IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***D.H., J.H. & E.H. v. Kline et al,***
2006 BCSC 1903

Date: 20061222
Docket: S013823
Registry: Vancouver

Between:

D.H., J.H. an infant by his Litigation Guardian the Public Guardian and Trustee
and,
E.H., an infant by her Litigation Guardian the Public Guardian and Trustee

Plaintiffs

And

Mark Kline also known as Mark Klein, Her Majesty the Queen in Right of the Crown of
British Columia

Defendants

BAN ON PUBLICATION

Pursuant to the order of the Honourable Mr. Justice Blair dated October 16, 2006,
the identity of the Plaintiffs and any information that could disclose the identity of the
Plaintiffs shall not be published in any document or broadcast in any way.

Before: The Honourable Mr. Justice Blair

Reasons for Judgment

Counsel for the Plaintiffs	H.A. Mickelson A.S. Dosanjh
Counsel for the Defendant, Her Majesty in Right of the Crown of British Columbia	A.K. Fraser N.H. Barnes
No one appeared on behalf of Mark Kline	
Date and Place of Trial/Hearing:	October 16 – 20, 23 – 27, 2006

Vancouver, B.C.

[1] The plaintiffs, D.H. her infant son J. H. and infant daughter E.H. claim damages from the defendants, Her Majesty in Right of the Crown of British Columbia (the "Crown") and Mark Kline following Mr. Kline's sexual assaults upon J.H. between October 1998 and July 1999.

[2] The plaintiffs claim against the Crown alleging breach of a fiduciary duty and negligence after two provincial probation officers permitted Mr. Kline, a convicted sex offender, to reside in the same home in which the plaintiffs occupied a basement suite and failed to properly warn D.H. of the risk posed by Mr. Kline. The Crown admits that it is vicariously liable if the probation officers, Randar (Rick) Gill and Dean Ginther, are found negligent and with that admission the plaintiffs discontinued their action against Mr. Gill. Mr. Ginther was not a party in the action. The plaintiffs on July 4, 2002 obtained judgment against Mr. Kline in default of his filing an appearance, with damages to be assessed.

[3] The parties commenced the trial with several matters which impacted on the conduct of the trial. The Crown applied for leave to proceed with a counterclaim filed April 25, 2006 against D.H., the purpose of which was to provide that if any loss or damage suffered by the infant plaintiffs J.H. and E.H. were apportioned between Mr. Kline or the Crown on the one hand and the plaintiff D.H. on the other, that the Crown could claim contribution and indemnity from D.H. on the basis of her alleged failure to take reasonable steps to protect J.H. I denied the Crown leave as the application came well out of the time permitted and would have delayed the trial, thereby causing yet further prejudice to the plaintiffs, particularly J.H.

[4] The plaintiffs sought an order naming the Public Guardian and Trustee (the "Public Guardian") as Litigation Guardian of the infant plaintiffs, J.H. and E.H. The plaintiff mother D.H. commenced this action on behalf of J.H. and E.H. as their guardian Ad Litem, but the Crown queried whether D.H. ought to continue as the guardian Ad Litem when, because of her involvement in the events surrounding the infants' claims, her position might be construed as being in conflict with that of her children. The Public Guardian, through its counsel, C.L. Jeklin, advised that it saw no conflict, but was prepared to act as the Litigation Guardian to ensure the trial proceeded. The Pubic Guardian further confirmed that H.A. Mickelson and A.S. Dosanjh would act as counsel for the Public Guardian on behalf of the infant plaintiffs and the infant's mother, D.H. I ordered the Public Guardian act as the Litigation Guardian for the infant plaintiffs. I further ordered that there be a ban on publication of the plaintiffs' names or evidence from which they might be identified. The style of cause and the pleadings were amended pursuant to my orders.

[5] The Crown applied to strike the plaintiffs' claims for special damages as well as the claims for general damages advanced by D.H. and E.H. following the plaintiffs' failure to provide particulars of these claims. I found that the plaintiffs' failure to respond to the Crown's request for particulars made before the trial was neither deliberate nor wilful, but an error. I concluded that the remedy sought by the Crown to be extreme and that the evidence surrounding the plaintiffs' claim for special damages and the claims advanced by D.H. and E.H. for general damages could be heard at a later date thereby permitting the trial to proceed and deal with the questions of liability and the assessment of J.H's damages.

[6] I ordered the plaintiff deliver particulars within 14 days and counsel arranged to have the plaintiffs' claims for special damages together with the general damages sought by D.H. and E.H. heard on January 29 and 30, 2007. The adjournment will have cost ramifications against the plaintiffs which will be determined following the subsequent hearing. I advised counsel that the adjournment of these secondary claims would not preclude me from addressing fully the questions of liability and J.H.'s non-pecuniary damages.

Background

[7] D.H. is a 32-year-old single mother presently working in the construction industry, although in 1998 and 1999 she relied mainly on government funding to support herself and her two children. J.H., 15 years old at the time of the trial, was born August 20, 1991 and was seven years old when assaulted by Mr. Kline. E.H. was born May 18, 1996 and is 10 years old. The plaintiffs in the summer of 1998 moved into the downstairs suite of a split level home in Surrey which included a front entrance, a laundry area, and front and back yards shared with the occupants of the home's upstairs suite.

[8] When D.H. and her children moved into the home, Richard Theoret, his partner Allan, also known as Alicia, Mousseau and the now deceased Donnie Pilot, occupied the upstairs suite. J.H. in 1998 and 1999 attended an elementary school several blocks from the home.

[9] D.H. met Mr. Kline in October 1998 through a long-time friend Joyce Ann Bulten, who was then in a relationship with a Charlton Cutts. Ms. Bulten testified that Mr. Cutts introduced her to Mr. Kline whom he had met in jail. In late 1998 the two men lived in Ms. Bulten's home which was located close to D.H.'s home. A friendship developed between D.H. and Mr. Kline and in October 1998 he started visiting the plaintiffs' home with those visits occasionally involving him looking after J.H. and E.H.

[10] D.H. learned in late 1998 from Mr. Kline that he had been jailed for assaulting a 17-year-old prostitute and was on probation. Mr. Kline lied with respect to the offence for which he was convicted, but correctly advised D.H. that his probation order precluded him from unsupervised contact with children younger than 18 years.

[11] Mr. Kline, born April 7, 1957, was sentenced on June 9, 1997 to two years less a day in custody followed by three years of probation on three counts of sexual assault and one count of invitation to sexual touching, the charges involving four young males. The probation order included the following terms:

> 1) Report forthwith upon your release from incarceration to a Probation Officer, and report thereafter at least twice per month as directed by the Probation Officer.
>
> 2) Reside where directed and approved by your Probation Officer ….
>
> 6) No contact with any person under the age of 18 years unless accompanied by an adult approved of in writing by your Probation Officer, and with the advanced written approval of your Probation Officer.
>
> 7) Not to attend within 4 blocks of any playground, school yard, park, recreation centres, daycares' or other places where children may congregate.

[12] Mr. Kline's criminal record also includes convictions on December 17, 1982 of three counts of indecent assault on a male for which he was sentenced to four years in jail. The 1982 and 1997 charges were similar in that they all involved young males.

[13] After his release, Mr. Kline on October 21, 1998 reported to the Surrey North Probation Office where he met Mr. Gill who assumed responsibility for supervising Mr. Kline during his three-year probation period. Mr. Gill prepared the required assessment in which he concluded Mr. Kline was a high risk to re-offend. Mr. Kline followed a somewhat transient existence after his release from jail, staying sometimes in local motels, at other times with friends, and on occasion at an abandoned cabin. This lifestyle concerned Mr. Gill who inquired of Crown Counsel whether Mr. Kline was in breach of the probation condition relating to residency, but the Crown office declined to proceed with Mr. Gill's concern.

[14] Mr. Gill denied Mr. Kline permission to move into a co-operative housing complex in Burnaby after learning the complex housed a number of children and was located close to schools and parks. On November 27, 1998 Mr. Gill permitted Mr. Kline to move into Ms. Bulten's residence, which was located in a four-plex. The probation officer checked Ms. Bulten's apartment on December 7, 1998 to confirm Mr. Kline's residency and the following day spoke to the property's manager to confirm that no children lived in the four-plex. Mr. Gill's file indicates that the manager agreed to contact him should any children move into the four-plex which Mr. Gill testified would have led to Mr. Kline's removal from the Bulten residence.

[15] Mr. Kline remained in the Bulten apartment until the end of December when he moved into a motel with Mr. Cutts. Mr. Gill started a two-month leave in December 1998 and probation officer Chad Salim assumed temporary responsibility for supervising Mr. Kline. On January 18, 1999 Mr. Kline sought permission from Mr. Salim to move into the suite occupied by Messrs. Theoret, Mousseau, and Pilot ("the upstairs suite") located above the suite in which D.H. and her children lived, although Mr. Kline apparently did not mention their occupancy to Mr. Salim. In rejecting Mr. Kline's request Mr. Salim noted the proposed residence was located within four blocks of two schools and residing there would have put Mr. Kline in breach of his probation order. After Mr. Gill's return from leave, Mr. Kline renewed his request to move into the upstairs suite, advising Mr. Gill on February 23, 1999 that the three men with whom he would reside knew of his charges as did the residents in the downstairs suite whom he described as a girl with two young children.

[16] Mr. Gill permitted Mr. Kline to move into the upstairs suite and on March 5, 1999 did a home visit with Mr. Ginther, a fellow probation officer. Mr. Ginther recalled a conversation with two of Mr. Kline's three roommates in which they identified themselves as probation officers with the sexual offenders unit, that they were confirming Mr. Kline lived there and ensuring that Mr. Kline had no contact with children as that would be in breach of his probation order. Mr. Theoret recalled the probation officers attending to inspect the residence and advising that Mr. Kline was on parole. He did not recall the officers mentioning that Mr. Kline was not to have any contact with children, but recalled that they refused to tell him the offence for which Mr. Kline had been convicted. Mr. Theoret testified that Mr. Kline told him that he was on parole or probation and that it was in connection with a prostitute. Mr. Mousseau did not recall meeting the probation officers and I assume that the second resident referred to by Mr. Ginther was the since-deceased Mr. Pilot.

[17] Mr. Gill recorded that on March 9, 1999 Mr. Kline told him that D.H. knew of his criminal charge and consented to Mr. Gill speaking to D.H.

about his criminal record. On March 29, 1999 Mr. Gill and Mr. Ginther spoke to D.H. in her basement suite and Mr. Gill testified that he would have identified himself as a probation officer with the sexual offenders unit, that Mr. Kline had been convicted of a sexual offence, and as a result Mr. Kline was not to have contact with children. He would have told D.H. that she should never leave her children with Mr. Kline, even for a short period.

[18] Mr. Gill testified that D.H. said her children had no contact with Mr. Kline and she was aware that Mr. Kline was prohibited from contact with children. When she asked about Mr. Kline's convictions, Mr. Gill told her the charges were sexual in nature, but as was his practice he did not provide her with any details, believing that it was not necessary as D.H. and the residents upstairs said Mr. Kline had no contact with children.

[19] D.H. knew Mr. Kline was prohibited from contact with persons younger than 18 years but understood the prohibition followed his dispute with a young prostitute. D.H. admitted that she lied in telling the probation officers that her children had no contact with Mr. Kline when he had been in contact with the children, including babysitting them when she was out of the house. Mr. Kline had also spent time with J.H. watching videos, fishing and teaching J.H. how to ride a bicycle. D.H. said her son had few male role models and she had earlier applied for a Big Brother for him from that organization. D.H testified that Mr. Kline filled a male role in J.H.'s life, she believed the relationship was good for her son, and she did not want Mr. Kline to get into trouble. D.H. did not see Mr. Kline's difficulties with a prostitute as creating a threat to her son. D.H. testified that if the probation officers had responded fully to her query and told her that Mr. Kline's criminal record involved sexual assaults upon young boys of her son's age she would never have allowed further contact between J.H. and Mr. Kline.

[20] Mr. Ginther was concerned about D.H.'s lack of surprise and her rather blasé response when told Mr. Kline's probation order precluded him from having contact with persons younger than 18 years, and that she should not leave her children with him for even just a few minutes. Mr. Ginther testified that D.H. described Mr. Kline as a "nice guy" who was causing no problems. Those comments taken alone are not particularly significant, however, Mr. Kline approached his previous victims by befriending their parents or custodians and used that relationship to get closer to his victims. The probation officers knew of Mr. Kline's grooming techniques and that he was a manipulative individual, but did not pursue D.H.'s comments which suggested cordial contact between herself and Mr. Kline.

[21] Despite their concerns and D.H.'s query about Mr. Kline's criminal record, neither Mr. Gill nor Mr. Ginther considered it appropriate to advise D.H. that Mr. Kline's criminal record included sexually assaulting young males. The decision followed from their usual practice of not advising persons of an individual's criminal record even though Mr. Gill earlier obtained Mr. Kline's oral consent to discuss his record. Nor did the probation officers ask D.H what she knew of Mr. Kline's criminal record, although it was probable her knowledge came from Mr. Kline whom the probation officers knew was less than reliable.

[22] With the assurances from Mr. Kline's roommates and D.H. that he was not in contact with children, Mr. Gill permitted Mr. Kline to continue living upstairs from the plaintiffs. Mr. Gill took no exception to the fact that Mr. Kline's residence was within four blocks of two schools and a playground, or that the Kline's residence housed a young male similar in age to those whom Mr. Kline assaulted in 1982 and 1997. In the months following, Mr.

Gill continued to supervise Mr. Kline monitoring his residency and employment and ensuring that he took counselling.

[23] What occurred between Mr. Kline and J.H. started to unfold on July 7, 1999 when Mr. Gill received a phone call from the Ministry of Children and Families ("the MCF") advising that Mr. Kline had been babysitting D.H.'s children. The informant, Naomi Meeches, phoned Mr. Gill on July 8, 1999 and confirmed Mr. Kline's involvement with D.H.'s children. Ms. Meeches testified that she frequently visited her cousin Allan Mousseau at his house and had met D.H. after she and her children moved into the downstairs suite. Ms. Meeches later met Mr. Kline after he became her cousin's roommate in the upstairs suite. Ms. Meeches had seen Mr. Kline and J.H. together a couple of times in Mr. Klein's bedroom with the door closed. She had also seen Mr. Kline go downstairs to D.H.'s suite. Ms. Meeches learned of Mr. Kline's past sexual offences from a friend who, when accompanying her to visit Mr. Mousseau, recognized Mr. Kline as the individual convicted for assaulting his grandson.

[24] Police arrested Mr. Kline on July 13, 1999 for breach of probation and assaulting J.H. Mr. Gill, an RCMP officer and a social worker spoke to D.H. on July 14, 1999. D.H. acknowledged being told in March 1999 that Mr. Kline was not to have contact with children younger than 18 years, but stated that if she had known Mr. Kline was a paedophile with a criminal record for sexually assaulting young boys she would never have allowed him to be with her children. She admitted lying in March 1999 when she told the probation officers that Mr. Kline had no contact with her children and did so because she did not want to get Mr. Kline into trouble as he was her son's best friend. Mr. Gill in his notes recorded that D.H. kept blaming him for what occurred between Mr. Kline and J.H. and did not take any responsibility for her actions.

[25] J.H. at first denied but then admitted to his mother that Mr. Kline had touched him sexually. J.H. at trial recalled little of his contact with Mr. Kline, stating that he did not remember and tried not to remember. However, on July 10, 1999 RCMP Cst. Helene Lavallee interviewed J.H., and I found the transcript of the interview admissible, being both reliable and necessary given J.H.'s efforts to forget his involvement with Mr. Kline and J.H.'s evidence that there was no reason why his statement to Cst. Lavallee could not be relied upon.

[26] J.H. told Cst. Lavallee that the touching occurred about 10 times in Mr. Kline's bedroom in the upstairs suite, including two or three times when he spent the whole night with Mr. Kline. J.H. said on each occasion he went into Mr. Kline's bedroom, there would be a sign on the door stating "don't come in", and the door would then be closed. Mr. Kline would take off his clothes as well as those of J.H. before touching J.H.'s penis and he would encourage J.H. to touch his penis which J.H. did on several occasions.

[27] Mr. Kline pleaded guilty on December 7, 1999 to charges of sexually assaulting J.H., touching J.H. for a sexual purpose, and inciting J.H. to touch his penis, contrary to ss. 271, 151 and 152 of the ***Criminal Code***. Mr. Kline was sentenced in October 1999 to six months in jail for breaching his probation order and to two years and six months on the sexual touching and sexual assault charges involving J.H.

[28] The plaintiffs contend that Mr. Kline's assaults together with the negligence of the probation officers in permitting Mr. Kline, a paedophile with a sexual interest in young males, to live in the same home as J.H. and in failing to fully warn D.H. of the threat Mr. Kline posed to her son J.H. renders both defendants liable for J.H.'s damages. The plaintiffs also claimed that the probation officers owed a fiduciary obligation to the plaintiffs and that the officers breached that obligation. However, the plaintiffs did not

pursue their claim of a fiduciary obligation and I am not satisfied that one exists. If a claim lies against the Crown in this action it is in negligence, not in an alleged but unproven fiduciary obligation.

[29] The Crown submits that the probation officers properly warned D.H. that Mr. Kline's probation order precluded him from having unsupervised contact with persons younger than 18 years, cautioning that her children should have no contact with Mr. Kline. The Crown submits the warning was sufficient and the probation officers had no need to provide D.H. with further information about Mr. Kline's criminal record.

[30] The Crown further contends that if D.H. had been truthful and told the probation officers on March 29, 1999 that Mr. Kline had been in contact with her children then the officers would have stopped further contact between Mr. Kline and J.H. The Crown also submits that the probation officers, in permitting Mr. Kline to reside in the upstairs suite and limiting the information provided about Mr. Kline's criminal background, were exercising their discretion as part of government policy and as a discretionary action it did not attract liability.

Negligence by Government Employee

[31] Where allegations of negligence are made against a government employee such as a probation officer, it is appropriate to consider and apply the test found in ***Anns v. Merton London Borough Council,*** [1978] A.C. 728 [H.L.] at pp.751-752:

> Through the trilogy of cases in this House – "*Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and*Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise …": see *Dorset Yacht* case [1970] A.C. 1004, per Lord Reid at p. 1027.

[32] The Supreme Court of Canada In ***Cooper v Hobart,*** [2001] 3. S.C.R. 537 revisited the test in ***Anns*** and highlighted the role of policy concerns in determining the scope of a government's liability for negligence. The Court at ¶30-34 described the test in ***Anns*** as follows:

> 30 … the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test,

that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from therelationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in *Yuen Kun Yeu [v. Attorney-General of Hong Kong [1998] A.C. 175]*, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.

31 On the first branch of the *Anns* test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

32 On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in *Donoghue v. Stevenson [1932] A.C. 562 supra*, at pp. 580-81:

> Who then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
>
> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend tosuch close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.
>
> [Emphasis added]

33 As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24, *per* La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in *Anns*, *supra*, was clearly intended to connote that the

> circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]
>
> 34 Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[33] ***Cooper*** reiterates the principle that for a duty of care to be imposed there must be a statutory basis for the duty undertaken by the government agency or its employees. The ***Correction Act,*** RSBC 1996, c. 74 forms the statutory base upon which a probation officer performs their duties, stating:

> 2. The purpose of this Act is to protect the community.
>
> …
>
> 5. (1) A person who is appointed a probation officer under this Act
>
> …
>
> (b) is an officer of every court in British Columbia,
>
> (2) A probation officer is responsible for the supervision of a person placed on probation by any court.

[34] The legislature in the ***Correction Act*** imposed a broad obligation or duty to protect the community, and specifically designated a probation officer an officer of the court with responsibility for supervising persons on probation including a duty to ensure that a person on probation complies with the terms and conditions of a court-imposed probation order as part of a person's sentence and to ensure that the community is protected.

[35] The Ministry of the Attorney General also prepared guidelines for probation officers to assist them in carrying out their statutory duties. On October 30, 1995, the Assistant Deputy Minister published an Interim Policy – Case Management of Adult Sex Offenders which outlined the steps to be taken by probation officers when managing sex offenders living in the community. Sheldon Green, a program coordinator with Corrections B.C., testified the 1995 Interim Policy with some amendments remains part of the policy manual given to B.C. probation officers.

[36] The Interim Policy states at para. 6.02 that the purpose of supervision of sex offenders is to enhance public safety by providing assistance and support to sex offenders and to monitor the offender to ensure compliance with court orders. At para. 6.07 probation officers are directed to contact key collateral contacts who are defined as including, but not limited to employers, supervisors, and family friends. The purpose of such contact is "to provide cautions about activities that could present a risk to the public or provide opportunities for the offender to re-offend".

[37] A further directive to probation officers came from the Ministry of Attorney General on December 11, 1995 and it was entitled Notification Policy to Protect Children from Abuse. The introduction notes that a fundamental obligation of society is the protection of children, stating:

> The purpose of this policy is to enhance the protection of children in all cases where there is a real risk of harm, by ensuring appropriate sharing and disclosure of relevant information relating to known abusers.

[38] The Notification Policy directs that when an offender presents a risk to children a notification to the "at risk" party must be conducted. The policy describes how a probation officer after determining that there is a real risk of harm to children posed by a person on probation is to release personal information about that person, including their criminal record, within the legislative constraints set by a variety of federal and provincial statutes including the ***Freedom of Information and Protection of Privacy Act,***R.S.B.C. 1996, c. 165. At p. 5, para. 5 (c) the policy notes that personal information might be disclosed pursuant to s. 5(2) of the ***Correction Act*** to ensure compliance with the terms of a probation order.

[39] The Ministry of the Attorney General on January 28, 1999 issued a further policy directive to assist in the interpretation of the 1995 Notification Policy. At para. 6.10 the Ministry reiterated its 1995 directive that probation officers are to conduct a risk assessment on all offenders under their supervision who have been convicted of sex and other violent offences against children, stating:

> When risk of re-offence is high, the probation officer must pro-actively effect notification to at risk persons.

[40] The policy continued at para. 6.11:

> Notification refers to the disclosure of an offender's personal information to an individual, group or the general community, with or without the offender's signed consent.

[41] Where the probation officer determines there is a risk, para. 6.19 provides in part:

> … the probation officer must effect notice to the at risk person, or person's guardian. Information disclosed must be limited to that information required to enhance safety. In most cases, information disclosed would identify the offender by name and description, general residential area, criminal history as it pertains to his offences against children, modus operandi and other information that is needed to identify why there is a risk.
>
> [emphasis added]

[42] While s. 2 of the ***Correction Act*** imposes a responsibility upon probation officers to protect the community as a whole, s. 5 provides that probation officers are also responsible for supervising persons on probation and ensuring compliance with their probation orders. In the instant case, Mr. Gill was responsible for ensuring among other terms of the probation order that Mr. Kline not have unsupervised contact with children younger than 18 years.

[43] The directives issued by the Corrections Branch linked ss. 2 and 5 of the ***Correction Act*** by addressing a particular segment of the community, specifically children and their protection, and directed that probation officers when carrying out their probation compliance function also take the steps necessary to advise an at risk person or the person's guardian with the information to enhance the safety of the at risk person. In the context of the Ministry's directives particularly the policy issued in January 1999, the at-risk person would be a child or that child's guardian.

[44] Mr. Gill recognized his duty towards J.H., a child at high risk, with his March 29, 1999 conversation with D.H., J.H.'s mother and guardian, in which he cautioned that Mr. Kline must not have contact with her children. Mr. Gill had assessed Mr. Kline as being a high risk to re-offend and knew from his criminal record that J.H. fell within the group in which Mr. Kline pursued his previous victims. He also knew that J.H. lived in close proximity to Mr. Kline and knew, or should have known, that the upstairs and downstairs accommodation housing Mr. Kline and J.H. respectively had a joint front door entrance, a shared laundry area, as well as shared front and back yards.

[45] I am satisfied that in the circumstances of this case, Mr. Gill was an individual in a proximate relationship with the infant plaintiff J.H. and his guardian, D.H. and that harm to J.H. by Mr. Kline was foreseeable given Mr. Kline's criminal record, the assessment that he was a high risk to re-offend, J.H.'s age and gender, and the close proximity of his residence to that of Mr. Kline. I conclude that Mr. Gill owed a *prima facie* duty of care specifically to J.H. given the circumstances, thereby answering affirmatively the first part of the test in ***Anns.*** I will next address the second part of the test in ***Anns.***

[46] The court in ***Cooper*** after referring to specific situations in which the first part of the ***Anns*** test had been answered in the affirmative turned to the second part of the***Anns*** test, stating at ¶37-39:

> 37 This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.
>
> 38 It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second

> stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons – more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).
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> 39 The second step of *Anns* generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. In this sense, we agree with the Privy Council in *Yuen Kun Yeu* that the second stage of *Anns* will seldom arise and that questions of liability will be determined primarily by reference to established and analogous categories of recovery. However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps of the*Anns* test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise.

[47] The plaintiffs submit that the instant case is analogous to the decision in ***N.(D.) v. Oak Bay (District)***, 2005 BCSC 1412 in which Silverman J. held the Crown vicariously liable for the negligence of its probation officer in failing to advise a hockey association that an association coach was a convicted sex offender on probation and under his supervision. In ***Cooper***, the court held that the second part of the test in ***Anns*** relating to policy considerations need not be addressed unless the circumstances create a novel situation. The facts in ***N.(D.)*** appear analogous to the situation in the instant case in which the plaintiffs allege that the probation officers failed to properly warn D.H. that Mr. Kline was a paedophile on probation and under their supervision and allowed Mr. Kline to live in close proximity to J.H.

[48] The Crown submits the facts in the two cases are not analogous as ***N.(D.)*** involves a probation officer failing to warn the hockey association, whereas in the instant case the probations officers did warn the parent, D.H. about Mr. Kline but she disregarded the warning and lied to the probation officers about her son's contact with Mr. Kline.

[49] I appreciate the Crown's point as to the differences between the two situations. In ***N.(D.)*** there was a total failure to warn and in the instant case the plaintiffs allege the warning was deficient. However, in ***Stewart v. Pettie***, [1995] 1 S.C.R. 131 Major J. in applying the test in ***Anns*** concluded at ¶32:

> The question of whether a duty of care exists is a question of the relationship between the parties, not a question of conduct. The question of what conduct is required to satisfy the duty is a question of the appropriate standard of care.

[50] I find that the absence of a warning in ***N.(D.)***, and the limited warning found in the instant case are questions going to conduct and standard

of care and do not detract from the similarity of the fact situations in the two cases such as to require an analysis of the instant case pursuant to the second part of the ***Anns*** test.

[51] The Crown further submitted that Mr. Gill in permitting Mr. Kline to move into the suite upstairs from that of the plaintiffs and in limiting the warning about Mr. Kline when he talked to D.H. exercised the discretion allowed him in his capacity and in fulfilling his duty as a probation officer and that such an exercise of discretion ought not attract liability. In ***Just v. British Columbia,*** [1989] 2. S.C.R. 1228, Cory J. reviewed decisions from U.S. and Australian courts with respect to the difference between policy and operational decisions made by government and stated at ¶20:

> 20 The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion. What constitutes a policy decision may vary infinitely and may be made at difference levels although usually at a high level.

[52] I do not question the Crown's suggestion that a probation officer might well have discretionary powers in the exercise of his employment which might exclude liability for an act flowing from the exercise of this discretion. However, in the instant case the probation officer's discretion is limited by the policy determined by the ***Correction Act,***the conditions of the probation order imposed on Mr. Kline, and the directives issued by the Ministry of the Attorney General specifically addressed to probation officers who are supervising sex offenders.

[53] The purpose of the ***Correction Act*** is to protect the community and a probation officer as an officer of the court is responsible for carrying through with that purpose when supervising a person on probation. Mr. Kline's probation order provided that he have no contact with any person under the age of 18 years unless accompanied by an adult approved of in writing and in advance by his probation officer. There is no discretion afforded the probation officer with respect to contact with persons younger than 18 years, and when read in conjunction with the other terms of the order, appears to preclude any exercise of discretion by the probation officer such that he could permit Mr. Kline to reside in the same home as J.H. and E.H. with its various common areas inviting contact between Mr. Kline and the two children, including the single front door, the common laundry room and the jointly enjoyed front and back yards.

[54] The policy directives, particularly the notification policies of December 11, 1995 and January 28, 1999 also limited Mr. Gill's discretion as they addressed the real concern that children should be protected when they are at a real risk of harm by ensuring appropriate disclosure of relevant information relating to known child abusers such as Mr. Kline. Mr. Gill assessed Mr. Kline as posing a high risk to re-offend and at trial acknowledged that Mr. Kline's presence in the home posed a danger to J.H. The January 28, 1999 policy directs that a probation officer must disclose to the at risk person or his guardian information which in most cases would include the criminal record as it pertains to his offences against children, *modus operandi* and other information needed to identify why there is a risk.

[55] I find that the policy guidelines found in the ***Correction Act,*** and the Attorney General's policies limited Mr. Gill's discretion as to the homes in which he could permit Mr. Kline to reside and mandated that he

must provide the at risk person or their guardian information such as Mr. Kline's criminal record and other information needed to identify the risk.

[56] I conclude that Mr. Gill's actions in permitting Mr. Kline to live upstairs from the plaintiffs, and in not fully advising D.H. of the threat posed by Mr. Kline, did not involve an exercise of discretion or the making of policy such as to exclude the Crown's liability in this case.

[57] The Crown submitted that ***Home Office v. Dorset Yacht Co. Ltd.***, [1970] 2 All ER 294, addresses the proper approach to an action involving allegations of negligence against the government, that particular action being brought against prison officers and the British government after borstal trainees supervised by government officers escaped and stole a yacht with which they damaged the plaintiff's yacht. Lord Reid at p. 301 acknowledged that those involved in supervising borstal trainees have a difficult and delicate task, continuing:

> That system is based on the belief that it assists the rehabilitation of trainees to give them as much freedom and responsibility as possible. So the responsible authorities must weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees and on the other hand the public interest of promoting rehabilitation. Obviously there is much room here for differences of opinion and errors of judgment. In my view there can be no liability if the discretion is exercised with due care. There could only be liability if the person entrusted with discretion either unreasonably failed to carry out his duty to consider the matter or reached a conclusion so unreasonable as again to show failure to do his duty.

[58] If there was discretion afforded the probation officers in the instant case, I conclude it was not exercised with due care.

Standard of Care

[59] I turn now to the question of whether the Crown through its probation officers met the requisite standard of care owed to J.H. The standard of care imposed on the probation officers relates to the type and level of action necessary for them to perform to discharge their duty of care owed to J.H. and their duty to mitigate the risk to the child. The standard of care must be measured against a standard of reasonableness.

[60] The ***Correction Act***, the policy directives issued by the Ministry of Attorney General between 1994 and 1999, and the terms and conditions of the probation order imposed on Mr. Kline assist in determining the standard of care appropriate in the circumstances which involved placing in the same home with shared facilities a paedophile assessed as being at a high risk to re-offend and a young male who fit the paedophile's target victim group.

[61] The Ministry's policy directives issued between 1994 and 1999 advised probation officers that they must pay increasing attention to protecting children from sexual offenders such as Mr. Kline, including over that time more specific notifications to ensure that those at risk and their guardians were made aware of the true nature of the risk from sexual offenders on probation. Mr. Gill was aware of the risk posed by Mr. Kline as reflected in

his refusal to allow Mr. Kline to move to a housing cooperative in which many children lived and the precautions he took before permitting Mr. Kline to reside in Ms. Bulten's residence.

[62] Mr. Gill permitted Mr. Kline to move into the upstairs suite knowing that Mr. Kline was a high risk to re-offend and his presence in the upstairs suite created a dangerous situation for J.H. In spite of the risk, it took five weeks after Mr. Kline moved into the upstairs suite before Messrs. Gill and Ginther met with D.H.

[63] The officers advised her they were from the probation office's sex offender unit, that Mr. Kline was a sex offender, that he was prohibited from unsupervised contact with persons younger than 18 years, and warned D.H. that he should not be alone with her children. Mr. Gill did not use the consent he obtained from Mr. Kline to speak more openly with D.H.

[64] D.H. advised the officers that she knew Mr. Kline's probation involved a no-contact provision and asked them about Mr. Kline's criminal record. The probation officers said it was not their practice to give such information to a person they described as a collateral, a term describing an individual such as a neighbour, friend or employer who might assist in monitoring or providing information about the person on probation. D.H. was more than a collateral. Her role, as described in the January 28, 1999 Notification Policy, was that of the guardian of J.H. an at risk person, and entitled to know the true nature of the risk posed to J.H. by Mr. Kline.

[65] I find that the probation officers, particularly Mr. Gill, after identifying the risk to J.H. failed to take the steps necessary to protect J.H. either by refusing Mr. Kline leave to reside in close proximity to J.H., in a home in which the occupants although living in separate suites, shared several common areas or, at the very least, by providing D.H. with information about Mr. Kline's criminal record sufficient to ensure that she could appreciate the risk he posed to J.H. I conclude that the probation officers, particularly Mr. Gill, did not meet the standard of care required of them to fulfill their duty of care towards J.H. in the circumstances of this case.

Causation

[66] The Crown contends that the plaintiff has failed to establish a causal link between the probation officers' decisions and what occurred between Mr. Kline and J.H. The Crown submits that from the evidence the assaults upon J.H. might have occurred prior to Mr. Kline moving into the suite upstairs from that of the plaintiffs. The Crown further submits that the officers properly warned D.H. about Mr. Kline and that D.H.'s misleading statement that Mr. Kline had no contact with her children effectively misled the officers as they could not have anticipated that a mother would have lied in the face of the warning about Mr. Kline which they provided to her.

[67] The Crown submitted that it was unclear when Mr. Kline assaulted J.H., contending that Mr. Kline had the opportunity to assault J.H. when he babysat the two children in their own downstairs suite before February 23, 1999 when Mr. Gill permitted Mr. Kline to move into the upstairs suite.

[68] J.H. testified that he could not remember the dates of the assaults, but told RCMP Cst. Lavallee who interviewed him on July 10, 1999 that the assaults occurred over a period of half a month to a month in Mr. Kline's bedroom upstairs. J.H. described the bedroom window being open and Mr. Kline

wearing shorts and a t-shirt and sleeping without a blanket because it was hot, from which I infer that the assaults occurred closer to the summer than in the autumn and winter period before February 23, 1999 when Mr. Kline moved into the upstairs suite. J.H. also described having chicken pox during the period when Mr. Kline was touching him and D.H. testified that J.H. had chicken pox towards the summer of 1999.

[69] The proximity of Mr. Kline's residence to that of the plaintiffs after February 23, 1999 facilitated Mr. Kline's contact with J.H. and I surmise his move into the upstairs suite might well have been part of his technique to get closer to J.H. and his family. D.H. indicated that she was comfortable with J.H. going upstairs with Mr. Kline because of the male role model he had become for J.H. and she knew that J.H. could come back downstairs easily if he wanted. Further, she believed that Mr. Kline's room mates would keep an eye on J.H. Ms. Meeches testified that she saw J.H. go into the bedroom with Mr. Kline and the door then closed. Mr. Theoret also remembered J.H. going into Mr. Kline's room on eight or nine occasions and the bedroom door would be shut. That both witnesses found nothing unusual in such behaviour reflects on Mr. Kline's ability to develop trusting relationships with those around him.

[70] I conclude on a balance of probabilities that Mr. Kline assaulted J.H. after moving into the upstairs suite on February 23, 1999 and the assaults occurred in Mr. Kline's bedroom in the upstairs suite in the late spring or early summer of 1999.

[71] The Crown further submits that the probation officers on March 29, 1999 properly warned D.H. about Mr. Kline, and that the assaults upon J.H. would not have occurred but for D.H.'s misleading statement that Mr. Kline had no contact with her children.

[72] Mr. Gill testified that in permitting Mr. Kline to remain in the upstairs suite after March 29, 1999 he relied on D.H.'s statement that Mr. Kline had no contact with her children. D.H. admits she lied. Mr. Gill testified that if he knew that Mr. Kline was involved in any way with the two children he would have been removed from the home. The defence contends that responsibility rests with D.H. for the continuing contact between Mr. Kline and J.H.

[73] I do not agree with the Crown's contention. Although I deplore D.H.'s conduct in lying to the probation officers, Mr. Gill knew from the reports that Mr. Kline was a manipulative individual who exercised his apparently considerable charms as a means of getting close to his young male victims. Although D.H. told the probation officers that she knew of Mr. Kline's no-contact order and the circumstances which led to its imposition, the only likely source of that information would have come from Mr. Kline himself, an individual who Mr. Gill must have been aware had little reason to tell the truth. D.H. asked the probation officers to tell her the nature of Mr. Kline's criminal history, a query which the probation officers ignored in spite of the January 1999 notification policy which, given D.H.'s role as the guardian of an at risk child, mandated a proper disclosure of the risk to J.H. posed by Mr. Kline.

[74] The officers did not pursue with D.H. what she knew of Mr. Kline's criminal record, although Mr. Ginther testified that he was concerned during the March 29, 1999 conversation that D.H. did not appear surprised and was somewhat blasé about the information regarding Mr. Kline that he and Mr. Gill provided. He found her response to be atypical.

[75] D.H. testified that if the officers had said that Mr. Kline was a paedophile who targeted young males, J.H. would have had no further contact

with Mr. Kline. D.H. is a single mother with a low income with which to support her family and the areas in which she lives attract persons in the same financial straits, some of whom have criminal backgrounds. D.H. appreciates the difference between a conviction for assaulting a prostitute and a conviction for assaulting young males. She saw the latter as a risk to her children, but not the former. D.H. accepted Mr. Kline's description of the offence leading to the probation order as involving a dispute with a prostitute, as did Mr. Theoret to whom Mr. Kline similarly described his offence. Mr. Theoret said if he had known D.H. was a paedophile he would have told him to leave the upstairs suite. D.H. also believed Mr. Kline when he told her that he had a young son living in the Maritimes which helped to explain his interest in spending time with J.H., and as the relationship between Mr. Kline and J.H. progressed, she saw her son obtaining the male companionship she felt J.H. needed.

[76] The Crown further submits that D.H. knew that Mr. Kline was a paedophile from her friend Joyce Bulten who testified she told D.H. of a rumour that Mr Kline was attracted to young boys. However, Ms. Bulten in cross-examination allowed that she could not remember whether the conversation with D.H. about this rumour was before, during or after the interaction between J.H. and Mr. Kline. Ms. Bulten also testified that D.H. was devoted to her children and was absolutely sure that if D.H. had known Mr. Kline was a paedophile, she would never have allowed him near her children. D.H. testified that she had no recollection of Ms. Bulten saying that Mr. Kline was a paedophile and if she had received that information she would have remembered it and stopped him from further contact with her children.

[77] Ms. Bulten's evidence of warning D.H. that Mr. Kline was a paedophile is troubling, but must be considered in the context of all the evidence. Ms. Bulten was unable to say when she had the conversation with D.H., and that during the period of late 1998 and the beginning of 1999, she was under considerable stress after her own children were apprehended. She stated that she lost touch with D.H. for some time during that period. The state of Ms. Bulten's memory at the time is also reflected in her inability to recall meeting Mr. Gill when he inspected her residence to determine if it was suitable for Mr. Kline, although the probation officer's records confirm the contact.

[78] I am unable on balance to conclude that Ms. Bulten warned D.H. about Mr. Kline, given that she is unable to say with clarity when and where the warning was given. Also, D.H. has no recollection of receiving such a warning, but is adamant that had she known of Mr. Kline's paedophilia, he would have had no further contact with her children. Ms. Bulten and Mr. Theoret both described D.H. as a mother devoted and protective about her children. Nothing in the evidence suggests other than that D.H. was keenly aware of her children's best interests. I accept that D.H. would have terminated Mr. Kline's contact with J.H. if she had known or even suspected that he was a paedophile.

[79] I conclude that the assaults by Mr. Kline upon J.H. would not have occurred but for the probation officer's creation of a dangerous situation when he allowed Mr. Kline to reside in such close proximity to a child who fit into his target group, a decision exacerbated by the probation officer's failure to properly warn D.H. about the risk to J.H. posed by Mr. Kline.

[80] The Crown accepts it is vicariously liable for the negligence of the probation officers. Although at the commencement of the trial I declined the Crown's application to file a counterclaim against D.H., it sought in its statement of defence an apportionment of liability pursuant to Rule 22 (15) of the ***Rules of Court*** as between the Crown, Mr. Kline and D.H. Although the apportionment will have no impact on the damages payable to J.H., I apportion

liability 75 percent to Mr. Kline, 20 percent to the Crown, and 5 percent to D.H. The Crown and Mr. Kline are jointly and severally liable for the damages suffered by J.H.

Non Pecuniary Damages

[81] Although the parties vigorously contested liability, their respective positions on damages attracted far less dispute. I described earlier in these Reasons the nature of Mr. Kline's assaults upon J.H. which took place over a 15 to 30 day period towards the end of the 1998-1999 school year. The assaults occurred after Mr. Kline assumed a trusted male figure role model for J.H. The fact that J.H. was abused by a male has created gender and sexuality confusion. He also suffered from migraine headaches during the three years after the assaults. Following the abuse, J.H. became more withdrawn in his behaviour and his academic performance at school deteriorated, conditions which have continued to the present.

[82] Although the assaults caused no physical damage to J.H. the experts who assessed J.H. reported that J.H. suffered significant psychological trauma from the assaults which, without assistance, will continue to impact him negatively. The purpose of damages is to fairly compensate the plaintiff and make him whole again, a difficult task when dealing with victims of sexual abuse such as J.H. In ***S.Y. v. F.G.C.,*** [1996] B.C.J. No. 1596 the Court of Appeal reflected on the difficulty of assessing damages in cases of sexual assault, stating at ¶50:

> They exemplify the difficulty of giving solace or satisfaction to a person who has been abused by one he or she was entitled to trust, and who may suffer from the psychological impact of that abuse for years to come. What amount of money is sufficient as a substitute for lost pleasures and amenities, and as compensation for what yet remains to be suffered?

[83] The court continued at ¶55:

> We are just beginning to understand the horrendous impact of sexual abuse. To assess damages for the psychological impact of sexual abuse on a particular person is like trying to estimate the depth of the ocean by looking at the surface of the water. The possible consequences of such abuse presently are not capable of critical measurement.

[84] And at ¶56:

> … the impact on individuals in particular circumstances of sexual abuse is so difficult to measure that other cases can only provide a rough guide for assessment in this case.

[85] Dr. Jake J. Locke, a psychiatrist with the B.C. Children's Hospital, was retained by the Crown to provide an independent medical examination of J.H. He assessed J.H.'s current psychiatric and psychological status, gave his opinion regarding the impact of the assaults upon J.H. and commented on J.H.'s future functioning and association outcomes. At p. 8 of his August 14, 2006 report, Dr. Locke noted:

> In my opinion, the sexual molestation caused significant psychological disturbance in J.H., and I do not think this can be disputed. I think that the abuse/molestation would affect anyone at J.H.'s age in a pervasive manner.

[86] At p. 9 Dr. Locke wrote:

> J.H.'s inability to trust anyone continues, as evidenced in his difficulties with socializing with age-appropriate friendships. Trust issues with males will likely continue. Potential trust issues with mother are also a concern …. The feelings of fear, guilt, shame, secrecy, and anger will likely influence future intimate relationships and self esteem.
>
> The psychosexual confusion resulting from the abuse is likely to cause J.H. to view intimacy primarily as sexual in nature. A seven-year-old needs love, warmth, and companionship, and I believe the abuse caused severe distortion in terms of his understanding of relationships. The violation by Mark Klein negatively impacted other aspects of relationship including trust, honesty, safety, and security.
>
> J.H.'s poor attention at school, especially in later grades, may have some genetic ADHS contribution. However, I also think that this abuse by Mr. Kelin may have had a significant contribution to his inattentiveness and poor concentration. It is conceivable that J.H. could easily have been distracted to thinking about the incidents with Mark Klein while, at the same time, making efforts to avoid thinking about the abuse. This could cause him to be quite confused and have very poor attention.

[87] In his conclusion at p. 10 Dr. Locke stated:

> I believe that J.H. experienced a significant negative psychological impact from the molestation and abuse by Mark Klein. This compounded the already disturbed psychosocial background related to the abnormal family dynamics, as discussed above. Although J.H. appears to be functioning relatively well at present (apart from school), I still believe that he is at risk for a clinical Depressive Disorder related to loss, poor self-esteem, and shame. I also believe that he is at risk for greater than normal disturbance in relationships.

[88] The Crown submits that a $75,000 award would be appropriate for J.H.'s non-pecuniary damages whereas counsel for J.H. submits that $100,000 should be the starting point for the assessment of non-pecuniary damages.

[89] The Crown referred in its brief of authorities to ***W.M.Y. v. Scott, B.C. Soccer Assoc. et al,*** 2000 BCSC 1294 which at ¶12 referred to the decision in ***S.Y. v. F.G.C.,*** *supra*, where McFarlane J.A. at ¶40 to 50 comprehensively reviewed the range of non-pecuniary damages for sexual assaults and concluded that they ranged between $100,000 and $175,000. Hutchinson J. in ***W.M.Y.,*** writing in 2000, concluded at ¶13 that the range had remained relatively stable, but that higher sums are awarded where seriously aggravating factors exist, including:

> … compensation for injury to the plaintiff's feelings of pride, dignity and self-respect. In many cases the duration of the abuse,

> the number of the assaults, the age of the plaintiff, the degree of violence and coercion, and the relationship of the plaintiff to the defendant are relevant in assessing the aggravating factors and to what extent they should affect the award. The defendant's lack of remorse may also be an aggravating factor.

[90] In the instant case, J.H. has suffered and continues to suffer injury to his pride, dignity and self-respect, faces confusion over his sexuality, has difficulty with relationships and trusting people, is unable to concentrate which has negatively impacted his education and he faces the risk of future depression. The actual physical abuse occurred on approximately 10 occasions scattered over a 15 to 30 day period, but it happened when J.H. was at a vulnerable age and was committed by an individual who had developed a trust with and become an important male figure in J.H.'s life. The only remorse exhibited by Mr. Kline is seen in his decision to plead guilty to the charges, rather than forcing J.H. to testify at the trial.

[91] Although the actual assaults upon J.H. occurred over a short period of time, the aggravating factors include the experts' conclusion that he has been left with a trauma which will be long-term and cause him difficulties in life. The aggravating factors are at the low end of the scale. I assess the non-pecuniary damages accordingly at $100,000.

Future Care

[92] The major difference between the parties lies in how best to assist J.H. to overcome the learning difficulties resulting from the 1999 assaults. The parties generally concur that as a result of the abuse, J.H. suffers from an inability to concentrate and to organize himself such that he can successfully complete the educational demands made upon him at school. The parties differ as to how best J.H.'s problems might be addressed. In its simplest terms, the plaintiff led evidence which would involve hiring a variety of professionals who would work with J.H. and the public school system in overcoming the blocks which have thwarted J.H.'s learning abilities since the 1999 assaults. This approach comes at considerable cost.

[93] The Crown contends that J.H.'s learning difficulties are best overcome within the public school system, using specialized resources which B.C. school districts with financial assistance from the provincial government can utilize to assist persons such as J.H. to overcome their learning difficulties. Although the Crown's approach comes at minimal cost I do not consider that cost motivates the Crown's position. David E. Carter holds a doctorate in educational psychology and special education and has considerable experience working in the B.C. public school system. He advances a persuasive argument for the advantages in J.H. continuing studying within the school system.

[94] J.H., at age 15, should be in grade ten but has been assigned to grade nine with his core courses at grade eight and nine levels. He twice failed or did not complete grade eight English and social studies. His school work, although it had flaws prior to the assaults attributable to asthma and other difficulties, has seen a troubling decline since the assaults, considerably diminishing his chances of graduating from high school, and rendering unlikely that without assistance he will ever qualify for post-secondary education.

[95] Dr. Josef Zaide, with a doctorate in neuropsychology and psychotherapy, assessed J.H. between July 31 and September 7, 2006 and noted that J.H.'s effort in school has been poor, does not complete assignments or completes them, but does not hand them in. He is disorganized. In his assessment he concluded that J.H. is not a behavioural problem at school, is perceived by his teachers as having a nice personality, but shows signs of having low self confidence. Dr. Zaide determined after testing that J.H.'s intelligence scale was high average, that he was particularly adept in perceptual reasoning tasks, his working memory and attention were very good, he did not have a disorder of attention, and his levels and quality of functioning in academic tasks indicated that he does not have a learning disability. He stated at p. 2 of his report:

> It is clear, given the bulk of the findings here, that JH is capable of achieving average to above average grades in high school and is potentially college or university material.

[96] While noting that J.H. demonstrated mild or relative weaknesses in fine motor and visual-motor integration and speed, reading speed and fluency and math computations he concluded:

> … these difficulties in and of themselves cannot account for J.H.'s very poor effort and failing grades in high school. It is likely that motivational and emotional factors form the major obstacles to J.H.'s achieving his potential.

[97] Psychologist Dr. Edward K. Shen at the request of Dr. Locke also assessed J.H. and his conclusions were similar to those of Dr. Zaide. He too estimated J.H. as having a high average intelligence, visual motor processing speeds at the low end of the average range, with reduced reading comprehension. Dr. Shen found J.H. to be a teenager with low self-esteem, shy and uncomfortable in social situations with a tendency to withdraw socially from school activities.

[98] Psychologist Dr. Michael F. Elterman testified as an expert in clinical and forensic psychology with a specialty in assessing sexual abuse. He testified that J.H., when he thought of the abuse he experienced, had developed a strategy or habit of thinking about other more pleasant things in order to distract his attention from the topic. Dr. Elterman described the outcome of J.H.'s coping strategy as learned inattention resulting in poor concentration and that the inattentiveness stemmed from the sexual abuse and the uncomfortable feelings experienced by J.H.

[99] Dr. Elterman described J.H. as being able to do the work when he applies himself adding that he can learn because he is a fairly bright boy, but has learned a strategy which stops him from learning and to overcome or unlearn this strategy he needs interdisciplinary support. Dr. Elterman testified that without intervention he doubted that J.H. would finish high school, picturing him falling further and further behind which would help remind him that he is failing and that for a variety of reasons he would not want to be in school. He concurred that the program recommended by Dr. Derek Swain is the type of approach he saw as being necessary to address J.H.'s learning difficulties.

[100] Dr. Locke on October 5, 2006 responded to Crown counsel's query whether J.H.'s academic difficulties can be said to have been caused by the sexual abuse and, if so, to what extent? The query followed the receipt of reports from psychologists Dr. Elterman and Dr. Swain, psycho-educational

report by Dr. David Carter, and a neuro-psychology report by Dr. Zaide. Dr. Locke after reviewing the aforementioned reports wrote:

> … I would first like to state my opinion that J.H.'s school difficulties are multi factorial in terms of causation. I believe that there are biological, psychological and social factors involved. It appears that all of the experts (including me) who were asked for an opinion have stated that the sexual abuse has had a profound impact on J.H. including on his academic functioning. Indeed as Dr. Swain and Dr. Elterman have stated, the abuse may be the largest factor, but in my opinion, not the only factor. I am unable to be more specific in regards to extent.

[101] The reports of Drs. Locke, Swain, and Elterman all prepared in the months before this trial indicate that J.H.'s learning problems continue and I conclude from their reports as well as other evidence that J.H.'s learned inattention and social problems are on a balance of probabilities the result of the 1999 sexual abuse.

[102] Dr. Swain, with a doctorate of education in counselling psychology, has a background in assisting clients with their psycho-social adjustment to disturbing life experiences. In his report he described J.H. as bright with good academic potential, but struggling as he lacked motivation and was frequently distracted. Dr. Swain attributed J.H.'s learning difficulties as stemming from the sexual abuse. He stated at p. 9 that

> 10. Regardless of co-existing stressors, the sexual molestation has had a significant negative impact on J.H.'s psychosocial development, impairing his self-concept, self-confidence, motivation, and school and social success.
>
> 11. Without an intensive interdisciplinary intervention to address his emotional, cognitive, behavioural, and social challenges, J.H. is unlikely to finish high school and will fall far short of his personal and career potential.

[103] Dr. Swain's approach to assisting J.H. involves an interdisciplinary treatment plan involving two components, an educational plan and a psychotherapy plan, carried out by qualified professionals guided by an appropriate professional coordinator. Dr. Swain envisaged the treatment plan continuing during J.H.'s remaining years in high school and for a further four years while completing a degree program. He saw the educational plan as helping J.H. to unlearn his dysfunctional coping strategy, guide him to catch up with an age appropriate curriculum and learn to focus his attention productively. He said this part of the plan would involve the hiring of a special education assistant to assist J.H. in completing the English and social studies courses in which he has fallen behind as well as keeping up with his present mathematics and science 9 courses. Dr Swain also recommended retaining a speech and language pathologist to assist J.H. to learn strategies to focus his attention on academic work by helping him develop structured organization and planning skills. In addition Dr. Swain suggested that J.H. should have a certified teacher as a tutor to meet with him twice a week for 1.5 hours in each session to provide structure and meaningful activity beyond school hours.

[104] Dr. Swain recommended a psychotherapy plan to assist J.H. in coping with the psychological difficulties flowing from the sexual abuse. In that respect, his recommendation paralleled Dr. Locke's suggestion that J.H.

receive long-term counselling and psychiatric therapy involving some 100 sessions over a 10 year period.

[105] Marie Louie Jang, with a masters degree from the University of B.C. in speech and language pathology, testified that an individual with qualifications similar to hers could assist J.H. with pronunciation, grammar and language problems, together with reading and writing difficulties, executive functions involving organization of his studies as well as social communication. Ms. Jang, who has worked extensively within the education system, opined that J.H. probably found school overwhelming and a speech and language pathologist could assist him with a program to overcome his difficulties by organizing his learning and notes with the assistance of his teachers and other support staff. Ms. Jang also testified that J.H. had difficulty communicating with his peers, showing signs of low self-confidence and low self-esteem and that a speech and language pathologist could assist in remedying his difficulties in this respect. Ms. Jang also recommended that a speech and language pathologist assist J.H. during his post-secondary education, noting that education becomes more difficult after high school.

[106] The plan advanced by Dr. Swain differs significantly from that recommended by Dr. Carter as outlined in his evidence, including his report dated September 17, 2006. Dr. Carter has worked for various school districts including the Surrey school district where in 2003 and 2004 he had responsibility for all supports for students with special needs as well as alternate education and behaviour intervention.

[107] Dr. Carter submits that the public school system offers additional supports for J.H. and that it would be better for J.H. to remain in the public system accessing the additional supports available within the system and permitting him to attend school with his peers. However, Dr. Carter acknowledged that for the school district to make further programs and assistance available to J.H. it required the financial assistance of the provincial government. He said the assistance would be provided if the school district convinced the provincial government that J.H. was a child experiencing a serious mental illness, a designation which he believed J.H. met based on Dr. Locke's recommendation that J.H. receive long-term mental health help. Dr. Carter said that with the psychiatric and psychological reports now available that the public school system is better able to obtain funding from the provincial government to assist J.H.

[108] Dr. Carter indicated that he was not comfortable with the descriptor "serious mental illness" being attached to a student before the province would give financial assistance to a school district for that student, but efforts to change the descriptor have so far been unsuccessful. He admitted that such a designation could cause difficulty for a student should it become known among his or her peers. Dr. Elterman took exception to Dr. Carter's suggestion that J.H. could be classed as having a serious mental illness to enable a school district to qualify for further provincial funding. He described the suggestion as inappropriate and ridiculous as J.H. does not have a serious mental illness and it would be dishonest to label him as such.

[109] Dr. Carter's program to bring J.H. back from the situation in which he has been left by the sexual assaults is dependent on the provincial government's acceptance that J.H. has a serious mental illness. There is no assurance that such will occur, particularly in light of Dr. Elterman's testimony.

[110] Although Dr. Carter believes that the public system can provide the necessary resources to assist J.H., I lack a detailed plan outlining the extent of the public resources and how they might be applied in J.H.'s case.

While the public school system has provided some limited assistance for J.H. over the past years, it appears to have been insufficient to realistically address his learning and other difficulties.

[111] I am not convinced that the public system of which Dr. Carter is a strong adherent is the best approach to J.H.'s difficulties. The public system has had seven years since J.H.'s difficulties showed themselves in failing grades and social difficulties within the school after the sexual assault, but has not been able to reverse what appears to be his deteriorating capacities brought on by what Dr. Elterman described as J.H.'s learned inattention.

[112] I accept with some qualifications that the approach best able to assist J.H. in overcoming his learning difficulties is that advanced by Drs. Elterman and Swain. The first qualification which I attach to Dr. Swain's plan for J.H. lies in his assumption that J.H. will complete a four-year university degree program. J.H.'s attendance at school prior to the sexual abuse was limited as he was only seven at the time, but even in those first few years his academic performance was less than stellar. I acknowledge J.H.'s intellect at the high end of the average scale bodes well for him, but that does not lead me to conclude that he would obtain a university degree. Dr. Zaide anticipated that J.H. was capable of average to above average grades in high school and described him as "potentially college or university material". I accept that universities now demand better high school marks than they did in the past which leaves a student with average to above average grades at a disadvantage. I conclude that J.H. would, without the assaults, have completed a two-year college program and that after overcoming his learning difficulties ought to be able to complete a similar college program. The assistance suggested by Dr. Swain would then for be for six, not eight years.

[113] The second qualification which I attach to Dr. Swain's plan for J.H. lies in his assumption that J.H. will require the full range of educational assistance he has suggested through the four years anticipated as being necessary for J.H. to complete high school followed by two years of post-secondary education. The length of time in which the assistance is required and whether it would diminish over the span of J.H.'s educational endeavours attracted little attention at trial. Dr. Swain did not see it diminishing, estimating the costs as remaining constant throughout high school and university.

[114] Dr. Carter I believe mentioned that such an intensive support system for J.H. might make him learning dependent, a condition which I gathered would not necessarily be beneficial. Dr. Elterman supported Dr. Swain's approach to provide assistance to J.H., but I do not construe his evidence as confirming that the assistance should necessarily continue throughout J.H.'s attendance through secondary and post-secondary education. I would anticipate that the assistance required by J.H. would diminish to some extent over the six years of his education program.

Future Care

[115] The cost of Dr. Swain's education plan was calculated using the cost of care multipliers prepared by economist Robert Carson:

(a) Special Education Assistant working half-time 182 days a year over eight years would cost $95,140;

(b) Speech and Language pathologist working five hours a week for 40 weeks a year over ten years would cost $135,000;

(c) Tutor working three hours a week for 40 weeks a year over eight years would cost $25,000; and

(d) Psychotherapy and education coordinator working six hours a month for 10 months a year for eight years would cost $27,000.

[116] The costs set out in (a) to (d) total $282,140. There is a further cost, that being to pay for 20 sessions of psychotherapy a year for J.H. over a 10-year period which has a present value of $25,000. There is no dispute with respect to the psychotherapy cost.

[117] The two qualifications I have attached to Dr. Swain's treatment plan both serve to reduce the total of $282,140 as calculated by counsel for J.H. I do not intend to perform a further calculation, but will assess the reduction for the shorter education period and the diminished services over time and determine the award under this heading at $240,000, an award which I consider generous and sufficient to ensure support is there for J.H. as he moves ahead with his education. The psychotherapy cost will remain unchanged at a further $25,000.

[118] In assessing the award for J.H.'s future care at a global figure of $240,000, I have not dealt separately with the various support staff suggested by Dr. Swain although the figure is arrived at roughly by following his recommendations. The Public Guardian will assume the obligation to create, with the assistance of educators and others, a program designed to carry out Dr. Swain's treatment plan, although the actual plan and the experts retained might well vary perhaps considerably from that envisaged by Dr. Swain. The end result, no matter what plan comes into play, will be to put J.H. and his education back on track so that he might attain his full educational potential in spite of the damage caused him by the sexual assault he suffered.

[119] C.L. Jeklin, counsel for the Public Guardian, attended throughout most of the trial although Messrs. Mickelson and Dosanjh appeared as counsel for the three plaintiffs. At the conclusion of submissions by counsel on record, Ms. Jeklin spoke at my invitation as to how the Public Guardian would handle the future care funds in the context of ensuring J.H.'s educational needs would be addressed. I thank her for the assistance she provided the court.

Loss of Earning Capacity

[120] In spite of the significant future care award designed to assist J.H. in completing a two-year post-secondary program, it is difficult to quantify the prognosis. However, as plaintiff's counsel pointed out, if a future care program generously funded increases the likelihood of J.H. attaining his educational potential, the court can reduce, but not eliminate, the spread found in Mr. Carson's report between J.H.'s lifetime earning capacity if he did not receive help and his pre-tort earnings potential.

[121] I am prepared using Mr. Carson's figures to assume that pre-tort J.H. would have completed a two-year post-secondary diploma or certificate program and that with the education support flowing from his future care award he has a 66 percent chance of achieving that goal, thereby placing his loss of future earning capacity in the range of $175,000.

Summary

[122] I find the defendants liable for the damages suffered by J.H. and assess his damages as follows:

Non-pecuniary damages:	$ 100,000
Future care for education:	240,000
Future care for psychotherapy	25,000
Loss of earning capacity:	175,000
Total:	**$ 540,000**

Costs

[123] I will reserve my decision on costs pending the continuation of this trial on January 29 and 30, 2007.

"R.M. Blair, J."
The Honourable Mr. Justice R.M. Blair