Court of Appeal File No.: C58883

COURT OF APPEAL FOR ONTARIO

DR. AGNES JANE WHITFIELD

Plaintiff/
Defendant by Counterclaim
(Respondent)

-and-

BRYAN WHITFIELD

Defendant/
Plaintiff by Counterclaim
(Appellant)

APPELLANT'S *REVISED* FACTUM

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PART I – STATEMENT OF THE CASE

1. The Plaintiff sued the Defendant, her brother, for sexually abusing her in the 1950s, '60s and '70s, from the time she was a young child up until her third year of university.[1] She purported to "recover" her long-forgotten memories of this abuse in 2001 in the midst of a family dispute over their mother's estate. The Defendant counterclaimed for defamation.

2. The action was tried by Mr. Justice McIsaac, sitting without a jury. It was effectively a bilingual trial, with the self-represented Plaintiff electing to give her evidence and question witnesses in her adopted language of French.

3. Mr. Justice McIsaac found for the Plaintiff and dismissed the Defendant's counterclaim. He awarded the Plaintiff general, special, and punitive damages in the total amount of $354,200.[2] The Defendant appeals, asking this court to dismiss the Plaintiff's action and enter judgment on the counterclaim in a nominal amount.

PART II – NATURE OF THE CASE AND ISSUES

4. The Plaintiff is the Defendant's younger sister. They grew up, along with two other siblings, on a farm near Peterborough in the 1950s and '60s. The Plaintiff, Defendant, and their sisters all went on to successful careers and enjoyed warm familial relations throughout their adult lives.

5. That changed in 2001 when the Plaintiff, then aged 50, claimed to "recover" memories of her brother subjecting her to a horrific course of sexual abuse that continued throughout her childhood and adolescence, right up until her third year of university. The allegations were

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[1] For the sake of clarity, the Appellant Bryan Whitfield, who was the Defendant below (and Plaintiff by way of the counterclaim) is here referred to as the Defendant throughout. The Respondent Agnes Whitfield is referred to as the Plaintiff.

[2] His Honour also awarded the self-represented Plaintiff $97,000 in costs, inclusive of disbursements.

bizarre, involving humiliating abuse, sodomy, and multiple instances of gang rape. All of this, according to the Plaintiff, had been "repressed" and forgotten, thereby explaining why she carried on a normal, cordial relationship with her brother over the ensuing decades, completely oblivious to the atrocities to which he had subjected her. Not until she got together with her second husband – who, as it happens, *also claimed to recover memories of his own childhood abuse around the same time* – did she manage to unlock these memories with his assistance and decide to pursue a civil suit against her brother. In another coincidence, this recovery process took place while the Plaintiff was in a heated dispute with her siblings over the fate of the family cottage.

6. The Defendant was far from the first or only target of the Plaintiff's wild allegations. She had also launched a very public campaign against her ex-husband's father for (she claimed) being a Nazi sympathizer. Her three daughters had become estranged from the Plaintiff as a result. She lodged professional disciplinary complaints against virtually all professionals affiliated with the defence, including her own sister. She called a handwriting expert to try to prove a conspiracy between the Defendant and the Peterborough Art Gallery.

7. The Defendant testified and categorically denied the allegations. More importantly, the other siblings – Joan (a pediatrician) and Margaret (a psychiatrist) – also denied witnessing anything even vaguely consistent with the Plaintiff's allegations. No family members, including her own daughters, were willing to testify on the Plaintiff's behalf. Indeed, the Plaintiff was unable to produce a *single witness* who saw anything untoward over this decade and a half of alleged sexual torture.

8. The Plaintiff did lead evidence from a psychologist, Dr. Sarah Maddocks, who purported to corroborate the Plaintiff's account by diagnosing her with post-traumatic stress disorder ("PTSD") and other psychological conditions. The Plaintiff refused to submit to a defence psychological assessment despite the Defendant having obtained a court order obliging her to do so. The trial judge refused to draw an adverse inference against her for this non-cooperation.

9. Dr. Maddocks administered standardized psychological tests to the Plaintiff, who registered uncommonly high on the "deception" and "fake-bad" scales. This did not cause Dr. Maddocks to question the Plaintiff's reliability; instead, she decided to base her diagnosis on their clinical interviews – i.e. what the Plaintiff told her – instead of the recognized psychological tests. Though she admitted in cross-examination that she'd failed to conduct a proper differential diagnosis, Dr. Maddocks concluded that the Plaintiff suffered PTSD and that childhood sexual abuse by her brother was the likely cause. Beyond a vague statement in the Appendix to her report, she did not explain whether or how it is possible for a 20-year-old adult to "repress" traumatic memories. Despite its obvious frailties, this evidence – on the trial judge's analysis – was the crucial piece that tipped the evidentiary scales in favour of the Plaintiff.

10. The trial judge's findings are rife with errors of law and palpable and overriding errors of fact. His conclusion that the abuse occurred was simply not one a reasonable trier of fact, acting judicially, could have reached. The Plaintiff's evidence was unreliable and replete with frailties that no reasonable trier of fact could have reconciled. The trial judge's analysis was skewed, and unresponsive to key issues in the case. A miscarriage of justice was the result.

11. In particular, the trial judge erred:

- By relying on an utterly unhelpful and inadmissible opinion from Dr. Maddocks as the decisive evidence tipping the evidentiary scales in favour of the Plaintiff. The opinion was oath-helping boilerplate that could not reasonably advance the fact-finding process. In addition, the trial judge misapprehended its content.

- By relying on Dr. Maddocks' opinion notwithstanding the Respondent's refusal – in breach of a court order – to cooperate with a defence psychological assessment. In the trial judge's words, Defendant's counsel made "heroic attempts to arrange for an independent assessment of Dr. Whitfield but her response was to frustrate those efforts to the extent of lodging complaints against the proposed assessors with their respective Colleges in Ontario and Quebec." It was patently unreasonable and procedurally unfair to decline to draw an adverse inference from this – and then to proceed to rely on the results of the Plaintiff's own uncontradicted assessment as the decisive evidence in the case.

- By failing to even advert to the voluminous evidence before him that the Plaintiff exhibited a pattern of making spurious allegations against a wide range of people *other than* the Defendant. Because they entirely ignore cogent evidence going to the core issue of the case – the Plaintiff's credibility – the reasons for judgment are legally insufficient.

- By finding, without evidence, that a person can repress – and thereby forget – memories of abuse suffered as an adult. The only expert evidence tendered on the theory of recovered memories pertained to *childhood* sexual abuse. Even supporters of the theory that memories of childhood sexual abuse can be repressed have never advanced the position that this can happen to adults, and there was no such evidence before the court.

- By relying on notorious facts that could not possibly be corroborative as confirmation of the Plaintiff's account. For instance, the presence of mountains near Vancouver was taken as corroborative of her story of having been subjected to a gang rape there. This finds no support in law or logic.

PART III – SUMMARY OF THE FACTS

The Plaintiff's Account

Family background and the alleged abuse

12. The Plaintiff, Agnes Whitfield, grew up on a dairy farm with three siblings: Bryan (the Defendant), Margaret, and Joan. Bryan is six and a half years older than Agnes. On her account, he subjected her to a truly extraordinary reign of sexual terror, extending from her early

childhood to her college years. Despite the frequency, duration, and sheer audacity of the abuse, no one else noticed it taking place.

13. She testified that the abuse began when she was four or five years old. The Defendant, at the age of 10 years old, started coming into her bedroom at night and putting his "member" in her backside.[3] It began with the Defendant masturbating himself against her, and soon escalated to sodomy. She didn't really know what was going on, except that it hurt.[4]

14. The Defendant would also come into her room early in the morning before leaving for hockey, either to sodomize her or to force her to perform fellatio. It tended to be violent, so she figured it was best not to resist.[5] Sometimes he would hold her head in the toilet bowl and threaten to make her drink.[6]

15. The Defendant would often lure her into the room in the dairy where they put the caps on milk bottles, then make her take off her clothes. At some point, he started asking her to fellate him. He would also torment her in the boiler room, threatening to burn her hands on the hot pipes and making her perform oral sex.[7] In the stables, he would say threatening things about the cows coming to eat them. Again, it was a pretext to force her into oral sex. He would insult her, saying she wasn't sucking hard enough, and would apply force to the back of her neck.[8] All of this was said to have happened when the Defendant was 11 years old.

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[3] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 41, lines 29-32 [Appeal Book, Tab 10, p. 104]
[4] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 42, line 23 to p. 43, line 13 [Appeal Book, Tab 10, pp. 105-106]
[5] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 43, lines 15-26 [Appeal Book, Tab 10, p. 106]
[6] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 44, lines 5-10 [Appeal Book, Tab 10, p. 107]
[7] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 50, line 8 to p. 52, line 28 [Appeal Book, Tab 10, pp. 113-115]
[8] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 54, lines 7-16 [Appeal Book, Tab 10, p. 117]

16. Consistent with her depiction of the Defendant as a sociopath, the Plaintiff recalled him torturing bunny rabbits to terrorize her and amuse himself.[9] He also got enjoyment from putting a noose around her neck and threatening to hang her with a pulley system.[10] Their sister Margaret sometimes joined the Defendant in his sadistic games, pointing a .22 rifle at the Plaintiff and laughing at her when she peed her pants in fear.[11]

17. The abuse was unrelenting and occurred daily throughout her childhood years. The Defendant would put the barrel of his .22 in her mouth; she testified to a vivid recollection of the metallic taste.[12] When the Defendant was a teenager, the Plaintiff would often accompany him on farm delivery runs in the pickup truck. When they parked, he would sodomize her.[13]

18. One time after the Defendant had entered university, she accompanied the Defendant to a remote place called Eel's Lake with a college friend of his called Thomas Stewart. She was forced to fellate both young men and they urinated on her. They then tied her up inside a mine shaft overnight, convincing her that if she moved, the roof would cave in.[14] Coming back to this incident later in her testimony, she also recalled that her brother and Mr. Stewart forced her to eat her own feces.[15]

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[9] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 55, line 30 to p. 57, line 11 [Appeal Book, Tab 10, pp. 118-120]
[10] A. Whitfield (in-chief), Vol. 1, November 19, 2012, p. 58, lines 10-24 [Appeal Book, Tab 10, p. 121]
[11] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 62, line 1 to p. 63, line 7 [Appeal Book, Tab 11, pp. 124-125]
[12] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 69, line 32 to p. 70, line 10 [Appeal Book, Tab 11, pp. 131-132]
[13] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 68, line 15 to p. 70, line 25 [Appeal Book, Tab 11, pp. 130-132]
[14] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 74, lines 5-17 [Appeal Book, Tab 11, p. 136]
[15] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 102, lines 9-30 [Appeal Book, Tab 11, p. 162]

19. When the Plaintiff was about 16 years old, she was sent by her mother to visit the Defendant in Ottawa, where he was now working as a teacher. She shared a room with her brother and he forced her to perform oral sex on him.[16]

20. In the summer of 1971, the 20-year-old Plaintiff accompanied the Defendant on a trip to British Columbia. She had just returned from her third year of university, which she had spent on exchange in France. Now a grown adult, she was induced to perform fellatio on him so that he would hand over the money their mother had sent for her.[17]

21. They attended a party at Long Beach on Vancouver Island, where the Defendant sold drugs to partiers and "prostituted" his sister to them. She testified in-chief that she was gang raped by a few young people around a bonfire. She also testified that the Defendant had tried to drown her while swimming at Long Beach.[18] On cross-examination, she changed her story and said she only had an "impression" that a gang rape had taken place, all the while refusing to concede that she had just testified to a very different claim.[19]

22. The next port of call was Vancouver, from where the Defendant and Plaintiff travelled into the nearby mountains in a borrowed car. Yet again, the Defendant "prostituted" his sister – this time to a group of construction workers, who perpetrated a gang rape while the Appellant went on a hike. They also ejaculated on her face.[20]

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[16] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 75, lines 4-20 [Appeal Book, Tab 11, p. 137]
[17] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 75, line 28 to p. 79, line 21 [Appeal Book, Tab 11, pp. 137-141]; Reasons for Judgment, para. 9 [Appeal Book, Tab 3, p. 10]
[18] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 83, lines 3-7 [Appeal Book, Tab 11, p. 143]; p. 102, line 32 to p. 103, line 20 [Appeal Book, Tab 11, pp. 162-163]; Reasons for Judgment, para. 9 [Appeal Book, Tab 3, p. 10]
[19] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 624, line 18 to p. 627, line 1 [Appeal Book, Tab 20, pp. 412-415]; p. 640, lines 1-27 [Appeal Book, Tab 20, p. 428]; Reasons for Judgment, para. 9 [Appeal Book, Tab 3, p. 10]
[20] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 83, line 9 to p. 86, line 21 [Appeal Book, Tab 11, pp. 143-146]

23. The horrors continued on the trip back to Ontario. Hitchhiking in the interior of B.C., the pair was picked up by a man who took them to a rented cabin. There, the Plaintiff was raped by both the Defendant and the driver they'd just met.[21] The Plaintiff eventually separated from her brother in Calgary and made her way back east on her own, vowing to never let this happen again.[22]

The intervening years

24. That is where the narrative of abuse ended, though the Plaintiff never explained when exactly after the 1971 trip she "forgot" the abuse of the previous decade and a half. Later in her twenties, she got married. She went on to earn a Ph.D. from Laval University in Quebec and became a Professor of English at York University.

25. In 1996, she decided to leave her first husband, whom she described as demeaning and abusive.[23] The Plaintiff moved from Toronto to Montreal and began living with Daniel Gagnon, whom she later married. Her daughters all ended up living with her ex-husband.[24]

26. In cross-examination, the Plaintiff was confronted with a number of letters she had written to the Defendant throughout their childhood and adolescent years. They were without exception affectionate. She wrote at various times that she was looking forward to him coming home for Christmas,[25] that she was his "adoring fan",[26] and that he was the "greatest brother in the

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[21] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 88, lines 3-32 [Appeal Book, Tab 11, p. 148]
[22] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 89, lines 1-7 [Appeal Book, Tab 11, p. 149]
[23] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 105, lines 4-29 [Appeal Book, Tab 11, p. 165]
[24] A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 107, line 25 to p. 108, line 15 [Appeal Book, Tab 11, pp. 167-168]; A. Whitfield (cross), Vol. 4, November 22, 2012, p. 240, lines 6-15 [Appeal Book, Tab 13, p. 201]; p. 288 lines 2-11 [Appeal Book, Tab 13, p. 237]
[25] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 201, line 29 to p. 202, line 23 [Appeal Book, Tab 13, pp. 181-182]
[26] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 213, lines 25-28 [Appeal Book, Tab 13, p. 193]

world."[27] The latter was composed when she was 17 – purportedly the same year that he took her to Eel's Lake with his friend, sexually assaulted her, and made her eat feces.[28]

27. The affectionate correspondence continued throughout their adult years, even after she left her first husband and moved in with Daniel. For instance, she wrote to the Defendant and his wife from Paris in 1999, thanking them for having her daughter stay with them.[29] She had not yet recovered her memories at that point.

28. In 1997, the Plaintiff and Defendant's mother died. The estate was to be split equally four ways. However, a disagreement developed around whether to sell the family cottage. In 2000, she received what she described as an ultimatum from her three siblings to sell the cottage or they would institute civil proceedings. In cross-examination, the bitterness of these dealings was highlighted with reference to emails exchanged between the siblings.[30]

29. She retained counsel and told her siblings that they should discuss the matter with her lawyer.[31] The memory "recovery" process began within months.

The memory "recovery"

30. The Plaintiff testified that she had her first "flashback" at the end of July, 2001 while conversing with Daniel about her childhood on the farm. She suddenly started getting agitated when describing a certain room in the dairy – then got up and started yelling "Daddy came." She saw

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[27] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 214, lines 5-6 [Appeal Book, Tab 13, p. 194]
[28] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 214, lines 13-17 [Appeal Book, Tab 13, p. 194]
[29] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 242, lines 1-24 [Appeal Book, Tab 13, p. 203]; Postcard dated March 24, 1999, Exhibit 30 [Appeal Book, Tab 30, p. 577]
[30] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 267, line 21 to p. 283, line 31 [Appeal Book, Tab 13, pp. 216-232]; See also various correspondence, 1999-2001, Exhibit 20 [Appeal Book, Tab 30, pp. 571-576; 578-593; 600-612]
[31] A. Whitfield (cross), Vol. 4, November 22, 2012, pp. 283, lines 23-31 [Appeal Book, Tab 13, p. 232]; Email dated November 8, 2000, Exhibit 20 [Appeal Book, Tab 30, p. 612]

her father's face with a horrified expression. That opened the floodgates: she had several more flashbacks of various kinds and began emailing her siblings for assistance.[32]

31. At a police officer's suggestion, the Plaintiff started keeping a journal of her memories as they emerged.[33] At trial, following an objection to the journal's admissibility, the trial judge ruled that it would be admitted for the purpose of understanding the memory-recovery process and not, at that point, for the truth of its contents.[34]

32. Her memories developed significantly over the latter part of 2001 and early 2002. A number of emails to her family detailing her emerging memories were adduced. In August 2001, she wrote to her daughters that the Defendant had threatened to kill her while holding a shotgun to her face.[35] In October, she wrote to a number of family members (with her lawyers copied), alleging for the first time that the Defendant had raped and prostituted her.[36] In November, she wrote to her sister Joan, claiming that the Defendant had tried to drown her, while admitting that "sometimes it seems like a total fiction to me as well."[37] In 2002, she took a trip out to British Columbia to "identify some of the places where the abuse occurred", and reported back to the police on her findings.[38]

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[32] Email dated July 26, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 640-642]; Email dated July 31, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 644-645]
[33] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 569, lines 5-8 [Appeal Book, Tab 18, p. 381]
[34] Ruling, Vol. 3, November 21, 2012, p. 125, line 31 to p. 126 line 12 [Appeal Book, Tab 12, pp. 169-170]
[35] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 563, line 7 to p. 565, line 16 [Appeal Book, Tab 18, pp. 375-377]; Email dated August 5, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 647-648]
[36] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 568, line 14 to p. 569, line 23 [Appeal Book, Tab 18, pp. 380-381]; Email dated October 21, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 654-655]
[37] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 569, line 24 to p. 571 line 5 [Appeal Book, Tab 18, pp. 381-383]; Email dated November 1, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 655]
[38] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 624, line 5 to p. 628, line 4 [Appeal Book, Tab 20, pp. 412-416]

33. The Plaintiff testified that she has been continuing to have flashbacks ever since 2001. They can feel like spasms, as if her body is recreating what happened to her in the bedroom. They are completely involuntary. She also sees threatening images. Sometimes she speaks in several voices, including her own voice as a little girl, her brother's, and her mother's. Sometimes it's just a young girl's voice saying "I can't tell," and then it ends. Sometimes she lets out a wail. Following a flashback, she feels immensely tired but tries to jot down what she said, and in which voices she said it. Generally she feels a great relief at the end, but there are moments when she is a ball of rage.[39]

Other allegations leveled by the Plaintiff

34. Another series of events addressed in cross-examination concerned her relationship with her daughters and her ex-husband Stan Kirschbaum. According to the Plaintiff, Mr. Kirschbaum's father had some kind of Nazi connection in Czechoslovakia during the Second World War. This began to concern the Plaintiff after their divorce, and after her estrangement from her daughters. Her way of dealing with it was to write to several news outlets, attempting to publicize her ex-husband and daughters' connection to an alleged war criminal. She acknowledged that her daughters did not react positively to this tactic.[40] In January 2001, six months before her flashbacks began, she wrote to the Defendant's wife, stating: "You could do me a great service by breaking off relations with Stan and by encouraging my daughters to change their name and to cease holding my departure against me."[41] Nothing came of this.

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[39] A. Whitfield (in-chief), Vol. 3, November 21, 2012, p. 172, line 22 to p. 180, line 24 [Appeal Book, Tab 12, pp. 171-180]

[40] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 263, line 27 to p. 267, line 20 [Appeal Book, Tab 13, pp. 212-216]; p. 284, line 5 to p. 288, line 11 [Appeal Book, Tab 13, pp. 233-237]

[41] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 288, line 18 to p. 289, line 16 [Appeal Book, Tab 13, pp. 237-238]; Letter dated January 25, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 620]

35. Despite the rift with her daughters, the Plaintiff continued to write unwelcome emails to her extended family about Mr. Kirschbaum's supposed past.[42] In February 2001, she sent out a group email informing them that "these examples, and there are so many more ***which are only beginning to come back now in my memory***, are extremely incriminating."[43] In cross-examination, she tried to clarify that she was referring to having had an opportunity to put information together – not a recovered memory *per se*. In subsequent emails copied to the extended family she castigated her daughters for refusing to accept her theory of their grandfather's Nazi sympathies. The Plaintiff also wrote group emails about the Kirschbaum matter to numerous faculty members at Glendon College – colleagues of her and her ex-husband – and even requested, bizarrely, that the elder Kirschbaum's wartime history be added to the agenda of the Faculty Council meeting.[44]

36. During this tumultuous period, the Defendant wrote to the Plaintiff asking her to have coffee or lunch with him.[45] The Plaintiff's group emails became increasingly erratic, however, and on March 30, 2001, the Defendant wrote to her politely asking to be removed from her group email list, stipulating that "[t]his is not an attempt to cut off communication."[46] After the Plaintiff finally signed off on the cottage sale in the summer of 2001, she wrote an email to the Defendant, copied to their siblings, in which she recalled "all the mean things you used to do to me" including twisting her arm and wringing her wrists. Ominously, she intimated that "[t]here are

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[42] Various correspondence, Exhibit 20 [Appeal Book, Tab 30, pp. 615-639]
[43] A. Whitfield (cross), Vol. 4, November 22, 2012, p. 291, line 22 to p. 293, line 28 [Appeal Book, Tab 13, pp. 240-242]; Vol. 7, November 27, 2012, p. 536, lines 24-31 [Appeal Book, Tab 18, p. 348]; Email dated February 15, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 625] [emphasis added]
[44] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 548 to p. 554, line 6 [Appeal Book, Tab 18, pp. 360-366]; Email dated April 12, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 634-636]
[45] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 542, line 25 to p. 543, line 1 [Appeal Book, Tab 18, pp. 354-355]; Email dated February 16, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 628]
[46] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 547, line 31 to p. 548, line 15 [Appeal Book, Tab 18, pp. 359-360]; Email dated March 30, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 632]

still a lot more pieces of the puzzle for me to put together."[47] Indeed, the first "flashback" arrived just days later.

37. Around this time, the Plaintiff's daughter Olga wrote to the Defendant apologizing for her mother's letter, urging him not to take it seriously and stating, "[m]om is not well and unfortunately this is not the first of this kind of accusation that she has made."[48] Over the next several months, the Plaintiff kept her family apprised by email as new memories emerged, one by one, of atrocities committed against her by the Defendant. She boasted that a social worker she consulted had called her a "model of courage."[49] To her sister Joan she acknowledged that sometime her emerging memories seem like "total fiction to me as well" but there is "no escaping the authenticity of the reactions of my body."[50] She excoriated her sister Margaret for her "silence" and asked "What will you look like when all this is aired in the newspapers, when the Whitfield family shameful abscess will be cleaned out?"[51]

38. Additionally, there was evidence that the Plaintiff's husband, Daniel Gagnon, had contemporaneously "recovered" memories about his own childhood sexual abuse at the hands of his father.[52] His memories surfaced a few weeks after the Plaintiff's. Remarkably, there was also

[47] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 555, line 20 to p. 560, line 3 [Appeal Book, Tab 18, pp. 367-372]; Email dated July 26, 2001, Exhibit 20 [Appeal Book, Tab 30, pp. 640-642]
[48] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 560, line 12 to p. 561, line 28 [Appeal Book, Tab 18, pp. 372--373]; Email dated July 30, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 643]
[49] Email dated August 20, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 651]
[50] Email dated November 1, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 655]
[51] Email dated January 15, 2012, Exhibit 20 [Appeal Book, Tab 30, p. 657]
[52] This evidence came in chiefly through Dr. Maddocks, giving her account of what the Plaintiff had told her during their sessions. See: S. Maddocks (cross), Vol. 5, November 23, 2012, p. 379, line 15 to p. 381, line 20 [Appeal Book, Tab 14, pp. 278-280]. At the opening of trial, the Plaintiff indicated that Daniel Gagnon would be called as a witness, but he never was.

evidence from the Plaintiff that Mr. Gagnon's *previous* spouse had also alleged abuse against her father while under psychiatric treatment during her marriage to Mr. Gagnon.[53]

39. The Plaintiff's history of making allegations against other people involved in this litigation was explored in cross-examination. She admitted making complaints to the professional regulators of the psychiatrist and psychologist whom the defence proposed to assess her.[54] She also admitted reporting her sister Margaret to the College of Physicians and Surgeons.[55] She even conceded that she asked the police to look into whether a neighbour's suicide many years ago was actually a murder committed by the Defendant. (In fact, the neighbor had locked the garage from the inside and killed himself with carbon monoxide.)[56] The trial judge declined to draw any inferences about her credibility or reliability from this pattern.

40. The Plaintiff called other evidence whose relevance was unclear. For instance, she called a forensic document examiner to compare the handwriting on the envelope of a letter she had received from the Peterborough Art Gallery rejecting her proposal for a show of her husband Daniel's work, to letters written by her adult daughter Olga.[57] The expert opined that Olga had likely written the address on the rejection letter.[58] According to the Plaintiff, the purpose of this

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[53] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 650, line 13 to p. 651, line 2 [Appeal Book, Tab 20, pp. 438-439]

[54] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 642, line 21 to p. 643, line 7 [Appeal Book, Tab 20, pp. 430-431]. The Plaintiff's complaint against Dr. Hoffman was entered into evidence as Exhibit 64 [Appeal Book, Tab 50, pp. 1110-1119]. The complaint against Dr. Slako was not tendered, but a letter confirming receipt of the complaint was entered as Exhibit 63 [Appeal Book, Tab 49, p. 1108].

[55] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 643, lines 8-10 [Appeal Book, Tab 20, p. 431]; Exhibit 65 [Appeal Book, Tab 51, pp. 1121-1129]

[56] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 637, line 22 to p. 639, line 4 [Appeal Book, Tab 20, pp. 425-427]

[57] Letter from A. Whitfield to Peterborough Art Gallery, Exhibit 41 [Appeal Book, Tab 38, pp. 875-876]; Email from Peterborough Art Gallery to A. Whitfield, Exhibit 42 [Appeal Book, Tab 39, p. 878]; Forensic Handwriting Report of Johanne Bergeron, Exhibit 43 [Appeal Book, Tab 40, pp. 882-887]

[58] J. Bergeron (in-chief), Vol. 6, November 26, 2012, p. 443, lines 5-10 [Appeal Book, Tab 16, p. 327]

was somehow to demonstrate that the Defendant was "manipulating" her daughter in a way that recalled the "dynamic" of the abuse she had suffered.[59]

Evidence of Dr. Sarah Maddocks

41. Dr. Maddocks was tendered by the Plaintiff, and qualified by the trial judge, as an expert "in the area of psychology, and in particular in relation to sexual victimization."[60]

42. Dr. Maddocks testified that she is a registered psychologist in private practice who devotes a portion of her practice to women recovering from childhood abuse. (Her published works, however, deal almost exclusively with eating disorders.[61]) She was retained by the Plaintiff's former lawyer to conduct an assessment of the Plaintiff's "recovered memory process." This assessment consisted of only two interviews (on consecutive days in 2003) and the administration of standard psychological tests. She also reviewed documents supplied by the Plaintiff's lawyer, the Plaintiff's diary entries from late 2001, emails sent by the Plaintiff to her siblings in 2001, and the notes of various other clinical practitioners.[62] Despite the ten years that elapsed between this evaluation and trial, no follow-up was adduced.

43. Dr. Maddocks' report was made an exhibit at trial. She testified that she considered two sources of information in coming to her diagnosis: (1) standardized psychological tests completed by the Plaintiff; and (2) her own interviews with the Plaintiff. She explained that the Plaintiff's performance on the standardized tests had scored extremely high on something called the

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[59] Submissions of A. Whitfield, Vol. 6, November 26, 2012, p. 421, line 14 to p. 425, line 5 [Appeal Book Tab 15, pp. 319-323]
[60] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 298, lines 15-22 [Appeal Book, Tab 14, p. 243]
[61] *Curriculum Vitae* of Dr. Sarah Maddocks, Exhibit 21 [Appeal Book, Tab 32, pp. 737-743]. S. Maddocks (cross), Vol. 7, November 27, 2012, p. 498, lines 9-24 [Appeal Book, Tab 17, pp. 346]
[62] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 299, line 27 to p. 301, line 2 [Appeal Book, Tab 14, pp. 244-246]

"Paulhus Deception Scale", which to Dr. Maddocks suggested a "crude form of self-enhancement" and "extreme maladjustment".[63]

44. The Plaintiff's deception rendered the standardized test results unreliable. Accordingly, Dr. Maddocks "looked more" to the interviews to arrive at her diagnosis. Her conclusion: depersonalization disorder, post traumatic stress disorder, panic disorder with agoraphobia, and personality disorder not otherwise specified.[64]

45. Dr. Maddocks acknowledged that spontaneous recovery is "rare," but observed the presence of various "sequelae" associated with recovered memory such as flashbacks and concluded that it had occurred in the instant case.[65]

46. Dr. Maddocks was particularly impacted by an episode that occurred toward the end of their final interview in which the Plaintiff "was observed to spontaneously within a few seconds switch consciousness and slip into a dissociative episode" which lasted about three minutes.[66] (The Respondent's physiotherapist also witnessed a similar "baby talk" episode where the Respondent appeared to be reliving childhood abuse.[67]) She concluded that there was "a strong indication that [the Plaintiff's] brother had severely sexually and physically abused her on a regular basis over a long period of time, starting when Dr. Whitfield was very young."[68]

47. On cross-examination, Dr. Maddocks agreed with the statement, drawn from an American Psychological Association report, that "at this point it is impossible, without other

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[63] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 303, line 11 to p. 304, line 18 [Appeal Book, Tab 14, pp. 248-249]; p. 312, line 2 to p. 313, line 27 [Appeal Book, Tab 14, pp. 257-258]
[64] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 304, lines 20-25 [Appeal Book, Tab 14, p. 249]
[65] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 318, line 25 to p. 323, line 24 [Appeal Book, Tab 14, pp. 263-268]
[66] S. Maddocks (in-chief), Vol. 5, November 23, 2012, p. 306, lines 2-12 [Appeal Book, Tab 14, p. 251]
[67] Reasons for Judgment, paras. 41, 48, 62 [Appeal Book, Tab 3, pp. 19-20, 25]
[68] Maddocks Report, Exhibit 21, p. 5 [Appeal Book, Tab 31, p. 663]; Reasons for Judgment, para. 12 [Appeal Book, Tab 3, p. 11]

corroborat[ive] evidence, to distinguish a true memory from a false one."[69] Dr. Maddocks also acknowledged that she made no effort to speak with any other members of the Plaintiff's family, or to gather potentially corroborative evidence from any other source. Further, she conceded that she had failed to carry out a differential diagnosis with respect to shared psychotic disorder ("*folie à deux*"), instead relying on the Plaintiff's assurance that she and her husband were not influencing one another in their contemporaneous processes of memory recovery.[70]

48. Importantly, Dr. Maddocks' evidence was exclusively concerned with childhood sexual abuse. Save for one ambiguous passage in her report, discussed below, she gave no evidence respecting the phenomenon of a grown adult repressing a traumatic memory and "recovering" it later on in adulthood.

Defence evidence

49. **Dr. Joan Whitfield** is the oldest sibling. She lived at the family home until leaving to pursue her medical career at Queen's University in 1959, when the Plaintiff was nine.[71] She would therefore have been present for the first several years of the Plaintiff's alleged abuse. Joan testified that the Plaintiff and Defendant seemed to get along quite well as kids.[72]

50. With respect to the family home, Joan recalled that sounds from upstairs, where the bedrooms were, could be heard almost anywhere upstairs and their mother would wake "at the drop of a

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[69] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 414, line 3 to p. 415, line 14 [Appeal Book, Tab 14, pp. 313-314]
[70] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 386, line 19 to p. 387, line 17 [Appeal Book, Tab 14, pp. 285-286]; p. 400, line 24 to p. 404, line 27 [Appeal Book, Tab 14, pp. 299-303]; p. 413, lines 2-3; [Appeal Book, Tab 14, p. 312]
[71] J. Whitfield (in-chief), Vol. 10, November 30, 2012, p. 789, lines 9-15 [Appeal Book, Tab 21, p. 442]
[72] J. Whitfield (in-chief), Vol. 10, November 30, 2012, p. 792, line 16 to p. 793, line 17 [Appeal Book, Tab 21, pp. 445-446]

hat."[73] No one ever heard anything to suggest that the 11-year-old Defendant was repeatedly sodomizing his five-year-old sister.

51. Joan testified that before she went off to university, she felt "almost like a second mother" to the Plaintiff. They spent a lot of time together and Joan was very proud of her sister's achievements.[74]

52. Joan became a pediatrician, retiring in 2003. Over the course of her practice she had occasion to deal with a number of cases of sexual abuse. She testified that she did not observe any indication of abuse between the Defendant and Plaintiff.[75]

53. **Dr. Margaret Whitfield**, the second oldest sibling, is a psychiatrist, now retired. She lived in the family home until 1960 and had a good relationship with the Plaintiff. She observed the Plaintiff and Defendant to get along fine as well. She never saw anything to indicate otherwise.[76]

54. Margaret first learned of the Plaintiff's allegations by email. She chose not to respond to any of those emails because the Plaintiff had been "pretty difficult to get along with leading up to the sale of the cottage" and the siblings had been instructed to only communicate with her through her lawyer. She didn't think that responding would lead to anything positive.[77]

55. **Doreen McConkey**, the siblings' former nanny, was called by the Plaintiff. She described the Plaintiff as a normal, active child. In her eight or nine years living with the Whitfields – even

[73] J. Whitfield (cross), Vol. 11, December 3, 2012, p. 851, lines 2-19 [Appeal Book, Tab 22, p. 464]
[74] J. Whitfield (cross), Vol. 11, December 3, 2012, p. 854, lines 16-19 [Appeal Book, Tab 22, p. 467]
[75] J. Whitfield (in-chief), Vol. 10, November 30, 2012, p. 798, lines 22-26 [Appeal Book, Tab 22, p. 451]
[76] M. Whitfield (in-chief), Vol. 11, December 3, 2012, p. 895, line 8 to p. 897, line 2 [Appeal Book, Tab 23, pp. 471-473]
[77] M. Whitfield (in-chief), Vol. 11, December 3, 2012, p. 898, lines 9-22 [Appeal Book, Tab 23, p. 474]

sharing a bed with the Plaintiff until Joan moved out – she never witnessed any abuse of the Plaintiff by the Defendant.[78]

56. The Defendant, **Bryan Whitfield**, testified that he has been married for 35 years and has two daughters. He has good relations with all members of the extended family, including the Plaintiff's three daughters. His relationship with the Plaintiff used to be good as well, but started to deteriorate during the time when the sale of the family cottage was being discussed.[79]

57. In his evidence in-chief, the Defendant was taken through each allegation made by the Plaintiff and specifically denied each one. In cross-examination, as noted by the trial judge, the Plaintiff declined to challenge him *on a single one* of those denials.[80] Instead, she spent most of her cross-examination going over maps and diagrams of the family home and its environs, matters that were not in dispute or probative of the allegations.

58. **Dr. Brian Hoffman**, a psychiatrist in practice since 1974 and a former Chief of Psychiatry at North York General Hospital, was tendered by the defence to give his opinion and diagnosis in respect of anxiety experienced by the Defendant as a result of the Plaintiff's allegations.[81] The Plaintiff challenged the admissibility of Dr. Hoffman's opinion, advancing a strange allegation that he was somehow biased because he and Margaret Whitfield had published articles in the

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[78] D. McConkey (cross), Vol. 8, November 28, 2012, p. 406, line 8 to p. 407, line 4 [Appeal Book, Tab 19a, pp. 406-407]; Reasons for Judgment, para. 14 [Appeal Book, Tab 3, p. 12]
[79] B. Whitfield (in-chief), Vol. 13, December 5, 2012, p. 1020, line 28 to p. 1021, line 12 [Appeal Book, Tab 24, pp. 490-491]
[80] Reasons for Judgment, para. 51 [Appeal Book, Tab 3, pp. 21-22]
[81] B. Hoffman (*Voir Dire* in-chief), Vol. 17, May 24, 2013, p. 24, line 32 to p. 25, line 5 [Appeal Book, Tab 26, pp. 496-497]

same psychiatry journal. According to Dr. Hoffman, he and Margaret have never met.[82] Cross-examination on this theme consumed days of court time.

59. Dr. Hoffman related that the Defendant has had a life-long history of episodes of anxiety and depression. The Defendant was modest in accounting for the effects of the allegations on his health, reporting that he didn't think they have affected his physical health or have resulted in psychological dysfunction. However, in Dr. Hoffman's opinion, the effect of the allegations has been to aggravate the anxiety suffered by the Defendant throughout his life.[83]

60. The defence had arranged to have Dr. Hoffman assess the Plaintiff as well, but the Plaintiff backed out at the last minute and ended up filing a complaint against Dr. Hoffman with his regulatory college, which was dismissed.[84] In cross-examination, the Plaintiff elicited Dr. Hoffman's opinion on the veracity of her own account: "From a psychiatric perspective it is simply not believable that Ms. Agnes Whitfield's true memories returned to her on a single day coincidently the day in which she had succumbed to pressure from her siblings whom she felt were lead [*sic*] and influenced by Bryan Whitfield to insist on the sale of the family cottage."[85]

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[82] B. Hoffman (*Voir Dire* cross), Vol. 17, May 24, 2013, p. 55, line 25 to p. 57, line 10 [Appeal Book, Tab 26, pp. 502-504]; Submissions of A. Whitfield, November 13, 2013, p. 37, line 13 to p. 38, line 16 [Note: The corrected version of the transcript filed by the Respondent does not contain the submissions of this date. An excerpt from the "uncorrected" transcript has been provided at Appeal Book, Tab 27, pp. 505-506]

[83] B. Hoffman (in-chief), Vol. 19, November 14, 2013, p. 29, line 9 to p. 30, line 18 [Appeal Book, Tab 28, pp. 509-510]

[84] Reasons for Judgment, para. 31 [Appeal Book, Tab 3, p. 16]; Submissions of J. Lanctot, Vol. 16, May 23, 2013, p. 66, lines 1-15 [Appeal Book, Tab 25, p. 495]; Vol. 17, May 24, 2013, p. 37, line 22 to p. 39, line 17; B. Hoffman (cross), Vol. 20, November 18, 2013, p. 55, lines 9-16 [Appeal Book, Tab 29, p. 517]

[85] B. Hoffman (cross), Vol. 20, November 18, 2013, p. 46, line 17 to p. 47, line 9 [Appeal Book, Tab 29, pp. 515-516]

Reasons for Judgment

61. The trial judge found that repressed/recovered memories "in the context of CSA" are a real phenomenon. He understood his task to be determining whether this was one such case.[86] He adopted prior judicial suggestions that a court should "proceed cautiously" in a purported case of recovered memory and look for independent corroboration.[87]

62. The trial judge stated that he found the Plaintiff to be a "compelling witness". Despite initial skepticism about the recovered memory claim, "now that I understand the magnitude of the abuse inflicted on her by the Defendant and the severe psychopathology that has been created by him, I accept that she forms part of that small pool of victims of CSA who experience this phenomena." As confirmation of the Plaintiff's version, the trial judge marshaled the following points:

- The places she described visiting with her brother are "real places"; for instance, Long Beach is a real place and there are mountains near Vancouver;
- The Plaintiff was basically consistent in her account, both in her journals and her statements to police – with the "minor exception" of her testimonial reversal about having been gang raped at Long Beach;
- The Plaintiff's "candid" description of performing fellatio on the Defendant when she was 16 years old, which left room for an interpretation "that she may have consented to the act";
- Doreen McConkey, the helper who shared a bedroom with the Plaintiff and never saw the Defendant abuse her, was absent for two periods between 1950 and 1957 (once for six months, the other for two weeks), thereby giving the Defendant an opportunity to sodomize his sister;
- The testimony of the Plaintiff's physiotherapist, Natalie Provençal, who recalled four instances during treatment where the Plaintiff lapsed into "some form of altered state" and mimicked the voices of a little girl and boy, making apparent reference to abuse.

[86] Reasons for Judgment, paras. 19-20 [Appeal Book, Tab 3, p. 13]
[87] Reasons for Judgment, paras. 21-22 [Appeal Book, Tab 3, pp. 13-14]

63. The trial judge further found that the Plaintiff's general refusal to answer "yes or no" questions on cross-examination was more corroboration of her having suffered sexual abuse.[88]

64. The trial judge observed that the Defendant's denials that any such incidents occurred "were not specifically addressed during cross-examination by the Plaintiff and, to that extent, remain unchallenged."[89] These denials were "equally compelling" as the Plaintiff's allegations.[90]

65. The trial judge noted that the Defendant's denials were supported "to a limited degree" by the testimony of his two other sisters, Joan and Margaret, who observed no indications of abuse and do not believe the Plaintiff's allegations. With respect to Joan, a pediatrician, the trial judge castigated her for failing to access "resources" in her profession "to discuss her younger sister's claims." The trial judge found this "profoundly disturbing."[91] In his view, Joan had "obviously dismissed these serious allegations in a summary manner because of the differences that had taken place over the parents' estates and the family cottage." Why this was "obvious" the trial judge does not say. The trial judge did not similarly vilify Margaret for not believing the Plaintiff over the Defendant, but likewise accorded little weight to her testimony.

66. After reviewing the testimony of the parties and their sisters, the trial judge found that "the scales between the case for the Plaintiff and that of the Defendant are relatively evenly balanced." That was where Dr. Maddocks' evidence came in: it tipped the scales decisively in the Plaintiff's favour. In his view, Dr. Maddocks was an impressive witness and the weaknesses pointed out by the defence did not undercut her conclusion that the Plaintiff's symptoms were "strongly consistent with severe sexual and physical abuse on a regular basis over a long period of time

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[88] Reasons for Judgment, para. 48 [Appeal Book, Tab 3, pp. 20-21]
[89] Reasons for Judgment, para. 51 [Appeal Book, Tab 3, pp. 21-22]
[90] Reasons for Judgment, para. 57 [Appeal Book, Tab 3, p. 23]
[91] Reasons for Judgment, para. 53 [Appeal Book, Tab 3, pp. 22-23]

starting when she was very young."[92] Finally, Dr. Maddocks' observation of the Plaintiff in the throes of a "flashback" – together with the physiotherapist's evidence to the same effect – provided strong corroboration that the Defendant abused her as alleged.[93]

PART IV – ISSUES AND LAW

A. Overview and standard of review

67. This appeal raises questions of law, mixed fact and law, and fact. While decisions on questions of law are reviewable for correctness, findings of fact may only be disturbed if they are the result of palpable and overriding error. This is a difficult threshold to reach. The Defendant submits, however, that if "palpable and overriding error" is a real standard that can actually be met in practice and not just in theory, this must be the case. No trier of fact, acting judicially and considering this record as a whole, could reasonably conclude on a balance of probabilities that the Defendant abused his sister. Considering the record as a whole and applying common sense, the trial judge's ultimate finding was palpably wrong.

68. For the purposes of appellate review, the proper approach is to evaluate individual findings for the presence of palpable and overriding error – and, if that threshold is met, go on to consider whether the errors have vitiated the result. The Supreme Court of Canada applied this approach in *Keays v. Honda*, finding that the trial judge's palpable and overriding errors of fact had "coloured the trial judge's judgment, making other findings and inferences suspect."[94] As it happens, the trial judge in that case was Justice McIsaac. The Appellant submits that the same thing happened here.

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[92] Reasons for Judgment, para. 59 [Appeal Book, Tab 3, p. 24]
[93] Reasons for Judgment, para. 62 [Appeal Book, Tab 3, p. 25]
[94] *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39, at para. 19

69. An appellate court will only intervene with a trial judge's factual findings "if the judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence, or has drawn erroneous conclusions from it."[95] As the Supreme Court stated in *Housen*:[96]

> [I]t is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

70. In *Waxman v. Waxman*, this Court (*per* Doherty, Laskin and Goudge JJ.A.) further fleshed out what the palpable and overriding standard means in practice:[97]

> The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz v. Canada*, [1996] 1 S.C.R. 254 at 281.

71. *Waxman* also explained that "[a] process which yields findings of fact that cannot pass the reasonableness standard of review will almost always be tainted by at least palpable error." Further, "a finding of fact based on speculation and not logical inference will be subject to appellate correction not because the finding is unreasonable, although it clearly is, but because a process of fact-finding based on speculation is clearly wrong and, therefore, constitutes a palpable error."[98]

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[95] *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at 121-122, *per* McLachlin J.
[96] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, at para. 23 [emphasis in original]
[97] *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at paras. 296-97 [emphasis added]
[98] *Waxman*, *supra*, at para. 306

B. The trial judge erred in law by relying on Dr. Maddocks' evidence

72. According to the trial judge, Dr. Maddocks' evidence was *the* crucial piece that tipped the balance of probabilities in favour of the Plaintiff. Viewed properly, this evidence was of negligible value – and in any event, the trial judge misapprehended its content.

73. First, the witness' opinion that the Plaintiff was telling the truth was inadmissible and should have been disregarded.[99] Where expert evidence on "recovered memories" is tendered, the danger is that it will impermissibly be treated as "corroborative of the validity of the memories recalled by the complainant."[100] As McLachlin J. stated in *R. v. Marquard*, "[i]t is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion."[101] Instead, the trial judge appeared to give it significant weight.

74. The trial judge also made palpable and overriding errors of fact in his assessment of this evidence. First, he was untroubled by Dr. Maddocks' downplaying of the Plaintiff's high scores on the deception and fake-bad scales, stating that "it was reasonable to place more reliance on the extensive interviews conducted with Dr. Whitfield than to put any weight on a self-skewed psychological test."[102] In other words, the trial judge found it was reasonable for Dr. Maddocks

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[99] Maddocks Report, Exhibit 21, p. 5 [Appeal Book, Tab 31, p. 663]; Reasons for Judgment, para. 12 [Appeal Book, Tab 3, p. 11]
[100] *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.)
[101] *R. v. Marquard*, [1993] 4 S.C.R. 223. See also *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535 (Ont. C.A.).
[102] Reasons, para. 60

to reason as follows: since the Plaintiff was lying on the standardized psychological tests, it was safer to rely on the Plaintiff's self-reports and Dr. Maddocks' own clinical judgment.[103]

75. Dr. Maddocks acknowledged that she failed to speak with any family, friends or associates of the Plaintiff, and failed to check with any of her health care providers, notwithstanding that these are recognized by the standard diagnostic checklist as helpful sources of information.[104] She was not provided with any of the letters exchanged between the Plaintiff and Defendant during the *very period in which the abuse was allegedly ongoing*. This shortcoming did not trouble the trial judge.

76. Dr. Maddocks noted that the Structured Clinical Interview for DSM Disorders ("SCID"),[105] which she purported to use in her work with the Plaintiff, sets out a framework for differential diagnosis. In other words, it provides for a kind of decision tree in which each possible diagnosis is considered and eliminated.[106] On cross-examination she admitted that she failed to carry out a differential diagnosis with respect to shared psychotic disorder ("*folie à deux*"), in that she failed to look for other evidence to rule it out. Rather, she simply relied on the Plaintiff's word that she and Daniel Gagnon were not influencing one another in their contemporaneous processes of memory recovery.[107] With respect to malingering, which is also recognized by the DSM-IV, Dr.

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[103] Unguided clinical judgment is generally recognized as possessing the lowest level of diagnostic accuracy: see, e.g., the comments of Charron J. (as she then was) in *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466 (Ont. Gen. Div.), at paras. 14-16.

[104] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 386, line 19 to p. 387, line 17 [Appeal Book, Tab 14, pp. 285-286]; Vol. 7, November 27, p. 486, line 19 to p. 488, line 21 [Appeal Book, Tab 17, pp. 334-336]

[105] SCID-1 Scoresheet, Exhibit 30 [Appeal Book, Tab 35, pp. 776-841]

[106] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 385, line 23 to p. 386, line 6 [Appeal Book, Tab 14, pp. 284-285]

[107] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 400 line 24 to p. 404, line 26 [Appeal Book, Tab 14, pp. 299-303]

Maddocks admitted that she said nothing in her report about ruling it out, even though the two warning signs stipulated by the DSM were present.[108]

77. Confronted with a 1998 policy statement of the Canadian Psychological Association and a 1995 American Psychological Association policy statement on dealing with recovered memories, Dr. Maddocks agreed with them that courts should be very careful in making decisions based on recovered memories with no corroborative evidence. She agreed that she was provided with no corroborative evidence in this case.[109]

78. The American Psychological Association's policy statement, which Dr. Maddocks acknowledged as authoritative, contemplates only the repression of *early childhood* memories. It does not allow for the possibility that an adult can forget, then years later remember, significant trauma like a succession of gang rapes. The Appellant has been unable to locate *any* scholarly support for the idea that such a thing is possible.

79. The trial judge declined to advert to any of this. In sum, he:

- Failed to recognize that there was *no* evidence before him, in Dr. Maddocks report or elsewhere, supporting the notion of *adult* memory repression – this is discussed further below;
- Dismissed any concern about the Plaintiff's elevated scores on the "deception" and fake-bad" scales, illogically finding that this compelling evidence of the Plaintiff having lied on standardized tests administered by Dr. Maddocks should have no effect on the credibility of her statements to Dr. Maddocks; and
- Failed to advert to Dr. Maddocks' concession that distinguishing true memories from false ones is *impossible* without corroboration, of which there was none here.

[108] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 404, line 28 to p. 406, line 20 [Appeal Book, Tab 14, pp. 303-305]
[109] S. Maddocks (cross), Vol. 5, November 23, 2012, p. 410, line 1 to p. 413, line 4 [Appeal Book, Tab 14, pp. 309-312]

80. Finally, the trial judge erred in assuming that if Dr. Maddocks' psychological diagnoses were accepted, this necessarily led to the conclusion that sexual abuse by the Defendant was the cause of it. There was ample evidence in the record that the Plaintiff had acted out irrationally against other people in her life having nothing to do with the Defendant's alleged abuse. There was also her own evidence that she had been abused by her ex-husband. In these circumstances, it was a clear error to assume a connection between the Plaintiff's psychological problems and the Defendant's guilt.

81. Given the centrality of the Maddocks evidence to the result reached, any one of these manifest errors would be sufficient to undermine the integrity of the verdict. In combination, they demonstrate that the trial judge's reliance on this evidence to find the Defendant liable was profoundly misconceived.

C. The trial judge misapprehended the "recovered memory" theory in finding that "repression" by adults is a recognized phenomenon

82. The trial judge found that attempts to "debunk" the phenomenon of recovered memory have been "unsuccessful", citing a 1998 American Psychological Association report. He went on to find that "the judicial and psychological community seem to be *ad idem* on this point." The sole authority cited for this proposition is a 1998 law review article written *by the Plaintiff's own former lawyer*, Susan Vella.[110] On no reasonable view does this represent a current scientific consensus.

[110] "Recovered Traumatic Memory in Historical Childhood Sexual Abuse Cases," by Susan Vella, Exhibit 50 [Appeal Book, Tab 43, pp. 923-954]

83. In fact, the recovered memory theory is now recognized as highly dubious, memory researchers having questioned whether the phenomenon exists at all.[111] (The dominant view among researchers is that trauma leads to too much remembering, not forgetting – hence, the prevalence of PTSD.) For the purposes of this appeal, however, it suffices to observe that this was not merely a case where memories of *childhood sexual abuse* were allegedly repressed and later recovered. Rather, the Plaintiff had to prove that she also unconsciously repressed memories of horrific things done to her *as a grown adult* – recall, she was a 20-year-old third-year university student at the time of the alleged B.C. gang rapes – then recovered them at a later point in adulthood. There was nothing before the trial judge to support the notion that grown adults can similarly "repress" memories of significant traumatic events. Counsel is unaware of the existence of any such authority in the extensive scholarly literature on "recovered" memories. The trial judge's own reasons consistently refer to "CSA" – childhood sexual abuse.[112]

84. The *only* reference to adult memory repression in the evidence appears to be the following confusing statement in the Appendix to Dr. Maddocks' report:[113]

> The later memories of abuse and dissociative processes were examined. The question of whether the amnesia for events that took place in her late teens [*sic*] was possible [*sic*]. Professional opinion suggests that once dissociative mechanisms are established it is possible that these psychological defences can continue into adulthood (Courtois, 1988).

The trial judge adopted this vague assertion and held:

> This includes the recognition that an individual who has suffered early childhood sexual abuse has the possibility of repression of abuse that takes place in an older context: see Exhibit 21, Report of Dr. Susan Maddocks dated July 15, 2004 at p. 39 referencing a publication by C.A. Courtois in 1988. This publication in turn was referenced in the 1998 APA Report which

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[111] See, e.g., E. F. Loftus and D. Davis, "Recovered Memories," Annu. Rev. Clin. Psychol. 2006, 2:469–98; R.J. McNally, "Searching for Repressed Memory," Nebr. Symp. Motiv. 2012 58:121-47; R. J. McNally, "Debunking Myths about Trauma and Memory," Can J Psychiatry, Vol. 50, No 13, 817-822.

[112] Indeed, the trial judge appeared to advert to the distinction between childhood and adult repression in an exchange with counsel during closing submissions, referring to this as a "hybrid" case: Submissions, November 21, 2013, Vol. 23, p. 16, lines 25-28.

[113] Maddocks Report, Exhibit 21, p. 39 [Appeal Book, Tab 31, p. 696]

> recognized the validity of total memory loss and delayed recall in a minority of sexual traumatized individuals: see Exhibit 51 at p. 26. Indeed Dr. Courtois was one of the authors of that prestigious report: see. p.1.

85. The operative passage in the Maddocks opinion is difficult to parse. It is far from clear whether she is actually endorsing the idea that memories of events occurring in one's "late teens"[114] can be repressed. The ungrammatical second sentence of the passage raises this as a "question" without answering it. The following sentence then speaks of "dissociative mechanisms" continuing into adulthood, but says nothing about memories of adult experiences being forgotten by way of repression.

86. The sole authority for this latter proposition – a 1988 book by therapist C. Courtois entitled *Healing the Incest Wound* – likewise says nothing about adult memories being repressed.[115] Nonetheless, the trial judge takes this ambiguous, likely erroneous reference by Dr. Maddocks and imbues it with the "prestige" of the 1998 APA Report, to arrive at a factual, scientific conclusion that neither Maddocks nor Courtois actually endorse.

87. It is difficult to overstate the significance of this error. The entire edifice of the Plaintiff's case rests on the plausibility of her claim that she suffered horrific abuse *up to the age of 20*, then entirely forgot about it for 30 years. This is contrary to ordinary experience and common sense, and would therefore normally be a serious, perhaps fatal blow to her credibility or reliability. Because the trial judge erroneously found as fact that adult memory repression is a scientifically recognized phenomenon, he transformed what should have been a dire problem for the Plaintiff's

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[114] The plaintiff, who was born on March 23, 1951, was actually 20 years old in the summer of 1971 when the trip to British Columbia allegedly occurred.

[115] C. A. Courtois, *Healing the Incest Wound: Adult Survivors in Therapy* (New York, W.W. Norton & Co., 1988). The passages of this book that make any reference at all to memory or amnesia are provided in the Appellant's Book of Authorities. A complete copy is available for inspection.

case into yet another indication that she was telling the truth. This amounted to palpable and overriding error.

D. The trial judge's handling of the Plaintiff's refusal to participate in a defence psychological assessment rendered the trial unfair

88. The Plaintiff originally agreed to be assessed by Dr. Hoffman, the psychiatrist who also assessed the Defendant.[116] However, she changed her mind and indicated that she would only agree to be assessed by a female practitioner. The defence acceded to this request and arranged for the Plaintiff to be assessed by a female psychologist, Dr. Slako. On November 21, 2011, Justice M.L. Edwards ordered that the Plaintiff attend a defence assessment to be "conducted by a female psychiatrist or female psychologist of the choosing of the defence." The Plaintiff disobeyed this order, apparently because of a concern (never substantiated) that Dr. Slako was biased through some kind of connection to her sister.

89. The trial judge observed, correctly, that defence counsel made "heroic attempts to arrange for an independent assessment of Dr. Whitfield but her response was to frustrate those efforts to the extent of lodging complaints against the proposed assessors [Dr. Slako and Dr. Hoffman] with their respective Colleges in Ontario and Quebec." He noted that defence counsel "went so far as to obtain a pre-trial order for an assessment" under Rule 33, but the Plaintiff resolutely refused to cooperate.[117]

90. The trial judge gave two reasons for not drawing an adverse inference from this obstructionist conduct. First, he had nothing before him to show whether or not her complaints against the proposed assessors were well founded. Second, he was "not satisfied that either of these

[116] The relevant history is recounted in the ruling of Edwards J. dated November 21, 2011 [Appeal Book, Tab 4, pp. 35-50]
[117] Reasons for Judgment, para. 31 [Appeal Book, Tab 3, p. 16]

complaints were an intentional effort to frustrate the process as opposed to being a reaction to her conspiratorial view of being under threat and acting in a self-destructive and impulsive manner as described by Dr. Maddocks at p. 26 of her report."[118]

91. The first reason given is factually misleading: there was uncontradicted evidence from Dr. Hoffman himself that the complaint against him had been dismissed as without merit.[119] Regardless, the trial judge's approach reverses the burden of proof on this issue: if the Plaintiff wanted to be excused from compliance with a court-ordered assessment, *she* had the burden of showing that the proposed assessors had misconducted themselves. The Defendant had no obligation to prove a negative. Further, the complaint against Dr. Hoffman and the one against Dr. Joan Whitfield for somehow conspiring against the Plaintiff were entered into evidence by the Plaintiff herself.[120] The vexatious nature of the complaints is plain.

92. The second reason for declining to draw an adverse inference – the Plaintiff's evident paranoia – is inconsistent with the first. Finding that the Plaintiff's conduct was an effect of her paranoid outlook should logically have led to an inference that the complaints were *not* well founded.

93. Further, the trial judge's observation that the order "did not conform with R33.02(1) in that the presiding judge did not specify the 'name of the health practitioner' who was to conduct the assessment" cannot have been a proper reason to excuse the Plaintiff from the consequences of her non-compliance. It is trite that court orders must be complied with unless properly set aside by a court of competent jurisdiction.[121]

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[118] Reasons for Judgment, para. 32 [Appeal Book, Tab 3, pp. 16-17]
[119] B. Hoffman (cross-examination), Vol. 20, November 18, 2013, p. 55, lines 9-16 [Appeal Book, Tab 29, p. 517]
[120] Exhibits 64 and 65 [Appeal Book, Tabs 50 and 51, pp. 1110-1119, 1121-1129]
[121] *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 51. On this issue, see also: Submissions of J. Lanctot, Vol. 24, November 22, 2013, p. 14, line 20 to p. 17, line 7

94. In this case, where the Plaintiff's psychology was effectively the crux of the dispute, it was essential that the defence have the opportunity to obtain another opinion. As Gillese J. (as she then was) stated in *Tsegay v. McGuire*:[122]

> The purpose of s. 105 and Rule 33 is to ensure that a defendant has full rights of production and discovery, once an action has been commenced and pleadings exchanged. These latter provisions ensure that if a party puts his or her medical condition in issue in a civil proceeding, the opposing party can test that allegation under fair conditions. A defendant is entitled to complete discovery in order to properly defend and assess the allegations in the pleadings.

95. The Plaintiff's refusal to cooperate with a defence assessment should, in itself, have led the court to place little or no weight on the self-serving Maddocks Report. Instead, the trial judge gave it decisive weight. This was profoundly unfair, both procedurally and substantively. Through no fault of his own – indeed, through the Plaintiff's *deliberate breach of a court order* – the Defendant was deprived of an opportunity to answer what turned out to be the decisive evidence in the case. This was much more than a discretionary decision not to draw an adverse inference favourable to the defence. Rather, the trial judge's handling of this issue compromised basic trial fairness in a manner that bears directly on the ultimate result.

E. The trial judge erred in law in his approach to confirmation

96. The trial judge accepted that in a case involving recovered memories, it is necessary to look for confirmatory evidence.[123] He erred in finding that the Plaintiff's account was corroborated by a number of obvious facts that had nothing to do with the truth of her allegations and which equally supported the Defendant's denial. His approach was logically specious and legally wrong.

97. As a matter of law, corroborative evidence is "evidence from a source extraneous to the witness whose evidence is to be corroborated, that is relevant to a material fact in issue – it thus

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[122] *Tsegay v. McGuire*, [2000] O.J. No. 1557 (S.C.J.) [emphasis added]
[123] Reasons for Judgment, paras. 21-22 [Appeal Book, Tab 3, pp. 13-14]

strengthens or confirms the evidence of that witness on a material fact."[124] A witness' knowledge of obvious facts is not relevant to a fact in issue and can do nothing to strengthen or confirm the evidence of the witness.

98. In *R. v. J.N.C.*,[125] the complainant alleged that her great-uncle had touched her inappropriately while giving her a tour of his boat. The trial judge was impressed by the complainant's ability to recall precise details about the boat, and used this observation to find the complainant a credible witness whose evidence about the touching should be believed. The New Brunswick Court of Appeal overturned the verdict on the basis that the trial judge had committed a palpable and overriding error of fact by drawing an illogical inference about the complainant's credibility from her description of the boat. First, the description was so generic that it could have applied to virtually any boat with a cabin. Second, there was no dispute that the complainant had been on the accused's boat – so even assuming her description was accurate, it could not logically support her version over the accused's.[126]

99. The trial judge's approach in the case at bar was even more troubling. He found confirmatory value in the Plaintiff having accurately reported on the existence of mountains near Vancouver – a fact so notorious that it could not constitute legally corroborative evidence. He also found confirmatory support in the existence of certain British Columbia towns mentioned by the Plaintiff in her testimony and noted that "[e]ach of them can be quickly confirmed on any reference map and are, accordingly, the proper subjects of judicial notice."[127] That is true – but it is also a reason why the existence of these places cannot logically have any bearing on the truth

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[124] *Gyorffy v. Drury*, 2015 ONCA 31, *per* Laskin J.A., at para. 33, quoting *Pepe v. State Farm Mutual Automobile Insurance Company*, 2011 ONCA 341, *per* Doherty J.A., at para. 15 (internal quotation marks omitted)
[125] *R. v. J.N.C.*, 2013 NBCA 59
[126] See also *R. v. D.T.*, 2014 ONCA 44, *per* Strathy J.A. (as he then was)
[127] Reasons for Judgment, para. 36 [Appeal Book, Tab 3, pp. 17-18]

of the Plaintiff's account. All it shows is that she has been to British Columbia, possesses a basic education, or can read a map – none of which were in dispute at trial.

100. Similarly, the Plaintiff's detailed knowledge of her own childhood home could not, as a matter of basic logic, provide any confirmatory support for her account of what happened there. The Defendant exhibited such knowledge too, yet apparently this did not equally support *his* story – a story that was, after all, corroborated by *actual eyewitnesses*. This approach to corroboration fatally vitiated the trial judge's fact-finding process and the ultimate result.

101. There was, by contrast, much to corroborate the Defendant's account. The trial judge did mention the most obvious source of corroboration – the evidence of his two other sisters – then dismissed it in question-begging fashion, criticizing these women for not accepting the Plaintiff's account.[128] Other sources of corroboration went unmentioned in the trial judge's reasons.

102. Further, the trial judge erred in law by using the "baby talk" episodes to corroborate the Plaintiff's account. This arose from the evidence of the Plaintiff's physiotherapist, Natalie Provençal, who testified that on four occasions she witnessed the Plaintiff appear to lapse into some kind of altered state and act out dialogue in the voices of a little girl and a little boy.[129] The dialogue included:

> Boy: Are you going to tell Mom? Don't tell Mom.
> Girl: No, I won't tell Mom. Don't hurt me.
>
> "I don't want that gooey stuff on my face."
>
> "Mom wants me to go to the barn with Bryan."
>
> Boy: Daddy is not here to help you now.
> Girl: Stop pointing that gun towards me.

[128] Reasons for Judgment, para. 53 [Appeal Book, Tab 3, pp. 22-23]
[129] N. Provençal (in-chief), Vol. 8, November 28, 2012, p. 598, line 1 to p. 601, line 6 [Appeal Book, Tab 19, pp. 399-402]

103. Despite the physiotherapist lacking any qualification to diagnose or interpret an ostensible "flashback" – indeed, despite the lack of any expert evidence on this point – the trial judge accepted this evidence as direct corroboration that "the plaintiff's recall is both genuine and accurate."[130]

104. It was legally improper for the trial judge to rely on the Plaintiff's "baby talk" for the truth of its contents. They were prior consistent statements of the party tendering them, and therefore inadmissible for their truth.[131] There was additionally no expert evidence that utterances made during a purported "flashback" of this kind are somehow reliable. There was not any expert evidence that these were even "flashbacks" at all. In all of these respects, the situation was analogous to that which arose recently in this Court in *R. v. M.C.*,[132] where the trial judge's erroneous reliance on utterances made by the complainant during a "non-epileptic seizure" required a new trial to be ordered. It likewise amounts to reversible error in the case at bar.

F. The trial judge's erroneous handling of the Plaintiff's alleged "consistency"

105. The trial judge found that the Plaintiff's account had been "consistent" – including in her recovered memory journal composed in the early 2000s – except for "one minor incident during the course of her trial testimony."[133] This "minor" incident arose when she testified in chief that she had been "gang raped" at Long Beach on Vancouver Island, at the Defendant's instigation. She then testified in cross that she hadn't actually said that; it was only a very strong "possibility" that she had been raped on the beach. What she remembers most clearly are the attempts to

[130] Reasons for Judgment, para. 48 [Appeal Book, Tab 3, pp. 20-21]
[131] *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10, at para. 5
[132] *R. v. M.C.*, 2014 ONCA 611
[133] Reasons for Judgment, para. 37 [Appeal Book, Tab 3, p. 18]

prostitute her.[134] Because of her refusal to acknowledge what she had said in chief, the judge asked the court reporter to read back the testimony and, after that was done, the Plaintiff acknowledged she had indeed testified to a rape.[135]

106. This was not a "minor" inconsistency. This was the Plaintiff significantly misrepresenting her *own testimony* given just days earlier about a major incident of abuse. What was previously a rape was, one week later, now a "possibility." A trier of fact being asked to believe the Plaintiff's bizarre account of what took place half a century ago could not reasonably perceive this inconsistency as "minor". Moreover, the judge's reasoning on "consistency" was legally improper because: (1) it ignored the express agreement that the journals were *not* to be used as substantive evidence but only to "understand…the process of recovery";[136] and (2) it offended the evidentiary rule that prior consistent statements are inadmissible to bolster the credibility of a witness.[137]

107. Further, as a matter of basic fairness, it was profoundly problematic to credit the Plaintiff for being consistent in her own diary and in her allegations since 2001, without reference to the 30-year period of *in*consistency that preceded it.

108. For all the reasons discussed above, this is "one of those rare instances where the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence."[138]

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[134] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 624, line 18 to p. 627, line 1 [Appeal Book, Tab 20, pp. 412-415]
[135] A. Whitfield (cross), Vol. 8, November 28, 2012, p. 640, lines 1-27 [Appeal Book, Tab 20, p. 428] Her original testimony was: "Donc, moi les images que j'ai de cette nuit sur la plage à Long Beach, c'est d'avoir été violée par quelque jeunes autour de ces – de ce feu de bois. Et mon frère faisait des rencontres pour vendre un peu de hash": A. Whitfield (in-chief), Vol. 2, November 20, 2012, p. 83, lines 3-7 [Appeal Book, Tab 11, p. 143]
[136] Ruling, Vol. 3, November 21, 2012, p. 125, line 31 to p. 126 line 12 [Appeal Book, Tab 12, pp. 169-170]
[137] *R. v. Stirling*, *supra*
[138] *R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7

G. The trial judge's approach to the evidence was marred by palpable and overriding errors

109. In addition to the specific errors just enumerated, the trial judge's global approach to the evidence was fundamentally flawed. Recall that he found both the Plaintiff and Defendant to be generally credible witnesses. Before considering Dr. Maddocks' opinion, he had no basis upon which to prefer one version over the other. Were it not for Dr. Maddocks' evidence, in other words, the Plaintiff would have failed to prove her case on a balance of probabilities. The critical paragraph in the trial judge's reasons reads as follows:[139]

> Up to this point of my analysis, the scales between the case for the plaintiff and that of the defendant are relatively evenly balanced. Dr. Whitfield's complaints against her brother are, in my view, extremely compelling and I am satisfied that they are neither a product of a wilful decision to slander her brother nor are they a construction of false memories either intentionally or inadvertently implanted into the mind of the plaintiff by her own efforts or those of third parties. The denials of Bryan Whitfield being effectively unchallenged by his younger sister during cross-examination and being substantively buttressed to varying degrees by his two older sisters, are equally compelling. That is why I find the evidence of Dr. Maddocks, including her report, to be of critical importance in resolving this litigation.

110. Given the bizarre nature of the Plaintiff's allegations, her demonstrated history of emotional instability, the implausible coincidence of her husband's contemporaneous memory-recovery, and her antipathy to the Defendant at the time the allegation was made – one would have expected a cogent explanation of how the trial judge satisfied himself that the Plaintiff's story was true. However, there is no meaningful analysis of credibility or, more importantly, reliability throughout the reasons.

111. The trial judge did have this to say about why he found the Plaintiff to be a "compelling witness":[140]

> Despite initial skepticism concerning her claim of repressed/recovered memories, now that I understand the magnitude of the abuse inflicted on her by the defendant and the severe

[139] Reasons for Judgment, at para. 57 [Appeal Book, Tab 3, p. 23]
[140] Reasons for Judgment, para. 35 [Appeal Book, Tab 3, p. 17]

> psychopathology that has been created by him, I accept that she forms part of that small pool of victims of CSA who experience this phenomena.

112. This reasoning is entirely circular. Whether or not the Plaintiff's "severe psychopathology" was caused by the Defendant was *precisely the issue to be decided*. The judge's appreciation of its "magnitude" could not logically answer the question of causation. This approach to the central factual issue – the Plaintiff's reliability and whether the recovered memories were genuine – constitutes palpable and overriding error.

113. Remarkably, any consideration of relative plausibility was absent from the trial judge's reasons. The Appellant submits that the Plaintiff's account – brutal and unrelenting abuse, unnoticed by anyone else in the home, punctuated by gang rapes by a rotating cast of mysteriously available predators ready to perpetrate an atrocity at the drop of a hat, with the abuse persisting up until her university years before suddenly vanishing from her memory for 30 years – all of this is manifestly "contrary to the mode in which mankind generally act."[141] In addition, the improbability of a pre-pubescent boy of 10 years old being sexually active, much less capable of sodomy, was never even adverted to. In other words, the trial judge entirely failed to consider the "inherent improbability that an event occurred," in Rothstein J.'s words from *McDougall*.[142]

114. The trial judge also neglected to consider the Plaintiff's prior history of making allegations in considering whether *these* allegations had been proven. There was unchallenged evidence before the court that following her separation from Stan Kirschbaum and her estrangement from her daughters, the Plaintiff had memories "come back" to her about the marriage.[143] She pursued a campaign to humiliate Mr. Kirschbaum by, among other things, lobbying to have York

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[141] See *F.H. v. McDougall*, 2007 BCCA 212, at paras. 100-101, *per* Southin J.A., quoting *Gardner v. Gardner* (1877), 2 App. Cas. 723 (H.L.)
[142] *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53, at para. 47
[143] Email dated February 15, 2001, Exhibit 20 [Appeal Book, Tab 30, p. 626]

University's Faculty Council debate Mr. Kirschbaum's father's alleged Nazi connections.[144] Just as Joan and Margaret witnessed nothing of the abuse the Plaintiff now says her brother perpetrated, her daughters witnessed none of the "abuse" she belatedly accused their father of. Indeed, at the time of trial she was not on speaking terms with any of her three daughters. The pattern bears a striking resemblance to what happened with the Defendant. The Plaintiff's conduct during the litigation – filing professional regulatory complaints against the two proposed defence assessors as well as her own sister Margaret – fits the pattern as well. The trial judge failed to consider any of it.

115. Untroubled by "inherent improbabilities," the trial judge declined to weigh the Plaintiff's pattern of behaviour in the balance. Worse still, at times he used the Plaintiff's evident unreliability and histrionic behaviour to *support* her case, reasoning that it must be a result of the trauma inflicted by the Defendant.[145] A reasonable person in the Defendant's position could be forgiven for detecting something Kafkaesque about a scenario in which his accuser's *in*credibility just provided more evidence of his guilt.

116. The frailties of the trial judge's approach can also be seen in his treatment of the contemporaneous memory recovery by the Plaintiff's husband. This should have been a warning sign that the Plaintiff's account was suspect. The trial judge in fact accepted that cases of genuine recovered memory are exceptionally rare. Logically, two cases coincidentally appearing in the same household must be far rarer still.

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[144] A. Whitfield (cross), Vol. 7, November 27, 2012, p. 548, line 16 to p. 554, line 6 [Appeal Book, Tab 18, pp. 360-366]
[145] Reasons for Judgment, para. 32 [Appeal Book, Tab 3, pp. 16-17]

117. Indeed, Dr. Maddocks in her report acknowledged that "[t]his is considered a highly unusual history and the question of whether they were involved in a process of mutual influencing was of concern and explored."[146] But she "explored" the issue by asking the Plaintiff about it. Dr. Maddocks merely notes that the Plaintiff "denied" that Daniel in any way implanted suggestions of abuse and "appeared to accept" the coincidence that this represented. And that was the end of it, apparently, as far as Dr. Maddocks was concerned. Consistent with this non-analysis, the trial judge concluded that Mr. Gagnon "did nothing to embed false memories in her mind and that his concurrent recovery of his own memories of parental sexual abuse is a simple coincidence."[147]

118. This analysis is unsatisfactory. If, on the trial judge's own view, genuine recovered memories are extremely rare, what are the chances of two such cases arising in a single household? On the Plaintiff's account, she had been together with Mr. Gagnon for years before their "recovered memories" emerged – within a few weeks of each other. Because they both *just happened* to be victims of abuse with recovered memories – i.e. they did not self-select as abuse victims – these are independent variables whose likelihood can be multiplied to yield a combined probability. To assign arbitrary figures for the sake of illustration: if genuine recovered memories are one in a thousand, the chances of two cases under one roof are one in a million. In other words, the chances of this actually being a "simple coincidence" – rather than an indication of conscious fabrication or *folie à deux* – are vanishingly small. (And this is to say nothing of the fact that Mr. Gagnon's previous spouse *also* appears to have made allegations against her own father while they were together.) In failing to resolve this problem, or even advert to it, the trial judge committed another palpable and overriding error.

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[146] Maddocks Report, Exhibit 21, p. 39 [Appeal Book, Tab 31, p. 696]

[147] Reasons for Judgment, para. 48 [Appeal Book, Tab 3, pp. 20-21]. The trial judge made this finding even though the plaintiff, in her opening, said that she would be calling Mr. Gagnon to testify, then did not – despite Mr. Gagnon's presence in court throughout the trial.

119. Interestingly, this trial judge appears to have engaged in similar reasoning in *R. v. Swanson*, where this Court overturned a conviction entered by McIsaac J. in a recovered memory case.[148] The Court (*per* Moldaver, Sharpe and Blair JJ.A.) was "concerned about several aspects of the trial judge's analysis" including his finding that the complainant's "bizarre and improbable allegations of sexual abuse at the hands of the appellant were probably true." It observed that "if anything, the record would suggest that these allegations were likely concocted, particularly in light of the Crown's concession about the frailties of [the complainant's] claim to a recovered memory." As demonstrated by the examples discussed above, McIsaac J.'s analysis in the case at bar followed a similarly problematic approach.[149]

H. The Reasons for Judgment are legally insufficient

120. The losing party in a civil case is entitled to know not just *that* he lost, but also *why*.[150] In this case, a reasonable person in the Defendant's position, reading the trial judge's reasons, would be left scratching his head. The trial judge quite simply failed to grapple with, or even advert to, a number of profoundly problematic aspects of the Plaintiff's case that had been duly raised and argued. Many of them are set out above.

121. On the Plaintiff's account, the Defendant was a sexual psychopath from the age of 10. One might therefore be surprised to learn that he ended up leading a productive, pro-social life as a respected college teacher. One might be surprised that he never manifested this brazen cruelty to

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[148] *R. v. Swanson*, 2007 ONCA 763

[149] See also the B.C. Court of Appeal's recent decision in *Antrobus v. Antrobus*, 2015 BCCA 288, at para. 1: "This case illustrates the difficulty of litigating over events that took place in the far distant past. While a plaintiff must only prove his or her case on the balance of probabilities, the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test: *F.H. v. McDougall*, 2008 SCC 53 at para. 46. In this case, the available evidence does not meet that standard."

[150] *F.H. v. McDougall* (S.C.C.), *supra*, at para. 98. See also: *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, at paras. 100-101.

either of his two other sisters – or, apparently, anyone else in his life over the past half century. The trial judge was entirely untroubled by this anomaly. From his reasons, it is impossible to know why.

122. It is also impossible to know why the trial judge made nothing of the Plaintiff's demonstrated pattern of making spurious allegations against anyone with whom she perceives conflict. She became estranged from her own daughters over one such campaign. She saw imagined conspiracies between all the defence witnesses. She even tried to implicate the Defendant in a non-existent murder. The Defendant was entitled to know why none of this objectively erratic behaviour registered at all in the judge's assessment of the Plaintiff's credibility or reliability.

123. According to former Associate Chief Justice John Morden – echoing the sentiments of the English judge R.E. Megarry – the most important person in the courtroom is the "litigant who is going to lose."[151] That is because the system depends for its legitimacy on the perception that even the losing litigant has gotten a fair shake. Respectfully, the trial judge's approach to this case constitutes a profound undermining of that ideal. No reasonable person in the Defendant's position would, after reading the Reasons for Judgment, feel that he had been given a fair and reasoned explanation of why he lost.

I. The trial judge erred in dismissing the counterclaim for defamation

124. The impugned communications comprise 14 pieces of correspondence (primarily emails) between July 26, 2001 and August 3, 2002, during the Plaintiff's "memory recovery" process. They were sent to various members of the extended family and certain third parties, such as two lawyers involved with the elder Whitfield's estate. They falsely accused the Defendant of sexual

[151] John W. Morden, "The 'Good' Judge" (Spring 2005), 23 Advocates' Soc. J. No. 4, 13-24, at para. 8; R.E. Megarry, "Temptations of the Bench" (1978), 16 Alta. L. Rev. 406 at 410

and physical violence against her and suggested that he may have abused others. The Plaintiff admitted publication but pleaded justification and qualified privilege.

125. If the Appellant is right that the trial judge's findings on the main action are unsustainable, then the defence of justification fails and the remaining issue is whether the trial judge erred in holding that the defence of qualified privilege applied.[152] As explained by Sharpe J.A., "[q]ualified privilege arises on occasions where the maker of the defamatory statement has an interest or duty to make it and the person to whom it is made has a corresponding interest or duty to receive it."[153] Further:

> Employment references, business and credit reports, and complaints to police, regulatory bodies or public authorities are classic examples of occasions of qualified privilege. The rationale for qualified privilege is that on such occasions, "no matter how harsh, hasty, untrue, or libellous the publication . . . the amount of public inconvenience from the restriction of freedom of speech or writing would far outbalance that arising from the infliction of private injury" (*Huntley v. Ward* (1859), 6 C.B. (N.S.) 514, at p. 517).

126. The Appellant submits that the trial judge's finding of qualified privilege was irreparably tainted by the erroneous fact-finding process described above. In deciding whether the recipients of the defamatory allegations had a legal "duty" to receive them, he simply blamed the other family members for their supposed insensitivity to their sister's plight. He wrote:[154]

> Although some or all of them may have found the disclosures distasteful and offensive, they had not only an interest but a familial duty to consider this "dirty family secret" and give their sister, sister-in-law and aunt at least a tiny benefit of a doubt as to the validity of her claims. Any group of right-minded persons would have done so, especially when her complaints were supported to a significant degree by the report of Dr. Maddocks. The refusal by two professionals such as her two older sisters to do so simply boggles my mind. This attitude was not only insensitive to their younger sister, it shows, in my view, a profound absence of professional objectivity.

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[152] The trial judge's factual finding that the Plaintiff genuinely believed her allegations – and therefore had no "malice" in the legal sense – is not challenged for the purposes of this appeal.
[153] *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241, rev'd on other grounds [2009] 3 S.C.R. 712, 2009 SCC 62, at para. 38
[154] Reasons for Judgment, at para. 82 [Appeal Book, Tab 3, pp. 30-31]

127. Besides being unfair and inappropriate, these comments were entirely irrelevant to whether or not the defamatory statements were made on an "occasion" of qualified privilege. The Plaintiff's belief that she was in the process of "recovering" decades-old memories cannot at law amount to an occasion giving her the right to broadcast them to the world at large without fear of consequence. This was not a targeted complaint to a police officer or child welfare agency. It was a campaign of vilification, whose audience for the most part consisted of people who were in no position to actually do anything about the Plaintiff's dated allegations.

128. If the trial judge is right, then there are no meaningful limits on the ability of a person to broadcast allegations – of the most defamatory kind imaginable – to the entire world, provided he or she believes them to be true. Qualified privilege would cease to be a targeted, occasion-based protection for certain kinds of socially desirable report, and take on the character of a general licence for defamation based on self-certified sincerity. That is not the law. Rather, the proper approach is the one taken by A.J. Goodman J. in *Vanderkooy v. Vanderkooy*, which was considered and rejected by the trial judge.[155]

129. The Defendant does not propose a new trial on this issue and seeks only symbolic damages. This Court is in as good a position as the trial judge to quantify them. The Defendant suggests that an award of $5000 is appropriate in the circumstances.

J. The appropriate order

130. Section 134 of the *Courts of Justice Act* gives this Court broad authority to "make any order or decision that ought to or could have been made by the court or tribunal appealed from", "order a new trial" or "make any other order or decision that is considered just."

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[155] *Vanderkooy v. Vanderkooy et al.*, 2013 ONSC 479, at paras. 173-190

131. In this case, the proper order is to enter judgment for the Defendant. No useful purpose would be served by ordering a new trial, and much unfairness to the Defendant would result. The Plaintiff had her day in court – 24 days in fact – and on any reasonable view of the evidence, failed to prove her claim. The action was commenced in 2002. The Defendant has had to deal with the stigma of the Plaintiff's allegations, and incur the cost of defending against them, for 13 years. It consumed the first decade of his retirement. The Plaintiff has shown herself to be extremely motivated and there can be little doubt that she would pursue a new trial if permitted, further depleting the time and resources of the Defendant and his family. At this point, enough is enough.

PART V – ORDER REQUESTED

132. The Appellant respectfully requests that the appeal be allowed, and judgment be granted to him with costs throughout. The Appellant also requests that judgment be granted on the counterclaim in his favour in the amount of $5000. In the alternative, the Appellant requests that a new trial be ordered with costs of the appeal.

133. The Appellant certifies that an order under subrule 61.09(2) has been obtained and estimates he will require 3.5 hours for oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2015.

Marie Henein
Matthew R. Gourlay

SCHEDULE A – AUTHORITIES TO BE REFERRED TO

Case law

1. *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39
2. *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114
3. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33
4. *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.)
5. *F.H. v. McDougall*, 2007 BCCA 212
6. *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53
7. *R. v. Swanson*, 2007 ONCA 763
8. *Antrobus v. Antrobus*, 2015 BCCA 288
9. *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.)
10. *R. v. Marquard*, [1993] 4 S.C.R. 223
11. *R. v. Béland*, [1987] 2 S.C.R. 398
12. *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535 (Ont. C.A.)
13. *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466 (Ont. Gen. Div.)
14. *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626
15. *Tsegay v. McGuire*, [2000] O.J. No. 1557 (S.C.J.)
16. *Gyorffy v. Drury*, 2015 ONCA 31
17. *R. v. J.N.C.*, 2013 NBCA 59
18. *R. v. D.T.*, 2014 ONCA 44
19. *R. v. Stirling*, [2008] 1 S.C.R. 272, 2008 SCC 10
20. *R. v. M.C.*, 2014 ONCA 611
21. *R. v. Burke*, [1996] 1 S.C.R. 474

22. *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41

23. *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241

24. *Vanderkooy v. Vanderkooy et al.*, 2013 ONSC 479

Scholarly works

1. E. F. Loftus and D. Davis, "Recovered Memories," Annu. Rev. Clin. Psychol. 2006, 2:469–98

2. R.J. McNally, "Searching for Repressed Memory," Nebr. Symp. Motiv. 2012 58:121-47

3. R. J. McNally, "Debunking Myths about Trauma and Memory," Can J Psychiatry, Vol. 50, No 13, 817-822

4. C. A. Courtois, *Healing the Incest Wound: Adult Survivors in Therapy* (New York, W.W. Norton & Co., 1988)

5. John W. Morden, "The 'Good' Judge" (Spring 2005), 23 Advocates' Soc. J. No. 4, 13-24

SCHEDULE B – LEGISLATIVE PROVISIONS

None.