Date: 20130409
Docket: 11/29
Citation: *Rich v. Bromley Estate*, 2013 NLCA 24

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

BETWEEN:

LOUIS RICH — APPELLANT

AND:

THE ESTATE OF RONALD BROMLEY, as represented by the Registrar of the Supreme Court of Newfoundland & Labrador — FIRST RESPONDENT

AND:

HER MAJESTY THE QUEEN in Right of Newfoundland, who at all material times to this action was represented by the Minister of Social Services — SECOND RESPONDENT

AND:

THE ROMAN CATHOLIC EPISCOPAL CORPORATION of Grand Falls (The Roman Catholic Diocese of Grand Falls) — THIRD RESPONDENT

Coram: Green C.J.N.L., Rowe and Harrington JJ.A.
Court Appealed From: Supreme Court of Newfoundland & Labrador, Trial Division (G) 200201T4456

Appeal Heard June 20, 2012
Judgment Rendered April 9, 2013

Reasons for Judgment by Green C.J.N.L. and Harrington J.A.
Dissenting Reasons by Rowe J.A.

Counsel for the Appellant: John W. Lavers
Counsel for the Second Respondent: Randolph J. Piercey Q.C.

Reasons for Judgment by Green C.J.N.L. and Harrington J.A.:

[1] This appeal arises from the dismissal of the appellant's claim for damages against Her Majesty the Queen in Right of Newfoundland (Province) for physical and sexual abuse by Father Ronald Bromley (Bromley) deceased, while the appellant was residing as a permanent ward of the Director of Child Welfare of the Province (Director) at the Whitbourne School for Boys (School).

BACKGROUND

[2] The appellant, Louis Rich (Rich) is a member of the Innu First Nations born in Sheshatshiu, Labrador on March 17, 1964. His mother passed away when he was five years old. In the ensuing five years he was nominally cared for by his sisters while his father was working away from the family home.

[3] Rich has had a longstanding alcohol abuse problem which began when he was nine years of age. This history is coupled with a lengthy criminal record for offences that included assault, sexual assault, resisting arrest and breaking and entering.

[4] His behaviour and troubled life generally led him to be transferred from custodial facilities in Labrador to the island part of the Province, where on August 17, 1976 he became a permanent ward of the Director. He was admitted to the St. John's School for Boys first but was later transferred to the Whitbourne School for Boys on or about August 27, 1976. He remained there intermittently until 1981.

[5] During the 1970s, Bromley, a Roman Catholic priest for the parish of Whitbourne, volunteered to organize activities for the residents at the

School. On or about August, 1974, following prior consultation with and approval from the Superintendent of the School, Bromley began to take wards including Rich from the School to his cabin in the nearby Placentia Junction area for overnight stays as an incentive for good behaviour. The Director of the Province's Department of Recreation and Rehabilitation was consulted by the Superintendent of the School regarding this plan and granted approval. There was evidence from a retired social worker supervisor that the Province had discontinued visits by social workers to the School on March 30, 1977. Rich testified that he was sexually and physically assaulted by Bromley at the cabin on two occasions during one such overnight stay on a weekend in July of 1977, with other boys from the School.

[6] The first assault allegedly happened while Bromley and the boys were swimming in a pond near the cabin. Rich testified that Bromley organized a diving game and instructed the boys to dive between his legs. Rich testified that Bromley "knelt" while he was diving between the priest's legs preventing Rich from swimming through his legs. He testified that he could see that Bromley had removed his underwear. He claimed that Bromley tried to hold his head underwater and put his penis in his mouth. Rich freed himself and swam away.

[7] The second assault allegedly happened shortly after the swimming activity ceased. Rich went back to the cabin to get dressed. He thought he had locked a door behind him. While putting his pants on, Rich testified that Bromley walked in and started watching him. The trial judge wrote:

> [17] Rich said Bromley told him to turn around and when he did he said Bromley was naked and was masturbating himself. He said Bromley told him it was all right as he was a man of God. Rich said Bromley told him to come towards him. He said Bromley made another attempt to put his penis in Rich's mouth. Rich said Bromley was holding him by the hair of his head. He said Bromley then ejaculated on his face. He said at one point Bromley forced him to put his hand on Bromley's penis and masturbate him.
>
> [18] Rich then said he thought Bromley smacked him across the face, knocking him unconscious. Rich said that when he woke up he was in bed, his face had been washed and the other boys were in the cabin. He was uncertain if they all stayed the night in the cabin but he thought they did as he recalled lying on the floor with one of the boys. Rich said they all went back to Whitbourne the next day before noon. He never went out with Bromley again, although Bromley tried to get him to do so. …

[8] Rich testified that he reported the incident to the Superintendent of the School, who responded by slapping him on the face and placing him in solitary confinement.

[9] Rich called similar fact evidence from William Dunne (Dunne), who had been at the School with him. Dunne and Rich knew each other but were not close friends.

[10] Dunne testified that Bromley assaulted him on three outings. He alleged that Bromley always took the boys swimming and encouraged them to dive between his legs. When the boys did this, Bromley would squat down and try to touch them sexually. Dunne also testified that Bromley assaulted him in his cabin twice, undoing his pajamas, stroking his penis, rubbing up against him, and on one occasion putting his mouth on Dunne's penis. Rich was not present on any of these outings.

[11] The trial judge held that Rich's story was not credible. He found that Rich did not remember the assaults until he saw Bromley's arrest on television. He noted that Rich's earlier writings while in custody and statements to the police only mentioned abuse by another priest, Father Paradis. In November 1991, Rich had allegedly denied that Father Bromley had assaulted him. The trial judge concluded:

> [112] There was no evidence or rumours of wrongdoing by Bromley prior to the alleged assaultive behaviour. The two alleged assaults on the plaintiff occurred on one day at Bromley's cabin and consisted of an attempt by Bromley to put his penis in Rich's mouth while the two of them, together with a couple of other boys, were swimming and attempting to put his penis in Rich's mouth a short time later in the cabin and eventually ejaculating on Rich's face and slapping him unconscious. Rich has a lengthy criminal record for break, entry and theft, assault and sexual assault. He is violent. He is an alcoholic and has abused drugs. He has had trouble maintaining relationships throughout his life.

He further described Rich as follows:

> [113] Rich had a troubled childhood, losing both of his parents to alcohol. His mother died when he was seven and his whole world changed. He was ostensibly raised by his older sisters as his father was either away at work or drunk but in reality he had little or no supervision. He started abusing alcohol at age nine and got into significant criminal trouble through breaking and entering cabins, and stealing alcohol and other property, including skidoos. Prior to being incarcerated in Whitbourne for some of these offences, he (while leading others) broke into a

> building and killed 100 chickens. He continued his life of crime and substance abuse into adulthood and sexually assaulted his own daughter.
>
> [114] The Court found that Louis Rich was not a credible witness. Bromley had died prior to the trial. Rich did not pursue criminal charges against him prior to Bromley's death. The Court found that Rich had not proved on a balance of probabilities that the assaults by Bromley had occurred.

[12] The trial judge emphasized Rich's lengthy criminal record and his monetary incentive to allege abuse by Bromley. While the trial judge admitted the similar fact evidence with the consent of counsel for the Province, he placed little weight on it. He concluded there were "substantial differences" between Rich's account and that of Dunne and found that it was unlikely in any case "that any 12-year-old boy, no matter how small, could swim under the legs of a man of average height while kneeling down in the water" (paragraph 45).

[13] The trial judge concluded that even if he believed Rich's allegations, he would not have found that the Province was liable for negligence:

> [56] It is easy to look back with the benefit of hindsight and the recent history of sexual abuse by Roman Catholic clergy and conclude that the government ought to have known of the risk to which they were subjecting Mr. Rich. But in the absence of evidence in respect of the knowledge of those in power at the time, there is no basis in the circumstances of this case to conclude that there was a foreseeable risk of harm in allowing Mr. Rich an overnight pass to visit Father Bromley's cabin in the company of other boys. There weren't even any suggestions of rumours which might have put the Director and Superintendent on notice that they ought to be careful in respect of Bromley.

[14] The trial judge found that Bromley's relationship with the School was that of a volunteer and a "completely independent contractor" in relation to the Province (paragraph 65). Accordingly, he found that the Province was not liable on the basis of "vicarious or strict liability" for Bromley's actions. He nevertheless found that if the Province was vicariously liable, he would have awarded Rich $45,000 in damages, including $15,000 for aggravated damages.

ISSUES

1. Did the trial judge err in holding that Rich was not a credible witness, while placing weight on irrelevant and/or incorrect

factors in assessing the credibility of Rich when recounting events which occurred during childhood?

2. Did the trial judge err in attributing little weight to the similar fact evidence admitted at trial?

3. Did errors of the trial judge, in his assessment of the credibility of Rich and his treatment of the evidence of Dunne, constitute palpable and overriding error justifying either a new trial or imposition of liability by this Court?

4. Did the trial judge err in holding that the Province was not vicariously liable for the actions of Bromley by failing to find that the Province was in breach of a non-delegable duty of care towards Rich?

5. Did the trial judge err in assessing the quantum of damages that was appropriate in the circumstances of the case?

STANDARD OF REVIEW

[15] Cameron J.A. of this Court summarized the standard of applicable review in *Cleary v. Courtney*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85 as follows:

> [15] The standards of review applied by this Court were discussed in **Ring v. Canada et al.,** 2010 NLCA 20, at para. 6:
>
> > The standard of review applied by an appellate court depends upon the nature of the matter being reviewed. A pure question of law is reviewed on a standard of correctness and an appellate court is free to replace the opinion of the trial judge with its own. Findings of fact, on the other hand, cannot be reversed unless the trial judge has made a palpable and overriding error. A determination of whether a legal standard was met involves the application of a legal standard to a set of facts which is a question of mixed fact and law. A question of mixed fact and law is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error in law and the applicable standard is correctness. These principles are well established: **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235.

> Findings of credibility are part of the fact finding process and are subject to the same standard of review, as are inferences drawn from the facts. If inferences drawn by the trial judge are reasonable, an appellate court should not intervene just because other inferences could also have been reasonably drawn: **H.L. v. Canada (Attorney General)**, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 74. …

[16] In this proceeding, the issues regarding the formulation of the principles respecting vicarious liability and breach of a non-delegable duty are questions of law and must be reviewed on a correctness standard. However, the issues about Rich's credibility and the weighing of the similar fact evidence are questions of fact and are to be reviewed on a standard of palpable and overriding error. The issues relating to the negligence of the Director and the Superintendent, and the quantum of damages are questions of mixed fact and law. Those grounds of appeal can only succeed if the trial judge made an error on an extricable question of law or a palpable and overriding error.

[17] A palpable and overriding error has been described as one which is "plainly seen" in *Housen* at paragraph 4. It may arise when (i) there is no evidence to support a trial judge's decision; (ii) irrelevant factors were considered and relevant factors were not, or (iii) where there is an award of damages that is inordinately high or low (see *Bussey v. White*, 2001 NFCA 7 at para. 7).

[18] In employing this list, two things must be kept in mind. First, the phrase "palpable and overriding error" encapsulates the highest level of appellate deference. It is not enough for the appellant to show that the trial judge considered one irrelevant factor, or that he or she failed to consider one relevant one. An appellate court will only intervene if the error is significant enough to displace the strong arguments in favour of deference.

[19] Second, the categories of palpable and overriding errors are never closed. As Iacobucci and Major JJ. wrote at paragraph 25 of *Housen*, "there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge – that of palpable and overriding error". Any error that is plain enough and significant enough will trigger appellate intervention, regardless of whether the error fits into any list of categories.

ANALYSIS

I Did the Trial Judge Err in Assessing Rich's Credibility?

[20] The trial judge in the final analysis did not find the evidence of Rich to be credible. He reached this decision from two vantage points. First, the trial judge doubted and drew a negative inference regarding Rich's credibility due to his refusal to "confront Bromley while he was alive" (paragraph 41). Second, the trial judge concluded that Rich "apparently didn't even remember the alleged assaults by Bromley until he saw Bromley's arrest on television" (paragraph 35). He found that the similar fact evidence, which was adduced by counsel for Rich with the consent of counsel for the Province, was not reliable, based principally on inconsistencies between the testimony of the witness Dunne and that of Rich. This evidence was adduced at trial without challenge to its admissibility by counsel for the Province. The contest at trial was over reliability, with the final result being that the trial judge rejected his evidence, giving it "low" weight in reaching the conclusion that Rich had not proven that he had been assaulted by Bromley as alleged.

[21] Before this Court, counsel for Rich takes the position that the trial judge erred in his assessment of credibility with respect to the finding that Rich did not confront Mr. Bromley on a timely basis. He found in fact that Rich had forgotten about the abuse until his memory was suspiciously revived by seeing Bromley on television in the wake of revelations that he was charged with sexual abuse.

[22] The trial judge stated that "Lewis Rich's credibility is a critical element against which to test the veracity of his allegations". He ultimately concluded that "the entire record reflects negatively on Rich's credibility". Underlying his reasons was the view that there "is a clear monetary incentive to now exaggerate any alleged assault by Bromley", noting that Rich had previously settled a lawsuit with the Roman Catholic Episcopal Corporation of Grand Falls (Corporation), the Third Respondent, with respect to the actions of another Roman Catholic priest.

[23] In reaching his conclusion that Rich was not a credible witness, the trial judge made two palpable and overriding errors:

1. He drew an adverse inference against Rich because he waited until Bromley had died to confront him. That inference was not supported by any evidence.

2. He rejected Rich's position that he had forgotten the abuse that he was alleging. That rejection was based on a misapprehension of Rich's evidence.

[24] Together, these errors demonstrate that, whether Rich is ultimately found to be credible or not, the trial judge's basis for his assessment of Rich's credibility is plainly incorrect.

1. *Rich Did Not Refuse to Confront Mr. Bromley*

[25] The trial judge drew the following adverse inference against Rich for failing to confront Bromley while he was alive:

> [41] … While I appreciate that it may be difficult for alleged victims to pursue such matters, it undermines Mr. Rich's credibility when he refused to confront Bromley when he was alive and could defend himself but is now pursuing the province for financial gain based on allegations against Bromley when the province and Bromley cannot offer any direct denial of these allegations.

[26] The trial judge's finding that Rich refused to confront Bromley while he was alive has two parts. The first is that Rich, having pressed criminal charges against Bromley, decided not to pursue them, leading to a stay of proceedings. The evidence on that point was mixed: some suggested that Rich decided not to pursue the charges, some that he accepted the Province's decision to drop them. In assessing the significance of this evidence, the trial judge does not appear to have considered the fact that Bromley had been acquitted on appeal of other charges would reasonably have shaken Rich's resolve to continue with the criminal proceedings against Bromley.

[27] The second part of the trial judge's finding is that Rich did not pursue his civil claim until it was too late for Bromley to deny it. That is not supported by any evidence. The record shows that Rich filed a statement of claim against Bromley while he was alive. The trial judge acknowledged that (Decision, paragraph 1). Bromley was killed in a motor vehicle accident subsequent to the commencement of the proceeding.

[28] Counsel for Rich argues that the trial judge placed undue emphasis on the fact that the criminal charges laid against Bromley with respect to the

alleged assaults were stayed. The stay occurred following a recommendation of the Crown to Rich in the wake of an appellate reversal of convictions of Bromley for similar alleged misconduct involving boys. This was a sufficient justification for the stay, eliminating the inference that he "dropped" the charges because there was no substance to them. The trial judge accordingly ought not to have relied upon it to question Rich's credibility.

[29] Counsel also submits that Rich's lengthy criminal record dating back to the age of 9 was unduly emphasized by the trial judge given his difficult upbringing in impoverished circumstances as a motherless (deceased) child and having a father who was away from home most of the time. We agree with the appellant's counsel that the trial judge overemphasized the record, particularly his specific reference to Rich's participation with other boys in an unfortunate incident that led to the senseless destruction of approximately 100 hens.

[30] The record does not suggest Rich was unduly slow in moving the civil case towards trial. The Province was dilatory with respect to production of documents and conduct of discovery. During the longest period of inactivity from December 3, 2002 to July 15, 2005, the ball appears to have been in its court.

[31] Finally, the record does not suggest that Rich had any reason to expect that his civil suit would ever go to trial without Bromley's testimony. It does not suggest that Bromley's death was predictable. Nor does it indicate that Rich would necessarily have wanted to avoid his testimony. On the stand, Bromley might have confessed, or offered evasive and unbelievable testimony that would implicitly bolster Rich's case.

[32] If Bromley's testimony was an essential element of the Respondents' case, they could have recorded his evidence. They did not, and cannot get the benefit of the most favourable assumptions about what Bromley's evidence might have been.

[33] The trial judge's adverse inference is not supported by any evidence and is a palpable and overriding error.

2. *Rich Did Not Forget About the Assaults*

[34] Rich had on some occasions denied being abused by Bromley over the years. These denials became a central point at trial, with the defence leading

evidence of prior inconsistent statements, and Rich introducing an expert witness to explain them.

[35] The trial judge rejected Rich's explanation:

> [35] [My impression that Mr. Rich's testimony was based in large part on a reconstruction of the events from his reading prior statements and other evidence] was supported by the fact that Rich apparently didn't even remember the alleged assaults by Bromley until he saw Bromley's arrest on television, respecting several assaults on others. Even though Mr. Curt Hillier, a clinical psychologist who testified for the plaintiff on the effects of sexual assault stated that it is not uncommon for victims of multiple sexual assaults to confuse and confabulate the various incidents, there was no expert evidence that forgetting the incident entirely might be expected from a person who had endured the life experiences of Mr. Rich. I was left to speculate which I decline to do.

[36] The word "apparently" implies that the trial judge was stating his understanding of Rich's explanation: Rich had denied the assaults because he did not remember them.

[37] Rich did not say that he forgot the assaults; he said that he had buried them. When his counsel asked him why he denied the abuse in 1990, Rich's testimony was as follows:

> Q: In 1990 did you deny a history of sexual abuse to the Brentwood Treatment Center?
>
> A: Yes.
>
> Q: And why did you do that?
>
> A: Shame and guilt.

[38] When defence counsel pressed him on that point, Rich denied pointedly that he had ever forgotten the abuse:

> Q: The incidents that you alleged happened with Father Bromley left your mind right. You forgot about them?
>
> A: Actually, I buried it. I buried, hoping it would never come back up on me.
>
> Q: Okay, and as I understand it, it was when you saw him on TV that he was arrested for other sexual assaults, that this came back to you?

> A: The shame and guilt came back to me so I denied it right away. I denied—it's something—I believe it was in Labrador Correction Centre when this happened, when I seen the priest on TV and I felt so guilty that I felt like everybody could see through me and—I don't know, somebody mentioned something about Bromley, or about priests in general, and I said I'm glad that never happened to me. I denied it because of the guilt that was involved in it, shame that was involved in it.

[39] The trial judge stated accurately, at another point in his reasons, that this was Rich's explanation: "[I]n November 1991[1] [Mr. Rich] denied that Bromley had assaulted him at all. He testified he was too embarrassed at the time to disclose it and didn't wish to speak about it" (paragraph 37).

[40] Despite this acknowledgement, the trial judge appears to have grounded an adverse inference regarding credibility on Rich having forgotten about the abuse. There was no evidence on which this inference could be based.

II Did the Trial Judge Err in Discounting the Similar Fact Evidence?

[41] The second issue deals with the trial judge's treatment of the similar fact evidence of Dunne and whether he assigned proper weight to it. Appellate courts rarely interfere in a trial judge's weighing of evidence, but they can if an appropriate factor is materially overemphasized or underemphasized, thereby constituting palpable and overriding error.

[42] The probative value of similar fact evidence has been discussed in detail by the Supreme Court of Canada in the context of admissibility issues, most notably in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908. The analytical framework emphasized in *Handy* is useful to help assess the trial judge's reasoning with respect to the weighing of that type of evidence, especially where the issue revolves around the strength and degree of the similarity of the evidence.

[43] Upon appellate review, the court ought to be able to assess whether a witness's testimony is sufficiently similar to the plaintiff's to show that the perpetrator had a distinctive *modus operandi* that could support the credibility of the plaintiff/victim, in this case, Rich. Notwithstanding the fact that counsel for the Province did not contest the admissibility of

[1] The correct date is November 2, 1990.

Dunne's evidence and the trial judge accepted it as admissible evidence (though reserving as to the weight to be ascribed to it), the trial judge nevertheless addressed the issue of admissibility in his decision. He stated that it has been submitted "to refute the defences of innocent association and lack of opportunity and to bolster Mr. Rich's credibility" (paragraph 43). He accepted that these were "legitimate uses" for the evidence.

[44] John Sopinka, Sidney N. Lederman, and Michelle J. Fuerst observe at paragraph 11.242 of *Sopinka, Lederman and Bryant: The Law of Evidence in Canada*, (3d) (Markham, ON: LexisNexus, 2009):

> The inferences sought to be drawn from the evidence of similar facts must accord with common sense, intuitive notions of probability and … the … unlikelihood of coincidence. The strength of the evidence in true similar fact cases increases when it demonstrates situation-specific conduct in closely defined and circumscribed circumstances. The degree of distinctiveness or uniqueness of the misconduct, the significant similarities or dissimilarity between the conduct in question and the conduct on other occasions, and the nexus or connectedness between the two are important factors to assess the strength of the similar fact evidence.
>
> (See pages 766-767, underlining added.)

[45] While the trial judge acknowledged that the similar fact evidence proffered by Dunne could be used to bolster the credibility of Rich, he proceeded on the basis that it was otherwise "presumptively inadmissible" under the *Handy* framework and "should be used with caution" (paragraph 43). The issue that emerges is whether or not the trial judge was unjustifiably skeptical as to the weight that should be accorded to Dunne's testimony, particularly where there appears to have been striking similarities with respect to the description of the *modus operandi* of Bromley at his remote cabin in his interaction with regard to young boys such as Rich and Dunne.

[46] The trial judge made a finding that "[w]hile the actual alleged assault in the water is somewhat similar, there are also substantial differences" (paragraph 44). It is in this context that this Court is invited by counsel for Rich to assess whether or not the trial judge underemphasized the striking similarities between the Rich description of Bromley's *modus operandi* in assaulting him during the diving game led by Bromley in the water and the description given by Dunne, to the point where they amount to palpable and overriding error.

[47] The judge's assessment of the weight to be assigned to admissible similar fact evidence is entitled to considerable deference and is subject to appellate review, as we have noted, on a standard of palpable and overriding error. The *Handy* analytical framework, which is directed towards the admissibility criterion of threshold reliability, amongst other things, technically has no application to issues respecting the weight to be accorded such evidence once it has been admitted. That said, the factors to be considered in the threshold reliability analysis are nevertheless useful in assisting in determining whether, on a standard of palpable and overriding error, the determination of ultimate reliability of the similar fact evidence evinces reversible error.

[48] The trial judge gave three classes of reasons for discounting Dunne's evidence: dissimilarities between his account and Rich's, the internal consistency of Rich's story, and Dunne's credibility. Analysis of the first class can be assisted by reference to the *Handy* framework respecting the factors to be considered connecting the formal circumstances of the similar fact evidence to the facts in issue. The second class of case is irrelevant; and the third class requires a separate analysis altogether.

1. *Analyzing the Connecting Factors*

[49] The trial judge identified three issues to which the similar fact evidence was relevant: "to refute the [defence] of innocent association", "to refute the [defence] of … lack of opportunity", and "to bolster Mr. Rich's credibility". The concession by the defence regarding the admissibility of the evidence of Dunne constitutes an implicit acknowledgement of the relevance of the similar fact evidence to a key issue in the trial. Further, the nature of the particular similar fact evidence that was before the trial judge in this case is of the nature and character that is highly relevant to meeting on the balance of probabilities the resolution of the question of whether Rich was likely assaulted by Bromley.

[50] Binnie J. provided a non-exhaustive list of possible factors connecting the similar facts to the circumstances at issue in *Handy*, at paragraph 82. We will use these to frame the analysis.

a. *Proximity in Time of the Similar Acts*

[51] The acts occurred within a few years of each other. Dunne testified that he was abused between 1977 and 1979; Rich testified that he was abused in either 1976 or 1977.

b. *The Extent to Which the Other Acts Are Similar in Detail to the Charged Conduct*

[52] The acts described by Rich and Dunne are similar:

1. In each case, Bromley took a group of boys that included the victim swimming at a pond near the cabin;

2. In each case, Bromley encouraged the victim to swim between his legs;

3. In each case, Bromley removed the clothing he was wearing (trunks in one case, underwear in the other);

4. In each case, Bromley attempted to touch the private parts of the victim during the diving game; and

5. In each case where the victim was in the cabin alone, Bromley assaulted him there also.

[53] The trial judge noted some dissimilarities between Rich's account and Dunne's:

1. Bromley treated Rich more violently than Dunne;

2. Rich had no recollection of Bromley's treatment of the other boys, whereas Dunne recalled Bromley touching the private parts of all the boys;

3. Rich recalls Bromley kneeling during the diving game, where Dunne recalls him standing; and

4. Rich describes a small, one-room cabin; Dunne describes a larger, multi-room cabin.

[54] The trial judge did not mention two differences. First, Rich ran away after the diving game and was assaulted in the cabin during the day. Dunne

did not run and was assaulted in the cabin at night. Second, Bromley attempted to put his penis in Rich's mouth during the diving game, but not in Dunne's.

[55] Differences (2), (3), and (4) are in the nature of small and peripheral discrepancies that are to be expected when people testify about traumatic events that happened thirty years earlier when they were children. As Wilson J. stated many years ago in *R. v. B. (G.)*, [1990] 2 S.C.R. 30 at p. 55:

> … [A] flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. … While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.

[56] McLachlin J. (as she then was) built on these comments in *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at p. 134:

> … Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying.

[57] As for difference (1), regarding the difference between the violent treatment of Rich as opposed to Dunne by Bromley, it would be suspicious if the acts *were* exactly identical. This is similar fact evidence of propensity, not eyewitness testimony. One sexual predator, even if he has a distinctive propensity, will behave differently in different moods, on different days, in different circumstances. Different victims may react differently, leading to different situations.

[58] As mentioned above, Rich was assaulted in the cabin during the day after he had run away from the diving game; Dunne was assaulted at night.

Perhaps Bromley was more violent because he was not surrounded by sleeping children; perhaps Rich, already upset, was more aggressive than Dunne. Perhaps Bromley may have been sometimes violent and sometimes not, depending on his mood.

[59] It was not an error for the trial judge to consider differences (1), (2), (3) and (4). They do lessen, to some degree, the probative value of the evidence. The question is whether he overemphasized them and in the process disregarded or seriously underemphasized factors pointing towards similarity to the extent of constituting a palpable and overriding error.

c. *The Number of Occurrences of the Similar Acts*

[60] Dunne described three occasions of abuse. On all three occasions he says he was assaulted during the swimming game. On the first and third he was also assaulted while in bed in the cabin; on the second occasion he slept in a double bed and was spared.

d. *Circumstances Surrounding or Relating to the Similar Acts*

[61] Each incident occurred when Bromley took a group of boys from the Whitbourne Boys Home on a weekend outing.

e. *Any Distinctive Feature(s) Unifying the Incidents*

[62] The diving game is particularly distinctive. Two boys are unlikely to have independently fabricated the story that a priest took off his undergarments, encouraged them to dive between his legs, and touched or attempted to touch their private parts. Further, Rich and Dunne each described Bromley repeatedly telling them while he was naked before them, either in the water or in the cabin, words to the effect that "It's ok ... I am a man of God".

f. *Intervening Events*

[63] Rich and Dunne did not confer about the abuse, or speak at all between 1979 and the day before Dunne's testimony.

[64] Counsel for the Province suggested no other factors that tended to support or rebut the underlying consistency of the similar evidence, nor are any apparent.

[65] The similar fact evidence in this case paints a picture of Bromley as a sexual predator with a distinct *modus operandi*. He would use his status as a priest to take a group of boys from the School — boys with the lowest possible social status, boys whose word would never be taken over his — on overnight stays at his cabin. There he would organize and participate in a distinctive diving game with them, taking off whatever he happened to be wearing and touching the boys, or at least some of them. Later, if he got the boys alone or unobserved in the cabin, he would attempt to sexually assault them, and in some cases, he succeeded.

[66] The connecting factors are strong. There are three distinct instances comprising five assaults, all of which happened within a few years of the abuse. The assaults share unique and distinctive features. Rich and Dunne had no opportunity to collude. The differences between the accounts are small, given the passage of time, the nature of traumatic childhood memories, and every assault being a unique event in time.

[67] If the dissimilarities were the only reason the trial judge assigned a "low" weight to the similar evidence, then the degree of emphasis placed by the judge on those dissimilarities, in the absence of some credible explanation for disregarding the other indicia of similarity, constitute palpable and overriding error.

2. *The Similar Fact Evidence Was Either Probative, Inadmissible, or Incredible*

[68] The same result can be reached by another approach. If the trial judge thought the probative value of the similar fact evidence was "low", and its prejudicial effect high or significant, he should not have admitted it notwithstanding the concession by counsel for the Province.

[69] Similar fact evidence is only admissible if its probative value exceeds its prejudicial effect. The prejudicial effect is usually large, so similar fact evidence with a low probative value is usually inadmissible. A trial judge who admits highly prejudicial evidence, even though its probative value is low, has essentially and improperly abdicated the role of gatekeeper.

[70] The trial judge's reasons appear to be contradictory: on the one hand, the probative value of the similar fact evidence exceeds its significant prejudicial effect (justifying its admission); on the other, the probative value

is low (apparently justifying its rejection as having little or no evidentiary value). This contradiction has no satisfactory resolution.

[71] The Province's consent cannot justify the trial judge's reasoning. The trial judge has a duty to treat the evidence in an internally consistent manner regardless of what the parties concede or consent to. If he does not, he errs and an appeal court is entitled to intervene. The trial judge could not accept the Province's concession that the evidence was more probative than prejudicial and still accept the contradictory argument that the evidence was not probative.

[72] If the trial judge disbelieved Dunne's evidence, that could explain the contradiction. We are satisfied, however, that the trial judge largely accepted Dunne's evidence. But for the trial judge's erroneous treatment of the connecting factors, he ought to have put significant weight on the similar fact evidence.

[73] The trial judge made only one comment about Dunne's credibility:

> [47] … It is noteworthy that Dunne did not commence criminal legal proceedings against Bromley so his allegations remain essentially untested. In these circumstances, it would be inappropriate to ascribe great weight to the similar fact evidence.
>
> [Emphasis added.]

[74] That comment is open to two interpretations:

1. Dunne's evidence must be slightly discounted because Bromley had no opportunity to contradict it. In that case, the phrase "[i]n these circumstances" refers not only to Dunne's decision not to press charges, but also to the previously-described differences between Dunne's account and Rich's, on which the trial judge seems to have placed more weight; or

2. Dunne is untrustworthy and his evidence must be rejected because he refused to confront Bromley while he was alive. In that case, Dunne's credibility alone can explain giving "low" weight to his evidence.

[75] On the first interpretation, the trial judge was applying Lord Mansfield's dictum that "all evidence is to be weighed according to the

proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." (*Blatch v Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at p. 970, quoted with approval in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at p. 328.) In evaluating Dunne's evidence, the trial judge could properly consider that the evidence cannot effectively be challenged because Bromley is dead.

[76] This interpretation could only explain a slight reduction in the weight of Dunne's testimony, not a virtual rejection. Dunne gave uncontradicted evidence which was not shaken in cross-examination. The standard of proof is a balance of probabilities. Most important of all from the perspective of Lord Mansfield's dictum, he withheld nothing—he produced all "the proof which it was in the power of the one side to have produced". In the circumstances, the first interpretation cannot explain why Dunne's evidence having been admitted with consent of the Province was not probative enough to receive significant weight.

[77] The second interpretation is based on the inference that Dunne was afraid to confront Bromley while he was alive and could contradict him. If the trial judge drew that inference, it could explain the contradiction. The problem is that the trial judge could not properly draw that inference.

[78] There is no evidence to suggest that Dunne was afraid to confront Bromley. Dunne was never asked why he did not press charges; the Province did not suggest to him that he was afraid; indeed, the Province did not mention his decision not to press charges in cross-examination. In the circumstances, the Province was not entitled to ask the court to draw an adverse inference against Dunne. Southin J.A., referring to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) said in *Steele-Wells v. Mahood* (1995), 4 B.C.L.R. (3d) 57 (C.A.) at para. 5:

> … It is of the utmost importance, in my view, that an inference should not be sought to be drawn against a witness, whether a litigant or a non-litigant witness, unless the inference which is sought to be drawn is squarely put. …

[79] The trial judge relied principally on minor inconsistencies that were peripheral to the main issue in order to assign "low" weight to the similar fact evidence. Those inconsistencies were to be expected because Rich and Dunne were describing two different events. The trial judge did not focus on the key question, which was whether the similar fact evidence established a connected and probative *modus operandi* which bolstered Rich's

description of the events. He erred by failing to give proper weight to the similar fact evidence of Dunne, which bolstered considerably the credibility of Rich's evidence that he had been sexually and physically assaulted by Bromley in the manner he described at Bromley's cabin. This constituted a palpable and overriding error.

III Summary on Issues of Credibility and Similar Fact Evidence

[80] To summarize, the trial judge made palpable and overriding errors in his assessment of the credibility of Rich and in his treatment of the admissible similar fact evidence relating to Dunne. Specifically, he erred in:

(a) drawing an adverse inference against Rich on the ground that he waited until Bromley had died before confronting him, when such an inference was not supported by any evidence;

(b) misapprehending the evidence with respect to whether Rich had "forgotten" about Bromley's assaults;

(c) assigning "low weight" to the similar fact evidence of Dunne by unjustifiably discounting the significant similarities, in matters of materiality, between Rich's allegations and those of Dunne's, when in fact there were strong connecting factors present.

[81] Reliance by the trial judge on these matters materially affected his assessment of the credibility of Rich's evidence and led to his conclusion that Rich had not led evidence sufficient to satisfy the court that on a balance of probabilities he had been sexually assaulted by Bromley.

[82] It must be remembered that Rich's evidence at trial was uncontradicted. This was not a case of the judge having to weigh evidence from conflicting sources (a plaintiff and a defendant) and deciding whether the evidence from the plaintiff was to be believed over that of the defendant or was sufficiently strong to overcome the contradictory evidence and should lead to a finding, on a balance of probabilities, of liability.

[83] The only thing standing in the way of a finding of liability on the basis of Rich's evidence was the judge's finding of Rich's lack of credibility.

[84] While an appellate court will usually give great deference to a trial judge's assessments of credibility, deference will not necessarily be

warranted if the evidentiary and analytical basis for those credibility findings are not supportable or disclose palpable and overriding error. As noted in *Housen v. Nikolaisen*, "[I]t is open to an appellate court to find that an inference of fact made by a trial judge is clearly wrong" (per Major and Iacobucci JJ at paragraph 22). If the evidentiary and analytical base for the inference is lacking, the resulting inference will be "clearly wrong".

[85] In this case the trial judge's assessment of Rich's credibility has been seriously undermined. Without that adverse finding of credibility, Rich's uncontradicted evidence should have carried the day.

[86] The trial judge's dismissal of Rich's claim against Bromley must therefore be set aside.

[87] The question that must now be addressed is whether a new trial should be ordered or whether this Court may proceed, on the existing record, to make a proper determination and enter judgment accordingly.

[88] Rule 57.23(1)(f) of the *Rules of the Supreme Court, 1986* allows this Court to "make any order which the appeal may require", and in the course of doing so it may "draw inferences of fact … or make any order which might have been made by the court appealed from" (rule 57.23(1)(b)).

[89] The two basic considerations that an appellate court must address when deciding a case on the existing record rather than sending it back for retrial are issues of practicality and fairness to the parties: *Matchim v. BGI Atlantic Inc. et al*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46 at para. 99.

[90] Here, the amounts at issue are relatively small. There has been a long and expensive trial. The case has been in the courts since 2001 and involves events that occurred in 1976. Memories no doubt have faded and witnesses have died. A new trial will be expensive and probably duplicative. The Court should therefore be careful not to order a retrial unnecessarily and to put the parties to additional expense and delay.

[91] It is true, of course, that the Court is more likely to return a matter for retrial where the evidence is conflicting and the resolution of those conflicts depends on assessments of credibility. See *Gillis v. British Columbia Transit*, 2001 BCCA 248, 88 B.C.L.R. (3d) 163, at paras. 10–12. However, even where the evidence to be reassessed is oral evidence as opposed to documentary evidence "an appellate court may replace the findings of a trial

judge with its own findings where what is at issue is inferences to be drawn from undisputed evidence" (*Matchim* at paragraph 102; underlining added).

[92] In this case, the judge's conclusions as to credibility were based on inferences drawn from Rich's uncontradicted evidence and from the similar fact evidence of Dunne which the judge did not discount on grounds of lack of Dunne's credibility.

[93] While observing Rich's demeanour was a factor in the judge's overall assessment of his credibility, the judge relied on the inferences he drew from his misapprehension of the evidence, as discussed previously, to support those impressions. He commented:

> [34] Mr. Rich appeared as a person who did not have a clear current recollection of the events of which he complained. I formed the impression from listening to him that his testimony was based in large part on a reconstruction of events from his reading prior statements and other evidence.
>
> [35] This impression was supported by the fact that Rich apparently didn't even remember the alleged assaults by Bromley until he saw Bromley's arrest on television …
>
> (Emphasis added.)

[94] From this extract, it appears that the judge formed his "impression" of Rich on the basis that his testimony appeared to be based on a reconstruction of the events from reading prior testimony and other sources. In the circumstances, where Rich was testifying about events he said occurred over thirty years previously when he was a young boy, it would be expected that he would attempt to refresh his memory of details and to prepare himself by reading prior statements before giving evidence at trial. This fact alone, without more, should not impact on his credibility in any material way. Any impression the judge had about Rich's credibility from observing Rich's demeanour should have been based on more than this.

[95] The only other factor contributing to the judge's "impression" of Rich was the "support" the judge felt his impression received from the various inferences he drew from the evidence which in his view supported his negative view of Rich's credibility. They included the matters discussed previously and for which we have concluded there was no basis for the inferences drawn.

[96] In addition to those matters, however, the judge also referred to a limited number of additional matters that in his view impacted negatively on Rich's credibility. We will deal with each of these in turn.

[97] Firstly, the judge placed emphasis on the fact that Rich at times was "confused" as to which priest (Bromley or another priest) had assaulted him first and at other times did not identify Bromley as an abuser when he had an opportunity to do so. The judge, however, does not appear to have considered the concerns expressed in the current case law about placing emphasis on the failure to make timely complaints of abuse. See, for example, the comments of Spies J. in *R. v. T.(J.)*, 2011 ONSC 1962:

> [78] … it must be remembered that the significance of the complainant's failure to make a timely complaint about the allegations of sexual assault must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons react to acts of sexual abuse.

[98] This observation is certainly relevant here in light of Rich's evidence that he "buried" the thoughts about the abuse out of shame and guilt.

[99] The judge also mentioned that Rich had a "monetary incentive" to exaggerate any assault by Bromley. That, of course is a situation that theoretically always exists when a claim is made for damages for sexual assault. In this case, however, the judge tied this observation to the fact that, on his view of the evidence, Rich had in the past attributed much more damage to assaults by the other priest rather than Bromley but at trial he said the damage was "equally as bad" (paragraph 38). (At trial, a psychologist who treated Rich also indicated Rich had previously told him that the impact of the abuse by the other priest was significantly greater than the abuse by Bromley, which he testified, was consistent with research that a breach of a trusting relationship tends to have a greater impact than abuse by a stranger: Transcript, June 3, 2011, pp. 37-38.) This conclusion that Rich said at trial that the abuse was equally bad is a mischaracterization of the totality of the evidence on this point.

[100] While Rich did say in cross-examination at one point that "I'd say today it would be basically the same", he immediately qualified that with the comment, "It's hard for me, like, to know which hurt more." (Transcript, June 1, 2010, p. 74). These comments must also be read in light of his evidence on direct examination, where in answer to a question as to "which of the two priests affected you more"? he answered:

> I always have trouble with that question. To weigh the difference – or to weigh the amount of hurt and anger and – that's involved in – both priests – I mean, it's hard to weigh which …
>
> (Transcript, May 31, 2010, p. 137.)

[101] This sort of qualified, reflective answer hardly seems like the answer that a person who was setting out to exaggerate his claim against Bromley would give.

[102] The other assumption underlying the judge's conclusions in this regard rests in his observation that when Rich wrote a five-page essay ("Shattered Dreams") concerning how his trust in the church and its officials was shattered, he only named the other priest in his allegations (although there was a general reference to "two priests" in the context of abuse suffered by him at the hands of others being described as not as severe as that committed by the "two priests"). When Rich was challenged on cross-examination on why he did not focus more on Bromley, he responded that he was "focusing on one person at a time" (Transcript, June 1, 2010, p. 87) – in other words, he was using the essay as therapy to deal with his demons respecting the abuse at the hands of the other priest at the time; it was not meant as a comprehensive description of his life of abuse (which is consistent with his statement at the end of the essay that "there was other sexual abuse by three males"). He also acknowledged that the other priest and he were very close, that he was like a brother to him and that the relationship was an ongoing one (unlike the one event with Bromley). In light of these circumstances, it was inappropriate for the trial judge to regard the absence of detailed revelations about Bromley in Rich's essay as somehow indicating that Rich was now exaggerating his claims against Bromley at trial.

[103] The judge also mentioned the fact that Rich had a "significant criminal record" which in his view reflected "negatively" on Rich's credibility. (We note however, that those convictions did not relate to truth-related offences like fraud, perjury or false pretenses – except for one summary conviction offence of fraudulently obtaining transportation in 2003, for which he was sentenced to one day in jail for time served.) This fact in itself cannot be enough to disentitle a claimant from pursuing a civil claim in court without at least considering the record in the context of the

social conditions of the offender and the circumstances in which the offences occurred.

[104] Finally, the judge also drew a negative inference against Rich's credibility from the fact that other boys who were present with Rich and Bromley on the day in question "could have testified on his behalf but did not" (paragraph 42). That, of course, presupposes that the reason they did not testify was that they contradicted Rich's version of events. It also presupposes that they were available and willing to testify. In fact, the record (Appeal Book, Vol. 1, Tab 2D, pp. 5,6 and 14) indicates that the only two identified potential witnesses (K.F. and M.R.) either did not want to get involved and would not cooperate (K.F.) or were deceased (M.R.). It is worth noting that it is not uncommon for persons not to want to be exposed as having been involved in incidents involving alleged sexual abuse and to deny that they saw anything in order to resist becoming involved. This explanation for the failure to call potential witnesses undercuts completely the reliance by the trial judge on their absence from the trial as a reason for drawing a negative inference with respect to Rich's credibility.

[105] It is apparent, therefore, that the basis for the conclusion reached by the trial judge with respect to Rich's demeanour did not exist, and the inferences that the judge drew from the evidence which were put forward by him to justify a negative conclusion about his credibility also did not support the conclusion drawn from his demeanour either. His credibility assessment is undermined.

[106] In these circumstances, therefore, where it is not a question of choosing between conflicting versions of events on the basis of conflicting evidence, but only drawing credibility inferences from otherwise undisputed evidence, this Court can and, in our view, should, make its own determination.

[107] The existing record is adequate for this purpose. It is difficult to see in the circumstances how it could be materially augmented if the matter were retried. Bromley is deceased and all that would again be able to be presented would be Rich's version of events. While perhaps a more intensive or differently-focused cross-examination of Rich could possibly be undertaken, that is not a sufficient reason in itself for a retrial. As noted by Wells J.A., dissenting (but not on this point) in *Welcon (1976) Limited v. South River (Town)*, 2009 NLCA 59 at paragraph 186, "[T]he parties must

be taken to have put forward, at [the first] trial, the evidence they wished the trial judge to consider."

[108] Accordingly, once it is concluded, as we do, that there is not a sufficient basis for discounting Rich's evidence on the basis of credibility, it follows, in light of the uncontradicted evidence of Rich on the crucial points, supported by the similar fact evidence of Dunne, that Rich has proven on a balance of probabilities that Bromley sexually and physically assaulted him and that Rich is entitled to judgment of liability in damages against Bromley.

IV LIABILITY OF THE PROVINCE

1. *Vicarious Liability*

[109] The trial judge considered Rich's claim against the Province based on vicarious liability, which he characterized as "strict or no fault liability of an employer for the actions of employee" within the framework of the decision in *Bazley v. Currey*, [1999] 2 S.C.R. 534. He described the rationale for this claim as being that "because of the nature of the duty owed to Rich by the Director and Superintendent and the unprecedented access granted to Bromley in respect of wards of the state and in particular Rich, the Province ought to be held vicariously liable for the alleged assaults perpetrated on Rich by Bromley" (see paragraph 58).

[110] The trial judge acknowledged that counsel for Rich had submitted that:

> [60] … the law has evolved over the years to include more than employees and that a person who is an independent contractor, an agent or even a volunteer may also act in such a way as to fix liability on the person who enjoys or allows that person to carry out certain functions on behalf of that person (the putative employer). The Court must look to the actual relationship between the parties and not be overly influenced by labels or purely legal relationships.

[111] The trial judge distinguished recent Canadian jurisprudence addressing this issue on the basis that Bromley was a "completely independent contractor" (see paragraph 65) over which the Province had "no control" or was:

> [68] … a volunteer, a Roman Catholic priest, who the Director and Superintendent of Whitbourne had no reason to distrust, who offered some of the residents of Whitbourne, whose behaviour warranted it as a reward, a few hours of respite from the rigours of institutional life, a freedom that they might wish to

> aspire to in the future if the good behaviour following release was maintained. An overnight stay at a private cabin or a movie was a reward for good behaviour and an incentive for continued future actions.

[112] The first question in assessing vicarious liability is whether any precedents "clearly" indicate whether, in the factual matrix of the case, the employer can be vicariously liable for abuse. The trial judge held that there were none. Given that answer, the question then becomes whether vicarious liability should be imposed for policy reasons: see *Bazley v. Curry*, at paragraph 15.

[113] The policy question involves two separate inquiries, though in many cases only one of the two is engaged. This matter was discussed by McLachlin C.J.C. on behalf of the majority in *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403:

> 19 To make out a successful claim for vicarious liability, plaintiffs must demonstrate at least two things. First, they must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. This was the issue in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59, where the defendant argued that the tortfeasor was an independent contractor rather than an employee, and hence was not sufficiently connected to the employer to ground a claim for vicarious liability. Second, plaintiffs must demonstrate that the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise. This was the issue in [*Bazley*], which concerned whether sexual assaults on children by employees of a residential care institution were sufficiently closely connected to the enterprise to justify imposing vicarious liability. …
>
> (Emphasis added.)

[114] These two issues are of course related. A tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it, if the tortfeasor is sufficiently closely related to the employer. The trial judge did not distinguish these questions. He conflated the first branch of the policy analysis, the inquiry into the relationship between tortfeasor and defendant, with the analysis of precedents, rather than with the question as to whether the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.

[115] A non-profit enterprise is responsible for the actions of a tortfeasor who is acting on behalf of the enterprise, but not for a tortfeasor who is acting on his or her own account: see *K.L.B.* at paragraph 21. In assessing whether a tortfeasor is acting on his or her own account, the court can consider the factors linked but not limited to "control" that McLachlin C.J.C. outlined as follows:

> 22 … As the Court held in *Sagaz*, "the level of control the employer has over the worker's activities will always be a factor" (para. 47). … [I]t would be unjust to impose vicarious liability for a tort committed in pursuit of the tortfeasor's own private purposes, or for tortious conduct that could not have been influenced or prevented by the person held vicariously liable …. Control is not, however, the sole consideration. … Many skilled professionals, for instance, perform specialized work that is far beyond the abilities of their employers to supervise; and yet they may reasonably be perceived as acting "on account of" these employers. Control is simply one indication of whether a worker is acting on behalf of his or her employer …. Other relevant factors include, as the Court noted in *Sagaz*, "whether the worker provides his or her own equipment", "whether the worker hires his or her own helpers" and whether the worker has managerial responsibilities (para. 47).

[116] In *K.L.B.* itself, McLachlin C.J.C. concluded that foster parents do not act on behalf of the government because they are too independent in making "day-to-day" decisions:

> 23 … Foster families serve a public goal — the goal of giving children the experience of a family, so that they may develop into confident and responsible members of society. However, they discharge this public goal in a highly independent manner, free from close government control. Foster parents provide care in their own homes. They use their own "equipment" …. While they do not necessarily "hire" their own helpers, they are responsible for determining who will interact with the children and when. They have complete control over the organization and management of their household; they alone are responsible for running their home. The government does not supervise or interfere, except to ensure that the child and the foster parents meet regularly with their social workers, and to remove the child if his or her needs are not met.

[117] At paragraph 75 of his decision, the trial judge focused on the need to find a "significant connection between the creation or enhancement of risk [by the enterprise] and the wrong that accrues there from, even if unrelated to the employers desires". He cited the reasons of Cromwell J.A. in *G.(B.M.) v. Nova Scotia (Attorney General)*, 2007 NSCA 120, 260 N.S.R., (2d) 257, which held that the Province of Nova Scotia was vicariously liable for sexual assaults perpetrated by a probation officer employed by that

province against a young delinquent who had been assigned to him for supervision during a period of court imposed probation (paragraph 74). The trial judge distinguished *G.(B.M.)* from the current case, stating that G.*(B.M.)* was "a classic vicarious liability case involving an employee whose job it was to supervise the plaintiff, unlike here where Bromley was a volunteer" (paragraph 74).

[118] However, in the following paragraph the trial judge properly acknowledged that "the label attached to a person or occupation is not the determining factor". In that respect, he cited paragraph 58 of *G.(B.M.)*:

> Canadian law uses a "significant connection" test to decide whether an employer should be vicariously liable for intentional and unauthorized wrongs by its employees. Vicarious liability generally will be appropriate in relation to acts by an employee "... where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires ...": *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 41. This significant connection test identifies situations in which the broad policy objectives of imposing vicarious liability — the provision of an adequate and just remedy and deterrence of wrongful conduct — will be served.

[119] Nevertheless, the trial judge analyzed the evidence regarding Bromley's connection with the School as follows:

> [76] … It must first be acknowledged that Bromley was a volunteer. He was a Roman Catholic priest who frequently visited Whitbourne in that capacity to minister to the youths resident there. Bromley was an independent contractor in relation to the province. He had not been assigned tasks to perform for Whitbourne, although he was given permission to take boys, including in particular Louis Rich, to his cabin overnight. Perhaps the authorities at Whitbourne should have taken more care to check Bromley's background before letting him do so but that goes to negligence on their part, not vicarious or strict liability.

[120] The trial judge erred by restricting his analysis to the narrow confines of whether Bromley was an employee or a volunteer/independent contractor rather than focusing on the generic inquiry of "significant connection", regardless of particular labels.

[121] In *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, the Supreme Court imposed vicarious liability upon the Corporation of St. George's for the assaults of Father Bennett against boys. McLachlin C.J.C.

described the imputation of vicarious liability to a principal and not just an employer of the *tortfeasor* as follows:

> [17] … The doctrine of vicarious liability imputes liability to the employer or principal of a tortfeasor, not on the basis of the fault of the employer or principal, but on the ground that as the person responsible for the activity or enterprise in question, the employer or principal should be held responsible for loss to third parties that result from the activity or enterprise.
>
> (Emphasis added.)

[122] McLachlin C.J.C. wrote:

> [20] … Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public. Effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps to reduce the risk of harm in the future. Plaintiffs must show that the rationale behind the imposition of vicarious liability will be met on the facts in two respects. First, the relationship between the tortfeasor and the person against whom liability is sought must be sufficiently close. Second, the wrongful act must be sufficiently connected to the conduct authorized by the employer. This is necessary to ensure that the goals of fair and effective compensation and deterrence of future harm are met: *K.L.B.*, *supra*, at para. 20.
>
> (Emphasis added.)

[123] The principle underlying the first inquiry was stated by McLachlin C.J.C. in *K.L.B.* as follows:

> [20] … Compensation will not be fair where the organization fixed with responsibility for the tort is too remote from the tortfeasor for the latter to be acting on behalf of it: in such a case, the tort cannot reasonably be regarded as a materialization of the organization's own risks.

[124] Applying these principles to the facts here, Bromley was acting on behalf of the Province when he took children to his cabin. Some of the factors point the other way—Bromley used his own tools, and was not closely supervised. But the critical factor in my view is that Bromley was exercising delegated authority over the children in his care and was specifically furthering the institution's "reward for good behavior" program.

[125] Bromley had no independent power to discipline the children and no independent duty to care for them. He was not an independent caregiver, like the foster parents in *K.L.B.* But while the children were in his care, he exercised vicarious power over them, delegated from the Province.

[126] Since Bromley was exercising the Province's custodial powers on its behalf in furtherance of its custodial policies—since he was temporarily standing in the Province's shoes as a care-giver—we can conclude that he was acting on the Province's account and that his relationship with the Province was close enough to support a finding of vicarious liability.

[127] The second inquiry is into whether the tort is sufficiently connected to the relationship to justify vicarious liability. As McLachlin J. wrote in *Bazley*, the factors to be considered in assessing whether a sufficient connection is present were stated in *Bazley* to include but not be limited to:

1. The opportunity that the enterprise afforded the employee to abuse his or her power;

2. The extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

3. The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

4. The extent of power conferred on the employee in relation to the victim;

5. The vulnerability of potential victims to wrongful exercise of the employee's power.

[128] With respect to the first factor, opportunity, the trial judge correctly acknowledged that the Province's grant of permission to Bromley to take Rich and other wards on overnight stays at his cabin for swimming and presumably other outdoor and indoor activities "created the opportunity for Bromley to abuse his authority over Rich and sexually assault him". However, the trial judge found that the law was clear that the creation of such an opportunity for harm was irrelevant "without job-created power" to permit vicarious liability to be imposed. He relied on *E.D.G. v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 459, para. 10, citing *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570. The former decision arose from a claim for damages

arising from the sexual assault of a female student from an Indian reserve by a janitor at a public school in North Vancouver. There was no indication that anything was amiss so as to arouse suspicion among teachers or administrators at the school and the janitor had a good work record.

[129] McLachlin C.J.C., in her reasons, noted at paragraph 9 that the trial judge had:

> … held that it would not be fair to impose vicarious liability on the Board, because Mr. Hammer's actions were not sufficiently connected to his employment to constitute a materialization of risks created by the Board. All that the Board did was provide Mr. Hammer with the opportunity to commit the assaults; it did not entrust him with the type of authority or the kind of tasks, that would significantly increase the risk of abuse.
>
> (Emphasis added.)

[130] The analysis here must focus on the majority reasons of Binnie J. in *Jacobi*, where he cited the trial decision in *E.D.G.* to support the proposition "that creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the 'strong connection' required to attract vicarious liability". However, presence of "job-created power" was not held to be a mandatory imperative in all cases.

[131] In this case, the trial judge erred by strictly requiring evidence of a traditional employer-employee relationship with regard to Bromley and the Province as a pre-condition to finding opportunity for creation of the risk of harm. The highest levels of the administration of the School granted approval to allow Bromley as an agent, volunteer or independent contractor to take wards into his sole custody and away from the confines of the School, a correctional facility for male youths, for overnight stays without any other supervision. Thus, the Province created an opportunity for risk of harm which equates to that which could be created by "job-created power" leading to a "materialization of risk" for these youths.

[132] The second factor to be considered is the extent to which the wrongful act occurred against the background of the Province's laudable aim of furthering the correctional mandate of the School. Any laudable aim which existed here was clearly thwarted by Bromley's actions towards Rich.

[133] The third factor is the extent to which the wrongful acts were related to friction, confrontation or intimacy inherent in the employer's or principal's enterprise. The court in *G.(B.M.)* at paragraph 67 rejected the appellant's submission that the term "intimacy" was limited to "physical intimacy" and held, relying on *Bazley* and *John Doe v. Bennett* (paragraph 29), that "psychological intimacy encourages victim's submissions to abuse and increases the opportunity for abuse".

[134] In this case the Province permitted the creation of a circumstance of physical and psychological intimacy with troubled young boys who were under its care and control for correctional purposes when they were placed in the hands of an agent, or a volunteer, without inspection, assistance or supervision at his private cabin at a location remote from the School.

[135] The fourth factor is the extent of power over the victim. The trial judge erred in concluding that Bromley did not exercise power over Rich because his contact was "a transitory, safety-related conference of power referable only to the time Rich was in Bromley's care". We do not believe this finding is consistent with the findings of the Supreme Court in *B.(E.) v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45 and in particular the discussion of the powers, duties and responsibilities of the alleged offender. At paragraph 30 the Supreme Court, citing its reasons in *Bazley*, held that the focus must be on whether:

> [46] … the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability – fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing.
>
> (Emphasis added by Supreme Court in *B.(E.)*.)

[136] Of particular relevance here is the last sentence of paragraph 46 of *Bazley*, not referred to in *B.(E.) v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, which reads: "… Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency

relationship, which on its own often creates a considerable risk of wrongdoing."

(Emphasis added.)

[137] The trial judge held:

> [81] … Bromley was not specifically authorized to do anything in relation to Rich. Certainly he had no authority to carry out any of the substitutional parenting responsibilities of Whitbourne such as education, vocational training, psychological assessment and counselling, discipline, nutrition, personal grooming and the myriad other day-to-day responsibilities assumed by Whitbourne when Rich was sent there.

[138] In our view, the judge incorrectly concluded that Bromley had no parenting responsibilities and no specific authorization and thus no power or dependency relationship. He was specifically authorized to take Rich and others into his sole care and custody away from the facility to a remote location. He was given clothing for them in the form of swim wear and pajamas. He was expected to feed them, house them and presumably take care for their physical and mental well-being by supervising and controlling their activities in order to ensure their care and safety. This would have been consistent with some of the statutory responsibilities of the Director and particularly the Superintendent of the School. The conclusion of the trial judge that "there [was] no evidence that he was given any direction to do anything in particular while the boys were in his care" is not sustainable as a rationale for absolving the Province from vicarious liability given the context in which these outings were authorized and took place. The focus of the trial judge ought to have been the power or dependency relationship which the Province permitted to exist between Bromley and the wards which created "considerable risk of wrongdoing" (see *B.(E.)* at paragraph 46).

[139] The fifth factor from *Bazley* is vulnerability of the potential victims. The trial judge acknowledged that Rich was vulnerable to Bromley's alleged assaults while in his care. He expressed the opinion that it was "little or nothing more than an extension of opportunity" (paragraph 83). He suggested that vulnerability would also exist if Rich had been taken for a ride in his car or a movie. The key point here is that while the vulnerability aspect was accepted as being a possible risk, the trial judge was inclined to downplay its significance. He wrote:

> [83] It is not as if Rich was forced to go with Bromley as would have been the case if Bromley had been an employee of Whitbourne. The evidence is that the boys wanted to go with Bromley (although this is not to support a suggestion that they wanted to be or could have consented to being sexually abused) in order to gain access to more freedom and treats of which they were deprived while at Whitbourne. To the extent to which Bromley used these freedoms and favours to further his own despicable ends cannot be laid at the feet of the province under the legal theory of vicarious liability.

[140] The reasoning of the trial judge on this point tends to diminish the significance of the vulnerability that arose for Rich and other wards who would have been drawn by the opportunity to enjoy a temporary release from custody at the School to a non-custodial recreational setting with "freedom and treats" which they could not have otherwise enjoyed but for the initiative of Bromley. These enticements would have aided the "grooming" of young males by a sexual predator in this situation. The trial judge incorrectly concluded that the Province could not be held vicariously liable for the fact that Bromley used "freedoms and treats" provided to Rich and other wards to further "his own despicable ends", when it is clear that the activities which occurred at Bromley's cabin were an adjunct to the School's correctional program and took place with the full knowledge and authorization of its senior officials.

[141] The trial judge also dismissed Rich's claim of vicarious liability against the Province because of its status, as he characterized it, in relation to his companion claims against Bromley's estate and the Roman Catholic Episcopal Corporation. At paragraph 85 he noted that the claim against Bromley's estate had been discontinued and the claim against the Corporation was stayed in return for payment of costs only, pending the outcome of the claim against the other defendants. He criticized the monetary incentive that was driving Rich to extend his reach to the recovery of damages from the Province.

[142] With the framework of *Bazley*, the trial judge held that it would be contrary to the policy of fair compensation and deterrence to allow Rich to pursue the Province "where there is <u>almost</u> no basis on which to ground a claim in vicarious liability for the actions of Bromley when he (Rich) has declined to pursue arguably the <u>real employer</u> of Bromley, the Roman Catholic Episcopal Corporation" (paragraph 85; emphasis added). He referred to the Supreme Court decision in *John Doe v. Bennett* as providing the legal foundation for that assertion.

[143] On the contrary, it is consistent with the policy of fair compensation and deterrence that vicarious liability on the Province for misdeeds of Bromley towards Rich and other wards be imposed on the Province. The fact that Bromley was a priest is irrelevant given the fact that the Province knowingly permitted a single male volunteer to act as its agent having sole care and control of boys outside the supervised custody of the School at his remote cabin to engage in recreational activities which included moments of intimacy of young boys undressing and dressing while swimming and going to sleep.

[144] The trial judge ought to have found that the *Bazley* factors governing the determination of whether the Province was vicariously liable to Rich had been met. The trial judge therefore erred in dismissing Rich's claim based on vicarious liability. In light of our previous conclusion that Bromley's estate is liable for the sexual and physical assaults on Rich, we would also allow the appeal and hold the Province liable in damages to Rich.

2. *Breach of Non-Delegable Duty*

[145] There remains the further question of whether liability could also be imposed on the Province based upon breach of a non-delegable duty arising from the provisions of the *Welfare of Children Act*, RSN 1970, c. 190 (the "Act"), which sets out the duties of the Director of Child Welfare and the Superintendent of the School. The appellant made submissions on this issue in his factum. Counsel for the Province asserts that a separate ground for liability based on breach of a non-delegable duty was not placed squarely before either the trial judge in the original pleadings or before this Court in the notice of appeal. Counsel claims that the Rich claim was pleaded in negligence in general and specifically based on vicarious liability. No express reference was made to a "breach of non-delegable duty".

[146] The notice of appeal filed March 1, 2011 contains six grounds. The first ground alleged that the trial judge erred in holding that the second respondent was not vicariously liable for the actions of Bromley.

[147] The fifth ground states that in his consideration of direct liability and/or negligence the trial judge erred in finding that the Province did not breach the duty of care it owed to Rich.

[148] The second amended statement of claim pleaded the following:

> Paragraph 3 – The Second Defendant [Province] held the Plaintiff [Rich] at the Whitbourne Boy's Home under a Court ordered wardship and was fully responsible for his health care, education and general well-being and also responsible to protect the Plaintiff from any harm especially sexual and physical assaults.
>
> Paragraph 22 –Alleged vicarious liability of the Province for the tortious acts of Bromley to whom the Province released into is care and control.
>
> Paragraph 30 – A claim for damages was based on, "The result of negligent and/or intentional actions and breach of trust and other common law, equitable and statutory duties to the Plaintiff".
>
> (Emphasis added.)

[149] In a pre-trial brief filed September 17, 2007, counsel for Bromley listed four bases for liability of the Province:

> (i) negligent performance of its duty of care towards Rich;
>
> (ii) breach of fiduciary duty owed to Rich;
>
> (iii) vicarious liability for the abuse committed by Rich relying on the principles established in *Bazley*;
>
> (iv) breach of its non-delegable duty owed to Rich citing Supreme Court decision in *Lewis v. British Columbia* [1997] 3 S.C.R. 1145.

[150] The trial brief cited a passage from *Lewis* followed by reference to the *Welfare of Children Act* and, in particular, the duties of the Director.

[151] The notice of appeal does not make explicit reference to breach of non-delegable duty, but does refer to statutory liability of the Province.

[152] At a minimum, it is clear that a breach of statutory duties was pleaded as a basis for liability. The concept of breach of a non-delegable duty giving rise to a tort remedy for a victim arises from statutory obligations imposed upon parties, most frequently being the Province, its departments, servants and agents. It is arguable that a breach of a non-delegable statutory duty is a particular category of the general law of negligence that is most often

engaged when there is a statutory regime that may inform the existence of the duty.

[153] For these reasons, we reject the argument of counsel for the Province that breach of a non-delegable statutory duty was never in play in this litigation. The theory of such a breach of duty arises from the interpretation of sections 28 and 47 of the *Welfare of Children Act*. At paragraph 53 of his reasons the trial judge acknowledged that the Director and the Superintendent had a "*prima facie* statutory duty of care" toward Rich as a ward of the Province.

[154] While the reasons of the trial judge do not expressly deal with the issue of a breach of a non-delegable duty as one of the potential grounds for fixing liability on the Province with respect to Bromley's actions, he stated in paragraph 1 of his reasons that the claim against the Province is based upon "negligence or statutory liability and vicarious liability". Further, at paragraph 32 he describes the second issue as being whether, if Bromley physically and sexually assaulted Rich, "the province [is] liable in negligence/statutory or vicarious liability for the actions of Bromley".

[155] At paragraph 76 of his reasons the trial judge stated:

> Perhaps the authorities at Whitbourne should have taken more care to check Bromley's background before letting him do so but that goes to negligence on their part, not vicarious or strict liability.

[156] It would appear that the references to "statutory" or "strict liability" in the context of separate references to ordinary negligence and vicarious liability is an indication that the issue of whether a non-delegable duty of care was also at play at the trial though perhaps not specifically identified in those terms.

[157] One of the headings of the judge's reasons generically refers to "negligence". Nonetheless, the analysis begins with a detailed review of the applicable statutory mandate of the Province under the Act. The statutory provisions referred to by the trial judge in his reasons at paragraphs 49 and 50 are the same provisions now relied upon by Rich to assert a breach of non-delegable duty by the Province as a separate ground to fix liability aside from vicarious liability.

[158] The trial judge, immediately following his reference to the legislative provisions, stated that counsel for Rich stated in the trial brief:

> It should have been reasonably foreseeable to the Second Defendant [Province] that by permitting Father Bromley to remove the Plaintiff and others from the Whitbourne Boys Home and take them to his cabin, the Plaintiff would be subject to abuse.

[159] At paragraph 52 he noted that counsel for Rich had referred to the decision of the Trial Division in *J.W.D. Estate v. Newfoundland and Labrador*, 2010 NLTD 47, 298 Nfld. & P.E.I.R. 74, which recognized a distinction between the status of children placed in a privately-run institution and those "declared to be wards of the state". The trial judge, relying on *J.W.D.* held at paragraph 53 that the Province "had a *prima facie* statutory duty of care toward Louis Rich as a delinquent ward of the state", through the Director of Child Welfare and the Superintendent of Whitbourne. However, he continued: "But that is not an end to the matter. While the duty of care is high, the province does not become a guarantor of the safety of a ward of the state: *B.(K.L.) v. British Columbia*, [[2003] 2 S.C.R. 403], paragraph 14".

[160] In the reasons addressing the negligence claim against the Province there was no discussion of a claimed breach of a non-delegable duty. The trial judge's reasons then moved on to the question of vicarious liability.

[161] The reasons demonstrate at paragraph 56 that the negligence claim was being considered in the context of foreseeability which the trial judge found had not been established by Rich. The claim in negligence was dismissed.

[162] A concise summary of the law of non-delegable duties is found in McLachlin J.'s concurring reasons in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145:

> 49 … The general rule at common law is that a person who employs an independent contractor will not be liable for loss flowing from the contractor's negligence. This rule for a long time admitted only three exceptions: (1) where the employer was negligent in hiring the contractor; (2) where the employer was negligent in supervising the contractor; and (3) where the employer hired the independent contractor to do something unlawful. A fourth exception crystallized in *Pickard v. Smith* (1861), 10 C.B. (N.S.) 470, 142 E.R. 535. Lord Blackburn stated the rule as: "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor" (*Dalton v. Angus* (1881), 6 App. Cas. 740 (H.L.), at p. 829). This exception is referred to as the "non-delegable duty" rule.

> 50 In essence, a non-delegable duty is a duty not only to take care, but to ensure that care is taken. It is not strict liability, since it requires someone (the independent contractor) to have been negligent. But if it applies, it is no answer for the employer to say, "I was not negligent in hiring or supervising the independent contractor." The employer is liable for the contractor's negligence. The employer already has a personal duty at common law or by statute to take reasonable care. The non-delegable duty doctrine adds another obligation—the duty to ensure that the independent contractor also takes reasonable care.
>
> (Emphasis added.)

[163] Judges and legal writers have found it challenging to find a satisfactory principle to explain which duties are non-delegable and which are not. The search for such a principle has been called "one of the leading sophistries in the law of tort" (Glanville Williams, "Liability for Independent Contractors" (1956) Cambridge L.J. 180 ("Williams Contractors") at p. 181). The Canadian approach has been largely to abandon the search for a single explanatory principle (*K.L.B. v. British Columbia*) and instead to "look to the different situations in which such duties have been found" (*K.L.B,*. at para. 31).

[164] The oldest and most common such situation is the case of a public authority exercising a statutory authority. Often these cases involved highways, as in *Lewis*; *Dalton v. Angus*; and *Hole v. Sittingbourne and Sheerness Railway Co.* (1861), 6 H. & N. 488, 158 E.R. 201. Nevertheless, it is the statutory authority context that the Supreme Court of Canada has used to decide claims arising from the battery of children.

[165] The first important case is *K.L.B.*, where children were taken into the custody of the Superintendent of Child Welfare, assigned to foster homes, and abused by their foster parents. The children claimed that the Superintendent had a non-delegable duty to care for them under the *Protection of Children Act*, RSBC 1960, c. 303. McLachlin C.J.C. agreed that the Superintendent had a non-delegable duty *before* placement with a foster family, but thought that it terminated on placement:

> 34 The *Act* imposes different duties at different stages of the placement process. Upon apprehending a child, the Superintendent is "responsible for the care, maintenance, and physical well-being of the child" until final disposition of the child's case by a judge: s. 8(5). The same subsection also provides that no liability shall attach to the Superintendent "by reason only that the child is provided with necessary medical or surgical care during such time". It follows from this exclusion that the Superintendent is responsible for other harms at this

> point, and that this duty is non-delegable. When a child is committed to the custody of the Superintendent, the Superintendent becomes the child's legal guardian and "shall make arrangements as soon as may be for the placement of the child in a foster home, or such other place as will best meet the needs of the child": s. 8(12). Alternatively, the Superintendent may deliver the child into the custody of a children's aid society which, under s. 10(1), must "use special diligence in providing suitable foster homes for such children as are committed to its care". These duties also appear to be non-delegable.
>
> 35 After placement, the Superintendent is granted the right to visit the child (s. 14). The organization or family caring for the child is required to provide information and access to the Superintendent, who must report deficiencies to the Minister (s. 15(1) and (3)). The Act also requires that if at any time it appears to the Superintendent that any children's aid society or foster home "is not such as to be in the best interests of the children in its care or custody … the Superintendent shall report the circumstances to the Minister", who may inquire into the situation and may remove the child (s. 15(3)). Again, responsibility for these specific duties lies on the Superintendent and arguably cannot be absolved by delegation.
>
> (Emphasis in original.)

[166] *K.L.B.* suggests that a public official cannot generally delegate a statutory duty to care for a child. None of the duties in the British Columbia *Protection of Children Act* was delegable. Before placement, the Superintendent's responsibility for care, maintenance, and physical well-being was non-delegable; so was the duty to find a suitable placement and to use special diligence in doing so. After placement, the duty to report deficiencies and problems to the Minister is non-delegable. However, these were held to be narrow and specific duties and the Minister had no *general* duty to care for the children.

[167] The next important case is *E.D.G. v. Hammer*, in which a school janitor abused a student. The Court again considered whether the statute created a general duty or not:

> 17 The issue in the case at bar is whether the *School Act*, R.S.B.C. 1979, c. 375, places … school boards under a non-delegable duty to ensure that children are kept safe while on school premises, such that school boards are liable for abuse or harm inflicted by school employees upon school children while at school? Or are the duties it imposes more limited?
>
> 18 The duties and powers of school boards are laid out in ss. 88-89 of the *Act*: see Appendix. Section 88 lays out the general duties. They include a duty to "determine local policy in conformity with this Act" (s. 88(b)); to "delegate those

> specific and general administrative duties which require delegation to one or more employees of the board" (s. 88(c)); to deduct from teachers' salaries the membership fees payable to the British Columbia Teachers' Federation (s. 88(d)); to prepare reports for meetings of electors (s. 88(e)); and to "visit a public school in the school district" when necessary or desirable (s. 88(f)).
>
> 19 Subsequent sections of the *Act* place school boards under a number of specific duties pertaining to student health and safety. Section 108 states that boards shall "provide each school in the school district with suitable first aid equipment" and shall ensure that there is at least one teacher on staff qualified to administer first aid. Section 109 states that boards must "ensure that the *Health Act* and regulations are carried out in regard to the pupils". Section 155(1)(e) requires boards to close schools temporarily when inclement weather may endanger the health of pupils or when so ordered by the appointed medical officer. Finally, s. 178(a) stipulates that boards must, when necessary, arrange for the repair and improvement of school buildings.
>
> 20 <u>These specific duties do not permit the inference that boards are generally and ultimately responsible for the health and safety of school children on school premises</u>. …
>
> (Emphasis added.)

[168] As in *K.L.B.*, the issue in *Hammer* was not that the school board was entitled to delegate its duty. The finding was that it did not have a general duty at all.

[169] In *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, children were abused at a residential school. They sued the Federal Crown, which had placed them at the school under the *Indian Act*, SC 1951, c. 29. The Supreme Court again found that the statute created no general duty of care owing to the children:

> 49 Section 113 of the Indian Act states that the "Governor in Council may authorize the Minister . . . (a) to establish, operate and maintain schools for Indian children". Section 114 goes on to provide that "[t]he Minister may (a) provide for and make regulations with respect to standards for buildings, equipment, teaching, education, inspection and discipline in connection with schools . . . (c) enter into agreements with religious organizations for the support and maintenance of children who are being educated in schools operated by those organizations".
>
> 50 The text of ss. 113 and 114 does not support the inference of a mandatory non-delegable duty. First, it uses the permissive term "may", as opposed to the directive term "shall", limiting the possibility of finding an obligation as strong as a duty. Second, the power of the government to enter into agreements with

> religious organizations for the care and education of Indian children suggests that the duty is eminently delegable and was contracted out of by the government. … Other provisions of the *Act* do not assist. The *Indian Act* falls far short of creating a mandatory duty to ensure the health and safety of children in residential schools.

[170] As with *K.L.B.* and *Hammer*, the issue was the existence of a general duty, not whether it is delegable.

[171] The most recent non-delegable duty case from the Supreme Court, *Reference re Broome v. Prince Edward Island*, 2010 SCC 11, [2010] 1 S.C.R. 360, was decided on the same basis. Children who had lived in a private orphanage sued the Province, claiming it owed them a duty of care under various provincial statutes. Cromwell J. applied the same test:

> [56] First, the appellants submit that from 1910 to 1961, [*The Children's Protection Act of Prince Edward Island*, SPEI 1910, c. 15 and *The Children's Act*, SPEI 1940, c. 12] imposed a non-delegable duty on the Superintendent to instruct Children's Aid Societies as to the manner in which their duties were to be performed, which included advising the Societies of their statutory obligation to provide places of temporary refuge for a period not exceeding three months (1910 Act, ss. 3 and 5). The Superintendent, the appellants submit, breached this duty by permitting children to be kept in the Home for a period exceeding three months. The short answer to this submission, however, is the one given by the Court of Appeal (and subject to the same qualification): the Home was not a Children's Aid Society, the children were not foster children or wards of the Province, and the legislation created no role for the Province in the operation of the Home or for the care of the residents (para. 128).
>
> [57] The appellants also submit that another non-delegable duty arose under s. 3 of [*The Children's Protection Act*, 1961, SPEI 1961, c. 3] mandating the Director to inspect or direct and supervise the inspection of the Home. However, this submission fails for the reasons set out earlier. The Court of Appeal noted that, properly interpreted, the relevant statutory provisions do not make the Province responsible for the care of the residents, for directing their care, or for ensuring that no harm came to them in the course of their care by the representatives of the Home (para. 126).
>
> [58] In short, while the appellants argue that if the Province was under a duty to use care then it could not divest itself of that responsibility by delegating its performance to the Home's Board of Trustees, the appellants have failed to show that the Province was subject to a duty to use care in the first place.

(Emphasis added.)

[172] The final paragraph encapsulates the issue. A statutory duty of care for children generally or *in loco parentis* is generally non-delegable. The key question is whether the particular statute imposes such a duty.

[173] The trial judge correctly accepted that *The Juveniles Act, RSN 1970, c. 190 (the Act,* later renamed *The Welfare of Children Act)* placed a quasi-parental duty upon the Director of Child Welfare and the Superintendent of Whitbourne. The intention to create broad and general duties is manifest in section 28 of the *Act*:

> The purpose of this Part is to ensure that the care, custody and discipline of a juvenile shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile requiring discipline shall be treated not as a criminal but as a misdirected and misguided child and one needing help, guidance, training and encouragement.

[174] In particular, the broad role of a guardian fell upon the shoulders of the Director under subsection 47(1):

> The Director shall be the guardian of every child admitted to a training school under a commitment, in the same manner and to the same extent as in the case of a guardian appointed by statute or by any court or by any will or instrument ….

[175] Arguably, the words of subsection 47(1) create an ordinary, delegable duty. Unlike the provisions in *Lewis* or (before placement of foster children) in *K.L.B.*, subsection 47(1) does not impose a general duty. It imposes *the same duty that a guardian has*. That may import and grant the Director the particular immunities that a parent or guardian has: see *K.L.B.* at paragraphs 38–41.

[176] The same cannot be said for the general duty that the Superintendent had under subsection 47(2):

> Subject to this section, the superintendent shall be responsible for the care and training of every child admitted to a training school while the child is in the training school.

[177] Like the language in *Lewis* and *K.L.B.*, subsection 47(2) creates a general duty. It requires the Superintendent to be responsible, not to engage someone else to take responsibility. It contains no limitation of scope. It contains no immunity. As in *Lewis* and in the "before placement" situation in *K.L.B.*, the statute in this case creates a non-delegable duty.

[178] It was acknowledged by the Province that permission for Bromley to take delinquent wards on overnight outings at his cabin occurred with the full knowledge and prior consent of the Province through the Director of the Department of Rehabilitation and Recreation of the day. It was also acknowledged that the School was an institution where troubled young males who had been frequent offenders had been placed into custody from other parts of the Province. In Rich's case, he had been transferred from Labrador to the St. John's School for Boys initially but later transferred to the School.

[179] The rationale behind allowing the opportunity for Rich and other wards to attend the Bromley cabin for an overnight outing was to provide a reward for good behaviour. The wards who were selected by Bromley received an enticement of short-term freedom from the custodial confines of the School. The arrangements that had been discussed by Bromley with the authorities at the School created a perfect opportunity for Bromley to groom and ultimately assault wards including Rich and Dunne.

[180] The wards would have been loath to report deviant behaviour by Bromley of a sexual or physical nature given the dubious credibility which they themselves would expect to have had given their backgrounds. Rich testified that when he reported the assaults by Bromley to the Superintendent at the School, he received a slap in the face and was placed in solitary confinement.

[181] The superintendent's statutory duty was for the care and supervision of wards whose past behaviour and rehabilitative needs required confinement at the School. This statutory mandate was entrusted to a volunteer or agent in the person of Bromley, to be knowingly discharged outside the confines of the School at a remote cabin under Bromley's sole supervision.

[182] While one might conclude that the School had a meritorious objective, the question remains whether it was prudent to entrust the care of these wards to an adult male who had promoted the idea of taking groups of wards to his remote cabin. It was the Superintendent who put Rich and other wards at risk by placing their physical and mental welfare solely in the hands of Bromley.

[183] We conclude that the Province had a general non-delegable duty, grounded in s. 47 of the *Juveniles Act*, to be responsible for the care and

training of the wards admitted to the school which could not be satisfied by entrusting them to persons outside the institution who by the absence of care and supervision by the School, could be subjected to sexual and physical assault. The Province is therefore liable to Rich for breach of this non-delegable duty as a result of the assaults on Rich by Bromley.

[184] Having found that the trial judge (i) committed palpable and overriding errors with regard to his consideration of the evidence in this case and (ii) erred in failing to find vicarious liability and breach of a non-delegable duty, we would set aside the decision of the trial judge on liability. We would grant the appeal on liability and hold the Province liable to pay damages to Rich. For reasons given earlier, we do not believe a new trial is warranted nor is it fair and just to the parties to require one.

V DAMAGES

[185] We accept the assessment by the trial judge of the nature of the physical and sexual assaults described by Rich and his analysis of the relevant jurisprudence with respect to quantum of damages presented by counsel at trial. We are satisfied that the trial judge did not err in applying the factors set forth in *Blackwater v. Plint*, in determining the nature and range of damages to be awarded in circumstances alleged by Rich.

[186] In applying the factors outlined in *Blackwater*, the trial judge rejected the submissions of counsel for Rich with regard to the range of damages. The nature of the assaults, while serious, is nevertheless at a level that does not justify an award in the range sought by Rich's counsel. He determined that if he had found the Province liable, he would have awarded $45,000 in damages including $15,000 for aggravated damages. This is an appropriate amount of damages to be awarded against the Province now that Rich has been successful in establishing liability of the Province.

[187] This Court has suggested that trial judges issue a single compensatory award rather than making separate awards for general and aggravated damages (see *Campbell v. Tremblay*, 2010 NLCA 62, 305 Nfld. & P.E.I.R. 1 at paras. 45-49 per Green C.J.N.L. and paras. 122-123, per Wells J.A.). Making separate awards is not an error in principle *per se*, but it risks double-counting common elements.

[188] In this case, the trial judge did not analyze general and aggravated damages separately. He performed a single analysis leading to a single

award, indicating only afterwards how much of the award related to aggravated damages. This procedure does not risk double-counting. Instead, it simplifies appellate review by providing clarity to the damages analysis.

COSTS

[189] Given that the appeal of Rich against the dismissal of his claim has been set aside, the award of costs in favour of the Province by the trial judge is set aside. We would award costs on trial and appeal in favour of the appellant to be taxed at Column 3 of the Scale of Costs in the Schedule to Rule 55.

SUMMARY AND DISPOSITION

[190] We would allow the appeal, impose liability on the Province and award the sum of $45,000 in general and aggravated damages. Rich may enter judgment against the Province for that amount, together with party and party costs here and in the Trial Division at Column 3 of the Scale of Costs.

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J. D. Green C.J.N.L.

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M. F. Harrington J.A.

Dissenting Reasons by Rowe J.A.:

[191] I have read the reasons of my brothers Green and Harrington. With respect, I must differ as to several key matters. I would have dismissed the appeal.

[192] I adopt the outline of the facts set out by the majority under the heading "Background".

Standard of Review Generally

[193] While it is not necessary to the proper disposition of this case, I would take this occasion to reflect briefly on standard of review generally. The formulation of legal tests (in this case for vicarious liability, for breach of a non-delegable duty and for negligence) are questions of law, for which the standard of review is correctness. Findings of fact, arising from the assessment of credibility and the weighing of evidence, are to be reviewed on the standard of palpable and overriding error.

[194] What standard of review is to be used regarding the application of a legal test to the facts as found? In *Cooper v. Cooper,* 2001 NFCA 4, 198 Nfld. & P.E.I.R. 1, Green, J.A. (as he then was) wrote at paragraph 8:

> Where the trial judge has committed an error of law … This would include:
>
> (a) a wrong analysis or formulation of the applicable law or legal principle involved;
>
> (b) an improper application of a legal rule or principle to the established facts.
>
> No deference is accorded to the trial judge's decision in this regard; his or her statement or application of the law is either correct or it is not.
>
> (Emphasis added.)

[195] However, in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235, the application of a legal test to the facts as found is characterized as a question of mixed fact and law; the relevant standard of review is palpable and overriding error, save when there is an "extricable question of law", in which case the standard is correctness.

[196] What is an "extricable error of law"? In practice, it has come to mean one to which the standard of correctness is applied. This is, of course, circular. Appellate courts have found there is an "extricable error of law" in the application of a legal test when they wish to set aside a trial judge's decision. And, they have found there is no "extricable error of law" in the application of a legal test when they wish to affirm a trial judge's decision.

[197] Such decision-making is conclusionary and arises from labeling, rather than analysis. The result is a type of intuitive or impressionistic decision-making, one that is the diametric opposite of deference; it is correctness in disguise, bringing us back, in practice, to *Cooper*.

Palpable and Overriding Error

[198] What is a palpable and overriding error? In *Housen v. Nikolaisen*, *supra*, Iacobucci and Major JJ. (for the majority) wrote:

> 1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.
>
> . . .
>
> 5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).
>
> 6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.
>
> …
>
> 22 … [W]e agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this [factual] conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
>
> (Emphasis added.)

[199] In *R. v. Clark*, [2005] 1 S.C.R. 6 at para. 9, the Court (relying on *Housen*) set it out this way:

> … Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong,

> unsupported by the evidence or otherwise unreasonable. The imputed error must, moreover, be plainly identified. And it must be shown to have affected the result. "Palpable and overriding error" is a resonant and compendious expression of this well-established norm … .

[200] Thus, in his findings of fact, did the trial judge make errors that are "plainly seen" or "clearly wrong"? Did the trial judge make inferences where no "evidence exists to support [the] inference"? Were his findings "otherwise unreasonable" (an unhelpfully vague phrase)?

[201] The majority suggest two errors by the trial judge in his consideration of Rich's evidence (see paragraph 24 above):

(a) Rich did not make the allegations against Bromley before his death which "was not supported by the evidence";

(b) The trial judge "rejected Rich's position that he had forgotten the abuse … [which] rejection was based on a misapprehension of Rich's evidence".

[202] Regarding Rich failing to confront Bromley before the latter's death, the facts are rather a tangle. In July 1998, a jury convicted Bromley of 11 counts of various forms of sexual assault against four complainants. In March 1999, Rich made a statement to police alleging he had been abused by Bromley. In January 2001, this Court set aside the July 1998 convictions and ordered a new trial: *R. v. Bromley*, 2001 NFCA 5 197 Nfld. & P.E.I.R. 316. In June 2001, Rich issued statements of claim alleging abuse by Bromley. In July 2001, Rich's allegations became the basis for one count in an information against Bromley (separate from the counts dealt with in July 1998). In May 2002, the police contacted Rich to ask whether he wished to proceed against Bromley; Rich said he did not. In June 2002, the Crown stayed the charges against Bromley relating to Rich's allegations. (Parenthetically, in April 2002, Bromley was again convicted of a charge originally dealt with in the July 1998 trial and again this Court overturned the jury's verdict, this time acquitting Bromley: *R. v. Bromley* 2004 NLCA 30, 61 W.C.B. (2d) 649.) In September 2004, Bromley was killed in a motor vehicle accident.

[203] The trial judge handled clumsily this aspect of his assessment of Rich's credibility. At the outset of his decision (paragraph 1) the trial judge indicated his awareness that Rich had sued Bromley before the latter's death. However, later in his decision (paragraph 41), he wrote:

> It undermines Mr. Rich's credibility when he refused to confront Bromley when he was alive.

Presumably, this relates to Rich's indication to police in May 2002 that he did not wish to proceed against Bromley in the criminal case.

[204] Is this a palpable or overriding error? I would say, no. Rather, I see it as an awkward treatment of the facts. This brings me to the majority's second and closely related point.

[205] Regarding the second point referred to in paragraph 24, the trial judge drew an adverse inference from the fact that:

> (a) at times, Rich had denied any sexual abuse;
>
> (b) later, Rich alleged sexual abuse, but referred to another priest (Leonard Paradis) and not to Bromley; and.
>
> (c) later still, Rich alleged that Bromley had abused him.

[206] I cannot fathom how it constitutes a palpable and overriding error for a jurist to say it reflects unfavourably on the credibility of a witness where that witness has:

> (a) denied that anything like the alleged behaviour occurred; and
>
> (b) later, when the witness alleged that wrongful behaviour had occurred, the witness named someone else as the perpetrator.

It seems to me entirely logical to see these factors as weighing against Rich's credibility.

[207] I turn now to the errors the majority attribute to the trial judge in regard to the similar fact evidence. It is fundamental to recall that what is in issue is not admission of this evidence; it was admitted by consent. Rather, the matter in issue is whether the findings of fact, based on the assessment of the evidence, fall afoul of the relevant standard of review, being palpable and overriding error. Thus, applying the analysis for admissibility of similar fact evidence in *R. v. Handy, supra*, is to conflate that test with palpable and overriding error.

[208] In any case, the majority advance two supposed errors relating to the trial judge's treatment of Dunne's evidence; they say:

(a) the description of the diving game given by Rich and Dunne was similar, but was said not to be so by the trial judge; and

(b) the alleged sexual assaults as described by Rich and Dunne were similar, but were said not to be so by the trial judge.

[209] Regarding the diving game, I am inclined to agree with the majority that the trial judge seems to have gone out of his way to emphasize small differences and to deemphasize major similarities. I would, nonetheless, not say this was a palpable and overriding error, but rather simply a difference of view as regards the weighing of the evidence.

[210] Regarding the alleged sexual assaults at the cabin, the trial judge was on solid ground in pointing out major differences between Rich's and Dunne's allegations. Rich described an event during the day, when only he and Bromley were present, in which Bromley sought to force Rich to perform fellatio, after which Bromley struck Rich with such force as to render Rich unconscious. (Is it credible that such a blow could be struck by an ordinary man, *a fortiori*, without causing obvious physical injury?) By contrast, Dunne described an assault by Bromley in the night, with others present (sleeping), and Bromley seeking to perform fellatio on Dunne.

[211] I see no palpable and overriding error in the trial judge's assessment that Dunne's description of alleged sexual assaults at the cabin did little to bolster the credibility of Rich's allegations of sexual assault there.

Conclusion

[212] Having concluded that the trial judge did not make palpable and overriding errors in his findings of fact, I would dismiss the appeal. Accordingly, I need not, nor will I, address other issues relating to causes of action or damages, dealt with by the majority.

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M. H. Rowe J.A.