

**Ontario Superior Court of Justice**

**John Doe v. O'Dell**

**Date: 2003-09-15**

*Peter A. Downard and Jennifer L. McAleer, for plaintiff.*

*Josée Forest-Niesing and Darren Berlinguette, for defendants.*

Court File No. 01-CV-212060CM

[1] SWINTON J.:—The plaintiff has brought this action for damages against Father Thomas O'Dell and the Roman Catholic Episcopal Corporation for the Diocese of Sault Ste. Marie because he was sexually assaulted by Father O'Dell when he was a child. He claims damages or compensation for battery, negligence and breach of fiduciary duty against Father O'Dell. As well, he claims that the Diocese was negligent and, in the alternative, vicariously liable for the acts of Father O'Dell.

[2] In order to protect the plaintiff's identity, I ordered at the outset of the trial that the style of cause be amended to substitute the name "John Doe" for the plaintiff's name. An order was also made prohibiting the publication of the name or identifying characteristics of the plaintiff or of other complainants who were youths at the time of assaults by Father O'Dell. In these reasons for decision, various codes will be used to describe individuals, in order that the plaintiff's identity will be protected.

THE FACTS

[3] The following is a summary of the facts. While some may not appear relevant at this point, they will be important in the determination of liability and damages later in these reasons.

*Life Before the Abuse*

[4] The plaintiff, JD, was born March 13, 1970 in a small town in northern Ontario. He is the middle child in a family of three boys. His older brother ("OB") is 18 months older, and his younger brother ("YB") is four years and five months younger. When JD was two years old, the family moved to another small town nearby. Since 1977, when JD was seven, the family has lived in the same house in that town.

[5] Each member of the family gave evidence at trial. The evidence of all, including JD, paints a picture of a close and happy family in the period up to the end of JD's Grade 5 year at school.

[6] Mother stayed at home until YB was in elementary school, although she did part-time work for unorganized townships from the home, usually working in the evenings. When the two older boys were young, she helped organize a co-op nursery school with other mothers. As well, she taught figure skating, and both the older boys took figure skating lessons. Subsequently, around 1979 or 1980, she worked part time for a bank, with one period of full time employment for six months between 1980 and 1986. Around 1979-80, Mother began to study part time for a university degree, largely in the evenings and at inter-session, with her final year full time. She obtained a degree in economics in 1986 and then trained as a real estate agent. She first worked full time in 1986, although she took summers off. She had many successful years as a real estate agent, sometimes earning as much as \$168,000 in a year. Since 1998, her income has fallen off, as a result of the economy, personal stress related to her husband's health and JD's problems, and a lack of motivation.

[7] Father obtained a mining technologist diploma from the Haileybury School of Mines after a three-year course. He worked as a draftsman for one company throughout his career, retiring in January, 2000. His work hours were quite regular, and he was usually home between 4:00 and 4:30 PM each day.

[8] The family attended the Anglican Church, although the parents were not particularly religious. The boys went to Sunday school when they were young and to church services. The family's attendance fell off in the late 1970s, in part because of Mother's dissatisfaction with the Church from around 1977 and in part because of the weekend attendance at the boys' ski meets.

[9] The family engaged in many activities together. For example, they went cross-country skiing together. Prior to the birth of YB, the family took frequent camping trips. They also participated in downhill skiing, swimming, and other activities. Around 1976, they purchased a camp on an island not far from their home, and they spent weekends there in the spring and fall and all of the summer. As there were very few other cottages on the lake, the brothers played together. Often, their paternal grandparents spent time with them there.

[10] The three boys participated in the Nancy Greene downhill ski team for their town, which allowed them to ski competitively until they were in Grade 8. The parents were actively involved with their sons' skiing. The ski hill is close to the family home, and Father

was a volunteer at the hill, repairing lifts and helping with races. Mother also attended the ski meets.

[11] JD's brothers were much more active in sports than JD. For example, JD played hockey for only one year, while his brothers were more avid players. He never liked to hunt with his father, although his brothers accompanied his father on hunting trips when they were older. Similarly, the other two brothers worked with their father fixing up old cars, but this did not interest JD. He was more interested in drawing and reading and making models, as well as in Star Wars and things involving the ocean. Nevertheless, the parents testified that Father tried to find time to do something with each boy that the child liked. While the other two boys liked sports or, later, repairing cars, Father read a great deal to JD — more, he said, than to the other two combined. Father also built models with JD — for example, of ships and planes.

[12] From around the beginning of 1981, JD and OB shared a paper route, delivering the local paper first once and then twice a week. The Catholic rectory was one of the stops on the route.

[13] From about the age of seven, JD had a best friend ("BF"), who lived in a house whose yard adjoined JD's yard. BF attended the Catholic school. The two were described as inseparable, playing hide and seek with the other neighbourhood children, going off on their bikes, going to the ski hill, and building forts. JD once attended a Catholic mass with BF's family when he was nine or ten years old. He testified that he found the service beautiful because of the art and the ritual.

[14] Essentially, the picture before 1981 is that of a close, happy, and caring family. That is not to say that everything was rosy, and that there were no problems. There was one incident of domestic violence somewhere between 1975 and 1977, when JD was about six years old. His father punched his mother a number of times during the course of an argument, and she sought medical treatment for her sore ribs from the family doctor. JD was in the house at the time of the incident, and overheard what went on and asked his mother about it subsequently. She described JD as upset and crying about the event. This was the only incident of domestic violence throughout the parents' 36-year marriage. Otherwise, the home was not a place of violence. Discipline was described as appropriate by all members of the family.

[15] JD's mother described him as a lonely child, despite his best friend. The evidence of family members indicated that the other boys made friends easily and had many friends. JD was more introverted and found it harder to make friends.

[16] JD described himself as different from other children of the same age, because he had "big questions", such as "where do we come from; where was I before I was born; where am I going after; who is God?" He testified that he expressed these questions to his parents, OB, and other children, and he felt different because other children were not interested in these questions. Sometimes, they told him he was weird. Sometimes, he talked to his paternal grandmother about such things, as he was very close to her.

[17] The defence questioned Mother and OB about the notes of Dr. B, the family doctor, from early 1979, when JD was almost nine years old. These notes are extremely difficult to decipher because of the handwriting. However, in a note dated January 10, 1979, there are references to "effeminate characteristics — doesn't mix well at school" and name calling. There is a further notation dated January 11, 1979, "not depressed but was — not suicidal". Dr. B also noted that JD laughed easily many times, especially with respect to talk of sex change. JD and his mother explained that JD had found an article about sex change operations in a tabloid, and he asked his mother about it.

[18] There is also a notation about JD on Mother's chart around the same time: "effeminate characteristics — plays with dolls" and "depressed — no best friend". Mother denied using the word "effeminate", although there is no question that JD had a mermaid doll, which was made for him by his mother and maternal grandmother at a time when he was fascinated by mermaids and things of the sea. OB rejected the description of his brother as effeminate, as did Mother.

[19] The follow-up note by Dr. B in early February, 1979 indicated that things were "much better", and that JD was taking a hockey stick to school, and he was much happier. There are no other medical notes about depression in these early years which were raised in cross-examination.

[20] JD attended the local public school from kindergarten to Grade 5. He described his school performance as "average" and said that he found school boring. During the course of the trial, his early report cards were examined in detail. There is a fairly constant theme in the teachers' comments about the need to pay attention, about a tendency to daydream, and a need for JD to apply himself more and to live up to his potential.

[21] When one looks at JD's grades, it appears that he was generally performing at or above grade level in Grades 1 and 2. He did better in art and was reading above grade level. Even in Grade 3, with a teacher with whom he had a difficult relationship, his final grades were at the C level, with an A plus in art and "satisfactory" for work habits and attitudes. JD testified that he liked art at this time, as well as reading for pleasure. His grades appear to decline in Grade 4, with some improvement in Grade 5, except for French. Then in Grade 6, when he switched to the Catholic school, his grades improved significantly, except for math and French.

[22] JD's parents indicated that they were not concerned about his grades. Mother testified that each of her boys performed in about the same way, although OB thought that his grades were lower than JD's. Mother also testified that JD's academic performance was consistent with her own performance and that of her husband when they were young, yet her husband had graduated from college, and she had obtained a university degree.

[23] Mother testified that Grade 3 was a turning point, which she attributed to an unsatisfactory teacher. JD was being teased at school in Grade 3, which Mother attributed to the fact that the teacher kept him in at recess to do work, thus ostracizing him from the other children. Mother explained that although this teacher described JD as "disruptive", she was not concerned, because the teacher seemed to find JD a problem. As well, Mother explained that JD would talk when the teacher was teaching, or he would tease the girls. She does not remember him picking on younger children, nor any referral for behavioural problems. JD testified that he did not remember being a problem in class, nor was he ever sent to the principal's office.

#### *Father O'Dell*

[24] Father O'Dell was ordained a priest in the Diocese of Sault Ste. Marie in 1973. He did not testify at the trial, although portions of his examination for discovery were read in as part of the plaintiff's case.

[25] Bishop John O'Mara, the former Bishop of St. Catharines, gave evidence about Father O'Dell's formation as a priest. The Bishop of Sault Ste. Marie from the time that Father O'Dell began to study for the priesthood until 1985 was Bishop Alexander Carter, who is deceased. Evidence about the way in which Father O'Dell's career unfolded and the way in which the Diocese operated was given by Archbishop Marcel Gervais of Ottawa, who was Bishop of Sault Ste. Marie from 1985 to 1989, and by Bishop Jean-Louis Plouffe, Bishop of Sault Ste. Marie since 1989 and Auxiliary Bishop from 1987 to 1989. As

well, there was testimony from two priests from the Diocese, Fathers Victor Amadio and Gerard Copeman.

[26] Father O'Dell first attended St. Augustine's College in Scarborough, where he received a Bachelor's degree in Philosophy after a pre-university year and a three-year course of study. He then entered St. Augustine's Seminary in 1969 to study theology. Bishop O'Mara was the Rector of St. Augustine's Seminary from 1969 to 1975.

[27] At that time, there was no psychological testing of candidates for the seminary. Testing was not implemented until 1973 at St. Augustine's. Archbishop Gervais was a professor at St. Peter's Seminary in London when that institution began psychological testing for candidates for the priesthood in the late 1970s. He testified that the concern was to test the maturity of the candidates.

[28] As Rector of St. Augustine's, Bishop O'Mara was the "father of the house", responsible for staffing, professors, and developing the seminary's daily life. There were about 12 residential faculty members and about 90 students at the seminary when he arrived, and about 60 when he left.

[29] Bishop O'Mara described the common life of the seminary. There was frequent interaction with the students, since the faculty and students shared many meals, attended daily religious service together, and lived in residence. There were weekly meetings of small groups of six or seven students with their assigned spiritual director, as well as individual meetings with the spiritual director every two weeks to discuss such matters as spiritual growth and their relationship with God. Students also performed several hours of pastoral work each week under the supervision of a field education director. Finally, there were evaluations of the students in the fall and spring by the faculty, who met as a group to discuss the students.

[30] Students at the seminary were sponsored by their diocese, and they returned to the diocese in the summer. In Father O'Dell's case, this was the Diocese of Sault Ste. Marie. Each summer, the Rector sent a pre-printed form to the priest of the parish in which the student would be working in order to obtain a report on the student at the end of the summer. As well, each year the Rector sent a written report to the bishop of a diocese respecting each student from that diocese, with a recommendation as to whether the student should continue or be admitted into orders.

[31] Bishop O'Mara recalled Father O'Dell as a student, but he did not remember anything extraordinary. He remembered little about him beyond his appearance. The records of the seminary indicate that Father O'Dell proceeded through the four minor orders of Tonsure; Porter, Lecter, Exorcist and Acolyte; the Subdiaconate; and the Diaconate. Before he was admitted to an order, a report was sought from the pastor of his home parish; a recommendation was made by the Rector; and approval was given by Bishop Carter of his diocese.

[32] In 1972, Father O'Dell was ordained to the Subdiaconate and Diaconate, and he took the oath of celibacy. After his ordination, the seminary turned him over to the diocese, and Bishop O'Mara had no recollection of seeing him again. He testified that when Father O'Dell left the seminary, there was no concern about his academic or pastoral work or his spirituality.

[33] On June 8, 1973, Father O'Dell was ordained as a priest. For several years, he was assigned as an assistant pastor to a parish. He was moved once in 1974 because of a complaint of a personality conflict from the pastor of the parish. The Diocese's records indicate that there were no other complaints about him in the files, and a number of complimentary letters from parishioners were filed in evidence.

[34] Evidence about the life of a priest was given by Bishop O'Mara, Archbishop Gervais and Bishop Plouffe. In cross-examination, Bishop O'Mara stated that a priest is to be a spiritual leader, who is expected to lead by example. He also acknowledged that the Church cloaks the priest with responsibility and authority. He agreed that a priest is in a position of trust.

[35] Archbishop Gervais described the ideal relationship of priest and parishioners as one of affection and devotion. With respect to non-parishioners, he said that the priest has no particular responsibility, but he is expected to be very welcoming. In cross-examination, he agreed that the Catholic Church encourages non-Catholics to learn more about the Church. He agreed in cross-examination that normally society regards the figure of a priest with respect. As well, he agreed that a priest will be regarded as a person of some authority, normally to be listened to and obeyed in spiritual matters. He also agreed that the Church hopes that a priest will be widely regarded as trusted. Finally, he agreed that the priest could develop a relationship of confidentiality and trust with a young person or a non-Catholic who came to the priest to discuss religious matters.

[36] Both Bishop Plouffe and Archbishop Gervais discussed their practice, as bishop, of trying to visit each parish once every year to two years. Normally, they or the Auxiliary Bishop would also come to the parish once a year for confirmation. Bishop Plouffe testified that these visits provided a vehicle for parishioners to raise concerns about the parish priest. In addition, there are now annual retreats of the priests, as well as deanery meetings for priests of a certain geographical area.

[37] In May, 1979, Father O'Dell was first appointed pastor in a small northern community ("Parish One"). This parish was a small one, with a one-room wooden church and living quarters next to it. Evidence about his performance there has been hampered by the passage of time. The only evidence of those who knew Father O'Dell in the critical period came from Fathers Amadio and Copeman. Both were priests in the diocese at the time, and both knew Father O'Dell and visited him at the rectory in Parish One.

[38] In the summer of 1979, four teenage boys came to live with Father O'Dell in the rectory. The teenagers returned to the rectory for the summer of 1980. One of them remained at the rectory over the fall and winter of 1980 to 1981. During that period, a sexual relationship developed between Father O'Dell and the boy ("Victim One"). This continued throughout 1982 and 1983, after Father O'Dell was transferred to the parish in which the plaintiff lived ("Parish Two"). As well, after his transfer, Father O'Dell engaged in sexual activity with the brother of Victim One.

[39] Both Father Amadio and Father Copeman described Father O'Dell's unkempt appearance and commented on his poor housekeeping skills and poor personal hygiene. Father Amadio would drop in unannounced to visit Father O'Dell periodically when he was driving from Sault Ste. Marie to his parish. He had known Father O'Dell since high school, although not well. He described the rectory as a bit of a shambles. He never saw anyone else living at the rectory when he would stop in — usually once in the winter, once in the fall, and once in May or June. He had heard about the boys staying there, but assumed that they were visitors.

[40] Father Copeman also stopped into the rectory once when driving through town on holidays. He, too, knew about the teenage boys and thought that they were visitors. He had no suspicion about any improper activity. He regarded Father O'Dell as a good priest.

[41] Archbishop Gervais testified that he never received any complaints about Father O'Dell while he was the Bishop of Sault Ste. Marie, and that he had received a positive impression of the priest from parishioners. Again, he commented negatively on Father

O'Dell's appearance, saying that he was unkempt, with lots of hair and a beard and not tidily dressed. He indicated that he would have been concerned had he known that there were teenage boys living at the rectory, as he would have wanted to know if their parents consented, and if there was adequate supervision. He testified that Father O'Dell should have sought permission to have the boys live there.

[42] Bishop Plouffe testified that he had no knowledge of the boys living at the rectory in Parish One. His first knowledge of the sexual activity between Father O'Dell and Victim One came in May, 1990, when Victim One asked to meet with the Bishop and revealed that he had been sexually abused by Father O'Dell. *Father O'Dell's Arrival in Parish Two*

[43] There is some dispute between the plaintiff and the defendants as to when JD met Father O'Dell. JD testified that he first met Father O'Dell in June of 1981 when BF asked him to come to the rectory to meet the new priest. He described the meeting as involving a number of children. They laughed and talked with Father O'Dell for about half an hour. Father O'Dell was very demonstrative, and would touch a child on the back or shoulder. JD thought the priest was "neat" and friendly, because he laughed and was relaxed with the children.

[44] JD testified that he next encountered Father O'Dell shortly after when he was coming home from school, and Father O'Dell was in the yard of the rectory with his dog. JD stopped to talk on two or three occasions, and the conversation ranged over God and heaven and what heaven was like; the new Catholic school under construction, which was to open in the fall; school and interests. JD testified that Father O'Dell made it clear that JD should switch to the new school, where the priest would be teaching religion. He also testified that Father O'Dell told him that he had to be a Catholic to get to heaven.

[45] JD testified that these conversations led him to pressure his parents to switch him to the Catholic school for Grade 6. He really liked Father O'Dell because he seemed to have all the answers to JD's questions. JD testified that he felt that he would not be lonely any more. He told his parents that he wanted to be with BF, and he wanted to go to the Catholic school because it was new, and other neighbourhood children were going there. As well, he wanted to take religion. He testified that his parents agreed to switch him if he promised to work hard. His younger brother was switched to the new school as well.

[46] JD then saw Father O'Dell the week before school started and told him that he would be attending the Catholic school. As noted earlier in these reasons, JD's school performance was markedly better in Grade 6. In his words, he had a "great teacher", and

he felt special because of the attention he received from Father O'Dell in religion classes. He also saw Father O'Dell at recess, and he felt that he was one of Father O'Dell's favourites.

[47] JD also began to spend time at the church with BF, who was an altar boy. They helped Father O'Dell with tasks, such as moving chairs or boxes of candles. Sometimes JD went to altar boy practice with BF, where he would ask Father O'Dell questions about the art, icons, and practices of the Catholic Church.

[48] It became a regular thing for Father O'Dell to ask JD into the rectory when he delivered the paper, twice a week. JD arranged his deliveries so that he came to the priest's quarters last. They would talk about religion and other things, and Father O'Dell called him his "little angel". Father O'Dell also taught the plaintiff the Hail Mary, and he would have JD recite prayers such as the Lord's Prayer. He explained hell, which was a new concept for JD. They would also watch TV or play with the dog. According to JD, the visits lasted about an hour, and he felt that Father O'Dell was his best friend. He felt special because of the attention, and he was getting the answers he wanted. During Grade 6, Father O'Dell would hug him or touch him in a way he described as "nice". For example, when they were sitting on the couch, Father O'Dell would put his arm around JD's shoulders.

[49] Father O'Dell came to JD's house once — probably in the fall of 1981, after JD and YB started Catholic school. He arrived unannounced around the dinner hour, and stayed a few minutes. JD testified that he was pleased by the visit and stayed close to Father O'Dell, leaning on him. His parents do not remember him being in contact with the priest during the visit, although his mother indicated that she would not have been concerned had that happened, since Father O'Dell was a priest.

[50] In the summer after Grade 6, JD and his family went to their camp, returning each week for the boys to deliver papers and to get groceries. JD did not see Father O'Dell that summer. The family returned home in late August, 1982. At some point when JD was delivering the newspaper, Father O'Dell appeared and asked him into the rectory. Father O'Dell gave him a big hug, grabbed his genitals, and said, "My, how you've grown". Both laughed, and JD testified that he thought it was funny at the time.

[51] JD went to another Catholic school for Grades 7 and 8. He continued to see Father O'Dell in religion classes once or twice a month, and he continued to feel special. By this time, he said, he was at the rectory two or three times a week. Father O'Dell began to

speak in depth about heaven and particularly hell. He said that hell was where bad people went, and they burned alive for eternity. He also told JD, "You must obey what the priest tells you". He continued to touch JD's genitals more frequently, but still in a joking manner, putting his hand down JD's pants and inviting JD to do the same to him.

[52] JD testified that his memory of what happened with respect to the more egregious acts of sexual assault is not clear. His memories are fragmented, and the chronology is difficult for him to determine. Over the years, he has tried to block out the memories of the assaults, as a coping mechanism.

[53] JD believes that it was probably in Grade 7 that Father O'Dell had him dress up in a white altar gown, without clothes underneath. Father O'Dell would call him his little angel and take photos. JD remembers one time in the spring of 1983 when he woke up on a couch, and Father O'Dell was sodomizing him with a wooden crucifix. What JD saw did not make sense to him, and it terrified him. Father O'Dell then dressed him and put him out the door of the rectory, trying to convince JD that he had fallen off his bike and hurt himself. When JD said that Father O'Dell had hurt him, the latter replied that JD would burn in hell and be eaten by the devil. He also said that no one would believe JD, and he would get JD's younger brother if JD did not do what he was told to do.

[54] JD said that he went home, feeling like he was in hell. He said that he told himself it did not happen and blocked it out of his mind. Although his mother noticed that his jacket was on inside out, he did not tell his parents of the assault and felt that he had done something wrong. As well, he testified that he did not want his relationship with Father O'Dell to end, as he loved the man. While he hurt for a couple of days and saw a small amount of blood in his underwear, he did not see a doctor.

[55] His mother remembered an incident where JD came home once with his jacket inside out, which she found unusual, since JD was careful about his appearance. She also remembered that JD once told her that he fell off his bike and hurt his bum. She wondered about this, as there was no crossbar on his bike, but she made no further inquiry.

[56] Both his parents testified that they were aware that JD spent a great deal of time at the rectory and the Catholic church with Father O'Dell. Neither was concerned about this. His father was pleased that JD had found someone who could answer his big questions. As a youth, he had had a positive experience in the time he spent at the Anglican Church. Similarly, his mother was not concerned, because Father O'Dell was a priest and "a man of God". In her adolescence, she had had a close relationship with an Anglican minister,

whom she regarded as a mentor. She testified that if JD had been spending time with an adult man other than a priest, she would have been concerned, but as Father O'Dell was a man of God, she assumed that her son was safe and had found a positive role model and a mentor. She also stated that she was happy that JD was spending time with Father O'Dell, because JD seemed happier and seemed to have increased self-esteem. She also testified that she never thought that sexual abuse would ever be a threat to her family.

[57] JD described other incidents in which Father O'Dell sodomized JD with his penis. JD estimated that this happened between six and a dozen times. There was also an incident one evening, in which oral sex occurred on the altar in the church. JD said that Father O'Dell also liked to rub smegma from under his foreskin under JD's nose. He also has a memory of Father O'Dell once holding a handkerchief with a foul, chemical smell to his nose, and he believes that he passed out.

[58] JD also remembers being put in the confession booth in the church after episodes of sexual abuse. Father O'Dell would tell him to confess his sins, as he was a sinner, and it was his fault for what had happened. JD also remembered Father O'Dell pointing to the smokestacks in the town and saying that was where they burned the children who disobeyed the priest.

[59] JD was cross-examined in detail about his memory of the sexual assaults, including the number of incidents and what exactly occurred. Inconsistencies between his evidence at the preliminary inquiry, criminal trial, examination for discovery and this trial were pointed out. JD explained that while his memory was confused, it was actually better at the time of this trial than in the past, as he has spent years now trying to piece together what happened.

[60] This is not a trial in which I must determine whether sexual assault actually occurred. Pursuant to a Request to Admit, the defendants admitted the following acts of sexual assault on February 3, 2003:

The abuse of [JD] by Father O'Dell included the following activities:

- (a) Father O'Dell performed anal intercourse on [JD];
- (b) Father O'Dell sodomized [JD] with a wooden crucifix;
- (c) Father O'Dell removed all of [JD's] clothing and placed him naked on the ... church altar, and then forced [JD] to perform oral sex.

[61] JD testified that the sexual assaults continued through Grade 7 and 8 and possibly into Grade 9. In Grade 9, he switched to the local public high school, and he stopped

going to see Father O'Dell. Throughout the period in which the assaults occurred, he testified that he blocked out the incidents. He still felt that Father O'Dell was his best friend, and they continued to talk of religion and God.

[62] In Grades 7 and 8, JD had often discussed the possibility of becoming a priest with Father O'Dell. Around Grade 9, JD told his parents that he wished to join the Catholic Church. They insisted that he be confirmed in the Anglican Church. When he spoke of this with Father O'Dell, the priest told him to obey his parents. Ultimately, he was confirmed in the Anglican Church.

[63] When JD was away from Father O'Dell, he testified that he began to feel lonely again, and he was confused and unable to concentrate. While he had always experienced nightmares, according to his mother, the nightmares became much worse around Grades 7 and 8. Before, he had nightmares about dragons or monsters. Around this time, he had nightmares of hell, fires, angels and devils. JD would scream and wake the household, and he also began to sleepwalk. One time, the family found him in the basement, wedged between the washer and dryer, and another time outside the house. JD testified that he dreamed of hell and about being eaten alive.

[64] JD's grades worsened in Grades 7 and 8. Once again, there were comments from his teachers about his need to put in effort. While his grades had once been average with some courses above average, they fell to below average.

#### *JD's Life After the Abuse*

[65] JD testified that his first recall of the crucifix incident was in Grade 10, when he took some pictures to show Father O'Dell. The pictures were of himself and a girl whom Father O'Dell knew. The latter got very angry and told JD that if he revealed anything, Father O'Dell would show a picture of JD on a black couch, with a crucifix in his anus. JD testified that before this, he had blocked out what had happened, but the photo brought back memories of the crucifix and the altar incidents. However, he made no complaint, as he felt terrified and ashamed that he had done something wrong, and it was his fault. As well, Father O'Dell had threatened to get his brother and to show the pictures. JD thought no one would believe him about what had happened.

[66] By high school, JD's grades were below average. In Grade 9, he was assessed by an educational consultant, Dr. Thornburg, who appears to have concluded that JD had a learning disability in the form of difficulty in processing information in an auditory manner.

As a result of this report and the decision of an I.P.R.C. (Independent Placement and Review Committee) dated December 4, 1985, JD attended a learning centre within the school at times and was given the opportunity to write exams in a special room. Still, his grades continued to be poor.

[67] In the early summer of 1987, just after Grade 11, JD had a flashback of what had happened with Father O'Dell, after an older male approached him in a sexual manner. JD went to the rectory and confronted Father O'Dell, saying that he was not afraid of Father O'Dell and then ran out. At the time, there was a young male in the rectory. JD told the youth not to listen to Father O'Dell and to get out.

[68] JD had another flashback once in high school when he was looking out the school window and saw Father O'Dell. He could not breathe, fell from his desk and ended up at the hospital. The diagnosis was stress, according to JD. He testified that he did not disclose the abuse at this time out of fear, shame, pain and guilt.

[69] JD testified that he has suffered from frequent flashbacks and invasive thoughts and continues to do so — for example, when he has seen someone who reminds him of Father O'Dell or heard something religious. He would try to block these thoughts out. Once, while in high school, he was upset when a man made advances to a female friend, since this reminded him of Father O'Dell. He assaulted the man with a beer bottle, and was criminally charged, convicted and sentenced to nine months' probation.

[70] JD testified that he was very lonely in high school, and his emotional state was very poor. He could not concentrate in classes. He was a loner, without many friends and with no close relationships, and he felt like an outcast. BF had gone to a different high school in another town. JD was called names like "loser" and "faggot", because he did not like changing in front of others in physical education class. He was confused about his sexual orientation and wondered if he was gay because of what had happened with Father O'Dell. He had no romantic relationships.

[71] All the family testified about JD's rages, which began around Grade 8 and continued in his high school years. JD testified that he became angry easily and would yell and scream. His older brother testified that the slightest thing could generate a rage. As well, JD was withdrawn and spent long periods of time alone.

[72] Around age 17, JD began drinking socially. He had first experimented with drinking at age 15 with BF, but at 17, his consumption increased steadily, and he began to drink

alone in his room or at the ski hill a few times a week. His parents began to notice their liquor disappearing. Over time, he began to drink to get drunk. He would also smoke marijuana at parties. He described drinking as his number one mechanism for coping with reality.

[73] His relationship with his father became strained through the years from Grade 9 on. JD had arguments with his father over his drinking, his school attendance and his marks. Mother confirmed that Father disapproved of JD's drinking, and this caused arguments.

[74] When JD was 13 or 14 years old, the family went for counselling, as his parents were concerned because he was so withdrawn. Apparently, his mother refused to go back, since the focus was to be on the parents. OB also expressed no interest in continuing. In the summer of 1987, his parents took JD to a psychologist, because they were concerned that he was hiding in his room all the time, and he did not have any friends. JD did not open up to this man, as he did not feel comfortable with the individual and was afraid of what he might be told.

[75] In the fall of 1987, he switched to a high school in Sudbury for Grade 12. He remained there until the spring of 1990, but did not earn enough credits for a Grade 12 diploma. His academic performance was poor, and he skipped school a lot. At that school, he had a female friend ("FF1"). He had no romantic relationships, although he was sexually intimate on two occasions with girls.

[76] In the summers of 1989 and 1990, he had summer jobs as a waiter. In the fall of 1990, he returned to the high school in his hometown for a semester. This was a difficult experience, given his age and the fact that his younger brother was in the high school and in one of his classes. He had one friend, a girl, with whom he hung out, and he dated another girl briefly. Otherwise, he felt isolated.

[77] His younger brother remembered the period in which both he and JD were students at the local high school. Some of his friends made comments that JD was a bit different or "a little weird". YB attributed this to the fact that his brother had mostly female friends, rather than males, and he was not into sports. OB also recalled that JD was lonely in high school, and that JD was kind of an outcast.

[78] JD was able to obtain four credits, although he was not able to write final exams because of stress. Dr. B gave him a note to get out of exams and prescribed Prozac for depression, although JD only took the pills about a week. He explained that he has a

natural aversion to taking pills, describing his fear of a "chemical lobotomy". While he needed one more credit, he did not want to continue at the school. He wanted to be away from the town and the sight of Father O'Dell's church.

[79] In his high school years, he had questions about his sexual orientation. While he was sometimes attracted to girls, he wondered if he was gay, and he sometimes felt attracted to men. He wondered if this was because of what Father O'Dell had done.

[80] JD was also very concerned about his acne as a teenager. His older brother observed that JD would sometimes wash his face so much it was raw. However, OB and YB did not think that JD's acne was worse than their own.

[81] In early 1991, JD made the first of several moves to Ottawa. FF1 from high school in Sudbury was studying there, and she persuaded him to move there. He found a basement apartment and enrolled at Canterbury High School for two credits in the beginning of February, 1991. Unfortunately, his friend broke her leg and moved back home, and JD stopped school in March, 1991. He found no work and went on welfare, using his grocery money to drink.

[82] FF1 returned to Ottawa in May, and they moved into a residence room at the university. JD tried unsuccessfully to find work. In August, 1991, he called his parents to come and get him, telling them that he was depressed and lonely, and he was not getting along well with FF1. They brought him home on the condition that he not drink and that he get a job.

[83] With his mother's help, JD enrolled in the Futures Program, in which the government would pay minimum wage if he found a job. His mother helped him get a "gofer" job at a radio station in Sudbury. He lived at home, and his parents provided a car. His relationship with his parents was not too bad. However, at the end of March, 1992, when the funding ran out, so did his employment. JD testified that, in this period, he may have started to think that he was gay, and on one occasion he had an experience of a sexual nature with a male.

[84] After the radio station, he was unemployed for a month, and then his mother helped him find employment as a general labourer with a construction company. He was let go in August of that year. JD testified that he began to miss a lot of work or arrived late because of his drinking, and the season was also slowing down. In the year from August, 1991 to August, 1992, his drinking had been increasing, and he would spend his pay on alcohol.

[85] In this period, he made some casual friendships at work, as well as a male friend ("MF"), who came out to him as gay. JD indicated that he did not know where he stood on this. His relationship with his father deteriorated further, as his father was angry about his inability to save money, his drinking and his irresponsible behaviour. JD described himself as isolating his father after the abuse by Father O'Dell. He mistrusted all older men in authority, including his father.

[86] After August, 1992, JD went on drinking binges that lasted for days. Sometime around late August, he came home one night after he had been drinking, and told his mother that he had been raped, and he thought he was gay. Then he got hysterical, and MF came and got him. JD gave no further details and tried to block out the memories. At this time, he was concerned about going to hell, because Father O'Dell had called him a sinner, and he was also concerned about AIDS. His mother indicated that she was sad for him after this disclosure, as he would never have children, but she testified that her relationship with him would not change if he was gay, as she felt that sexuality was a small part of a person.

[87] After this, JD went to live with his older brother in Stratford at the end of September. He tried and failed to find work. His drinking continued, while his brother was at work on the night shift. In January, 1993, they moved to London. At times, OB tried to talk to JD about his problems. According to JD, OB raised the subject of sexual abuse a couple of times, but JD refused to talk about it, saying that he had a secret, or "you don't know what I've been through".

[88] OB testified that he also talked to JD about being gay, telling him that if he was gay, he should deal with it, and the family would still love him. JD indicated that made him feel good. In London, he started going to gay clubs, and he ended up in a romantic relationship with one man for about three months. He also enrolled in a night school course in order to complete his high school credits. OB drove him to classes to make sure that JD attended, and he successfully completed the course and obtained his Grade 12 diploma at age 23.

[89] YB testified that he was about 18 years old when he learned that JD was gay, which would be around 1992. He said that he was indifferent to JD being gay. He thought that this was the secret that JD had been hiding, although JD's behaviour did not change after this, and the alcohol consumption got worse.

[90] In July, 1993, JD moved back home with his parents, following an argument with OB that ended up in a fight. He stayed a short while with his parents, but they did not get

along well, so he went back to Ottawa in August or September. His parents testified that he was to enroll in a Hotel and Restaurant Management Course at Algonquin College, but he did not do so. A female friend helped him get a job as a waiter at Swiss Chalet, where he worked from October until after Christmas, and they got an apartment together. There was no romantic relationship, as JD was feeling unsure about his sexuality.

[91] Around March, 1994, JD moved in with MF. Their relationship was not romantic. JD's drinking continued to be heavy, and in the fall of 1994, he went to a few meetings of Alcoholics Anonymous. However, he was not comfortable with standing up and talking about himself, so he stopped going. Through the period in 1994 in Ottawa, he started having suicidal thoughts and also had a serious flashback about Father O'Dell and the abuse when he sniffed a chemical in a bar. He went to gay bars after the AA experience, made some bad choices and became very concerned about HIV, so he got tested.

[92] YB testified that in the early winter of 1994, he moved to Ottawa and spent some time with JD on weekends. He described JD as on an emotional roller coaster. JD was drinking by himself and was often quite emotional when drinking. In the 1994-95 academic year, while YB was at Carleton University, he had an apartment across the hall from JD. He described JD as erratic, emotional and unpredictable in his behaviour. At times, JD would say that he had a secret, or something to the effect "if you only knew what I've been through". No details were provided. YB thought JD was looking for attention, and told JD that he was using this as an excuse for his bad behaviour.

[93] Just before Christmas, 1994, JD stopped drinking and stayed abstinent until his 25th birthday in March. At his mother's suggestion, he enrolled in a hairdressing course in Ottawa in early 1995. His parents paid his rent and gave him money for food. The course lasted until November. His course went well, and he had higher than average grades. He was attracted to a woman at the hairdressing school, but was confused about his sexual orientation. He also had an intimate relationship with a man for about a month. His drinking was generally at a reasonable level.

[94] After his course ended in November, 1995, he got a job cutting hair in a salon in Ottawa. However, after Christmas, he found it difficult to cut the hair and beards of older men, since they reminded him of Father O'Dell. This caused him to sweat and shake, and he had to take breaks, sometimes mid-cut. After this happened, he would get drunk in the evening and call in sick. He quit around March, 1996, because he could not explain to his

boss what was happening. Then he drank for a couple of weeks, and ended up calling his father once again to bring him home, letting his father believe that he had been laid off.

[95] It appears that the first time that JD told anyone that he had been abused was in the spring of 1996, when he told MF that he had been molested as a child and did not feel comfortable in his sexuality. He may have said it was a priest, but he did not name Father O'Dell.

[96] JD went home again at the beginning of June, 1996. Through a friend's mother, he got some casual work mowing lawns. He was offered a job at a hairdresser's, but he never started because he was too depressed. In July, his father had a very bad heart attack. Earlier, in 1990, his father had had open-heart surgery. JD testified that he felt responsible for his father's condition, because of the stress he had caused within the family. After his father got out of the hospital in August, FF1 called him from Vancouver Island and offered to help get him a job and a place to live there. As he blamed himself for his father's heart attack, he decided to get away.

[97] Another female friend ("FF2") helped get him a plane ticket. Before he left, he told her what Father O'Dell had done, without the details. This was the first time he had named Father O'Dell. He did not go to the authorities, he said, because Father O'Dell had drilled into him that no one would believe him. As well, he had not appreciated what Father O'Dell had done and what it meant or that it was a crime.

[98] JD went to Vancouver Island in September, where he found employment at two jobs: pumping gas and acting as a janitor at an inn in Tofino. He was drinking heavily on a daily basis and bothered by the fact that he had to sleep in a room with another man in the staff accommodations provided. In November, 1996, he decided to commit suicide. He went to the beach, left a suicide note and swam out into the ocean. He testified that he was screaming at God, asking, "Why did you let this happen to me?" When he came to, he was on the sand. He testified that it was at that moment he realized that what had happened was not his fault, and that what Father O'Dell had done was horribly wrong. In cross-examination, he said that he would pinpoint his realization that Father O'Dell was responsible for his emotional difficulties at this moment.

[99] He left Tofino and went to his maternal aunt's home on the Island. He told her that he had been molested by Father O'Dell. Her response was that maybe JD was just gay, and that what Father O'Dell had done could not be that bad. Given the perceived lack of empathy, he left for Vancouver, where he got a job in a gay bar, busing tables. He stayed

only two weeks, since he was upset by the sight of older gay men with beards. Again, he was drinking heavily. FF2 arranged a flight for him to get back to Ottawa, where he was met by MF. His father testified that he paid for the ticket.

[100] JD went home for Christmas in 1996, and in early January, 1997, he told his mother that Father O'Dell had abused him. He testified that his mother later told his father and OB's wife. Mother testified that she told Father later, after discussing this with OB, because of concerns about Father's health. Father thought that he had been told shortly before the criminal charges were laid — that is, around 1998.

[101] JD returned to Ottawa and moved into a house with a group of friends. He was on welfare until the summer and drinking in binges, at least every two weeks. At some point, he was employed for about a month at a hair salon, but his drinking interfered with his performance. He could not concentrate and experienced the sweating and shaking again.

[102] In February, 1997, he met a doctor in Ottawa, Dr. McGuinness, who was very helpful to him. A psychiatrist was recommended, but JD had one session with him in March, 1997 and did not continue, after this doctor told him that the root of his problems was his current homosexual relationship. JD did talk openly about his abuse by Father O'Dell and other matters with Dr. McGuinness until October, 1999, when the doctor became very ill.

[103] Around the summer of 1997, JD began spending time with a gay man who would eventually become his partner ("MP"), and he moved in with MP in August, 1997. Around October, the relationship became romantic, and it continued off and on to November, 1999. There was one interruption around May, 1998, when JD went back to his parents for about a month, but he came back to Ottawa in June.

[104] He had about two weeks of employment as a hairdresser in September, 1997, but could not stand the proximity to clients, and he did not find the boss very rational. He drank heavily through the period from the end of Christmas holidays in 1997 to May, 1998.

[105] It was sometime in 1997 that he told his father on the phone that he was gay. JD asked if he could bring his partner home, and his father said yes. They were given a room with a double bed. Father testified that he did not understand homosexuality, but he accepted it.

[106] While JD was at home in May of 1998, his father took him to the Sudbury Sexual Assault Centre, where he discussed his options with the director. The Centre arranged for

him to speak to a police officer with the Sudbury Regional Police in May, 1998. He went with his parents and the director of the Centre to the police station, where he gave a videotaped interview and later a written statement. He described his relationship with his parents at this time as good and supportive. His relationship with his father began to improve as his father realized what had happened.

[107] After JD returned to Ottawa, he worked for a couple of weeks at a cappuccino bar, but quit because he was too distraught. His partner told him to take some time off, and he would pay the bills.

[108] In September or October, 1998, JD went home to see Father O'Dell charged criminally. He testified at the preliminary inquiry in March, 1999. Father O'Dell was committed for trial.

[109] In November, 1999, JD moved back in with his parents and stayed until after Christmas, 2000. Around March or April of 2000, he went to a Help Centre in his hometown, where he began to see a counsellor a couple of times a week until November, 2000. She terminated the relationship because he was not making any effort to get better. Subsequently, after December, 2001, he began seeing her again. Essentially, according to JD, she has been a sounding board, and she has given him some relaxation exercises.

[110] Father O'Dell's criminal trial took place in June, 2000. He denied the acts of sexual assault. However, on July 4, 2000, he was convicted of having committed indecent assault and an act of gross indecency against JD. The plaintiff described it as "wonderful" to see Father O'Dell handcuffed and led out. On October 2, 2000, Father O'Dell was sentenced to 30 months in custody. He was held in custody for two or three weeks, and then released pending an appeal. The appeal was denied by the Ontario Court of Appeal on December 6, 2001. [Reported as *R. v. O'Dell* (2001), 152 O.A.C. 189.]

[111] JD worked briefly in the summer of 2000 at a haircutting place in his hometown. Subsequently, he was found eligible for support under the Ontario Disability Support Program ("ODSP"), because he had been diagnosed with post-traumatic stress disorder ("PTSD"). That diagnosis was made by Dr. K, a psychiatrist whom he saw in September, 2000. He was also given prescriptions for a number of drugs, which he refused to take.

[112] After trying Toronto and Ottawa as places to live, he eventually found an apartment in Sudbury in March, 2001. Around September, 2001, he moved in with a male friend, with whom he roomed until July, 2002. He then got another place alone in September, 2002,

but moved back home again at the end of January, 2003. JD is still living with his parents. He has continued to struggle with his drinking over the last few years, and he still has angry outbursts. His relationship with his mother has been good, and his relationship with his father has improved over the last two years, as they spend more time together and talk openly. His father had a third heart attack in 2001.

[113] JD has been on the waiting list for treatment at the Homewood Health Centre in Guelph for two years. His goal is to participate in their residential program for those with post-traumatic stress disorder. While he has now reached the top of the waiting list, it is Homewood's policy that he cannot commence treatment until all legal proceedings are finished. While other centres have been suggested for treatment of his alcohol problem, he testified that he did not attend them, as they were essentially detoxification centres, often for people in trouble with the legal system, and he preferred to wait for Homewood, where he could participate in the post-traumatic stress disorder program as well as treatment for his alcohol abuse.

[114] The evidence given by the other family members did not contradict that of JD in any significant way. All agreed that he had been difficult to live with since he was an adolescent because of his rages, his drinking and his isolation.

#### *Father O'Dell's Course*

[115] Bishop Plouffe first heard allegations that Father O'Dell had engaged in sexual activity with a young man when he met Victim One in the spring of 1990. Prior to that, he testified that Father O'Dell was a charismatic priest who appeared to be generally loved by his parishioners.

[116] Bishop Plouffe met with Father O'Dell and asked him to submit to an evaluation. Father O'Dell agreed and was sent to the Servants of the Paraclete in Jemez Springs, New Mexico, where he was first evaluated and then treated for a period of about nine months at the Diocese's expense. For a time, Father O'Dell continued to receive a salary, and then he was given an allowance by the Diocese. He has never participated in public ministry since his removal in 1990.

[117] On January 9, 1992, Father O'Dell was sentenced to six months' incarceration and two years probation after he pleaded guilty to acts of gross indecency between 1980 and 1985 with Victims One and Two. One of the acts described involved manipulation of the penis and scrotum by means of strings and pulleys.

## THE EXPERT EVIDENCE

### *The Psychological Impact*

[118] Dr. Richard Berry gave expert evidence on behalf of the plaintiff with respect to the effects of sexual abuse on children generally and on JD in particular. He is a registered clinical and forensic psychologist with a doctorate in Clinical Psychology from York University. He has been in private practice for 25 years, practising full-time for 12 years. For 19 years, he was associated with Thistleton Regional Centre, a children's mental health centre. For several years, he was Director of Adolescent Services there. In short, he has extensive clinical experience in the area of child sexual abuse.

[119] In the process of writing his reports for this proceeding, Dr. Berry interviewed JD and his parents, and had JD perform a number of psychometric tests. He was already familiar with JD, as he had appeared as an expert witness on behalf of the Crown in the criminal trial of Father O'Dell, giving evidence on recovered memory.

[120] Dr. Berry testified that the impact of child sexual abuse varies from individual to individual. In the short term, the victim may become withdrawn and show symptoms of depression. Some may act out, becoming aggressive to others or defiant of authority, while some may harm themselves, or have suicidal ideation or engage in suicide gesturing. Sleep disturbances are common, as is a decline in the ability to concentrate. Often, there is a fairly marked decline in academic performance. The victim may move towards hyper-reactivity, as well as hypersensitivity. As well, there may be anti-social behaviour, such as defiance, aggression or substance abuse.

[121] Dr. Berry testified that victims often use coping strategies. Often, the individual will engage in avoidance. For example, the victim may dissociate, so that the event of abuse does not register with him or her. Often, they lack a complete recollection of what occurred or a fragmented recollection of events. However, they may have flashbacks of the events of abuse in a parallel or similar situation. In the long term, according to Dr. Berry, the individual who dissociates may feel uneasy without knowing why. Over time, there may be an entrenchment of this approach to avoid dealing with issues. Often, a coercive strategy is needed to make them deal with their problems and engage in therapy. The individual may take a victim stance, blaming his or her problems on someone else. He testified, as well, that victims often end up in abusive relationships, and they often have difficulty in forming intimate long-term relationships. There may be vocational impacts because of the

difficulty in relating to supervisors and colleagues. As well, there are often disturbances in both sexual identity and sexual functioning.

[122] Dr. Berry listed the most common psychiatric conditions found in victims of childhood sexual abuse as depression, borderline personality disorder, post-traumatic stress disorder, disorders in relating to self and others, very high dependency-like needs, and difficulty in using reason to solve problems.

[123] Dr. Berry concluded that his clinical observations of JD, his review of the documentation and the test results were all consistent with a history of childhood sexual victimization. With respect to the tests, the validity scales, with one exception, indicated that the responses were consistent and reliable. Even with the one exception, he concluded that the fairly high elevation on the consistency/ inconsistency scale was consistent with the high level of disturbance with which JD presented clinically.

[124] According to Dr. Berry, JD has an above average intellectual capacity, although on the WRAT test, for basic reading, spelling and math, JD came out well below his functional capacity. Dr. Berry felt that result was consistent with the way JD presented before him, as JD was very labile, depressed and having difficulty concentrating.

[125] Dr. Berry would not say that JD has a learning disability, nor did he accept that there had been such a diagnosis when JD was in Grade 9. At most, he saw evidence of a circumscribed learning disability in math. In his view, JD's inability to concentrate at that time was consistent with a conclusion that the problem was caused by emotional disturbance. He suggested that had the assessors known of the sexual abuse, they might have drawn a conclusion very different from learning disability. Moreover, he was of the view that a learning disability would not be so serious as to cause the kind of academic underachievement which JD has experienced, especially given his obvious intellectual ability.

[126] Had the abuse not occurred, Dr. Berry was of the view that JD had the capacity to complete at least an undergraduate Arts degree at the university level, or he could have completed a community college course. In Dr. Berry's view, the academic record before the abuse indicated that JD was an academic underachiever. However, when assessing the future prognosis, he indicated that JD's ability to achieve academically now is unlikely, as the base line has been lost.

[127] Dr. Berry described JD as very reactive, using emotional outbursts as a way to distance himself. He also uses avoidance strategies. He has a lot of rage, directed at both himself and others, which verges on paranoia.

[128] In his view, the impact of sexual abuse on JD has been severe, extreme and enduring. He is of the opinion that there is no evidence of profound emotional or behavioural disturbance before JD met Father O'Dell, nor anything that can be identified in JD's life before Father O'Dell that would significantly contribute to his current state. He concluded that the underlying cause of JD's problems is the extreme trauma experienced because of the acts of Father O'Dell. Even if JD had a possible learning difficulty, the effect of Father O'Dell's actions would only exacerbate its impact. In Dr. Berry's view, Father O'Dell's actions were the primary cause of the numerous impacts which were identified in the course of his assessment and report.

[129] According to Dr. Berry, JD experiences pronounced and chronic depression, and he has an extremely impoverished sense of self — that is, low self-esteem. He lacks confidence and has difficulty in asserting himself. He has difficulty in focusing, lacks energy and motivation, and he presents as extremely hypersensitive and quick to misinterpret others. He is hyper-reactive, reacting with inappropriate displays of anger. He has ongoing anxiety and is subject to panic attacks. He has a very limited ability to trust other people, especially adult males. He experiences intrusive thoughts and flashbacks that are, at times, intense.

[130] JD testified that he grinds his teeth regularly because of nervousness, and they are worn down. At times, he has vomited frequently in response to stress and overeating. This began in his late teens and has continued. It was worse when he was 19 or 20 and at times such as the criminal trial. He estimated that this occurred for a period of about a month in some years.

[131] Dr. Berry testified that victims of trauma often grind their teeth as a response to stress and anxiety. Frequent vomiting may be part of a bulimic eating disorder or a response to anxiety and is consistent with trauma. He was not aware of anything else in JD's history which suggested a more likely major contributor to teeth grinding.

[132] Like many victims of childhood sexual abuse, JD has experienced dissociation, and this has affected his recall of events. According to Dr. Berry, fragments of memory then come forward in a disjointed manner. Dr. Berry was also of the view that JD has persistently used avoidance strategies over the years as a survival mechanism, including

the abuse of alcohol. JD has also taken a victim stance, blaming all his problems on the abuse.

[133] Ultimately, Dr. Berry diagnosed JD as having five disorders according to the diagnostic and statistical manual for mental disorders DSM-IV: alcohol dependence; post-traumatic stress disorder; chronic, borderline personality disorder; major depressive disorder; and generalized anxiety disorder. One of the results of the abuse, according to Dr. Berry, is JD's confusion about his sexual orientation. Dr. Berry was of the view that there were very few markers, prior to the abuse, to indicate what JD's sexual orientation would be.

[134] According to Dr. Berry, individuals like JD almost need a coercive strategy in order to get them into therapy. It is not enough to tell them to invest in themselves, as that tends to lay blame on the victim. In Dr. Berry's view, the criminal process and now these civil proceedings may serve that coercive function for JD, as they have forced him to examine what happened, rather than avoiding that exercise. This may assist him in beginning the psychotherapy that he needs, but has not yet had.

[135] Dr. Berry recommended treatment for the alcohol dependency, followed by treatment with a cognitive behavioural approach. He was of the opinion that the program at Homewood would be a reasonable starting point for the alcohol problem. This should be followed up by long-term individual cognitive therapy — probably once or twice a week for two to three years and once a week for up to five years. In current dollars, he estimated the cost at \$150 to \$185 per hour. Sessions are usually one hour to one and a half hours. He also suggested vocational rehabilitation programming after the earlier treatment, but this would take at least two years, and perhaps as much as five before it could start. With respect to future vocational prospects, he was of the view that JD might be able to maintain employment within five years, but the kind of employment will probably be basic, low level work, such as a security guard or shelver in a store.

[136] Expert evidence was given on behalf of the defence by Dr. Hy Bloom, who is both a forensic psychiatrist and a lawyer. Dr. Bloom agreed in cross-examination that he had much less clinical experience than Dr. Berry with respect to the issue of childhood victims of sexual assault, and that Dr. Berry had given many more presentations on this subject than he has done. Dr. Bloom was also concerned about the lack of time he had to meet with JD. He met with JD over seven hours on two occasions in January of this year.

[137] Dr. Bloom indicated in his report that he had no major concerns about JD's believability, although he qualified that in examination in chief, indicating that he saw some discrepancies in the way in which JD related certain things that gave cause for concern about his authenticity — specifically, his minimization of his academic challenges, the fact that he told Dr. B that he had been laid off from the hairdressing job in 1995 rather than fired, and the failure to mention difficulties in his family, such as potential violence and his mother's gambling. I note that JD himself was never asked about the gambling issue in cross-examination.

[138] Dr. Bloom was of the opinion that JD would have some difficulty in recalling the events of the abuse or their order, given the timing, the impact on him and the dissociation by him. Overall, he agreed to a substantial degree with Dr. Berry's conclusions. He concluded that JD was "severely sexually victimized" by Father O'Dell. He also diagnosed JD as having post-traumatic stress disorder and borderline personality disorder, and he concluded that the trauma that caused PTSD was the abuse by Father O'Dell. This manifests in flashbacks of the event, often induced by something recalling the abuser, and also manifests in avoidance of anything reminiscent of the traumatic experience. In JD's case, this has led him to avoid hairstyling for men with beards because of the resemblance to Father O'Dell. The borderline personality disorder manifests itself in volatile moods, rage reactions, often marked disturbances with identity, and difficulty with relationships.

[139] Dr. Bloom did not agree that JD was suffering from a major depressive disorder at the time of his report, but he did describe JD as having dysthymic disorder, which is a lower grade depression than major depressive disorder. He did see JD as having fairly chronic dysphoric features, but not some of the other features of a major depressive disorder.

[140] He also disagreed with the diagnosis of alcohol abuse disorder, although he agreed that JD has a history of alcohol abuse that is maladaptive and, in part at least, responsive to sexual abuse. He diagnosed this as alcohol abuse in partial remission. The difference in diagnoses comes from his view that JD experiences no physical dependence on alcohol, nor does he have a tolerance leading to increasing consumption. He also conceded that this distinction he draws with respect to alcohol may be a distinction without a difference.

[141] Where Dr. Bloom differed most significantly from Dr. Berry was with respect to certain other likely causes of JD's difficulties. It is Dr. Bloom's view that JD has likely been homosexual in orientation since a young age, given the predominance of males in his

sexual fantasies and the feeling of being different as a child. As well, he was taken to the portion of Dr. B's notes of January, 1979 where there were references to effeminate characteristics and playing with dolls. He felt that the fact that Mother had raised this issue with the family doctor was a sign of significant concerns.

[142] Dr. Bloom did not believe that JD engaged in homosexual activity as a way of acting out as a result of the abuse. However, he described JD as having ego dystonic homosexuality. In his view, JD is an individual whose homosexual feelings run contrary to his sense of what is right in a person. He also noted that JD's delay in disclosure might be affected by his hesitancy to disclose his sexual orientation, since disclosing the abuse might open up the issue of sexual orientation.

[143] Dr. Bloom agreed with Dr. Berry that the effects of the sexual abuse by Father O'Dell included increased difficulty for JD in relating to male authority figures and an inability to establish comfortable and trusting relationships with men. He agreed that it is common for abuse victims to avoid things that remind them of the abuse.

[144] He also concluded that the experience with Father O'Dell had a significant effect on JD's psychosexual adjustment and is a very important contributing factor interfering with or preventing JD from having a positive self-image around his sexuality. In addition, the fact that the abuse was highly intrusive and occurred in a homosexual context is a further complicating factor, as it would likely have instilled in JD the idea that homosexual involvement is aberrant. JD's relatively impoverished history of intimate relationships is another result of his having been victimized by a person whom he trusted, admired and cared for.

[145] Dr. Bloom also explained that the delay in disclosure was a well-recognized phenomenon of childhood sexual abuse. In JD's case, the delay is based on the traumatic impact of the abuse, the guilt and shame that victims feel, the fear of further stigmatization because of being victimized by Father O'Dell, and the fear of the reaction he might receive. He noted that delay in disclosure sometimes results from the failure to recognize the abuse and its impacts.

[146] While Dr. Bloom concluded that the sexual abuse had profoundly affected JD, he was of the view that there are other factors affecting him. Dr. Bloom interpreted the school records as showing that JD was lacking in motivation and interest from an early age. In his examination in chief, he indicated that there was no substantial change in academic performance in the years after the abuse. However, in cross-examination he clarified his

answer, agreeing that there was a decline in performance post-abuse. This is consistent with what he had said in chief after discussing Dr. Thornburg's report from 1985. According to Dr. Bloom, there is no dispute that the abuse would have exacerbated existing academic difficulties. He also agreed in cross-examination that there is nothing in the school records prior to the abuse which would be the basis for an opinion that JD was doomed to fail high school, or that he could not go on to community college or a liberal arts program at the university level. At most, he said that some red flags went up because of the comments from the teachers. He also agreed that he would be less concerned about JD's performance if the siblings had done no better in their performance. He was not clear if JD had a learning disability and felt that there was no definitive diagnosis of a learning disability. Moreover, he described JD as an intelligent individual.

[147] Dr. Bloom also believed that there may have been an estranged, unsupportive paternal relationship, which might have affected JD in a negative manner. He noted that if the father had homophobic feelings or difficulty with sexuality, that might negatively affect JD. However, he conceded that he was not in a good position to evaluate the home environment. He also stated that JD's problems with his father were contributed to by the abuse, perhaps significantly.

[148] Dr. Bloom found it unfortunate that JD has not yet had any intensive, focused therapy. However, he was careful to say that he was not ascribing any fault to JD for not getting treatment sooner. He attributed this delay, in part, to JD's desire to shut out the negative experiences with Father O'Dell and in part to the fact that JD is an avoider, who has acted out instead of dealing with the issues in his life. However, he noted, as did Dr. Berry, that abuse victims often do not deal effectively with the issues arising from abuse. In Dr. Bloom's view, JD's failure to seek out therapy is not solely because he has been a victim of abuse, although he stated that a disinclination to take responsibility for one's actions can be an after-effect of abuse, just as it can be a part of an individual's personality.

[149] Dr. Bloom indicated that therapy can assist with JD's difficulties with sexual intimacy and romantic relationships. However, motivation is key to success in mental health treatment. He thought that there would likely be periodic times when JD will be unable to work. Ultimately, he did not take issue with Dr. Berry's conclusion of the marked impact of the abuse, but he did not see all of JD's problems as stemming from the abuse. Indeed, he agreed that he still held the view expressed in his report: "I share many of Dr. Berry's

views and see the preponderance of [the plaintiff's] life difficulties as stemming from having been severely sexually victimized."

#### *Other Medical Evidence*

[150] There was evidence from JD about his erectile difficulties, as well as a report dated July 19, 2002 filed from Dr. J. Riddell, a urologist. The latter concluded that JD has erectile difficulties which do not appear to have a physical cause. In his view, the cause appears to be mainly psychological, not physical. Dr. Riddell also reported that JD seemed quite upset when told that the cause was psychological. Treatment is possible with drugs such as Viagra.

[151] JD testified that he has flashbacks of Father O'Dell when he engages in sexual activity. Dr. Berry testified that such flashbacks are common, and that anxiety and stress are often significant components of erectile dysfunction.

[152] In addition to Dr. Riddell's report, there was a report filed by Dr. Izchak Barzilay, a dentist specializing in prosthodontics, and a reply report from Dr. R.J. St. Aubin dated January 23, 2003. According to Dr. Barzilay, frequent vomiting and grinding of teeth has caused a loss of enamel on JD's front teeth, as well as general wear of the front teeth. He recommended crowns on the six upper front teeth and four lower front teeth, plus a bruxism appliance to protect the teeth, at a total cost of \$22,202. He is of the opinion that the crowns will have to be replaced three times and the appliance every two years. He was also of the opinion that at least four teeth may need endodontic treatment at a cost of about \$1,600 per tooth.

[153] Dr. St. Aubin took issue with the need for the endodontic treatment, as well as the cost and frequency of replacement of the crowns.

#### *Economic Loss*

[154] Although JD trained as a hairstylist, he has not worked as one since the summer of 2000, as he testified that he finds it difficult to work closely with people, especially adult male clients.

[155] Melanie Russell, a chartered accountant, gave expert evidence on behalf of the plaintiff with respect to the quantification of economic loss. She worked with three career path scenarios, had abuse not occurred: graduation from community college, graduation from university with a liberal arts degree and commercial pilot. She then assumed two

outcomes because of the abuse: receipt of a disability pension for life or employment at a minimum wage job commencing after treatment.

[156] The commercial pilot scenario was chosen because JD stated that as a child, before the abuse, he had wanted to be a pilot. He very much admired his maternal grandfather, who had been a pilot during World War II and who had owned a small air service company. However, in oral argument, the plaintiff did not rely on the commercial pilot scenario. This seems sensible, given JD's problems with math as a child, which would likely have affected his ability to pursue this career. As well, there is not much evidence to support the conclusion that he would have become a commercial pilot.

[157] With respect to past loss of income from May 1, 1991, following graduation from community college, to December 31, 2002, Ms. Russell calculated the average earnings of individuals with a post-secondary certificate in Ontario. In doing so, she used data from Statistics Canada, *Earnings of Men and Women 1995*, for the years 1992 to 1997, and she used the figures for the age brackets of 15 to 24 years and 25 to 34 years, depending on JD's age. For the years of 1998 and following, she considered the *Survey of Labour and Income Dynamics* for the years 1998 through 2000. Where appropriate, she adjusted for inflation. She also added a 10 per cent premium to represent the estimated differential of Ontario to Canadian earnings.

[158] Her estimate of lost earnings to December 31, 2002, had JD obtained a college diploma, was \$461,088. She then subtracted actual earnings to end up with a figure of \$358,400 for past loss of income. Had JD obtained a university degree, she calculated the loss at \$422,000. Ms. Russell also assumed that 10 per cent should be added to compensate for loss of employment benefits.

[159] With respect to future loss of earnings, had there been no abuse, she assumed that JD's income would rise every ten years, using the salary figure for the relevant age categories found in the Statistics Canada *Survey of Labour and Income Dynamics 2000*. Again, she added a 10 per cent premium for Ontario. She also increased these sums to take inflation into account, using the Consumer Price Index. She then worked with two post-abuse scenarios: unemployment, with receipt of ODSP to age 65, and employment full time to age 65 at a minimum wage job following counselling until December 31, 2004. She concluded that the future loss of earnings, had JD obtained a college diploma, would be \$1,280,292, less \$234,786 if the plaintiff remained on social assistance, for a figure of \$1,045,500. The final number if he obtained minimum wage employment was \$999,600.

[160] Ms. Russell made no adjustments for either positive or negative contingencies. She used a discount rate of 2.5 per cent, adjusted based on the normal Canadian mortality rates for males. No gross-up was made for taxes.

[161] Andrew Neuman gave expert evidence on behalf of the defendant. He is a chartered accountant, with a specialty in fraud examination. He assumed two scenarios had there been no abuse: graduation from community college and commercial pilot. He calculated the past loss of income, assuming no abuse, by starting with the average wage of community college graduates in 1995 for the age group 15 to 24 years at \$26,451.

[162] Mr. Neuman then adjusted forward and back for each year from July 1, 1991 to December 31, 2002 by calculating the average increase of personal income in Canada for each year. This figure reflects both increased earnings by individuals and increased participation in the workforce each year. Therefore, the percentages applied varied from 2.1 per cent in 1994 to 7.06 per cent in 2000. He then discounted the figures by 15 per cent for negative contingencies, which are discussed later in these reasons. Had abuse not occurred, he estimated the past loss of income with a community college diploma at \$276,958. Averaging this with the pilot scenario, he came up with a figure of \$275,105.

[163] In calculating loss of future income, absent abuse, Mr. Neuman assumed no salary increases after 2002, and he used the base figure of \$30,367 for the rest of JD's career, under the community college scenario. The present value of the estimated future employment income is \$635,562. This figure incorporates the 15 per cent negative contingency.

[164] With respect to the amounts that would have been earned after the abuse, he then assumed that JD should reasonably have taken steps to mitigate his damages in 1992, after he first disclosed the abuse to his mother, by entering into therapy. Had the plaintiff done so, Mr. Newman assumed that JD would have been on the road to recovery within two years, and he would either have graduated from community college or from high school by 1996.

[165] He concluded that there was a 50 per cent chance that JD would have obtained a community college degree in 1994 and been employed as a result, or that there was a 50 per cent chance that he would have worked at a minimum wage job. He calculated the overall past and future earnings at \$628,579 following the abuse. When this is subtracted from the earlier figure of \$946,511 (the average of the community college and pilot

scenarios), the estimated loss of income is \$317,931. Without considering the commercial pilot scenario, the loss of income is \$283,941.

#### CREDIBILITY

[166] The defendants have asked me to make findings with respect to the credibility of the plaintiff and other witnesses. In particular, I am asked to find that the plaintiff exaggerated with respect to the number of acts of sexual assault and the gravity of his damages. More particularly, it was suggested that he exaggerated with respect to his erectile difficulties, although this issue was not put to him in cross-examination, nor were other matters raised to suggest other causes of his problems, such as his mother's gambling, financial problems or the sale of the family camp.

[167] The defendants challenged JD's version of events surrounding his initial encounters with Father O'Dell, claiming that Father O'Dell was not in the parish in June, since his appointment did not commence until September 1, 1981 (although his letter of appointment was dated June 1, 1981). They also pointed out inconsistencies between JD's evidence at the preliminary inquiry, criminal trial, and on discovery about the timing and place of their meeting and what was said. Essentially, the defendants took the position that Father O'Dell could not have been in Parish Two in late June, 1981, nor could he have affected JD's switch to the Catholic school system. They also pointed to inconsistencies with respect to the details of Father O'Dell's visit to JD's home.

[168] Father O'Dell did not testify, and the only document which might call into question JD's version of events about the June meetings is an excerpt from the parish registry in Parish One indicating when certain events took place. Those events would not have prevented Father O'Dell from being in JD's town for a period in June, as JD testified, since the only event at which Father O'Dell presided in June was on the 25th.

[169] JD testified that his memory has gotten better over time, as he has reconstructed what has happened over the course of the legal proceedings. I am not surprised that JD has difficulty in recalling the precise details of what occurred many years ago when he was a young child. Moreover, Dr. Berry and Dr. Bloom have both testified of the memory difficulties experienced by individuals who were victimized as children, particularly because of the tendency to dissociate. Dr. Berry also testified that the memory of victims of childhood sexual assault often gets better over time as the individual sorts through the details of what occurred in the past.

[170] I found JD a credible witness, and I see no reason to reject his evidence on the significant issues in the case — especially given the admissions made by the defendants and Father O'Dell's failure to testify. The defendants admitted not only the acts of sexual assault, but also the facts that Father O'Dell spoke to JD of God and religion and told him that in order to get to heaven, he would have to become a Catholic. They also admitted that he became JD's friend and personal and spiritual advisor.

[171] I find that JD did meet Father O'Dell in June of 1981. However, while much was made at trial of the issue whether Father O'Dell was the key reason JD switched to the Catholic school, in the end, this issue is not important to the determinations I have made with respect to liability nor damages. It is the events that occurred during his Grade 6 year and following that are of central importance in this case.

[172] The defendants also challenged Dr. Berry's credibility, suggesting that he was evasive with respect to the interpretation of the school records and the family doctor's notes. I found Dr. Berry to be a thoroughly credible witness. He was understandably reluctant to draw conclusions from the doctor's notes, as it is not clear who made the comments about such matters as depression and effeminate characteristics, nor is it clear that the doctor made any formal diagnosis of depression. I found Dr. Berry to be a measured and careful witness, and I have relied heavily on his testimony in the course of these reasons, as he has greater expertise in the area of childhood sexual assault than does Dr. Bloom.

#### LIABILITY OF FATHER O'DELL

##### *Battery*

[173] Battery is the causing of "another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force" (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 25, 96 D.L.R. (4th) 289).

[174] In this case, there can be no doubt, given the admissions of the defendants, that Father O'Dell committed numerous acts of battery against the plaintiff. There was at least one incident involving the crucifix and another on the altar, and numerous acts of sodomy which occurred while JD was in Grade 7 and 8.

##### *Breach of Fiduciary Duty*

[175] A fiduciary relationship is distinguished by the elements of trust, loyalty and confidentiality (*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 405, 117 D.L.R. (4th) 161). The hallmarks of a fiduciary relationship were set out by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, 42 D.L.R. (4th) 81: the fiduciary has scope for the exercise of some discretion or power; the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[176] The defendants conceded that a priest has a fiduciary obligation in a case such as this. In my view, the evidence clearly supports the finding of a fiduciary obligation in the relationship between a priest and a child who comes to him with religious questions. Archbishop Gervais and Bishop Plouffe both acknowledged that a priest commonly engages in relationships of confidentiality, and he is perceived as a figure of trust and respect. Both JD and his parents placed their trust in Father O'Dell.

[177] I find that Father O'Dell had a fiduciary obligation to JD, and he breached that duty both by sexually assaulting JD and by terrorizing him with threats of hell and threats to his younger brother.

[178] The defendants argued that there was no fiduciary obligation on the part of the Diocese which would give rise to direct liability. The plaintiff did not argue that there was direct liability on this ground, and therefore, I need not deal with this issue.

### *Negligence*

[179] The plaintiff argued that Father O'Dell is liable in negligence, as he breached his professional duty to JD. Again, the defendants did not take issue with this claim. The plaintiff relied on the decision of *N.C. v. Blank*, [1998] O.J. No. 2544 (QL) (Gen. Div.) [summarized 80 A.C.W.S. (3d) 689] for the proposition that there can be liability in negligence, as well as for battery and breach of fiduciary duty. That case involved a breach of professional duty by a psychologist who engaged in sexual intercourse with a patient whom he had been treating.

[180] In this case, there has been both battery and breach of fiduciary duty by Father O'Dell. However, I share the view of the Nova Scotia Court of Appeal in *F.W.M. v. Mombourquette*, [1996] N.S.J. No. 260 (QL) (C.A.) [reported 152 N.S.R. (2d) 109 *sub nom. McDonald v. Mombourquette*] that a deliberate course of conduct can not form the basis for a finding of assault or battery and, as well, a finding of negligence. A finding of battery

in a case such as this is a finding of intentional wrongdoing, not inadvertent wrongdoing or failure to live up to the requisite standard of care, as in negligence. In my view, *N.C. v. Blank* is distinguishable from this case, as the Court there looked at a course of conduct by the psychologist, including the sexual relationship with the patient, that fell below the professional standard of care. In addition, the Court found that there was no genuine consent to the specific acts of sexual intercourse, and so there was battery as well with respect to those acts.

[181] Here, there were acts of battery committed by Father O'Dell. The assaults and threats were a breach of fiduciary duty as well. However, I do not find that he was negligent because of the intentional nature of his acts.

#### LIABILITY OF THE DIOCESE

##### *Negligence*

[182] The plaintiff argued that the Diocese is directly liable in negligence, as it owed him a duty of care, and it breached the standard of care in three ways: in appointing Father O'Dell as a parish priest without properly assessing his suitability, in failing to monitor and supervise him adequately, and in failing to investigate properly after Victim One made his complaint to the Diocese in 1990.

[183] In order for the Diocese to be liable in negligence, it must be established that the Diocese owed a duty of care to the plaintiff, and that it failed to meet the requisite standard of care. The Diocese has argued that while it had a duty of care to its parishioners, it had no duty of care to the plaintiff, a non-Catholic.

##### *Duty of Care*

[184] In order to determine whether there is a duty of care, a court must determine whether there is a sufficient relationship of proximity between the parties, such that the risk of harm to the plaintiff resulting from carelessness on the part of the defendant is reasonably foreseeable (*Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 72 D.L.R. (4th) 580 (Ont. Div. Ct.) at 585). Cases such as *John Doe v. Bennett* (2002), 218 D.L.R. (4th) 276 (Nfld. C.A.), and *K. (W.) v. Pornbacher* (1997), 32 B.C.L.R. (3d) 360 (S.C.), have held that a Diocese owed a duty of care to parishioners in cases where an individual was sexually assaulted by a member of the clergy.

[185] In my view, the defendant Diocese owed a duty of care to the plaintiff, even though he was not a Catholic. Bishop Plouffe agreed that the Catholic Church welcomes people of other faiths, and that discussions about religion with non-Catholics could result in a relationship of confidentiality and trust between a priest and a non-Catholic. He agreed that a priest is a person trusted in the community, and one who deals with the vulnerable, including children. Archbishop Gervais testified that while priests did not have any particular responsibility toward non-Catholics, they were expected to be accepting and cooperative with them and to answer their religious questions. He agreed in cross-examination that the Church encourages non-Catholics to learn more about the Church.

[186] Thus, it was foreseeable that a priest would deal with children, whether in the school or church setting, and that he might deal with non-Catholics and engage in discussions about religion with them in both settings. Those discussions could be private and confidential. JD dealt with Father O'Dell both in the school and church setting, seeking spiritual guidance from him, as well as companionship. In my view, a child like him was just as vulnerable and equally at risk as any Catholic child who dealt with a parish priest. It was reasonably foreseeable to the Church that if steps were not taken to choose suitably qualified priests and to supervise them properly, a child like JD could be harmed, just as a parishioner could be harmed.

[187] The defendants argued that there could be no duty of care, as the Diocese had no knowledge of the actual relationship between Father O'Dell and JD. Actual knowledge is irrelevant in determining whether there was a sufficient degree of proximity between the Diocese and a child like JD to found a duty of care. The question to be determined at this stage is whether JD belonged to a class of persons who were or ought to have been in the contemplation of the Diocese at the material time, not whether the Diocese was aware of JD himself. Given the evidence of Archbishop Gervais and Bishop Plouffe, I find that JD was a member of such class of persons — namely, children dealing with the parish priest in a school and religious context. There was a foreseeable risk of harm to members of that class if the Diocese did not take reasonable care in the selection and supervision of priests. Therefore, the Diocese owed JD a duty of care.

#### *Standard of Care*

[188] The appropriate standard of care is that of a "reasonably careful person" in the circumstances of the employer. In this case, the plaintiff argued that the Diocese failed to

meet the standard of care in the selection and supervision of Father O'Dell and investigation of the first complaint.

[189] Liability for negligence requires fault. A number of cases have dealt with allegations of negligence against a party because of inaction by that person after another individual assaulted the plaintiff. Often these cases involve an employer or a parent. The courts have held that the party is not liable in negligence unless he or she had actual knowledge of the wrongdoing or ought reasonably to have appreciated the risk of the wrongdoing and made inquiries or taken other action (see, for example, *M.M. v. R.F.*, [1997] B.C.J. No. 2914 (QL) (C.A.) [reported [1999] 2 W.W.R. 446] at para. 120).

[190] This principle was applied by the Newfoundland Court of Appeal in *Bennett, supra*, where the Diocese was found liable in negligence because the Bishops knew or ought to have known of a priest's misconduct, and they failed to respond effectively — for example, by removing the priest from ministry. Thus, their acts caused harm to the plaintiff (at 303-4). Similarly, in *Pornbacher, supra*, Quijano J. held that there was no negligence in placing a particular priest in the Diocese, as there was no evidence that the Bishop would have discovered any unacceptable behaviour had he made inquiries (at 373). However, there was negligence in the Bishop's failure to act prudently after receiving complaints that two other priests were sexually abusing children (at 375).

[191] The plaintiff argued that the Diocese failed to meet the standard of care when it made Father O'Dell a parish priest, first in Parish One and later in JD's hometown, both because it failed to assess his suitability, and because it failed to conduct psychological testing. He relied on Canon 521(3) of the *Code of Canon Law*, which states: "In order that one be appointed to the office of parish priest, his suitability must be clearly established, in a manner determined by the diocesan Bishop, even by examination." As there were no documents or testimony concerning any inquiries or examinations made by the Diocese before Father O'Dell was named parish priest in Parish One, I was asked to draw the inference that no inquiries had been made. There was no psychological testing of candidates for the priesthood at the time that Father O'Dell attended St. Augustine's Seminary, nor was there psychological testing done prior to his appointment as a parish priest.

[192] In my view, the plaintiff has not proven that the Diocese failed to meet the standard of care in its appointment of Father O'Dell as a parish priest. There is no evidence that the Diocese was aware of any acts of sexual misconduct by Father O'Dell prior to the

revelation by Victim One in 1990. Nor was there any sexual misconduct by him suspected, as related by all the witnesses for the defendants.

[193] There was no evidence of any reason to be suspicious of his conduct in the years of his formation. Bishop O'Mara gave extensive evidence about the training of candidates for the priesthood, which indicated that faculty members had an opportunity for close observation of the students while they were at the seminary. There were yearly reports from the pastor of his home parish, as well. In the period when Father O'Dell was in training for the priesthood — from 1969 through 1973 — the problem of sexual abuse of children was not on the horizon, according to Bishop O'Mara. He felt that Father O'Dell was a suitable candidate for the priesthood, after having overseen his education at St. Augustine's.

[194] In Father O'Dell's early years as an associate pastor, there were positive comments on his conduct from parishioners. The only negative comments over the years were addressed to his unkempt appearance and poor housekeeping. As an associate pastor, he served in four different parishes, and his appointments would have been discussed with the Personnel Committee of the Diocese. Nothing in his behaviour appears to have raised any suspicion of wrongdoing. Therefore, up to the time of his first appointment as a parish priest, I find that there was no apparent reason for concern about Father O'Dell's behaviour. He appeared to be a suitable candidate for the priesthood and the office of parish priest.

[195] The plaintiff's case rests on the argument that officials of the Church should have been aware of a *general* risk of sexual abuse of children by members of the clergy and taken appropriate steps to prevent it by psychological testing and inquiries. Each of the clergy who testified were questioned about their knowledge of other acts of sexual misconduct by members of the clergy over the years. Each of Bishop Plouffe, Bishop O'Mara, Archbishop Gervais, and Father Copeman had heard of one or more incidents, but generally those incidents occurred after Father O'Dell's training and first appointment as a parish priest. Bishop O'Mara first heard of an incident of sexual misconduct involving a priest and a young male around 1983. Archbishop Gervais heard of one incident around 1978 or 1979, Bishop Plouffe of one in 1986. Other incidents occurred in the late 1980s, with the first known incident in the Diocese of Sault Ste. Marie around 1989, just as Archbishop Gervais left.

[196] At the time of Father O'Dell's selection, training and early years as a priest, there was some awareness of the danger of sexual deviance among priests, but the problem was really not on the horizon, as Bishop O'Mara and Bishop Plouffe testified. A priest takes an oath of celibacy, and he is expected to respect that oath. Nevertheless, the plaintiff argued that the Church should reasonably have engaged in psychological testing of all priests, even though psychological testing was not the norm for candidates for the priesthood at the time that Father O'Dell was in the seminary, nor has it ever been required for parish priests.

[197] I was given no evidence about the efficacy of such testing to reveal that someone is a likely pedophile. Indeed, Archbishop Gervais testified that the testing was first used to assess the psychological maturity of candidates for the priesthood. Clearly, those who engage in sexual abuse of children seek to hide the fact, as did Father O'Dell here, and the plaintiff has not satisfied me that such testing would have been effective to prevent what happened here.

[198] In my view, given the general lack of awareness of the risk of childhood sexual abuse by priests around the late 1970s and early 1980s, it cannot be said that the Diocese acted unreasonably in selecting and appointing Father O'Dell. In my view, the evidence shows that the Diocese acted with reasonable care, given the awareness of the times.

[199] The issue remains whether the Diocese failed to meet the standard of care in its supervision of Father O'Dell. Specifically, the plaintiff argued that by the time Father O'Dell was appointed to JD's home town in 1981, the Diocese knew or should have known of the risk that some priests posed to minors, given their authority and struggle to sublimate their sex drives. He also argued that there was a complete absence of monitoring or supervision of priests, including Father O'Dell in Parish One when he had the teenage boys living with him.

[200] With hindsight, there was cause for concern about Father O'Dell's living arrangements in Parish One with the teenage boys. However, there is no evidence that officials of the Diocese knew of the living arrangements at the time. Father O'Dell did not inform the Bishop of their presence, nor seek his permission to have them there. In the context of the times, no concern was raised by anyone who knew about the boys' presence, such as Father Amadio or Father Copeman. Indeed, Father Copeman testified that he would have found it difficult to believe that there was any sexual activity going on, given Father O'Dell's appearance.

[201] Moreover, even if the arrangements had been discovered, there is no evidence that the response would have been to remove Father O'Dell from the office of a parish priest, as the plaintiff has suggested, since the Diocese had no knowledge or even any rumour of any sexual abuse prior to 1990. According to the evidence with respect to attitudes at the time, this living arrangement was not suspicious, nor was it necessarily a problem if the parents agreed. Bishop Plouffe indicated that the boys' presence would not have been a significant concern, given the level of awareness of sexual abuse in the early 1980s. I accept the evidence that there was no knowledge of misconduct nor reason to suspect it at that time.

[202] The plaintiff has failed to indicate what the Diocese should have done in the way of supervision to prevent the abuse of JD. A priest necessarily leads a fairly independent life, especially in a large diocese like Sault Ste. Marie, where there are many churches, often isolated from one another. The practice of the Bishop was to try to make a parish visit every one or two years, as well as a visit for confirmation, which could be annual. There is evidence that such visits provided one mechanism for the parishioners to voice concerns or complaints about a priest. Appointments of parish priests were reviewed by the Personnel Committee of the Diocese, which would comment on the needs of the communities and the talents of particular priests.

[203] There is no record or memory of any concern about Father O'Dell that is negative, except with respect to his appearance, from either Archbishop Gervais or Bishop Plouffe, nor did Bishop Carter report any problems to Archbishop Gervais when the latter was appointed Bishop. Father O'Dell had a reputation as a charismatic priest, and he was popular with many parishioners. Father Copeman spoke highly of his reputation as a priest.

[204] Again, the plaintiff argued that the Diocese should have been aware of the general risk of misconduct by priests and put better control mechanisms in place. However, as I have said above, the evidence is that the level of awareness of sexual abuse was still very low in the late 1970s and early 1980s, and obviously, a perpetrator tried to keep his activities secret. In my view, there was nothing to suggest to the Diocesan officials in the early 1980s that there was a problem of sexual abuse that needed to be immediately addressed in the Diocese of Sault Ste. Marie. At that time there seemed, at most, to be isolated cases of sexual deviancy or impropriety elsewhere, which were antithetical to the teachings of the Church and to the obligations of a priest.

[205] Moreover, as JD's mother indicated, in those days, she saw no reason to be suspicious when a child spent time with a priest, since he was a man of God and worthy of trust. Her views seem typical of those generally held at the time.

[206] In my view, the Diocese acted reasonably in the way in which it supervised the parish priests, including Thomas O'Dell, in the early 1980s, when the abuse occurred. This is not a case like *John Doe v. Bennett, supra*, where the Diocese was found negligent because of the failure to act despite information brought to the Bishop's attention about the misconduct of a particular priest. Here, there is no evidence of any information brought to the Diocese's attention that should have raised suspicion. In contrast, in *F.S.M. v. Clarke*, [1999] B.C.J. No. 1973 (QL) (S.C.) [reported [1999] 11 W.W.R. 301], Dillon J. found the Church negligent because she held that the Church officials knew of the sexual misconduct or ought to have known, given the circumstances, or the Church was willfully blind to it (at para. 180).

[207] Finally, the plaintiff argued that the Diocese failed to meet the standard of care in the way in which it investigated the complaint of Victim One. Had it taken steps to inform the parish or contact the police, the plaintiff argued that Father O'Dell's abuse of JD might have come to light earlier and the time frame of his recovery might have been accelerated.

[208] When the Diocese received the first complaint, Bishop Plouffe called in Father O'Dell, removed him from public ministry and sent him for evaluation and then treatment at Jemez Springs. At that time, the Diocese did not reveal the complaint to the parishioners. The defendants argued that this was reasonable, as Victim One, then an adult, was the one to decide whether he wished to make public disclosure and go to the police. Moreover, they argued that Father O'Dell was innocent until proven guilty.

[209] Around the time that Victim One made his complaint and Father O'Dell was sent for treatment, the plaintiff had still not disclosed the fact of the abuse by Father O'Dell to anyone. It was not until sometime around mid-1992 that he blurted out to his mother that he had been raped, but he did not disclose the details to her then. Indeed, he was unable to disclose the name and the fact of the abuse by Father O'Dell until mid-1996. Even today, he has been unable to address the problems caused by the abuse by engaging in therapy.

[210] While I find it difficult to fathom why Bishop Plouffe never asked Father O'Dell if there were other victims, I do not find negligence in the way in which the Diocese responded to Victim One's complaint. They removed Father O'Dell from public ministry,

thus avoiding the risk of further harm. They left to Victim One, an adult, the choice whether to go to the police. This was a reasonable response, for as Father Copeman observed, it should be the victim's choice whether and when to disclose.

[211] Finally, I fail to see that any damage to JD was caused by the way in which the Diocese investigated. Given the evidence regarding JD's inability to disclose and deal with the impact of the abuse, I find it highly speculative for the plaintiff to argue that had there been a more rigorous investigation after Victim One's complaint in 1990, JD might have gotten treatment earlier. The record does not support that conclusion. Therefore, there is no basis to find the Diocese liable in negligence as a result of the investigation. The claim against the Diocese in negligence fails.

#### THE VICARIOUS LIABILITY OF THE DIOCESE

##### *The Legal Test*

[212] Vicarious liability is a form of strict liability or no fault liability, since it is imposed on an employer for the acts of an employee in the absence of fault by the employer. The traditional Salmond test held the employer vicariously liable for the employee's torts if the employee's tortious acts were authorized by the employer, or if the employee's unauthorized acts were connected with the authorized acts to the extent that they must be viewed as a mode of performing authorized acts (*Salmond and Heuston on the Law of Torts* (20th ed., 1992) at 456).

[213] The difficulty in applying this test has always been to determine whether the employee's act was an independent one, or whether it was an unauthorized mode of doing an authorized act. The Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534, 174 D.L.R. (4th) 45, and *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 174 D.L.R. (4th) 71, attempted to reconcile the cases dealing with the second branch of the Salmond test and to provide a principled approach for the determination of vicarious liability in cases of sexual misconduct by an employee. McLachlin C.J.C., writing for the Court in *Bazley*, stated that the first line of inquiry for the trial judge is to determine whether there are precedents in decided cases on similar facts (at 544, 545). She went on to observe that "only very close cases may be useful" (at 544), and if prior cases do not clearly suggest a solution, the judge should determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability (at 545).

[214] The two broad policy goals underlying vicarious liability are fair compensation for the victim when an employer has introduced a risk into the community and deterrence of further harm (at 554). "Fair" compensation requires a consideration of the interests of both the employer and the victim.

[215] These policy goals require that the employee's conduct must be closely and materially tied to a risk that the employer has placed in the community (at 549, 556). McLachlin C.J.C. also emphasized that an employer's vicarious liability does not depend on the foreseeability of harm in the traditional negligence sense (at 558). She quoted from J.G. Fleming, *The Law of Torts* (9th ed., 1998), where it is stated: "The inquiry is not directed at foreseeability of risks from specific conduct, but at foreseeability of the broad risks incident to a whole enterprise." She also emphasized that mere opportunity to commit a tort was not sufficient to create vicarious liability. The inquiry must be into the strength of the causal link between the opportunity and the wrongful act (at 559).

[216] In determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrongdoing in those cases where precedent is inconclusive, McLachlin C.J.C. set out the following principles to be applied by courts (at 559-60, emphasis in original reasons):

- (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
- (2) The fundamental question is whether the wrongful act is *sufficiently related* to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate 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. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
- (3) In determining the sufficiency of the connection between *the employer's creation or enhancement of the risk* and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
  - (a) the opportunity that the enterprise afforded the employee to abuse his or her power;

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

[217] With respect to sexual abuse by employees, she stated, "It must be possible to say that the employer *significantly* increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks" (at 560). She went on to say:

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. [At 563.]

Finally, she refused to create an exception for non-profit organizations (at 565-6).

[218] Applying those principles in *Bazley*, the Court held that the employer, a non-profit foundation operating residential care facilities for emotionally disturbed children, was vicariously liable for sexual abuse by an employee who acted in a quasi-parental role, caring for the residents' intimate physical and emotional needs. In contrast, the Court split 4 to 3 in *Jacobi v. Griffiths*, which was decided the same day as *Bazley*. The majority held that the Vernon Boys' and Girls' Club, a non-profit recreational club, was not vicariously liable for sexual abuse by the program director of the club.

[219] In contrast to the facts in *Bazley*, the program director did not offer parenting to the children who came to the facility; rather, his job was to organize recreational activities. The children were assaulted away from the club and outside working hours, with the exception of one incident. Griffiths was not placed in a special position of trust with respect to the children's care, protection and nurturing. Binnie J. noted that even if one of the plaintiffs described Griffiths as a "god-like authority", that did not reflect a state of affairs which the club promoted, nor was it foreseeably incidental to the enterprise (at 594). He went on to say at 596:

While any situation which places adults in contact with children creates some possibility of abuse, an employer who encourages an employee to create no more than a positive rapport with children is not at the same end of the spectrum of risk as the employer in *Children's Foundation*.

Important to the majority's conclusion was the absence of job-created authority over the children (at 597, 609).

[220] Therefore, the central question to be determined in this case is whether the Diocese significantly increased the risk of sexual abuse by putting an individual in the position of Father O'Dell and requiring him to perform the duties of a parish priest. The Diocese argued that there should be no vicarious liability, either because Father O'Dell was not an employee, or because there was not a significant increase in risk created by placing Father O'Dell in the position of a parish priest in JD's hometown, especially given that JD was not a Catholic. As well, the Diocese argued that Father O'Dell's acts were independent and not linked to his position.

*Was Father O'Dell an employee?*

[221] The most common relationship giving rise to vicarious liability is that of employer and employee, but vicarious liability may also arise out of other relationships, such as principal and agent. In determining whether there is vicarious liability, the courts have looked at the substance of the relationship, rather than its form.

[222] Factors considered in determining whether a relationship is one of employer and employee include control, ownership of tools, chance of profit and risk of loss (*Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.) at 169). Other factors include the power to select, control and train the alleged employee, as well as the burden of remuneration (see, for example, *B.M. v. Mumford*, [2000] B.C.J. No. 2490 (QL) (S.C.) [reported 84 B.C.L.R. (3d) 146] at paras. 23-24; *T.L. v. Hilton*, [2001] O.J. No. 4619 (QL) (S.C.J.) [reported 207 D.L.R. (4th) 765 *sub nom. Lariviere v. Hilton*] at para. 15).

[223] The defendants argued that there can be no vicarious liability here because Father O'Dell was not an employee of the Diocese. A priest is incardinated into a Diocese at the time of his ordination. The defendants argued that the priest is not hired by the Diocese, nor is he normally paid by it; rather, he is paid from the offerings of the parish, although on rare occasions, according to Bishop Plouffe, the Diocese will supplement the salary.

[224] In both *Bennett, supra* (at 292-3) and *Pornbacher, supra*, the Courts found that the Diocese was in the position of an employer for purposes of the doctrine of vicarious liability. I reach the same conclusion here. In this case, the fact of control is key to the determination that the relationship is, in effect, that of employer and employee for purposes of the doctrine of vicarious liability. Before an individual can enter training for the priesthood, he must be approved by his Diocese, as was Father O'Dell here. Even though a parish priest is normally paid from the offerings of the congregation, the priest is

attached to a particular Diocese through incardination. He swears an oath of obedience to the Bishop, and the Bishop exercises significant control over his life.

[225] Bishop Plouffe described the priest as "an extension of the Bishop, his immediate collaborator". While they may be collaborators, as the Bishop states, the relationship is still hierarchical, with the Bishop exercising extensive control over the parish priest. It is the Bishop who determines his assignments, generally after consultation with the Personnel Committee. Most importantly, the Bishop has the power to remove the priest from his post or from performing public ministry, or he may impose a lesser form of discipline. According to Canon Law, the priest cannot engage in commerce without the permission of the Bishop. All this illustrates that the priest is subject to close control by the Bishop of the Diocese.

[226] Moreover, after Father O'Dell was removed from priestly duties by Bishop Plouffe, he continued to receive an allowance from the Diocese. There has been a pension plan in existence for the priests of the Diocese from the 1970s at least. The Diocese paid for Father O'Dell's treatment at Jemez Springs, as well as his legal fees in the criminal process.

[227] On these facts, I find that Father O'Dell was in a relationship indistinguishable from that of an employee of the Diocese for purposes of the doctrine of vicarious liability.

*Is there conclusive precedent with respect to vicarious liability for sexual misconduct?*

[228] The Diocese conceded that the facts of the present case are so extraordinary that it is impossible to apply previously decided cases, in accordance with the first step of analysis in *Bazley, supra*. Nevertheless, it is useful to consider two Canadian appellate court decisions in which vicarious liability of the Catholic Church for sexual misconduct by a priest has been an issue. In *Mombourquette, supra*, the Nova Scotia Court of Appeal held that a Diocese was not vicariously liable for sexual assaults committed by a priest against a boy, as did a majority of the Newfoundland Court of Appeal in *Bennett, supra*. Leave to appeal and cross-appeal the decision in *Bennett* has been granted by the Supreme Court of Canada. In contrast, vicarious liability was found by a judge of the British Columbia Supreme Court in *Pornbacher, supra*.

[229] In my view, *Mombourquette* is not helpful in determining the issue of vicarious liability, although it has been cited by the defendants. The case was decided before the Supreme Court of Canada's decisions in *Bazley* and *Jacobi, supra*. The Nova Scotia

Court's reasons were brief and turned on the conclusion that the priest could not have been acting in the course of his employment when he acted criminally and in a manner totally contrary to the religious tenets of the church (at para. 47). The Court applied the Salmond test, and therefore, its conclusion rested on an approach which the Supreme Court has rejected, since it focused only on the issue of whether the priest acted in the scope of his employment. As well, it ignored the line of cases in which employers have been held liable for criminal acts, such as theft.

[230] Binnie J. did refer to *Mombourquette* in *Jacobi*, when he reviewed precedents (at 602-3). However, in my view, this does not indicate approval of its reasons. Binnie J. did this in the context of looking at the weight to be given to the employer's aims in determining vicarious liability. I note that he also referred to *Pornbacher*, in the later section of his reasons dealing with cases of risks inherent and foreseeable in the nature of the employer's enterprise (at 608). That case reached a different conclusion with respect to vicarious liability.

[231] Marshall J.A. in *Bennett* assumed that Binnie J. had approved *Mombourquette*, a conclusion which I do not share, given the reference to *Pornbacher*. As well, I note that McLachlin C.J.C. commented on the formalistic and unhelpful reasoning in *Mombourquette* in her dissenting reasons in *Jacobi*. Therefore, I find that *Mombourquette* is of no assistance, as it applied a test which has been superceded by the principled approach in *Bazley*. Moreover, I note that the facts of the case are different from those before me, as the priest there met the victim in the course of coaching a wrestling team, and there does not seem to have been the same degree of connection between the priest's religious functions and the abuse that there is in this case.

[232] The Newfoundland Court of Appeal in *Bennett* did have the benefit of *Bazley* and *Jacobi* when it made its decision. However, in my view Marshall J.A., writing for the majority, erred in the application of the Supreme Court's decisions, and the minority decision of Cameron J.A. applied the principles correctly. In particular, Marshall J.A. was preoccupied with the policy considerations against holding non-profit charitable organizations vicariously liable for sexual assault. He concluded that non-profit charitable institutions should not be liable for acts unconnected with and inimical to their purposes, and he stated that support for his premise that social policy justifies rejection of vicarious liability for non-profit charitable bodies was to be found in Binnie J.'s judgment in *Jacobi v. Griffiths* (at 298, 302).

[233] However, it is clear that the Supreme Court of Canada has refused to carve out an exception for non-profit institutions (*Bazley* at 563; *Jacobi* at 617). What Binnie J. said in *Jacobi* was that nonprofit organizations are entitled to insist that the strong connection test between enterprise risk and sexual assault be applied with "appropriate firmness" (at 617).

[234] Moreover, Marshall J.A. failed to apply the principled approach to the facts in the particular case. He emphasized that the acts of the priest were clearly unconnected with his position, without considering the other factors set out in *Bazley*. Again, I note that Binnie J. stated in *Jacobi* that it is relevant to consider the employer's aims, as they provide some guidance as to the risks that the employer reasonably believed that it was introducing to the community and for which it may reasonably be held responsible (at 602). However, that is not the only factor which he considered.

[235] In contrast, the minority decision of Cameron J.A. examined the principles and the facts in detail, and then upheld the trial judge's determination that the Diocese was vicariously liable. In her view, the parish priest not only had the opportunity to abuse victims, but he was given a position of power vis-à-vis children who participated in church activities (at 348-49). He also used fear, intimidation and the trust of their parents to exploit his victims. She concluded:

... the abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the Church and Bishops fostered, as well as the special opportunities for exploitation of that relationship it furnished. [At 349.]

*Is the Diocese Vicariously Liable Here?*

[236] Applying the principled approach to the facts of this case, the first question to be determined is whether "the employer *significantly* increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks" (*Bazley, supra* at 560, emphasis in the original reasons).

[237] In *Bazley*, an important consideration was the extensive period in which the employee was alone with the child, and the extent to which the adult supervised the child in intimate activities, which increased the opportunity for abuse and so increased the risk of harm. Obviously, the risk of abuse is significantly higher in a residential setting like the one in *Bazley*, where the employee cares for a child in a quasi-parental role and is engaged in intimate physical care. In contrast, the majority in *Jacobi* held that the boys' and girls' club was not vicariously liable for the sexual assaults committed by the program

director, emphasizing that he was not placed in a position of authority over the children, as in *Bazley*, nor was he engaged in their care, protection or nurturing (at 596).

[238] While the plaintiff argued that Father O'Dell's conduct was closely tied to a risk that the Diocese created in the community, the Diocese argued that there should be no vicarious liability, as the acts of Father O'Dell were clearly unauthorized, secret, and committed against an individual who was not a member of the parish. The Diocese took the position that the abuse was not committed within the specific context of Father O'Dell's responsibilities or duties as a priest and was an independent act. Although he was clearly encouraged and expected to form relationships with child parishioners, there was no specific expectation of him with regard to non-parishioners, and the Diocese received no benefit from Father O'Dell's contact with JD, since JD was not Catholic. As well, JD was visiting Father O'Dell with the permission of his parents and went to him voluntarily on each occasion. As JD and his family were non-Catholic, this would have further eroded the level of authority which Father O'Dell might have had over JD. Finally, the abuse occurred mostly in the rectory, which was the priest's living quarters.

[239] The starting point for analysis must be the constellation of duties and responsibilities expected of a parish priest by the Diocese. Archbishop Gervais and Bishop Plouffe gave evidence that the priest was expected to be a presence in the schools. Both Catholics and non-Catholics attended those schools, and religion was taught to all, with the priest participating in classes regularly. There was evidence, as well, about priests being expected to work with children in other settings, such as the training of altar servers or at camps.

[240] There is evidence that Father O'Dell mixed regularly with the children in the schoolyard, that he taught religion once or twice a month at the schools, and that he heard confession at the schools once or twice (including the confession of JD). Father Copeman commented on Father O'Dell's reputation of working well with children.

[241] Archbishop Gervais and Bishop Plouffe also testified that the priest was to provide spiritual leadership in the community, and he was expected to engage in confidential discussions with members of the community, including children. It was expected that he would respond to non-Catholics if asked questions about religion. A priest was expected to be a role model in the community, and it was acknowledged that people would treat him with respect and trust. Archbishop Gervais also conceded in cross-examination that a

priest is viewed as an authority in spiritual matters and is normally listened to and obeyed in such matters.

[242] Father O'Dell's position as a parish priest gave him the opportunity to develop a trust relationship with JD through a grooming period in Grade 6, and then allowed him to abuse that trust, both through sexual and psychological means. Father O'Dell developed a relationship with JD both through the religion classes and schoolyard contacts at the Catholic schools and also in the one on one encounters at the church and rectory, when JD raised questions about religion and spirituality with him. The evidence of JD was clear and uncontradicted that Father O'Dell was a spiritual mentor to him, who provided answers to his questions about religion and life. Father O'Dell taught him prayers, heard his confession at least once, and told him that he must obey the priest. JD admired him and trusted him and came to spend a great deal of time with him at the church and rectory. Religion here was a significant part of the "bait of attractions" that Father O'Dell used to develop an intimate relationship with JD.

[243] A parish priest like Father O'Dell inevitably worked alone, without direct supervision on a day-to-day basis. At the time that the abuse occurred in this case, people were less aware of the dangers of sexual abuse than they are today. JD's parents were not concerned about the time which he spent alone with Father O'Dell because, in the words of JD's mother, he was a man of God, and therefore, to be trusted. Thus, his position as a priest conferred on him a mantle of trust, which gave him the opportunity to prey upon JD without raising suspicion in his parents.

[244] However, mere opportunity to commit sexual abuse is not enough to render an employer vicariously liable for sexual abuse committed by an employee. Important to the determination of vicarious liability in this case are the factors of psychological intimacy in the relationship between a priest and an individual who seeks spiritual guidance and the job-created authority of a priest. Both significantly increased the risk of sexual abuse of a child like JD, in my view.

[245] Father O'Dell developed a special relationship of spiritual guidance and instruction with JD. Over time, he developed a relationship of psychological intimacy with JD, which gave him psychological power over JD. In my view, this intimacy and power directly resulted from the exercise of responsibilities expected of a parish priest. The evidence is clear from the defence witnesses that a priest may develop a relationship of spiritual intimacy based upon confidentiality with an individual who comes to him for religious

instruction and guidance. This type of relationship may occur with a child, as it did here. JD came to Father O'Dell with "big questions" about life and religion that had long preoccupied him, and he got answers from a person he perceived as a friend, mentor and role model.

[246] Much has been made of the fact that JD was a non-Catholic. However, I find the distinction made between the situation of a Catholic child and the plaintiff an artificial one, particularly on the facts of this case. JD was attracted to Father O'Dell both because of his personality and his ability to answer JD's "big questions". The fact that Father O'Dell could provide answers about religious questions attracted JD to him and led to a closer relationship with JD than Father O'Dell was likely to have had with a Catholic less committed to religious study and inquiry.

[247] A priest is a person of authority in the community in religious matters. In this case, Father O'Dell abused that authority. Over time, spiritual discussions with JD were transformed into threats of hell and accusations of wrongdoing, which allowed Father O'Dell to exercise psychological power over JD. This both facilitated the acts of abuse and impeded JD from revealing the acts to his parents or others. JD was told that he was a sinner and made to confess. As well, he was told that no one would believe him if he disclosed what had happened, a threat made more real because of the respected role of a priest in the community.

[248] The defendants suggested that the authority of Father O'Dell over JD would be less than it would have been if he were a Catholic. That is not borne out by the evidence of JD. He worshipped Father O'Dell, perceived him as an authority in matters of religion, and was terrified by what happened and the threats made by Father O'Dell.

[249] Clearly, the acts of sexual abuse committed by Father O'Dell were totally antithetical to the beliefs of the Catholic Church and contrary to his priestly vows. Nevertheless, his priestly functions were inextricably enmeshed with his wrongful acts against JD. Even though JD was ultimately confirmed in the Anglican Church, he discussed with Father O'Dell the possibility of becoming a priest or converting to the Catholic Church in Grades 7 and 8, when the abuse was occurring. While the conversion did not occur because of his parents' insistence that he be confirmed an Anglican, the fact that JD sought to convert and thought of priesthood because of his interaction with Father O'Dell indicates that the relationship between them, in part, carried out the religious objectives of the Church.

[250] Another factor in determining whether the employer should be held vicariously liable is the vulnerability of the victim. Archbishop Gervais agreed in cross-examination that a priest with a sexual attraction to children would try to keep that secret, and this created a real danger for vulnerable individuals, given the independence and authority of the priest. While any child who looked to a priest for religious and moral guidance would be vulnerable to sexual assault if the priest were a predator, a child like JD was particularly vulnerable. He felt different from other children, and he had big questions about life. His spiritual and personal relationship with Father O'Dell was very special to him. Therefore, he was particularly vulnerable to an abuse of the priest's power.

[251] This is not a case like *Jacobi*, where the defendant Griffiths was encouraged to develop rapport with children, but was not given job-created authority over them. A priest like Father O'Dell was expected to give spiritual guidance to Catholics and to individuals like JD who came to him with questions. He was expected to develop relationships of trust and confidentiality, even with children, and he was the authority on matters of the Catholic religion.

[252] In *Jacobi*, the presence of a parent was held to be an important factor that made the children less vulnerable than the victims in *Bazley, supra*. While JD had parents and a good family environment, his parents felt no reason for concern about JD's contacts with Father O'Dell precisely because he was a priest. Had JD been spending time with another adult male, his mother said, she would have investigated. Moreover, one of the reasons JD felt that he could not disclose the abuse to his parents was the fear that Father O'Dell would harm his brother and the fear that he would not be believed. In this case, he did not feel able to go to his parents.

[253] The Diocese has argued that it would be unjust to hold it vicariously liable because the acts of sexual misconduct were not foreseeable in the early 1980s. However, it must be remembered that foreseeability in this context focuses on the foreseeability of broad risks, not risks pertaining to the acts of a specific individual. Moreover, we are not speaking here of foreseeability as that term is understood in negligence law.

[254] At the time that JD was abused, there was some awareness that priests were capable of deviant sexual desires. Both Archbishop Gervais and Bishop Plouffe admitted in cross-examination that they had been generally aware for years that priests, like other human beings, could be subject to deviant sexual desires, which would be kept secret. They also acknowledged that in light of the special role of priests dealing with vulnerable

people, including children, such desires could pose a significant risk of harm if they existed in a particular case.

[255] The Diocese also argued that deterrence, one of the policy considerations in determining whether there is vicarious liability, is not a factor that applies here, given the religious and charitable character of the Catholic Church. Reliance was placed on the majority reasons in *Bennett, supra*, where the societal implications of holding the Church vicariously liable weighed against finding vicarious liability.

[256] The Supreme Court of Canada made it clear in *Bazley* and *Jacobi* that there is no exemption from vicarious liability for nonprofit charitable organizations. There is no evidence in this case to support the conclusion that a finding of vicarious liability on the part of the Diocese would have any significant impact on its ability to carry on its religious or charitable functions. Moreover, the evidence about the financial situation of the Diocese shows that it is a significantly different organization from the largely volunteer organization discussed in *Jacobi*. The employer there was a largely volunteer organization with two paid employees, and it largely subsisted on the basis of grants and donations.

[257] The Diocese here is part of a large and complex ecclesiastical organization. In my view, vicarious liability can play a deterrent function here in promoting creative efforts to deal with the problem of sexual abuse — for example, through greater supervision of priests, psychological testing, and possible proactive responses to sexual abuse in the Church. Indeed, the 1992 publication of the *ad hoc* Committee of the Canadian Conference of Catholic Bishops, *From Pain to Hope*, discusses the problem of sexual abuse of children, the various interests to be considered, and steps to be taken — for example, in priestly formation or the development of protocols to deal with complaints of sexual abuse of children.

[258] In sum, it is clear from *Bazley* and *Jacobi* that a determination whether an employer is vicariously liable is made after a close analysis of the facts of the particular case. I find that Father O'Dell's priestly functions not only afforded him an opportunity to abuse his power, but his priestly functions were also inextricably enmeshed with his wrongful acts against JD. This is not a case of an "independent" act by the priest, detached from his job-related responsibilities. His wrongful acts were directly related to the psychological intimacy inherent in the role of a priest as conceived by the Church, and were directly related to the psychological powers inherent in his functions as a priest. As the sole parish priest in JD's hometown, operating with great independence and no day to day

supervision, he had been granted substantial power within his parish by the Diocese. His dealing with vulnerable persons also formed an important part of his priestly functions.

[259] JD came to him for spiritual guidance and considered converting to Catholicism. Spiritual discussions and religious teaching with JD were transformed over time into terrorizing threats of hell and descriptions of children being burned alive because they did not obey the priest. Spiritual direction was transformed into commands for sexual submission and silence, backed up by threats of harm to JD's brother, boasts that no one would ever believe JD, and accusations that he was a sinner.

[260] Given the facts of this case, I find that there was a significant connection between the employment of Father O'Dell and the abuse. In my view, a significantly increased risk of sexual abuse of a child like JD was created by putting an individual like Father O'Dell in the position of a parish priest and requiring him to perform his assigned responsibilities. Therefore, the Diocese is vicariously liable for the damages caused by the acts of Father O'Dell.

THE *LIMITATIONS ACT*, R.S.O. 1990, c. L.15

[261] No limitation period exists in Ontario for causes of action based on the breach of a fiduciary obligation (*M. (K.) v. M. (H.)*, *supra*, at 59). However, the defendants argued that the causes of action in negligence and battery are barred, as the limitation period has run. According to the , the limitation period for an action in negligence is six years and for an action in battery four years (s. 45(1)(g) and (j)). While I have not found liability in negligence, it is still necessary to deal with the limitations issue, in the event that I am in error.

[262] There was a suggestion in the written argument that the Diocese can claim the benefit of the limitation period of six years, even if vicariously liable for Father O'Dell's breach of fiduciary duty. No authority is cited for this proposition, and it must be incorrect. Vicarious liability is just that — vicarious or derivative of the liability of the employee. Therefore, it follows that the same limitation period would apply both to the wrongdoer and the employer who is vicariously liable for his acts.

[263] In *M. (K.) v. M. (H.)*, *supra*, the Supreme Court of Canada dealt with the application of limitation periods in cases where incest had occurred when the plaintiff was a child. In my view, there is no reason to treat cases of incest differently from sexual abuse of children by someone other than a relative. In each case, as Dr. Berry and Dr. Bloom have

explained, there are often long periods before disclosure occurs, and the victim often has difficulty in determining the connection between the assault and the harm suffered.

[264] The Supreme Court held that although tort claims for sexual abuse are subject to limitation periods, the rule of discoverability applies. In applying the discoverability rule, LaForest J. stated:

In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes. [At p. 35.]

The Court went on to say that "the issue properly turns on the question of when the victim becomes fully cognizant of who bears the responsibility for her childhood abuse, for it is then that she realizes the nature of the wrong done to her" (at p. 45). Finally, the majority stated that there is "a presumption that certain incest victims only discover the necessary connection between their injuries and the wrong done to them (thus discovering their cause of action) during some form of psychotherapy" (at p. 47). The defendant can rebut this presumption by leading evidence showing that "the plaintiff appreciated the causal link between the harm and its origin without the benefit of therapy" (at p. 48).

[265] The Statement of Claim in this action was issued in June, 2001. The defendants argued that the limitation period in this case began to run in the summer of 1987, when JD first confronted Father O'Dell. Alternatively, it began to run from the early 1990s when he told his brothers that he had a "big secret". Finally, the period was said to have run from November, 1996, when he tried to commit suicide.

[266] In my view, the limitation period did not begin to run in 1987, the first date suggested by the defendants. For one thing, the plaintiff was not yet of the age of majority, and a limitation period cannot begin to run until the age of majority (s. 47 of the Act). In any event, the defendants have confused JD's awareness that there had been some incidents involving Father O'Dell with his ability to reconstruct what had happened, the fault for what had happened, and the causal link between the abuse and his own condition, both emotional and vocational. I accept JD's evidence that he was not aware of the injuries that Father O'Dell had caused him in the fall of 1987. He was aware that he had been assaulted, and he felt rage, but the connection was not made then between the assaults and the range of emotional and mental injury inflicted. As he testified, he still felt confused and fearful.

[267] The defendants also relied on the fact that JD told his brothers several times that he had a "big secret" when they asked what was wrong with him. The evidence indicates that he said this at various times — for example, when he was living with OB in 1992-93 or when YB spoke to him in Ottawa around 1994.

[268] Dr. Berry stated that this might indicate JD was making some kind of a connection between the abuse and the harm suffered, in the sense that JD was aware of things that bothered him. However, Dr. Berry was of the view that JD was not at a stage in the early 1990s where he had the capacity to address what had happened. In his view, to hold JD accountable for addressing the issues at that time would be, in effect, to blame the victim who has been so traumatized that he is incapable of obtaining psychological help. I accept Dr. Berry's evidence.

[269] To meet the test in *M. (K.) v. M. (H.)*, the plaintiff must have a "substantial" awareness of the harm and its likely cause. I find that in the early 1990s, JD lacked substantial awareness of the connection between the extent of the harm suffered and the abuse. The reference to a "big secret" does not indicate that he had made any real and clear connection between the abuse and his emotional problems — for example, his alcohol abuse or depression. Indeed, in this period and throughout his life since the abuse, there has been a pattern of avoidance with respect to the memories of the abuse and an inability to discuss the abuse with anyone. It was not until mid-1996 before he was able to reveal that Father O'Dell had abused him as a child. In my view, he was not making the connection in 1992 between his problems and the abuse.

[270] In the alternative, the defendants argued that the limitation period began to run in November, 1996 at the time of the suicide attempt. JD did indicate that after the suicide attempt, he realized that he was not at fault for what had happened, and he began to appreciate that Father O'Dell bore the responsibility for his emotional and psychological problems. The defence argued that this is the latest date at which the limitation period began to run. The result would be to bar the claim in battery, but not the claim in negligence.

[271] Dr. Berry was asked about the impact of the suicide attempt. He concluded that it was a part of a process in which JD has been putting together and understanding the impact of the assaults by Father O'Dell. According to Dr. Berry, JD at that point started to make the connection between his own behaviour and the abuse, but this should not be seen as a moment where suddenly a light went on, and JD appreciated all that had

happened. Rather, this was part of a process of realizing what occurred, in which JD has been recognizing the connection between his problems and Father O'Dell and beginning to address his problems constructively.

[272] In *M. (K.) v. M. (H.)*, the victim remembered the acts of incest from her childhood and even made disclosures about them at various times, which were not believed. However, in that case, the limitation period was held not to have run until after she began therapy as an adult, because she then saw the nexus between the injuries and the incest.

[273] This is not a case like *M. (K.) v. M. (H.)*, in that there has yet to have been therapy. It was not until April of 2000 that JD began to see a counsellor regularly, although she has not engaged him in real therapy. Therefore, the presumption that the limitation period begins to run from the time of therapy cannot apply.

[274] The evidence shows that over time, JD has been coming to appreciate the impact of the abuse on his life. While he attributed blame for the assaults to Father O'Dell at the time of his suicide attempt in November 1996, I find that was not enough to trigger the running of the limitation period. I accept Dr. Berry's evidence that there has been an ongoing process in which JD has been coming to realize the connection between the emotional and vocational problems which he has experienced and the abuse by Father O'Dell. However, this is not a case where a light went on in November, 1996, and the connections were made between the assault and the extensive harm suffered, such as the alcohol abuse, personality disorder or post-traumatic stress disorder. JD was not even able to tell his mother about the abuse until early January of 1997. Around February, 1997, he met Dr. McGuinness, with whom he began talking about his problems over the next two years. However, he was unable to engage in more formal therapy. For example, he did not follow through with the psychiatrist whom he saw in March, 1997. The diagnosis of post-traumatic stress disorder was not made until September, 2000.

[275] In my view, JD's appreciation of the connection between his injuries and the abuse has been achieved through the course of the criminal and civil litigation, but it is an ongoing process. It was not until May, 1998 that he first went to the Sexual Assault Centre to discuss his options. I find that JD did not have substantial awareness of the connection between his injuries and the abuse through 1997 and even well into 1999. Therefore, the cause of action in battery is not barred, since the Statement of Claim was issued in June, 2001, which was within the limitation period, nor would a cause of action based on negligence be barred.

## NON-PECUNIARY DAMAGES

### *Quantification*

[276] The essential purpose of tort law is to place the plaintiff in the position in which he would have been, absent the defendant's actions. The plaintiff is entitled to "fair and reasonable compensation" for the non-pecuniary damages which he sustained and will continue to suffer as a result of the wrongful conduct (*Andrews v. Grand & Toy Ltd.*, [1978] 2 S.C.R. 229 at 264, 83 D.L.R. (3d) 452). The purpose of damages for non-pecuniary loss is to compensate the plaintiff for pain and suffering and loss of amenities and enjoyment of life.

[277] In the case of battery, an award for non-pecuniary damages covers pain and suffering, as well as aggravated damages relating to the manner in which the wrongful conduct was committed (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 263, 92 D.L.R. (4th) 449). In determining the appropriate compensation required to provide reasonable solace, the court must consider the plaintiff's subjective experience of pain and suffering and loss of enjoyment of life, not the gravity of the defendant's wrongful conduct. Although the award of damages for non-pecuniary losses must ultimately turn on the facts of the particular case, it is important, as well, to consider awards in other cases. As Dickson J. stated in *Andrews v. Grand & Toy*, *supra*, "The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional" (at 261).

[278] It is always difficult to put a monetary value on the loss suffered by a plaintiff in a case like this. The plaintiff has sought an award of \$300,000 for general and aggravated damages on the basis that the sexual abuse has had a devastating impact on him. The defendants argued that non-pecuniary damages, including aggravated damages, should be assessed at \$150,000 and then reduced by 25 per cent to take into account other causes of his injury.

[279] They also argued that aggravated damages should not be awarded against the Diocese, relying on Cory J. in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 195. There, the Court awarded aggravated damages in a libel action only against the defendant Church and not the other defendant, their lawyer, finding that the Church was the party which had engaged in misconduct. The problem with that argument in this case is the passage in *Norberg v. Wynrib*, *supra*, which indicated that aggravated damages are not separable from general damages in a case of personal

injury, unlike the aggravated damages for libel in *Hill*. Moreover, in this case, there is no issue of wrongdoing on the part of the Church; rather, the liability of the Church is vicarious and, in my view, it extends to all the non-pecuniary damages which the employee has caused to the plaintiff. This approach has been followed in *A. (C.) v. C. (J.W.)* (1997), 35 B.C.L.R. (3d) 234 (S.C.) at 309, and *D.W. v. Canada (Attorney General)*, [1999] S.J. No. 742 (QL) (Q.B.) [reported 187 Sask. R. 21] at para. 56.

[280] The British Columbia Court of Appeal in *Y. (S.) v. C. (F.G.)*, [1997] 1 W.W.R. 229, stated that up until 1990, damage awards for sexual abuse commonly fell into the range of \$40,000 to \$65,000, while some recent awards across Canada ranged between \$100,000 and \$175,000 (at 243-4). There, the Court reduced a jury verdict of \$350,000 to \$250,000. The plaintiff referred to a list of cases where the damages in cases in 2000 through 2003 ranged from \$85,000 to \$200,000. For example, in *C.D. v. R.D.*, [2003] O.J. No. 281 (QL) (S.C.J.) [summarized 119 A.C.W.S. (3d) 763], Chadwick J. awarded \$150,000 in general damages against one defendant in a childhood sexual abuse case, plus \$50,000 aggravated damages against each of the defendants. In *E. (J.A.K.) v. British Columbia*, [2002] B.C.J. No. 597 (QL) (S.C.) [reported 1 B.C.L.R. (4th) 107], the award was \$150,000 for general damages, including aggravated damages. In *T.W.N.A. v. Clarke*, [2001] B.C.J. No. 1621 (QL) (S.C.) [reported 92 B.C.L.R. (3d) 250], the range of awards was \$130,000 to \$150,000 for non-pecuniary damages and \$25,000 for aggravated damages (at para. 385). More recently, in a case of serious ongoing physical abuse, Molloy J. awarded \$100,000 for general and aggravated damages (*AC. v. Y.J.C.*, [2003] O.J. No. 758 (QL) (S.C.J.) [reported 36 R.F.L. (5th) 79] at para. 78).

[281] Archbishop Gervais read a passage in *From Pain to Hope*, the 1992 report of the *ad hoc* Committee on Child Sexual Abuse appointed by the Canadian Conference of Catholic Bishops. The passage quoted describes the wounds of sexual abuse as ones which "damage children to the very core of their being and their fundamental self-identity" (at 27). In this case, both Dr. Berry and Dr. Bloom agreed that JD has suffered profound trauma from the sexual abuse committed by Father O'Dell. The acts of abuse were of extreme deviancy, and I accept the evidence of Dr. Berry that the impact of the abuse has been severe, extreme, and enduring. The abuse has had a severe impact on all aspects of JD's life, including his family and interpersonal relationships, his sexual identity, and his educational and vocational achievement. His father described JD's past years as "lost", as if he has been in a jail because of the abuse. Unlike his brothers, he has not had the ability to form a loving relationship with a partner, to create a family, to go to college and have a

career. The abuse is likely to have a life-long impact, even if JD engages in intensive therapy in the future.

[282] There is a great deal of agreement between Dr. Berry and Dr. Bloom on the impact of the sexual abuse on JD. For example, both agreed that he suffers from post-traumatic stress disorder and borderline personality disorder as a result of the abuse. Where they disagree, I prefer the evidence of Dr. Berry. Dr. Bloom conceded that Dr. Berry has greater clinical expertise with respect to the impact of child sexual abuse than he does. Dr. Berry also had more opportunity to interact with JD, to test him, and also to meet his parents.

[283] Moreover, in my view, some of the disagreement between the two experts is not significant. Dr. Berry diagnosed JD as having severe chronic depression, while Dr. Bloom felt that JD did not meet the DSM-IV criteria for a major depressive disorder at the time of his examination. However, Dr. Bloom did diagnose fairly chronic dysphoric features — that is, a general feeling of unhappiness. There is ample evidence that JD has suffered profound depression over the years as a result of the abuse. This has caused one suicide attempt, and he has had suicidal thoughts at other times.

[284] Moreover, Dr. Bloom did not diagnose JD as an alcoholic according to the DSM-IV criteria, because there were no symptoms of withdrawal nor increasing dependence. Again, however, it is evident that JD has a long-standing problem with alcohol abuse that has profoundly affected his personal relationships and his ability to carry on employment. I find that this was a result of the sexual abuse, since alcohol has been used as a coping strategy to avoid the memories of the abuse.

[285] With respect to the future, the prognosis is guarded, according to Dr. Berry. JD's mother's concerns are both sad and apt. In her opinion, no one is likely to be able to put JD back together again, and she believes that he will never achieve his true potential. She believes that he will continue to have difficulty relating to people, and that he is unlikely to have a meaningful relationship. She worries for him when she and her husband are gone. In my view, the evidence shows that her fears are well-founded. JD has suffered profoundly in the past, and the abuse will probably affect the course of the rest of his life.

[286] The acts of sexual abuse perpetrated by Father O'Dell were extremely painful and terrifying to JD. In addition, he was terrorized by the threats which Father O'Dell made about burning in hell or getting his younger brother. He has suffered terrible nightmares and flashbacks. While the defendants argued that he had nightmares before the abuse and they might be attributable to the fact that he played Dungeons and Dragons, I accept

his mother's evidence that the nightmares became much worse around Grade 7 and the subject matter changed, and I find that they were caused by the abuse.

[287] JD has problems in achieving and maintaining an erection, which Dr. Riddell believes to have a psychological cause. JD testified that he has flashbacks of the abuse when he attempts to engage in sexual acts. The defendants suggested that JD had exaggerated his claim on this issue, although no question to this effect was put to him. I find on a balance of probabilities that the abuse was a material cause of his erectile difficulties, given the psychological basis. It may be that his confusion about his sexual identity is also a contributing factor, but that does not detract from the fact that the abuse has materially contributed to this problem.

[288] JD reported experiencing a great deal of confusion about his sexual orientation throughout his adult life. He testified that he is currently uncertain of his sexual orientation. Much was made of whether or not JD's orientation is and has been homosexual. In my view, that is not an issue that I need to decide. It is clear from both Doctors Berry and Bloom that the abuse had a profound and negative impact on JD's psychosexual adjustment. Dr. Bloom also testified that the abuse has had a significant effect on JD's ability to deal with his sexual orientation.

[289] In sum, as a result of the sexual abuse, JD suffers from a number of serious psychological disorders. He suffers from erectile problems because of the abuse. He has had continuing difficulty in forming meaningful relationships outside his family, and I accept Dr. Berry's evidence that this is a result of the abuse. His relationship with his father has been particularly difficult and, again, this can be traced to the abuse and his difficulty in accepting male authority figures, as well as his abuse of alcohol.

[290] In cases where sexual abuse has been carried out in particularly humiliating and undignified circumstances, the plaintiff may be entitled to aggravated damages (*Norberg v. Wynrib, supra*, at 263). Factors that can affect the assessment of aggravated damages in cases of sexual abuse include the relationship of the parties, the number of assaults, the duration of the abuse, the age of the plaintiff, the degree of violence and coercion, the nature of the abuse, the extent of the impact on the plaintiff and the lack of remorse (*Y. (S.) v. C. (F.G.), supra*, at para. 58).

[291] Here, the assaults occurred in a relationship of trust. JD looked to Father O'Dell both for spiritual guidance and as a mentor, and that trust was terribly betrayed. While JD cannot recall the precise number of times that he was assaulted, I have accepted Dr.

Berry's evidence that this memory problem is also a direct result of the abuse. JD testified that he believed that the abuse occurred over a period of two years through Grades 7 and 8 and on a number of occasions, and I accept that evidence. He was 11 years old when he met Father O'Dell, and was particularly vulnerable, as he was a lonely child who felt different. Father O'Dell made threats with respect to JD's brother and with respect to JD's salvation. The abuse was of extreme deviance, and the impact has been severe and pervasive. There has been no expression of remorse from Father O'Dell. Indeed, despite the admissions of the assault before trial, it was evident from Bishop Plouffe's evidence that Father O'Dell still denies the abuse. Moreover, the defendants suggested in the written argument that the criminal conviction was in question because of the inconsistencies between JD's evidence in this trial and the criminal proceedings.

[292] In these circumstances, and taking into account the range in past cases, I have concluded that the award of general and aggravated damages should be at the upper end of the spectrum, given the gravity of the damages suffered by JD and the aggravating factors present here. Therefore, I award \$175,000 in general and aggravated damages for non-pecuniary loss.

#### *Causation*

[293] The defence argued that the pain and suffering and difficulties which JD has experienced have been caused not only by the abuse, but also by other factors in JD's life prior to the abuse, which have contributed to his current emotional distress and difficulties in life. Specifically, they argued that JD's sexual orientation has always been homosexual, and part of his distress and difficulty in life has come from coping with his sexual orientation. Related to this fact is the difficulty in dealing with his father. The defence suggested that JD's father was homophobic, and this increased JD's anxiety in revealing his homosexuality and in dealing with his father. As well, the defence argued that other traumas, such as the incident in JD's youth when his father struck his mother, were also factors which made him psychologically vulnerable. They pointed to his learning disability as something which would have contributed to his problems, and they relied heavily on indications in Dr. B's notes from JD's childhood indicating that he suffered from depression and emotional problems as a child pre-abuse. Given that the abuse by Father O'Dell was only one factor contributing to JD's current state, according to the defendants, the non-pecuniary damages should be reduced by 25 per cent.

[294] The Supreme Court of Canada in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, stated that causation is established where the defendant's conduct "materially contributed" to the plaintiff's injury — that is, where the factor falls outside the *de minimis* range (at para. 15). While other factors might have contributed to the plaintiff's injuries, that does not excuse a defendant from liability for all the damage suffered, if that defendant materially contributed to the injury.

[295] In this case, the defendants invoked the "crumbling skull" doctrine, arguing that even without the abuse, JD would have suffered certain problems in his life, since there was evidence that he was seriously damaged before he met Father O'Dell. Alternatively, they argued that there were other factors that would have arisen in his life which would have contributed to his difficulties, such as his sexual orientation. In *Athey*, *supra*, Major J. described the crumbling skull doctrine in the following terms:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position *better* than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the preexisting condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage ... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. [At para. 35; emphasis in original.]

[296] The plaintiff argued that Father O'Dell caused or materially contributed to his injuries. He submitted that, at most, this is a case where the "thin skull" rule applies — namely, that the defendant takes the plaintiff as he finds him, even if the injuries suffered are more serious than one might normally expect because of the particular vulnerability of the plaintiff.

[297] In my view, the plaintiff's suggested approach is correct. The evidence of JD's situation pre-abuse does not present a picture of a child born to fail academically, nor to have major psychological and substance abuse problems. I share Dr. Berry's view that the pre-morbid history does not demonstrate that JD was dysfunctional prior to meeting Father O'Dell.

[298] Like Dr. Berry, I believe that the school report cards probably reflect academic underachievement. It is difficult to interpret the comments of teachers many years later and without their presence to explain their expectations. However, comments about daydreaming and the need to concentrate and to apply oneself do not suggest that JD was

doomed to fail. Indeed, the achievement in Grade 6 shows his ability to perform well in a more stimulating environment. I accept Dr. Berry's evidence that absent abuse, JD probably could have graduated from a community college or a university arts program. Indeed, I note that Dr. Bloom never took the position that JD was bound to fail academically based on the early records. He indicated that at most, they raised red flags. He also stated that he would be less concerned about the early grades and comments if the siblings had done no better academically. The evidence before me was that all three boys had equivalent academic records, and the other two brothers are successfully established in careers after completing community college.

[299] Nor is there evidence to support the conclusion that JD was a child who acted out at school or who was a behavioural problem. The defendants placed a great deal of emphasis on the comments of one Grade Three teacher about teasing and picking on other children and being disruptive. This is a very thin reed on which to rest an argument that JD was a behavioural problem at school. That is not his evidence nor that of his parents, and no other report card suggests such a problem.

[300] The defendants placed great emphasis on notes from early January, 1979 made by Dr. B at the time JD was almost nine years old. They argued that the notes show that JD was likely to have suffered depression and other psychological problems even without the abuse because of references to depression, not suicidal, wants sex change, effeminate characteristics, and no friends.

[301] Neither Dr. Berry nor Dr. Bloom would put significant weight on these notes. Again, they commented on the unusual reference to a sex change operation, but drew no conclusions. In my view, it would be improper to do so, as these notes are part of a lengthy medical history. They were made by Dr. B, and there is no way of knowing what he meant by them, whether they contained his words or those of JD's mother, and whether there was a clinical diagnosis made of depression. Part of another note in Mother's file at this time says, "I feel no real problem now but may need help in the future." The follow-up note indicates that things have improved. In my view, this does not provide an evidentiary basis from the pre-abuse period to conclude that JD was likely to have suffered emotional and psychological problems of the magnitude he suffers, even if he had not been a victim of abuse.

[302] The defendants also made much of the fact that Father once hit Mother several times when JD was about seven years old. The defendants argued that this would have

been a traumatic event which likely affected JD detrimentally. Dr. Berry stated that a child could suffer damage if raised in a conflicted home environment. In my view, the evidence does not support the conclusion that JD grew up in such an environment. There was one regretful incident of spousal violence in a home that was otherwise stable and clearly loving. I cannot believe that this one incident was so traumatic as to have damaged JD seriously for life, and the expert evidence does not support such a conclusion. Nor do I see any basis for linking his flashbacks to this incident, as the flashbacks relate to the conduct of Father O'Dell, not to anything that occurred within the family. Indeed, Dr. Bloom stated that the cause of the post-traumatic stress disorder and the related flashbacks was the sexual abuse.

[303] Nor do I accept the defence theory that the 1979 suggestion that JD give up the mermaid doll and play with hockey and GI Joe dolls was a sign of parental rejection that might have marked him for life. Again, the record here is to the contrary — JD felt loved and was loved by a caring family when he was young, and his parents have supported him through the many difficult years.

[304] The defendants also argued that Father was homophobic, and this would have contributed to JD's difficulties in dealing with his sexual orientation. As well, they argued that JD would have had a difficult relationship with his father anyway. In my view, the main source of problems between Father and JD arose from JD's conduct post-abuse, including his abuse of alcohol and his inability to apply himself academically or vocationally. Thus, the sexual abuse was a major source of that conflict, since it caused the avoidance behaviour. As well, it materially contributed to JD's rages against his Father and his alienation from him. Moreover, the evidence does not support the conclusion that Father was homophobic. Father was quite candid in saying that he does not understand homosexuality, but he accepts it. When JD told him of his male partner in 1997, Father invited them home, and they were given a room to share. The fact that Father was not told about JD's sexual orientation until some time after Mother was told is, in my view, consistent with the fact that JD found it easier to talk to his mother than his father. His younger brother, too, testified that he found it easier to communicate with his mother as a teenager. In my view, the evidence does not support a conclusion that Father was homophobic, nor that his relationship with JD was likely to be a major source of JD's serious psychological problems.

[305] Finally, the evidence is weak that JD was predisposed to a homosexual orientation, and that the conflict about his sexual orientation would have contributed to his

psychological difficulties, absent the abuse. I accept Dr. Berry's evidence that one cannot tell from the pre-abuse record what JD's sexual orientation was likely to be. The fact that he had a mermaid doll or a bike with no crossbar is not sufficient to draw any conclusion about his sexual orientation at such a young age. But more importantly, as I have said above, the issue is not whether JD was likely to have a homosexual orientation. The evidence of both Dr. Berry and Dr. Bloom was that the abuse significantly interfered with his sexual identity. Therefore, while life might be more difficult for a gay man, given the discrimination in our society or the difficulty that he may have in coming out to parents or peers, that does not diminish the damage caused by the sexual abuse. The abuse has severely interfered with JD's ability to deal with his sexuality, and it is the cause of his post-traumatic stress disorder and other emotional disorders.

[306] This is not a case where we are dealing with divisible psychological injuries or successive harms, some of which may be attributed to the abuse and some to other factors which pre-dated the abuse. Nor are we dealing, in my view, with an individual who was likely to have suffered significant problems of the type JD has experienced, absent the abuse. We are dealing here with a child who was vulnerable and lonely. He was passing at school, with some difficulty in math and perhaps a circumscribed learning disability, but he was not presenting with behavioural problems. He was part of a loving and supporting family. He may not have been popular, with many friends, nor an athlete, nor an extrovert, but there is no evidence of pre-existing problems which were likely to cause the serious emotional and psychological damage that JD has suffered.

[307] The defendants relied on cases such as *J.L.M. v. P.H.*, [1997] B.C.J. No. 477 (QL) (S.C.) [reported 31 B.C.L.R. (3d) 155] at para. 136, upheld on this issue [1998] B.C.J. No. 1546 (QL) (C.A.) [reported 177 W.A.C. 165]; *R.A.R.B. v. British Columbia*, [2001] B.C.J. No. 963 (QL) (S.C.) [reported 104 A.C.W.S. (3d) 1054] at para. 145; and *M.B. v. British Columbia*, [2001] B.C.J. No. 586 (QL) (C.A.) [reported 197 D.L.R. (4th) 385] at paras. 98-105. In these cases, the plaintiff suffered from pre-existing vulnerability factors prior to the sexual abuse because of earlier family problems, which the courts held were likely to have led to personality problems absent any abuse. As well, in *J.L.M.*, the Court found that there was an intervening event which caused the post-traumatic stress disorder. Therefore, the judges held in each case that the damages should be reduced to reflect the fact that the defendant caused only part of the plaintiff's injuries.

[308] The evidence here does not support the conclusion that JD was a "crumbling skull" plaintiff who was likely to have experienced the kinds of psychological and vocational

difficulties that he has suffered absent the abuse. Nor is there evidence of factors post-abuse which have caused him divisible damages. At most, he was a "thin skull" plaintiff, and I find that the sexual abuse materially contributed to the damages he has suffered. Therefore, the damage award should not be reduced.

### *Mitigation*

[309] Finally, the defendants argued that damages should be further reduced because the plaintiff should have mitigated. Specifically, it was suggested that there were lost opportunities to obtain counselling in a timely fashion, which could have reduced his suffering.

[310] A plaintiff is not entitled to be compensated for losses in tort that could reasonably have been avoided had the plaintiff mitigated his damages. The onus is on the defendants to show that the plaintiff failed to take reasonable steps to mitigate (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 at 331, 57 D.L.R. (3d) 386).

[311] The defendants suggested that one of these lost opportunities occurred in 1984, when Father arranged for family counselling, and Mother refused to continue because she did not wish to explore aspects of her own life. In my view, JD, then 14 years old, cannot be blamed for the failure to participate in this exercise. More importantly, though, it is clear from the evidence that he would not have been in a position to participate effectively in counselling at that time because he was dissociating and avoiding the memories. Even in 1992, when he first revealed the fact of sexual assault to his mother, he immediately tried to block out what he had said. He testified that he was not in a position to discuss the details, even with his family. Therefore, he was in no position to open up to a counsellor even in 1992.

[312] There was ample evidence that the plaintiff was not in a position where he was able to disclose the fact of the abuse until sometime in mid-1996. However, even then he was unable to engage in therapy. I accept Dr. Berry's evidence that he did not have the capacity to engage in therapy because avoidance of the memories of the abuse was one of his ways of coping. Dr. Berry testified that victims of abuse often need a coercive strategy to make them engage in therapy, and he described the criminal and civil litigation process as playing that role, to some extent, with JD.

[313] Even Dr. Bloom conceded that the plaintiff should not be blamed for failing to have engaged in therapy earlier, and stated that it would only be speculation on his part whether

earlier therapy would have been effective. While he described it as unfortunate that JD had not been able to benefit from earlier therapy, he was careful not to "blame the victim" for the inability to disclose at an earlier time or to obtain therapy earlier. His evidence, at the strongest, was that JD had not engaged in therapy earlier in part because of his tendency to want to shut out the negative experiences with Father O'Dell and in part because he is an avoider. He agreed with Dr. Berry that abuse victims often do not deal with the issues arising from the abuse.

[314] The onus is on the defendants to show that the plaintiff has failed to take reasonable steps to mitigate by engaging in therapy earlier. In this case, I find that they have not satisfied that onus. JD did not have the capacity to engage in therapy through most of the 1990s, and that incapacity was a direct result of the abuse.

#### ECONOMIC LOSS

[315] In this case, the plaintiff seeks significant damages for past loss of income and future economic loss. He has worked only sporadically over his adult life, and has not worked since 2000. The prognosis for the future, according to Dr. Berry, is likely minimum wage employment, at best, after he has completed a course of intensive therapy. Dr. Berry was of the opinion that absent the abuse, JD would likely have graduated from community college or even university and had stable and long-term employment, like his parents and brothers.

[316] Dr. Bloom indicated that it would be good if JD could try to find employment at an earlier stage than after his therapy, although he did not disagree with Dr. Berry about JD's problems with future employment. Dr. Bloom also raised a question why JD could not continue as a hairdresser by limiting his clientele to women, so as to avoid the problem he had dealing with male clients. In my view, this option does not seem feasible, given his discomfort with close proximity to people.

[317] I find that JD's difficulties in completing his education and then finding and maintaining employment are a direct result of the sexual abuse. His chronic depression, difficulties dealing with authority figures, his hypersensitivity and hyper-reactivity, and his alcohol abuse all result from the abuse, and they have interfered with his ability to maintain employment, as indicated in JD's evidence. As well, they affected his educational achievement, as described earlier in these reasons. There was a pronounced decline in performance in high school and a delay in completing high school because of his drinking, depression and flashbacks. While other individuals might have been able to sustain some

type of employment despite the abuse, that has not been the case here. Therefore, I find that the abuse by Father O'Dell has materially contributed to the loss of income, past and future. That loss is a substantial one.

[318] The exercise of determining the loss of income suffered by JD is difficult because of the young age at which he was abused. In oral argument, the plaintiff based his claim on the assumption that he would likely have graduated from community college. This position is a conservative one, as there was evidence from Dr. Berry that JD had the potential to graduate from a liberal arts course at a university. However, it is also a very reasonable position to take, given that both his brothers graduated from community college; his father had post-secondary training; and his mother obtained a university degree.

[319] The defendant's expert witness, Mr. Neuman, assumed that had JD not been abused, he would have graduated from community college, but he then applied a 15 per cent negative contingency factor to the average earnings figures of males with a community college diploma. This was based on a number of factors: JD's learning disability, which might have affected his earning power and his self-esteem; his relationship with his father which might have affected his self-esteem; family health problems which may have limited his career path and life expectancy; alcohol and drug abuse which may have occurred independent of the abuse; and his acne condition which may have affected his self-esteem.

[320] In assessing pecuniary loss, contingencies are intended to reflect the realistic risk that a loss may have occurred or will occur, apart from the defendant's wrongful conduct. The Supreme Court of Canada in *Athey v. Leonati*, *supra*, observed that future events need not be proved on a balance of probabilities. A future possibility will be given consideration when it is "a real and substantial possibility and not mere speculation" (at para. 27). A contingency may be general in nature — for example, the likelihood of unemployment, illness or promotion — or it may be specific to the individual plaintiff — for example, possession of a marketable skill or a poor work history (*Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.) at 14-15).

[321] In my view, the contingencies relied upon by Mr. Neuman are not "real and substantial possibilities"; rather, they are mere speculative possibilities which were not supported by the evidence at trial. For example, one of the factors leading Mr. Neuman to include this negative contingency was a possible learning disability. Neither Dr. Berry nor Dr. Bloom concluded that there was a definite diagnosis of a learning disability. Both

expressed the view that Dr. Thornburg, who seems to have suspected a learning disability, was unaware of the abuse and its impact on JD, and this might have affected any diagnosis. Both agreed that the plaintiff is an intelligent man. He presented at trial as an articulate and intelligent individual, who has been an avid reader since his youth. There is no question that he has had difficulty with mathematics, but this is not sufficient to support the negative contingency of a learning disability that would have reduced his earnings significantly below the average level of a community college graduate.

[322] I have already discussed his earlier academic performance. While there is a theme in the early report cards up to Grade 6 that the plaintiff needs to concentrate and that he daydreams, this is not sufficient evidence from which to conclude that he was destined to fail academically, or even that he would end up with below average employment earnings. Neither of his brothers performed better in school, yet each has completed community college, and his older brother also attended police college. One brother made over \$70,000 last year and the other over \$100,000. His father had the same type of early academic performance and went on to obtain a post-secondary diploma, while his mother went on to obtain a university degree. The results in Grade 6 show that when motivated, the plaintiff could perform very well, although he had problems with math and French. In my view, it is likely that had the abuse not occurred, he would have completed at least a community college course.

[323] Mr. Neuman also considered a number of other factors that led him to apply the 15 per cent negative contingency to both past and future loss of income. One was the negative relationship with his father, which might have affected his self-esteem. I have already explained my view that the evidence does not support a conclusion that he would have had such a troubled relationship with his father, absent the abuse, that it would have affected his earning capacity.

[324] With respect to the impact of family health problems, the only evidence before me is Father's history of heart disease. I have no medical evidence to suggest the likelihood of JD suffering from the same problems. Nor is there any reason to reduce his estimated earnings because of possible substance or alcohol abuse absent the sexual abuse. JD's alcohol abuse has been attributed by the expert witnesses to the sexual abuse by Father O'Dell. There is no evidence of a family history of alcoholism that might suggest an elevated risk of alcohol abuse, absent the sexual assaults. While young people in JD's town drank under age, this does not lead to the conclusion that JD would possibly have become an alcoholic. Nor does the fact that he has used marijuana suggest the realistic

possibility that this would have led to a drug problem affecting his job performance absent the abuse. Similarly, there is mere speculation that JD's acne condition would have affected his self-esteem so much as to affect his earning capacity. OB and YB testified that his acne was no worse than theirs. Therefore, I reject Mr. Neuman's application of a negative contingency with respect to JD's earnings.

[325] When I look to the two experts' views with respect to the quantification of the loss of income, I do not find the evidence of Mr. Neuman helpful to my task for a number of reasons. Mr. Neuman appeared rather partisan when he gave his evidence. He made several comments that suggested Ms. Russell was a biased witness, although I did not find her to be so. She appeared to have taken great care in working out her scenarios.

[326] In addition, I find Mr. Neuman's method of calculating both past and future loss of income to be unreasonable. His starting point for calculations is 1995. He used Statistics Canada data for 1995 to determine the likely income for a community college graduate, picking the age category of 15 to 24 as the baseline for the year 1995. In contrast, Ms. Russell used the age category of 25 to 34 for that year, given that the plaintiff turned 25 in March, 1995 and she assumed that he would have been working since 1991. The difference in the figures is significant — \$26,451 versus \$37,066 (if one excludes the 10 per cent Ontario premium added by Ms. Russell). The choice of this number then significantly influenced all of Mr. Neuman's calculations. In my view, Ms. Russell's choice of numbers was more reasonable.

[327] Equally problematic is Mr. Neuman's method of adjusting that figure. He has adjusted that figure, both forwards and backwards, using a factor based on the average increase of personal income in Canada and the percentage change in that level from year to year — a percentage that reflects increased income from increased participation in the Canadian workforce, as well as increases in the amount of wages paid to individuals. This leads to some results that intuitively make no sense — for example, in the year 2000, he assumed a 7.06 per cent increase.

[328] In my view, Ms. Russell's approach makes more sense for year to year adjustments. She has used data from the 1995 Statistics Canada tables for 1991 through 1995, and more up to date data as it became available for the years 1996 through 2000. She has adjusted the figures in accordance with the Consumer's Price index after 2000. The increase from year to year is modest, and consistent with what one would expect in

terms of increases from year to year around that time. I find her approach more reasonable than Mr. Neuman's approach.

[329] I also find her approach more reliable, as she has used Statistics Canada tables whenever possible — that is, for the years 1995 through 2000. Mr. Neuman has taken one Statistics Canada figure from 1995 and then worked backwards and forward from that based on his assumptions about the growth of personal income in Canada, without any effort to do a reality check by looking at more recent Statistics Canada data relating to the earnings of community college graduates.

[330] With respect to past loss of income, I accept Ms. Russell's calculations with two adjustments. First, she assumed a 10 per cent premium for Ontario wages over national figures. Mr. Neuman used the Canadian average, and I find that reasonable, as it is not clear where JD would have worked had the abuse not occurred.

[331] Secondly, she deducted amounts that JD received from earnings or from ODSP in calculating past income loss. On February 25, 2003, JD made an assignment and direction to the Ministry of Community and Social Services agreeing to reimburse the Minister of Finance for all financial assistance paid or to be paid by the Ministry since February 1, 2000 to the date the claim is settled or until financial assistance is terminated. As JD must repay this money, his past income loss is increased by the amount of \$26,390.14 (as of February 17, 2003). The plaintiff asked that I order the defendants to pay JD the amount of \$26,390.14 in order that he may repay the Minister of Finance for the payments received from ODSP. In my view, that is not the appropriate order. Rather, given the evidence that he must repay the ODSP received, the amount to be reimbursed should be deducted from the income which Ms. Russell deducted in making her calculations.

[332] While she assumed a loss of income of \$358,400, I find that the past loss of earnings is that figure discounted by 10 per cent (\$330,628) plus the ODSP to be reimbursed — a sum of \$357,018.19.

[333] Ms. Russell added 10 per cent for loss of benefits. She provided no documentary basis for this figure, drawing upon her experience. I am not satisfied that the plaintiff has proved 10 per cent is a reasonable figure. No amount is awarded for loss of benefits.

[334] With respect to future loss of earnings, had abuse not occurred, Mr. Neuman took the figure from his past loss of earnings table of \$30,367 for 2002 (a figure which reflects the 15 per cent negative contingency) and assumed that same figure for 2003 and every

year until retirement. Thus, he has assumed a salary figure for JD at age 33 that is less than the average for the category 25 to 34 years. In contrast, Ms. Russell used the 2000 Survey of Labour and Income Dynamics, adjusted for inflation, and she adjusted the future earnings for the age categories used in the survey as JD grew older.

[335] Again, her figures seem more logical, adjusting for inflation and increases in wages as JD grew older. My one concern is her number for ages 55 to 65, which she obtained from the 1995 table and adjusted for inflation. It reflects an increase from the previous category of almost \$15,000, and the leap from the earlier category does not seem reasonable, given that the one table in evidence indicates a reduction in earnings for that category. Therefore, I have adjusted her figures by using the same figure for 55 to 65 as she used for 45 to 54, for a total of \$1,216,666, less 10 per cent, which gives a figure of \$1,106,064.

[336] That brings me to past loss of earnings, given that abuse did occur. Ms. Russell deducted earnings for minimum wage employment starting in January, 2005 in the amount of \$280,723. This is a reasonable assumption, given Dr. Berry's prognosis.

[337] Again, I find that the post-abuse scenario put forward by Mr. Neuman is based on assumptions that are inconsistent with the evidence at trial. Mr. Neuman assumed that JD had a duty to mitigate after disclosure of the abuse around 1992. He also assumed that had JD obtained treatment, he would have been able to begin earning income around 1994. This would have reduced his past loss of income as well as his future loss of income.

[338] As stated above, it was not until 1996 and into early 1997 that the plaintiff really was first able to disclose the fact of the abuse by Father O'Dell. The evidence is clear that the plaintiff has coped with the sexual abuse by dissociation and avoidance. I have accepted Dr. Berry's evidence that JD did not have the capacity to engage in therapy as a direct result of the abuse, and it is only in the last few years, in part as a result of the legal proceedings, that JD has begun dealing with the fact of the abuse and its impact on him. Therefore, the assumption that the plaintiff should have obtained therapy in 1992 as a result of a duty to mitigate is flawed, as is the assumption that he would have benefited from therapy within two years and been able to engage in meaningful work by 1994.

[339] Even at trial, when Dr. Berry spoke about the plaintiff's prognosis, he suggested that it was reasonably good, if he has proper support. He described the plaintiff as unlikely to be able to achieve academically, as he has lost the ability to concentrate and organize

necessary for further education. Both he and Dr. Bloom were of the view that the first step must be cognitive and behavioural therapy, with vocational issues to follow. Dr. Berry suggested that the most likely future was minimum wage employment, and not until after intensive therapy — probably within five years. JD gave evidence that he would like to get a job and have a more normal life once he has attended Homewood. Therefore, it is reasonable to assume that there will be employment, post-abuse, at minimum wage employment starting in 2005.

[340] Often, a contingency factor is applied to future loss of earnings to reflect the possibilities of unemployment, illness, or other interruption of employment. In my view, it would be unfair to apply such a factor here, as there is a real possibility of positive contingencies, had abuse not occurred — for example, that JD would have earned more than the average community college graduate, given his intellectual abilities and given the experience of his brothers, or that he would have obtained a university degree and earned more than a community college graduate. In this case, it is likely that the negative and positive contingencies cancel each other out. Therefore, I award \$357,000 for past loss of income and \$825,340 for future loss of earnings. These amounts do not make any adjustment for income tax, as that issue was not addressed before me.

#### COST OF FUTURE CARE

[341] The plaintiff claims compensation for the cost of therapy and associated travel costs, as well as the cost to repair his teeth.

[342] Both Dr. Berry and Dr. Bloom testified that lengthy and intensive counselling is essential for JD to deal with his alcohol abuse and the sequelae of the sexual abuse. Using the figure of \$150.00 per hour for counselling given by Dr. Berry and assuming that counselling will be needed for an hour once a week for five years, \$39,000 would be required.

[343] The cost of a private room at Homewood was \$203 per day as of February 11, 2000. In the circumstances, given JD's difficulty with proximity to other males, it is reasonable for him to have a private room in order that he can address his therapy effectively. The initial program is for six weeks, which will cost around \$8,526. This assumes that costs have not increased since 2000, which seems unlikely. The plaintiff sought \$65,000 in total for future therapy, including travel costs, which have not been itemized in any way.

[344] Given the likely increase in costs at Homewood, the very real likelihood that he will need a longer period at Homewood than six weeks, the cost of future counselling, and the cost of travel for therapy, I award \$55,000 for the cost of future therapy.

[345] The plaintiff also seeks damages for the cost to repair his front teeth. He gave evidence that he grinds his teeth because of stress, and vomiting associated with anxiety and overeating has been a longstanding problem. Dr. Berry gave evidence that bulimia and grinding teeth can be symptoms of childhood sexual victimization.

[346] I accept the evidence of Dr. Barzilay that there has been a loss of enamel and general wear of the front teeth, and that the damage to JD's teeth has been caused by the vomiting and grinding his teeth. I find on a balance of probabilities that this was caused by the stress and emotional problems resulting from the sexual abuse.

[347] The plaintiff claimed between \$78,302 and \$127,702 for the cost of crowns, their replacement and endodontic treatment. The defendants suggested a modest amount of \$5,000 to \$10,000.

[348] I accept the submission of the defendants that the plaintiff has not proved that the endodontic treatment is required, and that the frequency of replacement crowns every ten years is questionable. I am not satisfied that the bruxism appliance will be necessary if the underlying anxiety that caused the teeth grinding is addressed in therapy. Therefore, I award \$25,000 as a reasonable amount for dental repairs, given the evidence before me.

#### OTHER ELEMENTS OF THE DAMAGE AWARD

[349] There is a subrogated OHIP claim of \$301.90, which I order to be paid by the defendants.

[350] The plaintiff also sought the amount of \$10,205.75 from the defendants to repay his Canada Student Loan. He argued that he was unable to obtain suitable employment because of the abuse, and therefore he cannot repay this debt. I do not accept this head of damages. The plaintiff will receive a substantial amount for past and future loss of income. Had he earned this income, he would have had the ability to repay the student loan, and he will be in a position to do so from the amount awarded.

#### PUNITIVE DAMAGES

[351] The plaintiff sought punitive damages against both Father O'Dell and against the Diocese on the basis of vicarious liability. Such damages are awarded where the

defendant has engaged in malicious, oppressive or high-handed misconduct that offends the court's sense of decency (*Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257 at para. 36). The general objectives of punitive damages are punishment of the defendant, deterrence of the wrongdoer and others, and denunciation (at para. 68). The Supreme Court also made it clear that punitive damages are to be awarded only in exceptional cases and with restraint.

[352] The Supreme Court in *Whiten* also observed that the governing rule is proportionality. Therefore, a trial judge should consider how the combination of compensatory damages, punitive damages, and any other punishment related to the same misconduct contributes to achieving the objectives of retribution, deterrence, and denunciation. Where a defendant has already been punished, either criminally or through a professional disciplinary process, punitive damages are generally not awarded, because this would amount to double punishment (*Norberg, supra*, at 267). This was the reason given for not awarding punitive damages in a case such as *CD. v. R.D.*, *supra*, at para. 13. In contrast, the Court awarded punitive damages in *J.P. v. U.S.*, [1999] B.C.J. No. 1230 (QL) (S.C.) [summarized 88 A.C.W.S. (3d) 795 *sub nom. P. (J.) v. Sinclair*] at para. 36, despite a criminal penalty, because of the reprehensible nature of the conduct.

[353] In this case, Father O'Dell was convicted of a criminal offence and sentenced to 30 months in prison. While there can be no doubt that his conduct shocks one's sense of decency and is deserving of condemnation, this is not a case where punitive damages should be awarded. He has been punished in the criminal system, and it is not my role to assess the adequacy of the punishment. Moreover, in this case, I have awarded a very large sum in damages. The size of the damage award in this case should deter others from similar misconduct. Therefore, no award is made for punitive damages against Father O'Dell.

[354] Given that determination, there is no need to determine whether the Diocese could be held vicariously liable for punitive damages.

#### CONCLUSION

[355] There shall be judgment for the plaintiff against Father O'Dell for battery and breach of fiduciary duty and against the Diocese of Sault Ste. Marie on the basis of vicarious liability. The following damages are awarded:

Non-pecuniary loss including aggravated damages     \$175,000

Past loss of income	\$357,000
Future income loss	\$825,340
Cost of therapy	\$55,000
Dental repairs	\$25,000
OHIP subrogated claim	\$301.90

[356] If the parties wish to address further issues, including interest and costs, they may contact my assistant within 30 days of the release of this decision to make an appointment.

*Judgment for the plaintiff.*