided. Dr. Swaine did not know that the probation officer who was supervising Mr. M, Cesar Lalo, was regularly sexually assaulting and abusing him. Instead of the structured guidance that Mr. M needed, he was physically and psychologically violated. When Mr. M reacted by seeking to escape his abuser and lashing out at authority figures, he was sent to youth correctional centres. Chart notations and letters from various psychiatrists and psychologists document an inexorable deterioration in Mr. M's psychological health. Whenever he was released from incarceration, he was returned to the supervision - and continued abuse - of Mr. Lalo.

The consequence of child sexual abuse last far beyond the commission of the act. Researchers have documented that there is a significant statistical relationship between "childhood sexual abuse" and the development of *Borderline Personality Disorder*. This disorder profoundly impacted and distorted Mr. M's perception of the world and the people he encountered. Struggling with an increasingly limited ability to function, Mr. M appears to have become trapped in a self-perpetuating, downward spiral that has come to define his entire life.

Among the various terms and diagnostic handles that emerged from the psychometric tests that Mr. M completed, the same clinical diagnosis - *Posttraumatic Stress Disorder* - repeatedly came to the fore. An exploration of the underlying aspects, components and assumptions behind this disorder offers a path that helps to put into a context the impact of the damage that Mr. M has suffered as a result of having been sexually abused. The *Diagnostic and Statistical Manual of Mental Disorder-IV-TR (DSM-IV-TR)* notes that *Posttraumatic Stress Disorder* can occur,

following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves (among other possibilities) a threat to one's personal integrity ... The person's response to the event must involve intense fear, helplessness or

horror ... the characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event, persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness.

“Violent personal assault” and “sexual assault” are specifically cited as examples of traumatic events that can precipitate a *Posttraumatic Stress Disorder*. The *DSM-IV-TR* goes on to note,

Avoidance patterns may interfere with interpersonal relationships and lead to marital conflict ... auditory hallucinations and paranoid ideation can be present in some severe and chronic cases.

The damage resulting from a massive traumatic episode is heightened when the stressor involves a specific individual. “Childhood physical or sexual abuse” is specifically cited as being the type of event that is especially likely to cause catastrophic and long-lasting psychological damage. Mr. M’s trauma was compounded by the fact that the abuse was predictable and he was powerless to control or stop it from happening. Mr. M recalls Mr. Lalo giving him two choices - “*have sex with me or be sent to Shelburne where lots of people would have sex with you*”.

Information gleaned from Mr. M’s interview and echoed in the interpretive results and blind analysis of objective psychometric tests mirror the long litany of symptoms that are attributed to sufferers of PTSD. These symptoms include:

- impaired affect modulation
- self-destructive and impulsive behavior
- dissociative symptoms
- somatic complaints
- feelings of ineffectiveness
- shame, despair or hopelessness
- feeling permanently damaged
- hostility

- social withdrawal
- feeling constantly threatened
- impaired relationships with others

Sadly, Mr. M reports that he suffers from and experiences all of these symptoms.

The posttraumatic stress and psychological turmoil that Mr. M suffered during the course of his contact with Mr. Lalo has left an indelible and lasting emotional scar. It has shaped and defined Mr. M's vocational experiences and has greatly limited his ability to maintain any emotional attachment to members of his family, friends or a potential romantic partner.

[95] The standard of practice in Nova Scotia versus other jurisdictions became an issue, as the defence expert Professor James Alcock, a professor of psychology at York University, testified as to the alleged flaws in Mr. Roth's methodology.

[96] Professor Alcock was qualified as an expert before the Court as follows:

1. Psychological assessments;
2. The use and interpretation of psychological tests;
3. The diagnosis of psychological maladies, including Posttraumatic Stress Disorder and Borderline Personality Disorder;
4. The relationship between childhood abuse, parental neglect and sexual abuse and psychological maladies, including Posttraumatic Stress Disorder and Borderline Personality Disorder;
5. Professional and ethical responsibilities of psychologists;
6. Evaluation of research methodologies and conclusions.

[97] Professor Alcock was highly critical of Jason Roth's report for its failure fully consider LM's earlier years, before the sexual abuse began, which included a rocky home life, physical abuse and neglect.

[98] With respect to the diagnosis Mr. Roth made of Posttraumatic Stress Disorder and Borderline Personality Disorder occasioned by the sexual abuse and its result in the failure of his life, Professor Alcock comments:

I find those statements to be, quite frankly, unprofessional, irresponsible of misleading. First of all, they misrepresent the literature with regard to the effects of childhood sexual abuse, as I shall discuss below. Secondly, the fact that Mr. Roth totally ignores the powerful effects of childhood parental maltreatment on an adult's ability "to maintain any emotional attachment to members of his family, friends or potential romantic partner" and on "ongoing psychological, vocational and interpersonal malaise," is astonishing.

I want to make several points at this juncture:

(1) There is no direct link between childhood sexual abuse and psychological malfunction. There is no direct link between childhood sexual abuse and any particular psychological disorder or constellation of psychological symptoms. As heinous as child sexual abuse is, there are many well-adjusted adults who suffered abuse as children and who were not traumatised as a result. On the other hand, is also the case that some lives are devastated by such abuse. But one cannot assume that because there was sexual abuse, an individual's emotional life will suffer devastation as a result. Consider, for example, these studies:

- Kendall-Tackett, Williams and Finkelhor (1993) reviewed 45 studies of the effects of sexual abuse of children, and found that while sexually abused children showed more emotional symptomatology than nonabused children, two-thirds of the victimised children recovered within the first 12 to months. It was concluded that, "*The findings suggest the absence of any specific syndrom in children who have been sexually abused and no single traumatizing process.*"
- Find, Tromovitch and Bauserman (1998), examined 59 studies and concluded that "*...students with SCA (child sexual abuse) were, on average, slightly less well-adjusted than controls. However, this poorer adjustment could not be attributed to CSA because family environment (FE) was consistently confounded with CSA. FE explained consistently more adjustment variance than CSA, and*

CSA-adjustment relations generally became non-significant when controlled for FE. Self-reported reactions to and effects from CSA indicated that negative effects were neither pervasive nor typically intense, and that men reacted much less negatively than women. The college data were completely consistent with data from national samples. Basic beliefs about CSA in the general population were not supported.

It is extremely important, with regard to Mr. M's case, to note that this study pointed to the very significant role that family environment plays with regard to adjustment in childhood, adolescence and adulthood.

(2) There is no direct link between childhood sexual abuse and Post-Traumatic Stress Disorder. Consider, for example, this recent research by Taft, C.T. Schumm, J.A. Marshall, A.D., Panuzio, J. & Holtzworth-Munroe, A. (2008) that connects PTSD symptoms to family violence experienced in childhood:

“Current study findings are consistent with a recent study among another clinical sample of abusive men, in which it was found that experiences of psychological abuse and neglect were stronger predictors of trauma symptoms and abuse perpetration in adulthood than was the experience of childhood physical abuse ... These results are also consistent with a growing literature among samples of children ... and women ... exposed to family violence, suggesting that psychological abuse exposure is a relatively stronger predictor of PTSD symptoms than is physical abuse victimization. Nonphysical forms of abuse exposure may have a stronger impact on the victim in part because these behaviours are evidenced more frequently, creating an atmosphere of fear and undermining victims' overall sense of well-being and self-worth ... Results suggest that the experience of psychological maltreatment may be particularly likely to lead to distress and trauma symptoms ...”

This link between psychological abuse and PTSD is obviously very relevant in Mr. M's case.

(3) There is no direct link between childhood sexual abuse and Borderline Personality Disorder. The long-term mental health consequences of childhood psychological maltreatment have been clearly documented by many years of psychological research. Being neglected/emotionally maltreated, the data show, can have effects as serious as being physically abused, and Borderline Personality Disorder can result. For example, a recent study (Allen, 2008), reported that:

“Current depression and BPD [Borderline Personality Disorder] features were significantly predicted by the frequency with which one's requests

for attention were ignored during childhood. These results may be explained by evidence suggesting that psychologically maltreated children may fail to develop self-esteem at the same rate as non-psychologically maltreated children ... and that maltreated children may fail to develop appropriate emotion regulation strategies ... Psychological rejection and degradation may also contribute to the problematic and unstable interpersonal relationships that are characteristic of individuals diagnosed with BPD ...

[99] Mr. Roth on the other hand relied on certain journals and articles in support of his thesis that child sexual abuse can account for LM's adult behavioral issues:

- Article on "Complex Trauma in Children and Adolescents"
- Article on Borderline Personality Disorder
- Article entitled the "Role of Childhood Sexual Trauma and the Etiology of Borderline Personality Disorder: Considerations for Diagnosis and Treatment"
- Article entitled, "Borderline Personality Disorder Symptoms and Severity of Sexual Abuse"
- Article, "Relationship of Childhood Sexual Abuse to Borderline Personality Disorder, Post-Traumatic Stress Disorder, and Multiple Personality Disorder"
- Article, "Trauma Reinactment: Rethinking Borderline Personality Disorder when Diagnosing Sexual Abuse Survivors"
- Article, "Borderline Personality Disorder"
- Article, "Disassociation: An Insufficiently Recognized Major Feature of Complex PTSD"
- Article, "Disclosure of Child Sexual Abuse. What Does The Research Tell Us About The Ways That Children Tell"
- Factsheet: "Conduct Disorder" (two pages)
- "Conduct Disorder" (three pages)

[100] It is fair to say, the Court has before it various articles that oppose one another on the issue of the impact of child sexual abuse.

[101] In his evidence, Professor Alcock testified that he believed Mr. Roth's report contained a serious confirmation bias that is to say, Mr. Roth began his work with a diagnostic hypothesis in mind and did not seek out data to contradict it.

[102] Professor Alcock referred to a few examples of earlier theories that had been debunked and that were the frequent subject of confirmation bias when these theories had historically been before the courts.

1. The satanic ritual abuse cases in Cornwall, Ontario, that never happened;
2. Child sexual abuse accommodation syndrome as recantation, which has occurred where an over zealous mother says her child was sexually abused and the court ignores the child's recantation as the court has been told this is a symptom of the earlier abuse;
3. The repressed memory of sex abuse syndrom with delayed recall of the earlier sexual abuse; and
4. The phenomena of multiple personalities in the face of childhood sexual abuse.

[103] He testified that all these four theories have now been completely discredited.

[104] Professor Alcock is of the belief that the physical or psychological abuse LM suffered at the hands of his mother or stepfather JG in early life can be as devastating as the sexual abuse he suffered. Indeed he is of the view that physical neglect can be more profound. He testified that it does not mean people are not traumatized by childhood sexual abuse but much less so than you would think.

[105] He expressed the opinion that no tests given to LM help in terms of causality. Professor Alcock agreed LM was a very troubled person with a complex array of problems, but in his view, he cannot say the degree to which the sexual abuse altered his life.

[106] Unfortunately, Professor Alcock did have the opportunity to meet with LM and form his own opinion as to LM's problems, but he declined the invitation of his counsel to do so.

[107] He agrees that he is unable to make a diagnosis of LM but submits that Mr. Roth's work is inadequate and of no help to the Court.

[108] Specifically he targeted the following areas of concern in the Roth report and outlined by his counsel in written argument:

- “A psychological ‘test’ is never a direct measure of an individual’s psychological state ...” (p. 6)
- “Validity scales cannot measure either honesty or dishonesty.” (p. 6)
- “Symptom Checklist ... one cannot rely upon it at all whenever a client might have some reason to try to communicate pain and suffering and emotional stress.” (p. 7)
- “Trauma Symptom Inventory ... one can easily exaggerate one’s distress ... The inventory ... is not useful when there is any possibility of the motivation to exaggerate symptoms ... Simply put, such a conclusion based on this inventory is irresponsible and misleading.” (p. 8)
- “MMPI-2 ... Mr. M’s L-scale score is 43 ... *The MMPI-2/MMPI: An Interpretive Manual*, p. 109), where it states that L-scores of 44 and below suggest that ‘Clients may be attempting to create an extremely pathologic picture of themselves ...’” (p. 9)
- “The F scale score is so high that [it] is off the chart ... For scores of 23 and above (Mr. M’s is beyond 120), ‘*The profile is probably invalid ...*’” (p. 9)

[109] Defence counsel submits:

The test results, Prof. Alcock concludes, “In light of the above, it is clearly very possible that these MMPI-2 results reflect significant symptom magnification.” (p. 9) He finds nothing in the documents that would suggest that Mr. M has been suffering from PTSD. He offers that the diagnosis of PTSD and BPD fit with *now-discredited arguments* that such disorders generally flow from child sexual abuse. Prof. Alcock finds nothing in Mr. Roth’s report that persuades him that such diagnosis are accurate in Mr. M’s case. (p. 10)

[110] In conclusion, Professor Alcock stated in his report:

In my view, Mr. Roth’s report is misleading in the extreme. It reflects a very serious misinterpretation of the psychological tests that were administered, and it ignores the importance of the psychological and physical abuse visited upon Mr. M, beginning long before any sexual abuse. His failure to consider the important

role of Mr. M's childhood experience in the home as a possible causal agent of his reported emotional distress and his long history of antisocial behaviour is stupefying to me.

Based on his report, I have no confidence either in the conclusions that Mister Roth has reached with regard to Mr. M's diagnoses (sic), or in his attribution of all of Mr. Roth's social, emotional, and vocational problems to the sexual abuse carried out by Mr. Lalo.

[111] In cross examination, Professor Alcock agreed that LM did not fit the "childhood onset conduct disorder" DSM-IV-TR at pp. 94-95 and that no early diagnosis of "opposition defiant disorder" had been made relating to LM when under the age of 10. Professor Alcock agreed that had there been no Cesar Lalo in LM's life, his earlier bad conduct might have been more easily resolved than if he had had childhood onset conduct disorder.

[112] Professor Alcock agreed that the article "Borderline Personality Disorder Symptoms and Severity of Sexual Abuse," by Kenneth Silk, M.D. published in the American Journal of Psychiatry was a reputable journal. Dr. Silk had noted in his article.

Many studies over the last eight years have linked the diagnosis of borderline personality disorder to a history of trauma during childhood. Some studies looked solely at sexual abuse, others at sexual and physical abuse, and still others included trauma such as witnessing or being involved in other forms of violence particularly domestic violence. Despite methodological differences among these studies, all are consistent in finding a high frequency of reported childhood sexual abuse among patients with borderline personality disorder.

...

The majority of sexual abuse reported by patients with borderline personality disorders was not a single, nonpenetrating event with a strategy. Clearly then, studies that attempt to understand the relationship between sexual abuse and borderline personality disorder syndrome need to examine not only the occurrence of sexual abuse but the nature and the severity of that abuse as well.

[113] Professor Alcock agreed that the nature of the abuse and the frequency of the abuse would be an issue. He agreed there were many variables at play.

[114] Dr. Silk made the following comments in the discussion of his research:

Severity of sexual abuse, particularly ongoing sexual abuse, predicted parasuicide, regression in therapy, and the DIB index and total DIB scaled scores. Sex with a parent predicted chronic feelings of hopelessness and worthlessness in the entire borderline personality disorder cohort and intolerance of being alone among the female subjects with borderline personality disorder. Ongoing sexual abuse predicted the total DIB scaled score for the entire borderline personality disorder to cohort and the female subgroup even though the range of the scores was quite limited. If total scores on the DIB is any measure of degree of severity of “borderlineness” then repetitive sexual abuse in childhood may be a predictor of severity of borderline personality disorder.

Our results suggest that ongoing sexual abuse may predict some of the symptoms that are well known factors of interpersonal functioning, among patients with borderline personality disorder, particularly as the patient might appear in interpersonal and psychotherapeutic settings. Perhaps the repetition of abuse and not abuse itself fertilizes the soil from which future symptoms and behaviour of borderline personality disorder grow. Ongoing sexual abuse is a continuous, repetitive exposure to interpersonal trauma that damages one’s attachments at an early age and can seriously impair future capacity to attach in satisfying and safe ways. These attachments failures can distort interpersonal development throughout life and lead to adult character pathology. Severe or continuous abuse over years may culminate in a strong conviction that other people are unsafe and interested only in their own gratification, and, hence, may lead to a belief in a malevolent object world. Further damage, it would appear, occurs if abuse takes place at the hands of family members or close relatives. In these instances, the abuser is someone who was suppose to be a protector and toward whom the victim may have felt great affection, and so the victim may experience chronic feelings of hopelessness and worthlessness.

[115] Professor Alcock agreed with that statement and agreed that the duration of sexual abuse is a consideration in how likely it is that a person will be harmed.

[116] He agreed that the age difference between the child and perpetrator can also be a factor, as well as that the perpetrator’s position of power and authority, the intrusiveness of the assaults and the type of assault were all important variables.

[117] When asked in cross examination if it might be more likely than not that LM would present with the diagnosed symptoms, on a balance of probabilities Professor Alcock agreed that “it would not surprise me if he suffered” as the result of the Lalo abuse.

[118] Professor Alcock agreed with the Court that LM presents as a very disturbed person but reiterated that the issue for the Court was one of causation.

[119] In cross examination, Professor Alcock agreed that the article by Bruce Rind, Robert Boursermand and Philip Tromovitch, that he relied on in his report, had caused significant debate and controversy, including in the United States Congress and the American Psychological Association. The thesis of this study was:

Many lay persons and professionals believe that child sexual abuse (CSA) causes intense harm, regardless of gender, pervasively in general population. The authors examined this belief by reviewing 59 studies based on college samples. Meta-analyses revealed that students with CSA were, on average, slightly less well adjusted than controls. However, this poorer adjustment could not be attributed to SCA because family environment (FE) was consistently confounded with CSA. FE explained considerably more adjustment variance than CSA, and CSA-adjustment relations generally became nonsignificant when studies controlled for FE. Self-reported reactions to and effects from CSA indicated that negative effects were neither pervasive nor typically intense, and that men reacted much less negatively than women. The college data were completely consistent with data from national samples. Basic beliefs about CSA in the general population were not supported.

[120] Professor Alcock agreed this is a very controversial article that flies in the face of what everyone assumes to be true. Yet, he believes that this discussion and debate is important and will result in debunking the assumption that child sexual abuse causes great trauma, much like the four earlier theories he referred to.

[121] The plaintiff's counsel pointed out to Professor Alcock that the Rind article has been widely used for immoral purposes by those who would condone sex between teenage boys and older men. Professor Alcock said he had no knowledge of that but suggested the article may be more controversial to those not in the psychological community.

[122] In conclusion Rind states:

Summary and Conclusion

Beliefs about CSA in American culture center on the viewpoint that CSA by nature is such a powerfully negative force that (a) it is likely to cause harm, (b)

most children or adolescents who experience it will be affected, (c) this harm will typically be severe or intense, and (d) CSA will have an equivalently negative impact on both boys and girls. Despite this wide-spread belief, the empirical evidence from college and national samples suggests a more cautious opinion. Results of the present review do not support these assumed properties; CSA does not cause intense harm on a pervasive basis regardless of gender in the college population. The finding that college samples closely parallel national samples with regard to prevalence of CSA, types of experiences, self-perceived effects, and CSA-symptom relations strengthens the conclusion that CSA is not a propertied phenomenon and supports Constantine's (1981) conclusion that CSA has no inbuilt or inevitable outcome or set of emotional reactions.

One possible approach to a scientific definition, consistent with findings in the current review and with suggestions offered by Constantine (1981), is to focus on the young person's perception of his or her willingness to participate and his or her reactions to the experience. A willing encounter with positive reactions would be labeled simply *adult-child sex*, a value-neutral term. If a young person felt that he or she did not freely participate in the encounter and if he or she experienced negative reactions to it, then *child sexual abuse*, a term that implies harm to the individual, would be valid. Moreover, the term *child* should be restricted to nonadolescent children (Ames & Houston, 1990). Adolescents are different from children in that they are more likely to have sexual interests, to know whether they want a particular sexual encounter, and to resist an encounter that they do not want. Furthermore, unlike adult-child sex, adult-adolescent sex has been commonplace cross-culturally and historically, often in socially sanctioned forms, and may fall within the "normal" range of human sexual behaviors (Bullough, 1990; Greenberg, 1988; Okami, 1994). A willing encounter between an adolescent and an adult with positive reactions on the part of the adolescent would then be labeled scientifically as *adult-adolescent sex*, while an unwanted encounter with negative reactions would be labeled *adolescent sexual abuse*. By drawing these distinctions, researchers are likely to achieve a more scientifically valid understanding of the nature, causes, and consequences of the heterogeneous collection of behaviors heretofore labeled CSA.

Finally, it is important to consider implications of the current review for moral and legal positions on CSA. If it is true that wrongfulness in sexual matters does not imply harmfulness (Money, 1979), then it is also true that lack of harmfulness does not imply lack of wrongfulness. Moral codes of a society with respect to sexual behavior need not be, and often have not been, based on considerations of psychological harmfulness or health (cf. Finkelbox, 1984). Similarly, legal codes may be, and have often been, unconnected to such considerations (Kinsey et al., 1948). In this sense, the findings of the current review do not imply that moral or legal definitions of or views on behaviors currently classified as CSA should be abandoned or even altered. The current findings are relevant to moral and legal

positions only to the extent that these positions are based on the presumption of psychological harm.

[123] This debate may not be over, but it is clear that Professor Alcock's position regarding the diminished impact of child sexual abuse, is not yet widely embraced by the psychiatric and psychological communities.

[124] Nevertheless, I am left with the Roth report tendered on behalf of the plaintiff that is, in my view, seriously flawed. In methodology alone, I accept Professor Alcock's judgment that this report does not meet the standards of expertise the Court must require.

[125] Mr. Roth's reliance on others who are familiar with psychometric testing required, at the very least, proper attribution. But, in addition, as Professor Alcock stated:

What is so important, then, is that the psychologist who interprets the test be very familiar with the problems and pitfalls of testing, and be very experienced in the use of a particular tests (sic) themselves. Psychologists are directed by their codes of ethics and by their professional bodies to ensure that they employ (sic) only those tests for which they have appropriate training, knowledge and experience.

Further, no test is to be used in isolation. That is, one cannot and must not interpret a test without taking into consideration the circumstances of the particular individual who has been tested. Thus, it would be irresponsible for one individual to administer a psychological test and interpret that test without having conducted a detailed clinical interview of the testee. Similarly, it would be irresponsible for a clinician to use test interpretations provided by another psychologist who had no detailed knowledge of the testee.

[126] This process of proper test administration and informed interpretation simply did not occur.

[127] I accept that Mr. Roth's piecemeal approach to this assignment did not produce a result upon which the Court could rely with the appropriate degree of confidence.

[128] Although it is clear to me that Mr. Roth's efforts were sincere, I agree with Professor Alcock. There is a significant distinction between the trained counsellor,

such as Mr. Roth and the trained clinician, skilled in administering psychological testing and diagnosing psychopathologies.

[129] I was less concerned than Professor Alcock, that Mr. Roth did not give proper consideration to all of LM's childhood experiences. It was clear from his evidence that he was aware of and did consider all of LM's background and the early physical abuse he suffered at home. It is fair to say, however, that he did not sufficiently deal with this issue in his report, so that it may appear he lacked balance or was overly eager to assist LM.

[130] I accept Mr. Roth's evidence that this assignment came at a difficult time in his personal life, when he had family illness to attend to and was away, during the period when the report required his full attention.

[131] In coming to this decision on the *voir dire* that the Roth report and the evidence in its support is inadmissible, I have considered the plethora of cases on the subject of admissibility of expert reports.

[132] Specifically, I have considered the following cases:

[133] In *R. v. Mohan*, [1994] 2 S.C.R. 9, the Supreme Court held that Dr. Hill's evidence was not admissible under the principles governing the admissibility of expert evidence and restored the convictions. Justice Sopinka set out the criteria by which to decide the admissibility of expert evidence at para. 17:

(a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; (d) a properly qualified expert.

[134] Relevance requires both logical relevance and a consideration of probative value versus prejudicial effect.

[135] In *R. v. J. (J.L.)*, 2000 SCC 51, Binnie J. called for a rigorous standard for the admissibility of expert evidence:

25 Expert witnesses have an essential role to play in the criminal courts. However, the dramatic growth in the frequency with which they have been called upon in recent years has led to ongoing debate about suitable controls on their participation, precautions to exclude "junk science", and the need to preserve and protect the role of the trier of fact -- the judge or the jury. The law in this regard

was significantly advanced by *Mohan, supra*, where Sopinka J. expressed such a concern at p. 21:

Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

and at p. 24:

There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

and at para. 28:

28 In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

[136] Counsel for the defendant have cited *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786 (1993), where the U.S. Supreme Court ruled that trial judges are to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." While Justice Blackmun noted that many factors would bear on the inquiry, he referred to four general observations as "appropriate":

1. whether a theory or technique can be (and has been) tested;
2. whether the theory or technique has been subjected to peer review and publication;
3. the known or potential rate of error of a particular scientific technique, and the existence and maintenance of standards controlling the technique's operation;
4. whether there is general acceptance in the relevant scientific community.

[137] I cannot help but comment that plaintiff's counsel could also rely on these observations, as they may apply to the Rind article relied upon by Professor Alcock and defence counsel.

[138] I have also considered *R. v. D.(D.)*, 2000 SCC 43, which contains an important discourse on the dangers of expert evidence at paras. 48-57.

[139] Regrettably, the Court is now left without an expert opinion as to the psychological damage suffered by reason of Cesar Lalo's sexual abuse of LM.

[140] I am left to consider the evidence of the accused and other witnesses as well as the documentary record that profiles LM's earlier life and the law governing claims of this nature.

LAW AND ANALYSIS:

[141] The state of the law in Nova Scotia in relation to damages for historic sexual assaults can be found in the Court of Appeal's decision in *G. (B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, where the trial judge had rejected the appellant's argument that the assaults had "little if any impact" on the plaintiff's education and career, which were allegedly affected more by his "abusive home life." The trial judge held that to reduce the assaults to "a momentary transient unpleasantness without any long-lasting psychological impact ... would ignore the psychological evidence and common sense." (para. 8).

[142] The Court of Appeal affirmed the trial judge's conclusion on causation, which included the finding that but for the assaults, the plaintiff "would at some point have at least received his high school equivalency and successfully completed some form of trades training," which would have given him "more employment opportunities at an earlier age and significantly enhanced the income he had earned in the past and would be capable of earning in the future." The abuse in the plaintiff's household had made him "particularly vulnerable" to the effects of the assaults. There was no error in the trial judge's conclusion that the assaults "had been shown to have been likely to have had substantial impact on [the plaintiff's] educational attainments and career development." (paras. 165-168)

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

[144] Damages awarded by the trial judge for past and future loss of income were the global sum of \$500,000.00. The Court of Appeal acknowledged that quantification was difficult in the circumstances. The trial judge was satisfied that the assaults had caused a "substantial interference" with the plaintiff's "ability to earn income in the past and with his capacity to earn income in the future" (paras. 168-174). In the view of the Court of Appeal, "the nature of this loss and the particular circumstances of the case made estimating the amount of that loss an inexact science to say the least. The judge was required to do his best on the evidence presented" (para. 174). The court went on:

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

It is important to understand that the loss of earning capacity award is fundamentally different from the award for non-pecuniary losses. The non-pecuniary damages, as discussed earlier, are awarded in relation to losses that are not financial in nature and cannot really be measured in money. A non-pecuniary award, as we have seen, is determined by placing a particular victim and set of circumstances within a range of conventional and, in a sense, arbitrary awards as determined largely by precedent. In contrast, a pecuniary award on account of past and future income loss is concerned with the financial loss the victim has shown he or she has experienced and will experience as a result of the wrong. Unlike in the case of non-pecuniary damages, there is no "range" for awards of pecuniary damages; decided cases do not provide benchmarks as to an appropriate range of pecuniary damages for loss of past income or income earning capacity. The amount of the award is determined by the extent of the financial loss as disclosed in the evidence in each case. (paras. 175-176).

[145] The trial judge had not itemized the award, finding that it was impossible, on the available evidence, to make reliable findings about the plaintiff's actual pre-trial earnings or precise future earnings. He was presented with estimates projecting

future (as well as past) losses, with and without the assaults. The estimates suggested a potential global loss of more than \$1 million. The Court of Appeal said:

With respect to future earnings, [the expert's] projections were based on the assumption that B.M.G.'s earnings would remain below - substantially below - that of a high school graduate. The judge did not accept that assumption. He found that B.M.G. "has the ability to surpass the average income level of high school graduates in the future": reasons para. 186. This, of course, would significantly reduce the amount of future loss compared to that calculated by [the expert]. The judge also properly took into account that the impact of negative contingencies such as job loss, unemployment or injury are difficult to evaluate and that B.M.G. could have mitigated his loss by making better use of his inheritance money, a sum of nearly \$200,000, which he had obtained around 1997: reasons para. 186. These considerations would further reduce the award. (para. 190)

In the circumstances, and in view of the trial judge's findings of fact, it could not be said that the global award was erroneous (para 191).

[146] Earlier cases have considered this issue. The aim of an award of damages for lost earning capacity is to compensate a plaintiff for "all pecuniary gains he would have made but for injury." Klar, et al, *Remedies in Tort*, Volume 4 at 27:63. The assessment is not "purely mathematical," but is intended to promote a reasonable award. The Supreme Court of Canada stated in *Engel v. Salyn*, [1993] 1 S.C.R. 306:

In assessing damages for pecuniary losses, the objective sought is full compensation. Although it is virtually impossible to evaluate future losses with complete accuracy, the trial judge must attempt to put the injured party in the position that the party would have enjoyed if the accident had not occurred.... In the case of self-employed persons, quantifying the victim's contribution to the business is inherently difficult. The best approach to calculating future losses must be dictated by the particular circumstances. Expert witnesses may assist the judge in determining the most appropriate method of calculation.

[147] There is, it should be noted, a distinction between "loss of earning capacity" and "lost future income." This point was discussed in *Exide Electronics Ltd. v. Webb* (1999), 177 N.S.R. (2d) 147, where Freeman J.A., for the court, wrote, at para. 44, that "Loss of earning capacity is loss of a capital asset; it can be compensated for even when it is not accompanied by a reduction in income," as in

a situation where a plaintiff can return to work, but with "a disability that restricts the scope of other employment that might become available in the future." By contrast, "The simplest illustration for an award to replace future income is total permanent disability, which requires an assessment based on earning expectations over the plaintiff's working lifetime." Similarly, in *Abbott v. Sharpe*, 2007 NSCA 6, Saunders J.A. said, at para. 156: "... this award was intended to compensate for diminished earning capacity which is seen as a loss to a capital asset, as opposed to a mathematical calculation of projected future lost income." In my view "loss of earning capacity" is the relevant approach in the present case.

[148] Loss of future earning capacity need not be proven on a balance of probabilities. The plaintiff is required to establish that

... future loss of earning capacity is a real possibility and that there is a reasonable chance it might occur. Hypothetical events are to be given weight accordingly to their relative likelihood, and a hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. (*Remedies in Tort* at 27:63.3)

[149] Upon identifying the plaintiff's source of income, the court should consider what the projected income would have been had the injury not occurred. In considering possible changes in income level, courts will take into account such factors as "promotion, demotion, career change or withdrawal from the workforce." In order to determine the likelihood of such events, "the court will usually look at the individual's field of work, his temperament, education and ability, marital status and the general economic conditions." It has been said that "the court must take into account the particular abilities and temperament of the plaintiff in an effort to predict his capacity to overcome his disability and function effectively in the workplace." *Remedies in Tort* 27:67-68.

[150] The consideration of contingencies in an award for future income loss was discussed by Saunders J.A., for the Court of Appeal, in *Campbell-MacIsaac v. Deveaux*, 2004 NSCA 87, in a passage that is worth quoting at length:

Whenever we speak of contingencies in the context of calculating an award of damages for future loss, one is obliged to measure, by way of estimate, the chances that a particular thing will occur or would have occurred and then reflect those chances, whether they are positive or negative in calculating the damage award. This engages the trier of fact in an exercise of prediction, based not on

guesswork but on proper proof and requires a careful consideration of the evidence and a healthy dose of common sense.

The analysis undertaken by Justice Oland in *Kern v. Steele*, 2003 NSCA 147 (N.S. C.A.) beginning at ¶ 56, is most instructive. Her approach, together with the authorities upon which she relies, may be briefly summarized. When assessing contingencies the court is engaged in the exercise of examining possibilities, probabilities and chances against the likelihood that they might prevail in any given factual situation. The evidence upon which such estimations are based must be "cogent evidence and not evidence which is speculative" (*Schrump v. Koot* (1977), 82 D.L.R. (3d) 553 (Ont. C.A.)). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility" (*Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.)). Justice Oland also endorsed the approach in *Graham, supra*, which was to distinguish general contingencies from special ones. Into the category of general contingencies fall those features of human experience that are likely to be common to all of us, things like the aging process, sickness, or promotions at work; whereas circumstances falling into the category of special contingencies are peculiar to that particular claimant. For example, remarkable talents, education, a unique illness or a poor employment history would be characterized as special contingencies.

As was noted in *Graham, supra*, and endorsed by Oland, J.A., in *Kern*, the impact of general contingencies may not be easily susceptible to formal proof. A trial judge has a discretion whether to adjust an award for future pecuniary loss in order to take into account general contingencies, but any such adjustment ought to be a modest one. Where, however, a party relies upon a specific contingency, whether negative or positive, there must be sufficient proof on the record which would support an allowance for that type of contingency. At all events, as noted by Oland, J.A., the overall approach is that which best achieves fairness between the parties (*Keizer v. Hanna*, [1978] 2 S.C.R. 342 (S.C.C.), wherein Dickson, J. (as he then was)) held at page 351 that:

. . . At the end of the day the only question of importance is whether, in all the circumstances, the final award is fair and adequate. Past experience should make one realize that if there is to be an error in the amount of an award it is likely to be one of inadequacy.

Fairness and adequacy are concepts rooted in fact and also to some extent in inferences drawn from facts. As such, in the assessment of fairness and adequacy, considerable deference is owed to the findings of a trial court.

[151] *Leddicote v. Nova Scotia (Attorney General)*, 2002 NSCA 47, paras. 53-58 also provides an extensive review of the law and terminology respecting lost future income and earning capacity.

[152] There is a good deal of case law in other jurisdictions dealing with the damages on account of historic sexual assaults on the subsequent educational and employment histories of plaintiffs. A common pattern, seen repeatedly in the caselaw, is one where childhood sexual abuse of the plaintiff in an institutional or authority-based setting – such as a religious or educational establishment, or involvement with a religious authority or probation officer – is followed by drug and alcohol abuse, difficulty in school, erratic employment and criminal activity. In such cases, the availability or quantum of damages for future income loss or lost earning capacity is often a point of controversy.

[153] It has been said that cases of historic sexual assault present significant challenges to a court in determining issues of causation. In *Blackwater v. Plint*, *supra*, at para. 74, calculation of damages for sexual assault was complicated by two other (statute-barred) sources of trauma: trauma suffered in his home and trauma for non-sexual abuse and deprivation. McLachlin C.J.C. said, for the court at para. 74:

... In reality, all these sources of trauma fused with subsequent experiences to create the problems that have beset Mr. Barney all his life. Untangling the different sources of damage and loss may be nigh impossible. Yet the law requires that it be done, since at law a plaintiff is entitled only to be compensated for loss caused by the actionable wrong. It is the "essential purpose and most basic principle of tort law" that the plaintiff be placed in the position he or she would have been in had the tort not been committed: ...

[154] The authors of *Remedies in Tort* state that loss of future earning capacity "should be calculated on the basis of the degree that the abuse suffered contributed to the lack of education, training and work experience." They call for certain assumptions to be made, including assumptions about the victim's likely education level, occupation and the date of entering the workforce. They also suggest considering any possible improvement in earning capacity on account of counselling and family support. *Remedies in Tort* at 27:74.2

[155] An award of damages requires evidence. In the absence of evidence, "the court should not assume that a plaintiff will continue to have a reduced earning

capacity and will not upgrade his or her education or enter into rehabilitation." *Remedies in Tort* at 27:74.2. In *L.(H.) v. Canada (A.G.)*, 2005 SCC 25, there was a lack of evidentiary basis for the trial judge's findings of lost future income. Fish J., for the majority, said:

... The finding that a person has had emotional and substance abuse problems which in the past have impacted on his earning capacity is not in itself a sufficient basis for concluding on the balance of probabilities that this state of affairs will endure indefinitely.

... To assume, without additional evidence, that H.L. will continue to suffer from substance abuse and emotional problems, will not upgrade his education or enter into rehabilitation, and will continue to have a reduced earning capacity, would be to do him an unnecessary and unwarranted disservice – particularly in the light of his own evidence that he had already at the time of trial taken steps to end his addiction to alcohol.

[156] The uncertainties of determining a future course of events were discussed in *J.R.S. v. Glendinning*, [2004] O.J. No. 29895 (Ont. S.C.J.), where a group of siblings had been sexually abused by a priest. The trial judge held that with respect to past and future loss of income it was necessary to "gaze into a crystal ball to determine that loss. What sort of career would they have had but for the abuse? What were their prospects and potential prior to being subjected to Glendinning's assaults? (para. 284) The answers to these questions were not required to be answered on a balance of probabilities. The onus was as described in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27: "A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation." In *Athey* at para. 29, Major J. (for the court), cited Lord Diplock's comment that, by contrast to determining what happened in the past on a balance of probabilities:

... in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[157] At *Glendinning, supra*, (paras. 284-297) where the defence submitted that "lifestyle choices" (such as drug use) must be considered in relation to the plaintiff's career success or failure, it was necessary to consider whether it was the

defendant who introduced the plaintiff to drugs. As to uncertainties, there was no family tradition of higher education, but it was "entirely possible" that one or more of the plaintiffs would have completed at least a high school education. There was, however, "no evidence of or expressed early desire on the part of any one of the three relating to career plans" that was of assistance. There was little evidence respecting the incomes of the plaintiffs during the years in which they were living "by their wits" and were involved in illegal activities, including drug trafficking, partly in order to feed their own drug habits. Given the lack of information, it would be guesswork to assess lost earnings on the basis of any of the scenarios advanced by the experts. The trial judge opted instead for a "life course" approach to estimating "the monetary costs of criminal violence to victims thereof." This approach, which estimated "the long-term costs of criminal violence" by deriving "from the regression effects of violent victimization on annual personal income" had "the advantage of dispensing with the need to consider the various contingencies outlined by defence counsel when using one of the other three scenarios, the necessity of assessing the actual but undeclared earnings of each Plaintiff, and whether they have mitigated their losses."

[158] In *Curran v. MacDougall*, 2006 BCSC 933, at para. 81, the trial judge cited the principles of causation as set out by the trial judge in *Blackwater v. Plint*, *supra*, as ultimately derived from the Supreme Court of Canada's decision in *Athey v. Leonati*:

- (1) If the psychological injury would have occurred at the same time, without the injuries sustained in the sexual assault, then causation is not proven;
- (2) If it was necessary to have both the sexual assaults and the other life circumstances for the psychological injury to occur, then causation is proven since the psychological injury would not have occurred but for the sexual assaults;
- (3) If the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on a balance of probabilities, whether the defendant's sexual assault(s) materially contributed to the psychological injury.

[159] The trial judge in *Curran* distinguished the respective burdens for past and future loss of income:

... For past loss of income, the plaintiff must prove, on a balance of probabilities, a causal link between the sexual assaults and corresponding injury and what the plaintiff would have earned.... For future loss of earning capacity, the standard of proof to be applied is simple probability. Possibilities and probabilities, chances, opportunities and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation: ...

[160] The trial judge continued at paras. 144-145:

Damages for loss of future earning capacity are intended to compensate a plaintiff whose earning capacity has been affected by a defendant's wrongdoing. The loss is of a capital asset. Some of the considerations to take into account were set out in *Brown v. Golaiy*, [1985] B.C.J. No. 31 (B.C. S.C.):

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

The court must assess the chance that such a loss will occur. As noted above, future or hypothetical events need not be proven on a balance of probabilities; they are simply given weight according to their relative likelihood: *Athey, supra*.

[161] In *Curran*, the court at para. 147 was satisfied that the sexual assaults contributed to the plaintiff's anxiety and depression, "but not to the extent of impacting his future earning capacity." The court distinguished *X v. M. (R.D.)*, 2006 BCCA 221, (para. 250), where "the plaintiff had established that his capacity to earn an income had been affected by the assaults." Similarly, no damages were awarded for lost future income in *P.(V.) v. Canada*, 1999 SKQB 180. The plaintiff attributed his difficulties – including an inability to accept authority figures in employment – to assaults that occurred when he was seven years old. The trial judge accepted that the assaults had occurred, but was not convinced that "all VP's

difficulties relate to the abuse he suffered." (para. 46) The trial judge took the view that the impact on the plaintiff was not as strong as suggested by the psychological experts (para. 52). The trial judge awarded damages for past loss of income, but held, at para. 61, that there was inadequate evidence to support "an inference of future income loss and I have no evidence of any wage rates on which to make any such award."

[162] In *Blackwater v. Plint, supra*, (paras. 93-96), McLachlin C.J.C., for the court, stated that an award of a "conventional" amount for loss of future earning opportunity was appropriate where the plaintiff was disabled from his occupation of logging for reasons other than the sexual assaults, and he lacked the "intellectual capacity to pursue vocational or retraining programs 'save for the briefest and most practically oriented.'"

[163] In *Doe v. O'Dell*, [2003] O.J. No. 3546 (Ont. S.C.J.) (paras. 317-318), the trial judge concluded, that the abuse was a material contributing factor to the plaintiff's past and future lost income. His "difficulties in completing his education and then finding and maintaining employment" were "a direct result of the sexual abuse." The loss of income was "substantial." Determining the amount of lost income was difficult due to the young age at which the abuse occurred. The contingencies raised by the defence, such as the possibility of a learning disability were not real and substantial possibilities, but only "mere speculative possibilities." (para. 321). Had the abuse not occurred, the trial judge was satisfied that the plaintiff would have at least completed a community college course. The court rejected the application of a negative contingency to the plaintiff's earnings, considering it likely that the negative and positive contingencies cancelled one another out.

LM'S EVIDENCE:

[164] LM was asked by his counsel to detail the nature of the assaults for the Court. I had as the trial judge in Cesar Lalo's trial on these charges heard LM testify once before.

[165] On both these occasions he cried throughout this portion of the evidence. His testimony is compelling and the painful effect of these assaults is palpable.

[166] He described how he thought he was 11 years old of age and that it was the fifth or sixth time he had seen Cesar Lalo. On the first occasion Cesar Lalo opened LM's shirt and began rubbing his chest. He remembered they were in the old *. The next time he saw Cesar Lalo, Cesar Lalo put "his hand down my pants and fondled me and asked how I liked it and stuff like that."

[167] On the next occasion, Cesar Lalo had LM fondle him. LM said this mutual fondling occurred at a few more meetings, then Cesar Lalo performed oral sex on him and he was asked to give Cesar Lalo oral sex. He testified that the oral sex happened perhaps five more times.

[168] The assaults finally culminated in an incident in Cesar Lalo's car at *. LM had managed to leave the Shelburne School for Boys a day early and the school called for his return. His evidence is that Caesar Lalo said he would be responsible for him. Caesar Lalo took LM to *, a park in north end Halifax, in his car. LM was reading his probation report. Caesar Lalo wanted oral sex, as he demanded on many previous occasions. Caesar Lalo opened his shirt and pants and was rubbing him, but for the first time this activity ended when "he shoved his finger up my ass, my buttocks."

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

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

[171] Raising a similar defence to that in *G. (B.M.)*, the defence argued that LM was not really hurt by these sexual assaults and was as or more likely to have suffered long term effects from the physical abuse he suffered in his home.

[172] With respect to the sexual abuse the defence cross examined LM on his answers to questions raised at the trial of Cesar Lalo.

Q. How did you feel while this was going on?

A. I don't know. I never felt really nothing, I guess. I ... I never had sex in my life or nothing like that, so I didn't know if it was good or bad ...

[173] Six months later in a mental health setting (April 17, 2004) the defence suggests that again he said the assaults did not affect him at the time. Marie Angleopoulos, Ph.d., a psychologist noted "he was not affected by these experiences at that time."

[174] Lastly, in his discovery evidence of July 13, 2006, when asked about the impact of the sexual activity with Lalo, L provided the following answers to questions asked by defence counsel:

191. Q. The report also talks about several sexual assault experiences from a probation officer.

A. Sure.

192. Q. And you state in the report that you were not affected by those experiences at the time.

A. No. Well, you know, I was getting - I was not going to jail with all my buddies when they were going so, you know, I thought it was no - you know, he was doing me a favour by abusing me, sexually abusing me, to tell you the truth, at - I was a kid and stuff, so - but now that I'm older.

193. Q. When did his - so we're talking about mental reaction. When did his abuse become a problem for your mentally?

A. I seen, I seen, you know, people on - I think the first time when I reported it, right, I seen a guy on there [TV] and he was brave enough to come forward. And I think I was in jail at the time, and then, you know, it all come crashing down on me then. Then I come forward and, ever since then, I've been - you know, before that, you know, I had thoughts of what happened to me and stuff like that, but it was all thoughts in my own mind. I couldn't tell no one or nothing like that, or I'd be known as a rat and a piece of shit, right. So basically, I just - it was all inside me. I just couldn't fucking - I couldn't tell nobody. People would - you know, my friends already I - he was doing something to me, Cesar Lalo. Every time I would leave the place they would say, "Oh, Lalo, Lalo", so you know.

194. Q. What the report says, thought, that you were not affected by those experiences at the time. I gather what that - what you were referring to...

A. Well, I was 11, 12.

195. Q. When you were a lad when this happening ...

A. Sure.

196. Q. ... that it wasn't affecting you, so it wasn't providing nightmares, wasn't giving anxiety, wasn't making you angry, to your understanding, at the time.

A. Not that I can recall. Like I said, all I knew, I was getting off of - getting off going to jail, you know. So when everyone else is going to jail, I got to stay home 'cause I was getting sexually abused, so...

[175] In my view, these are truthful and literal answers to questions asked. However, this is not the extent of his evidence. LM is very guarded and often does not speak more fully of these events. When he does, he is very emotional, very angry and often in tears.

[176] His counsel had to press him to address the effect of these assaults. Haltingly he responded:

I knew I was hurt ... and something in my mind ...

I didn't know what sex was. I was just a kid. I thought he was doing me a favour not sending me to Shelburne and abusing me.

I have flash backs ... the hurt ... my bum. I used to get a pain in my bum. I had a fissure in my bum, but always had flashbacks to Lalo.

[177] He did testify that the fissure occurred years later and was not the result of Lalo's assault, but caused flashbacks.

[178] It is important to note that Cesar Lalo was a probation officer, an officer of the Family Court, who exercised ultimate power over LM. He was in a position of trust. LM was a 13-year old who sought out a big brother:

The Court: Did you ever get a big brother?

Mr. M: No I didn't ... Yes, I wanted one ... wanted to get one for years ...

The Court: How come you didn't get one?

Mr. M: I still don't know. I don't know, like you know um, I think I was on the waiting list and then ... 16 and you don't get one like that and all the guys in the neighbourhood actually staying out of trouble had a big brother type of deal.

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

I just didn't like uh you know after the abuse and stuff I just um uh I just had no respect for any of the teachers and nothing like that right. Um, just you know, before that, it's relatively document that I had respect for everyone and then as soon as the abuse started I guess I felt that I was getting the bad end of the stick ... even as youth I realized this stuff shouldn't be happening to me. I use to take my anger out on other people I guess.

I was never disrespectful. Like a couple of incidents like I already said like I um got in an argument with, well basically not an argument I would you know I was mad and I would say something disrespectful to my mother and I um but besides like the few incidents that I had yeah, me and my mom (inaudible).

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

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

He threatened me, my family and everyone else so I never had no choice in the matter. He threatened to send to me Shelburne, threatened to hurt my brothers and sisters and my mother, whoever ... If I didn't participate in what you know, what he was doing, then I would go to Shelburne and he knew people down there that could beat me, beat the shit out of me. He referred to how small I was and would say how, you know, basically – I'll send you there and you won't like it

down there. He said to me you might not come back. Right, so that was enough for me. ...

I wasn't a violent person then. I didn't want to go to jail. Lalo told me if I ever go to Shelburne I would never get out ... that I'd probably die there.

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

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

[184] About his use of heavier drugs he testified:

Everyone in * did crack cocaine except for certain kids, J, T, LA, they were good kids ...

I use to put coke in a cigarette, called a coco puffer when I was 15 ½ - 16. Then graduated at age 16 to crack cocaine ...

[185] He also testified:

... not sure of the exact dates when I started. Tried weed and hash as a kid a couple of times. Smoked crack age 14 or early age 15 ... got bad so I went to Vancouver, my whole life crashed in on me.

[186] By 1989, Dr. Rhodri Evans characterized this as chronic drug abuse.

[187] It is also clear from the various Atlantic Child Guidance Assessment reports from 1987 - 1990, earlier referred to herein, that LM became irritable, quick tempered, had trouble relating to others, was subject to angry out bursts and became depressive. This included what the psychologists term "suicide ideation."

[188] LM testified that at age 16 or 17 he tried to slit his wrists numerous times because "the abuse ... the torture was just not fair." He testified that as an adult he had also tried a few times but medication had eased that impulse.

[189] Currently he testified he was on anti-depressants, smokes a lot of weed and cigarettes. He testified "grass calms me down, if no joint, not sure what I'd do." He testified he does not take hard drugs and tries not to drink because it brings out the worst in him.

[190] Defence counsel has attacked LM's credibility in advancing their theory that these childhood sexual assaults were not the source of a lasting injury.

[191] They suggest LM is motivated to testify in pursuit of a large settlement from the Province.

[192] I agree there are issues of credibility.

[193] LM was asked to explain why, in all of the meetings he had at the Atlantic Child Guidance Centre he did not single out Cesar Lalo or the sexual abuse but instead blamed his stepfather JG and his physical abuse as a root of these behaviour problems.

[194] LM testified:

Really Lalo did it but I blamed J, used J as the person who was abusing me not Lalo. I transferred (abuse) over to J . . . it was easier to talk about him than Lalo.

At the time I thought Caesar Lalo loved me and J hated me. It was discipline, I realize now.

I had never before been beaten by my grandmother or grandfather.

When everyone said 'there's something wrong' ... I couldn't rat on Lalo ... so they asked me 'is there abuse at home' I took that ... the one strapping (by J) and told of it over and over ... I regret now blaming J ... they wanted to hear stuff saying what is wrong so I'd make stuff up, said 'J beat me ...well only twice but I made it

more often ... until a psychiatrist helped me later and I told him there were only two beatings.

[195] LM also testified:

Once I realized this man was planting this all in my head, Cesar Lalo, trying to make everyone else to be the bad guy then I, you know, with a little bit of counseling, I think a grip on it. Mr. Dick MacLean never abused me. I was bad. I got strapped. Now I realize discipline equals you know, you know, if you act up you get discipline. Back then, I couldn't, you know, I thought 'Oh Jesus' the world was falling in on me right. Everyone, everyone, everyone's abused me right. ...

I thought it was abuse and you know, I, I told a lot of people and you know, I got co, basically coerced into believing that he was the bad guy, you know.

[196] It is not unusual for victims of sexual assault to not reveal the abuse when it is going on. Cesar Lalo controlled LM's life and freedom. He controlled a very vulnerable young boy, who by reason of other life's circumstances was ripe for Cesar Lalo's picking.

[197] From the time the sexual abuse began, it is obvious from the evidence, school records, Atlantic Child Guidance Centre reports and LM's own testimony, that he really began acting out and engaged in more serious criminal activity. Drug use fuelled the need to commit property crimes – a pattern that has lasted into adulthood. LM testified he has never sold drugs, but stole and hustled to get them.

[198] Defence counsel suggest that LM made bad choices early in life at ages 9 or 10, associated with the wrong people and initiated a life of criminal activity. They submit that LM does not regret this conduct but is proud that he is an accomplished thief who has chosen not to work. In particular, they reference LM's own testimony where he admits that he steals. Why then, the defence suggests, should the Court accept any of his testimony?

[199] I believe that LM is a more complicated and troubled person than the straight line criminal characterization defence counsel puts forward.

[200] LM did admit that he lies and steals, but he testified:

I do steal and I do hustle, but um, I don't uh, use it as my um, ways of living, I use it if I need uh, weed, I got none, either go steal something or rob someone or steal drugs.

From stealing I would use these money for uh, weed and stuff like that and um, and like the money and like I said, I would only steal when I needed it and uh...

[201] He testified:

I worked at a pawn shop, well, I never worked there, I um was at my friend's pawn on * ... want to elaborate on the hustling part, if I may ... no I'm going to elaborate, I was working at my friend's pawn shop; people would bring things in; things he didn't want I would buy and sell them off - that's hustling to me.

[202] He is in fact disarmingly honest as he describes his activities. He testified about his current life style. LM testified "basically I stay at home because I am angry and violent."

[203] In an attempt to demonstrate this may not be so, defence counsel arranged video surveillance of LM for several days in April 2009 taken by a private investigator Kevin Stone.

[204] The video sessions began at LM's home in * and awaited his departure in various cars, with various people driving him, and followed his activity for a few hours each day before he returned home again. For the most part, he returned to the old north end neighbourhood near * and can be seen buying marijuana, which he freely admits to doing on a frequent basis.

[205] He was video-taped on one occasion in the Halifax Shopping Centre, and can be seen from a distance putting something in his pocket, which the defence suggested was shoplifting glass frames from an optical store. LM denied this, saying they were his own sunglasses. Mr. Stone could not say that he had seen shoplifting in progress.

[206] The video sessions ended when LM became aware of a person in a truck outside his home watching him. LM says he thought he had a gun, which in reality was a video camera. LM testified he became very angry and paranoid and chased Mr. Stone away, so he departed. LM called the RCMP who investigated and later told him it was a private investigator with a camera.

[207] I did not find the video was particularly damning evidence. LM had testified that he does not drive and relies on his family to take him into town when he goes. Indeed, he identified the various cars he was seen in as his uncle's and traced the exchange of various cars and trucks to his uncle's home and business etc.

[208] The daily use of marijuana and even shoplifting are an acknowledged part of his life.

[209] The portions of the tape that show any angry LM approaching Mr. Stone's vehicle are also consistent with the conduct I saw in court, when LM becomes agitated, angry and not able to cope.

[210] I say that LM is complicated. By that I mean in three and one-half days of testimony, one day of it in strenuous cross examination, it became clear that LM is a very disturbed person. He demonstrated this a number of times in very emotional moments that required the Court provide him with time out to collect himself. He was angered by the defendant's aggressive cross examination. He was agitated when other witnesses, particularly the psychologists testified about him. Finally, he asked the Court's permission to absent himself from the balance of the trial.

[211] First hand, by his conduct he confirmed the various medical diagnosis before the Court. Ignoring Mr. Roth's work, I note that in her 2004 report Dr. Angelopoulos describes in her clinical impressions, the same conduct that LM displayed before this Court. She also diagnosed LM to have Posttraumatic Stress Disorder.

[212] I do not reject his evidence concerning the effect the sexual abuse he suffered had on his life as untruthful, simply because LM is an admitted liar and a thief, a position the defence has urged the Court to adopt.

[213] LM has a drug addiction. He commits criminal acts in furtherance of that addiction, not an unfamiliar reality before our courts. Nor are drug addictions as the fallout of sexual abuse. Nor can I simply accept that his life was on a trajectory of drug addiction and crime before he met Cesar Lalo, due to his difficult early circumstances.

[214] His early life was not all bad. In part he had a normal and happy childhood. He testified:

My mother tried to keep me grounded and away from trouble.

My gran loved me to death and didn't want me to leave but said, well she's your mother.

[215] He rode horses in * with his granddad. He played lots of sports and was on the * football team in the * of Halifax at age 11 and 12.

[216] I have no illusion that life in public housing with his mother in * was an easy life, or without bad influences, but it is also apparent from the record that his mother tried to help him and cooperated with the Atlantic Child Guidance in the assessment process. She also managed to do well by her other children.

[217] The analogy used by Professor Ken Cooper-Stevenson of "the sliding glass doors" applies to the circumstances of this case. Professor Stephenson wrote of the "sliding doors" and "back to the future" in valuing alternative life patterns.

[218] I began this decision by saying the task was to look at LM's life before and after the event of meeting and subsequently being abused by Cesar Lalo.

[219] In the film the "Sliding Doors," two parallel lives of the heroine are examined, one where she gets through the closing doors of the subway train, and the other, where by a split second she fails to get on the train. Similarly with LM there are two life sequences. The real life of today, having endured the event of Cesar Lalo, and what may happen in the future as a result of this event and the hypothetical or other life LM may have lived had he not had such a damaging encounter with Cesar Lalo. In the sliding doors analogy the Court attempts to quantify the difference between the two life patterns and reflect the difference in value between the two, with the hopeful goal of quantification moving beyond a global sum award, a difficult task in the present circumstances.

[220] So I have examined these two life patterns. There is no doubt in my mind that the Lalo "event" generated a significant and lasting change in LM's life plan. And I have asked myself what was the hope and promise of his life before Lalo.

Could he have lived even a conventional or somewhat normal life, but for this event? Will he ever get back on the track his life might have taken but for this event? What is the long-term difference between the life he has today and one he might have had, if the probation officer he met was an honourable and decent man. LM's life changed dramatically for the worse after he passed through that sliding glass door into Caesar Lalo's "care" at the age of 13.

[221] On the balance of probabilities, I find a significant causal connection between the sexual abuse LM suffered and his incapacity to get on with life and become a productive member of society.

[222] I accept LM's evidence as credible and a truthful explanation given today through adult eyes of the painful events of his childhood.

[223] This case is in part much like the circumstances of *G. (B.M.) v. Nova Scotia Attorney General, supra*. One cannot ignore the earlier psychological evidence of distress, even if the psychologists of the day did not know they were dealing with an undisclosed sexual abuse case. The impact of the abuse is a matter of evidence and common sense.

[224] In considering causation in relation to damages (as opposed to liability), the court referred to the judgment of McLachlin C.J.C. in *Blackwater v. Plint*, [2005] 3 S.C.R. 3. It is important to distinguish between causation in relation to liability and causation in relation to damage assessment. With respect to liability, the principle is that the defendant is liable if his or her wrongful acts were a cause of injury even though they were not the only cause. The principle with respect to damages is that the defendant is not responsible for injury or loss that the plaintiff would have suffered even absent the defendant's wrongdoing. This was discussed by the Chief Justice in *Plint*:

78 ... The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original

position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. ... [Emphasis by C.A.]

[225] I have no doubt that like the assaults in *G.(B.M.)*, it can be said these assaults interfered with LM's life and personal autonomy, were humiliating and degrading acts committed by a public official in a position of trust.

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

[227] In this case, I set the award for general damages at \$125,000. I note that defence counsel also agree that this would be within the appropriate range.

[228] The more difficult task, in the circumstances is the calculation of the requested award of damages for past and future lost income.

[229] The defence argues that LM has not sustained a loss of income, while the plaintiff's counsel suggests that LM, who acquired a GED, grade 12 equivalency, and also completed the academic portion of a plumber's trade, at the Nova Scotia Community College, might have had a full-time trade that would provide him a good living, but for the injury caused by Cesar Lalo.

[230] Actuary Brian Burnell gave expert testimony. He provided three scenarios for the lost earnings calculator. Scenerio A, the average earnings of a male Nova Scotia high school graduate; Scenario B, LM's longest period of employment working 76 days in the year 2000 being an average yearly earning of \$38,115.00; Scenario C, the income received from Aluma Systems in 2002, at \$39,911.00 per year.

[231] He provided at Schedule 3 to his report multipliers of the present value of future income to age 65.

[232] In preparing these calculations, Mr. Burnell came up with an hourly rate, for previous employment and created an annualized figure for LM's income.

[233] LM's claim for a lifetime loss of earnings is \$1,300,000.00.

[234] LM's employment history is sparse. His vocational aspirations are also complicated.

[235] I do accept that he is fairly intelligent and has completed various vocational courses.

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

[237] LM has not offered any evidence of employment history before 1997.

[238] LM testified that, having heard that other victims of Cesar Lalo, came forward to lay complaints, he did as well.

[239] He testified that after he gave his statement to Constable Halliday, he "hoped to change my life" and took courses in forklift operation, offshore work such as scaffolding and working in confined spaces, first aid and helicopter survival training, and finally a plumbing programme at Nova Scotia Community College.

[240] He testified "I tried to stop using Lalo as an excuse but it backfired."

[241] LM reported Canada Revenue Agency income is as follows: 1997 (\$2450.00), 1998 (\$4202.00), 2000 (\$8688.00), 2001 (\$116.00), 2002 (\$14,448.00), 2003 (\$3795.00). He has not worked since 2003.

[242] He currently lives on a disability pension of \$803.00 per month, received from April 2007 forward. Between 2004 and April 2007, LM lived on social assistance and received \$405.00 per month.

[243] LM testified he has been trying to straighten out his life for more than 10 years. He testified that he is generally trouble in the workplace, gets fired for arguing with people and also tested positive for marijuana use and is unable to ever work in the offshore again.

[244] The evidence is mixed on this point, with the *, his job placement plumbing employer, not recalling any incident where he allegedly threw a hammer. Yet, DG his plumbing instructor at Nova Scotia Community College was aware of the difficulties he had getting along with others, while on job placement and at the school.

[245] DB, a used car dealer who employed him some years ago, remembered how he had confrontations with at least three customers, and said that although he was a good worker he had to be let go.

[246] KM of * spoke well of LM's work in scaffolding and said he would hire him again. He did not recall conflict in the work place, but recalled LM was better working alone.

[247] Nevertheless, considering the evidence before me, there is some basis upon which to suggest that LM could have had a plausible income or career path, but for the assaults by Cesar Lalo. His career path is not entirely speculative.

[248] In my view, this is a circumstance where a global award for damages is appropriate. I am taking into consideration certain negative contingencies, as well as the real possibility of future rehabilitation and adjustment to a more fulfilling and productive life, although I do not believe he will ever achieve a full recovery from the psychological injury he sustained. LM has suffered various physical injuries in the past, as previously outlined. I accept that his back injury may have resolved, but his failure to recover completely from his broken leg or to pursue physiotherapy at the time has negatively impacted on his future income.

[249] Further he does not have a driver's license and has a lifetime driving prohibition. His drug use is also an issue. He did begin using marijuana before he encountered Cesar Lalo and there is a fair chance he would have continued its use, with a negative impact on his future industry.

[250] LM is well aware of his current addiction issues and acknowledges he may now benefit from future counselling. He has even identified psychologist Steve Cann, as someone with whom he made progress.

[251] I have also considered the impact of his early life, which like that of FLB in *Blackwater v. Plint*, could be described as uneven.

[252] Unlike FLB, I do not draw the conclusion that LM would have experienced significant psychological difficulties in any event and cannot make the case for causation. His stepfather's presence in his life was transitory. The abuse was confined to a few incidents and his mother successfully reared his siblings.

[253] I also recognize that respecting past loss income mitigation is a consideration. LM has been in receipt of social assistance, as well as income from illegitimate sources.

[254] He has also received a monetary award for past abuse suffered at Shelburne, and has been unable to use these funds wisely.

[255] With these uncertainties and contingencies, I find there is an insufficient basis upon which to make a precise forecast of lost future earning capacity.

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

[257] This is also a circumstance that cries out for a structured settlement.

Lump-sum damages vs. structured settlements:

[258] There is a good deal of commentary on the advantages of structured settlements or periodic payments over traditional lump-sum damage awards. The authors of *Remedies in Tort*, Volume 4 at 99.1, note that lump sum awards of damages "pose problems due to the effects of inflation, fluctuations in investment rates and tax liability as well as the inherent difficulties in speculating as to the future needs and life expectancy of the plaintiff." In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, Dickson J. (as he then was) said, for the court at para. 236:

The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and

expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

[259] By contrast, under a structured settlement, the plaintiff receives the damage award "in the form of tax-free periodic payments, thus avoiding the possibility of dissipation of a large lump sum payment." (*Remedies in Tort*). As McLachlin J. (as she then was) said, for the court, in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, [1989] S.C.J. No. 94, at paras. 7-8:

The imperfections of a lump sum, once-and-for-all award, as a means of providing for a plaintiff's cost of future care have often been noted. Where the injury is serious and the period of time for which care must be made lengthy, a large number of variables enter into the calculation. Should the plaintiff live longer than projected, or earn less on his capital than expected, he will run out of funds for his care. On the other hand, should chronic illness force him to live in an institution rather than his own home, or should he die earlier than forecast, the funds provided may turn out to be excessive, resulting in a windfall for him or his heirs at the defendant's expense.

Considerations such as these support the conclusion that in cases where care must be provided for a long period in the future, periodic payments are more consistent than the lump sum rule with the fundamental principles upon which the assessment of damages for personal injury are founded -- the basic concepts of *restitutio in integrum* and full but fair compensation. The whole basis of the claim advanced by the appellant is that in order to provide adequately for his future care he requires a monthly stream of income indexed for inflation for the rest of his life. Periodically paid sums capable of adjustment in the event of changed circumstances best ensure that this need will be met, given the impossibility of predicting the future with any real accuracy. At the same time, it is urged, the result would be fair to defendants, ensuring they pay only what is actually required.

[260] Professor Waddams, in his *Law of Damages* (looseleaf) at 3.10-3.260 and 3.90 has canvassed the arguments respecting periodic payments as an alternative to lump sum damages. Noting that the prevention of dissipation is sometimes raised as reason to resort to periodic payments:

An argument commonly made in favour of a change from the present system is that plaintiffs tend to squander the proceeds of their judgments and that a scheme of periodic payments would restrain the dissipation of the proceeds of awards.

The point raises the question of whose money is the award. If it really is the plaintiff's money and the plaintiff is of full age and understanding, it is difficult to object to the plaintiff doing what she likes with it. However, as the tort system comes to be seen more and more as an accident compensation scheme funded indirectly by the public through liability insurance premiums ... it becomes clear that dissipation of judgment proceeds is a matter of public concern, especially as the plaintiff, if he leaves himself destitute, will be thrown upon the public purse for support by the social welfare system.

[261] After weighing the competing policy considerations, Professor Waddams concludes that "it seems difficult to graft a system of periodic payments onto the present system of fault-based individual responsibility." Waddams, *Law of Damages* at 3.250. The concern that a plaintiff will potentially dissipate the recovery from a lump sum settlement was pointed out in *Yepremian v. Scarborough General Hospital (No. 2)* (1981), 120 D.L.R. (3d) 341, 1981 CarswellOnt 568 (Ont. S.C., H.C.J.), at para. 6 where the plaintiff had been rendered incompetent to manage his own affairs as a result of a brain injury. The court, in approving a structured settlement, noted that "[i]t apparently has been the experience of many solicitors that lump sum payments, even in the case of substantial payments resulting from serious personal injury or death, are often dissipated within months or a few years of the payment being received."

Availability of structured settlements:

[262] A structured settlement may be imposed by a court only where legislation permits it. In *Watkins*, the Supreme Court of Canada explicitly declined to change the common law rule. McLachlin J. said at paras. 16-17:

The change in the law which we are asked to endorse in this case would constitute a major revision of the long-standing principles governing the assessment of damages for personal injury – in particular, the principle that judgment is to be rendered once-and-for-all at the conclusion of a trial, and the correlative entitlement of the plaintiff to immediate execution on the entire award. Permitting courts to award periodic damages for personal injuries does not involve the extension of an existing rule, but the adoption of a new principle. We are not concerned with the right of a court to award the periodic payment of a judgment which has been finally delivered. Rules governing execution in several provinces permit this to be done. We are concerned rather with the proposal that the plaintiff lose his or her right to a final, once-and-for-all-award, to be replaced by a scheme under which the amount he or she receives may depend upon the ruling of the

court on applications far in the future. The change is, moreover, fraught with complex ramifications extending beyond the rights and obligations of the parties at bar.

The arguments of the advocates of the award of damages on a periodic basis are powerful. But they leave unanswered the question of whether a court may abrogate the long-standing legal principle of the right to a once-and-for-all lump sum award, and cannot be considered in isolation from the difficulties which might ensue from empowering courts to grant periodic damages in tort. In attempting to remedy the shortcomings of the present system, care must be taken not to create new and greater difficulties.

[263] After reviewing several of the complications that could arise from changing the law on this point, McLachlin J. concluded at para. 23:

In summary, I conclude that the well-established limits on judicial law-making powers as well as the complexities associated with introduction of the concept of periodic payments into our law, preclude the court from ordering periodic reviewable payments for future cost of care in the stead of the lump sum judgment to which the plaintiff is entitled under existing legal principles. For the same reasons, it would be inappropriate for the court to order the defendant to purchase an annuity for the plaintiff's care during his lifetime.

[264] In accordance with the general rule, the traditional view in Nova Scotia was that a structured settlement was "only available through negotiation and settlement." *Piercey (Guardian ad litem of) v. Lunenburg (County) District School Board* (1993), 128 N.S.R. (2d) 232, 1993 CarswellNS 263 (S.C.) at para 9. For an example of an approved negotiated structured settlement, see *Pitchuck (Litigation Guardian of) v. Tricon Global Restaurants (Canada) Inc.*, 2004 NSSC 224 CarswellNS 454 (S.C.). See also *Remedies in Tort*, Volume 4 at 99.1. This situation provoked judicial comment. In *Parnell (Guardian ad litem of) v. Singer* (1992), 111 N.S.R. (2d) 127, 1992 CarswellNS 504 (S.C.T.D.), Gruchy J. said at paras. 121-123:

As I have already indicated, I was very concerned about Mrs. Parnell as she gave evidence. She is, in my view, not likely to be able to effectively manage her son's affairs. She is the Guardian Ad Litem. Randy is no longer a legal infant but he obviously should not be entrusted to manage his own fund.

The case is an ideal one for a structured settlement - a course of action which I cannot order.

I raised this matter with counsel during argument and they asked that I leave this matter for their further consideration after the filing of this decision. I do so, but with this comment. The Court has the inherent jurisdiction to protect infants and persons under other disabilities. I am of the opinion it is necessary in this case to take firm action to protect Randy and Annette Parnell's financial interests, and ultimately, the public's financial interests.

[265] Similarly, in *Armstrong v. Baker* (1992), 113 N.S.R. (2d) 420, 1992 CarswellNS 102 (S.C.T.D.), Saunders J. (as he then was), said at paras. 18-19:

While planned amendments to legislation may soon change the picture in Nova Scotia, I am presently unable to order a defendant to provide a structured settlement to an injured plaintiff. In *Watkins v. Olafson*, [1989] 2 S.C.R. 750, 61 D.L.R. (4th) 577, McLachlin J. found that the Manitoba Court of Appeal erred in ordering that an award for future care be made in the form of periodic payments. In doing so, she considered the issue of whether a court should award an annuity:

In summary, I conclude that the well established limits on judicial law-making powers as well as the complexities associated with introduction of the concept of periodic payments into our law, preclude the court from ordering periodic reviewable payments for future cost of care in the stead of the lump sum judgment to which the plaintiff is entitled under existing legal principles. For the same reasons, it would be inappropriate for the Court to order the Defendant to purchase an annuity for the Plaintiff's care during his lifetime. (at p. 764)

As much as I am prevented from compelling Mr. Baker to provide a structured settlement, so too would any judge be prohibited from compelling Mr. Armstrong to accept such an offer. I am well aware of the advantages of a structured settlement. It would obviate the need for a management fee and would effectively eliminate all income tax consequences for the Armstrongs. However, to this point the choice is entirely in the hands of plaintiffs and it must be left to them to decide, with advice of counsel, whether the provisions of legitimate offers made under C.P.R. 41A meet their requirements.

[266] Similar comments appear in an Alberta decision, *Carleton (Next Friend of) v. Vayro*, 2002 ABQB 1104, 2002 CarswellAlta 1652 9Q.B.), an application to approve a lump sum settlement, where Power J. noted at paras. 10-12 the benefits of structured settlements, which could provide, *inter alia*,

Protection from premature dissipation of awards by accident victims through squandering, unwise investments, or otherwise improvident disposition with the consequence of such victims and their dependants ending up on welfare.

There is an insurance industry survey that is cited in many of the articles written about structured settlements, cases in which a large cash settlement is paid to a personal injury victim, within two months 25% have spent all of it, within one year 50% have spent all of it, within two years 70% have nothing left, and within five years 90% have nothing left.

In this case the parties have not agreed to a structured settlement. ... A more significant problem with structured settlements is that they cannot be imposed by the court, they must be negotiated, by counsel.

[267] In the absence of a provision in the enabling legislation, the court was obliged to follow *Watkins*.

Legislative reform:

[268] The *Nova Scotia Judicature Act* was amended, pursuant to the *Automobile Insurance Reform Act, 2003* (2nd Sess.), c. 1, s. 26, to permit the court to order "periodic payments." The *Judicature Act* now provides, at s. 35B:

35B In a court proceeding in which damages are claimed for personal injuries or for the death of a person, or under the *Fatal Injuries Act*, the court may, on the application of any party, order that the future pecuniary damages and such other damages as the parties may agree be paid in whole or in part by periodic payments.

[269] The present case is clearly one in which "damages are claimed for personal injuries." However, the provision is phrased quite narrowly and does not appear to permit the court to act on its own motion to impose periodic payments. The wording is clear: periodic payments may be ordered "on the application of any party." Thus jurisdiction now exists to order periodic payments where one party is opposed, which was not the case in the past. However, such jurisdiction only arises when a party applies for such an order.

[270] I will await hearing from counsel on such a proposal and would consider it appropriate that at least a significant portion of the award be structured after LM

has been able to meet his current financial obligation and also expended a reasonable sum for his housing requirements.

[271] I will also hear submissions on costs at counsel's request, if agreement as to costs is not reached.

Justice M. Heather Robertson