IN THE SUPREME COURT OF YUKON

Citation: *W.E.* v. *F.E. et al*, 2008 YKSC 40

Date: 2008 06 02
S.C. No. 04-A0058
Registry: Whitehorse

BETWEEN:

W.E.

Plaintiff

- and -

F.E., R.C., HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by HER MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE COMMISSIONER OF YUKON, and JOHN DOE AND JANE DOE

Defendants

THE IDENTITY OF W.E., F.E. AND R.C. AND ANY INFORMATION THAT COULD DISCLOSE THEIR IDENTITY, INCLUDING THE USE OF THEIR INITIALS, SHALL NOT BE PUBLISHED OR BROADCAST IN ANY WAY.

Before: Justice J.E. Richard

Appearances:

Daniel S. Shier, Norah Mooney	Counsel for the Plaintiff
Keith Parkkari	Counsel for the Defendant R.C.
John T. Henderson, Q.C., Lorena K. Harris	Counsel for the Defendant The Commissioner of Yukon

REASONS FOR JUDGMENT

Introduction:

[1] This litigation concerns allegations of sexual abuse perpetrated upon the plaintiff almost thirty years ago at a time when the plaintiff was 5 - 7 years of age.

[2] The plaintiff is [W.E.] (previously known as [W.E.]). He is now 34 years of age. He is referred to in the style of cause, and hereafter in these Reasons, as W.E. A Court Order was made in 2004 prohibiting the publication or broadcasting of his name.

[3] One of the defendants is [F.E.] who is the maternal aunt of the plaintiff. It is alleged that she engaged in sexual contact with the plaintiff in 1978 - 1980 at a time when she was 13 - 14 years of age and the plaintiff was 5 - 7 years of age. This defendant is referred to in the style of cause and hereafter in these Reasons as F.E. The 2004 Court Order similarly prohibits the publication or broadcasting of her name.

[4] Another of the individual defendants is [R.C.] who was, in 1978 - 1980, the principal and a counsellor at the elementary school attended by the plaintiff. It is alleged that during that time he engaged in sexual contact with the plaintiff. He is referred to in the style of cause and hereafter in these Reasons as R.C., and again, the 2004 Court Order prohibits the publication or broadcasting of his identity.

[5] The third defendant against whom allegations are made in this litigation is the Commissioner of the Yukon Territory. The Commissioner is the representative of the Government of the Yukon Territory, and is referred to hereafter in these Reasons as YTG. In this litigation the plaintiff claims that, in connection with the wrongful acts of F.E. and R.C., YTG breached its duty of care towards the plaintiff, thereby committing the tort of negligence for which YTG is liable to the plaintiff.

[6] (The plaintiff discontinued his claim against the defendant Her Majesty the Queen in Right of Canada. The defendants John Doe and Jane Doe were never served with the Statement of Claim and thus no relief is sought against those named defendants.)

[7] This case raises many issues. Some of these are difficult. The issues include:

a) an assessment of the credibility and reliability of testimony concerning events of thirty years ago, in particular the testimony of the plaintiff and of the defendant R.C.

b) the liability in negligence of one defendant for the intentional tort of another defendant.

c) determination of causation when a plaintiff suffers from a mental disorder or personality disorder.

d) the measure of damages flowing from the intentional tort of assault and battery.

The Plaintiff:

[8] The plaintiff W.E. is 34 years old. He presently resides, most of the time, with his parents (mother and stepfather) in a comfortable home in a rural area outside of Whitehorse. He is unemployed and receives social assistance. He has a Grade 8 education. By his own account he has for many years been addicted to alcohol and drugs. His pattern of behavior, or lifestyle, in the past year includes regular "binges" which he says occur every weekend or every second weekend. On these occasions he leaves his parents' home and does not return for 3 - 4 days. At night he "crashes" at the home of friends, or at the Salvation Army, or on the street or other public areas. In his words, he "does not look after himself" — he consumes alcohol, consumes drugs including cocaine, engages in physical fights with others, and consumes little or no food. After 3 - 4 days he gets sick, is unable to move or function, and then telephones his parents to come and get him. He says he cannot function without the support of his parents; he says he has tried, and cannot do it. He says he cannot hold down a regular job, meaning, for him, getting up and going to work 9 - 5; he says he has tried and cannot do it. He says he has made some efforts to upgrade his education but has always failed, because of his inability to commit himself to a schedule or routine. The plaintiff states that this pattern of lifestyle in the past year represents a "slowing down", or an improvement, over his previous lifestyle. Previously, he says, his self-destructive lifestyle would go on for months on end.

[9] The plaintiff had a difficult childhood, a difficult adolescence, and, for the most part but not always, a dysfunctional and unhappy adult life to date.

[10] The plaintiff is of mixed ancestry. His mother is First Nations. His biological father is non-aboriginal or Caucasian, and presently lives in Ontario. His biological father and his mother separated when the plaintiff was 3 years old. His stepfather (also First Nations) became part of the family unit (mother, stepfather, the plaintiff, and the plaintiff's older sister) when the plaintiff was about 4 years old. The plaintiff was raised by his mother and stepfather; the family lived at different residences in the Whitehorse area over the years when the plaintiff was growing up.

[11] The plaintiff's mother has been gainfully employed throughout her adult life. The plaintiff's stepfather, in the early years, was a hard-working individual in construction and other trades and who had gainful employment on a seasonal basis. The step-father, in those days drank alcohol to excess (by his own admission); however he stopped drinking alcohol in 1982, when the plaintiff would have been 9 years of age. Thereafter, the stepfather has had a successful life, and in recent years has been […]. Both parents testified at the trial. It is obvious they both care very much for the plaintiff. Although they have difficulty understanding his self-

destructive behaviour, they have been, and remain, very supportive of him. They pray regularly that he may overcome his addictions.

[12] The plaintiff recalls that in the months leading up to entering kindergarten in September 1978, he was quite excited about the prospect of going to school (he was apparently jealous of his older sister who was attending elementary school, which was just a few blocks from the family home on […] Street). His parents also recall this "excitement" on the part of the plaintiff. This positive anticipation was soon replaced with disillusionment, as the plaintiff says he was "beaten up" by other children on his first day of kindergarten. He says he was beaten up, and bullied by other kids — both native and non-native — on a regular basis throughout his early school years. He says it continued until he got big enough to defend himself, and then he started bullying the bullies. His involvement in physical fights, including fights with weapons, continued through his adolescent years and adult life.

[13] At the time he commenced kindergarten, and for a few years thereafter, the plaintiff suffered from enuresis (bed-wetting and wetting his pants) and from encopresis (messing or soiling his pants). He was teased about this by other schoolchildren.

[14] The plaintiff had difficulty with schoolwork from an early age. In his testimony he says he "gave up" on school as early as Grade 3 and did not make any effort. He says any references in report cards to the effect that he was making progress are simply the result of the school authorities "pushing" him through the school system.

[15] The plaintiff's mother arranged for the plaintiff to be assessed at Sunny Hill Hospital for Children in Vancouver, B.C. in July 1987 when the plaintiff was 13 years of age. It was determined that the plaintiff suffered from a learning disability and also that he had impaired hearing in his left ear. In 1991, when he was 17 years of age, he was assessed by a psychologist in Whitehorse at the request of Youth Probation Services. It was that psychologist's view that W.E.'s behavioural difficulties at that time were related to "a long-standing history of what would appear to be attention deficit disorder with hyperactivity as a child".

[16] The plaintiff says that, with few exceptions, he always felt that the teachers "belittled" him.

[17] It is the plaintiff's evidence that he began drinking alcohol before going to junior high school. His parents each described one particular incident when the plaintiff was 12 years of age and they responded to a phone call advising them that the

plaintiff was intoxicated at a bush party, and they went and picked him up and brought him home and he was indeed extremely intoxicated.

[18] It is the plaintiff's evidence that his lifestyle, when he was in junior high school and since that time, has been characterized by drinking alcohol, doing drugs, engaging in physical fights, and criminal activity such as thefts and break and enter. He has also been engaged in self-destructive behavior, including burning himself with cigarette butts, cutting and slicing himself, and pulling out his toe-nails. He has had suicidal thoughts, including an attempt at suicide at age 13.

[19] Evidence at trial indicates that the plaintiff engaged in criminal activity as a youth and as an adult, including crimes of assault, theft and break and enter. He has served custodial sentences.

[20] The plaintiff has not maintained steady employment of any meaningful duration during his adult years. All of his employment, he says, has been short-term, and has ended because of his drinking and doing drugs.

[21] The trial evidence does disclose one period of the plaintiff's adult life that was, by his account, a positive and happy experience and that was the time that he lived common law with a woman, [T.], with whom he has a daughter [A.], now 16 years of age. He lived common law with [T.] for approximately 7 years. He has not maintained contact with his daughter, as he says that the child's mother does not wish for them to have a father-daughter relationship and he does not pursue the matter.

[22] As described in more detail later in these Reasons, the plaintiff testified at trial about being sexually abused, as a child, by each of F.E. and R.C. In addition, he states that he was also assaulted, sexually, in the same general time frame, i.e., when he was 5 - 7 years old, by two other individuals who are not parties to this lawsuit. One of these individuals was [R.V.], who the plaintiff described as an adult "family friend" who often visited the family home on […] Street. The plaintiff says that [R.V.] was often drunk and smelled of alcohol. The plaintiff says that [R.V.] sexually assaulted or sexually abused him on a number of occasions. He says that there were a few times when [R.V.] rubbed the plaintiff's genitals. On one occasion, he says [R.V.]put his finger in the plaintiff's anus.

[23] The plaintiff says that the other abuser, unnamed, worked at the day care centre that the plaintiff often attended after school hours when he was in Grade 1. He does not recall the name of the person, but it is his best recollection that the person was employed there as a janitor. He recalls that this person would grab him and take him

into a closet and sexually abuse him by fondling his genitals and masturbating him. The plaintiff does not recall how many times he was abused by this person. In one of his narratives the plaintiff states that this abuse included digital penetration of his anus.

[24] The plaintiff's testimony is the only evidence before the Court with respect to the abuses at the hands of the family friend and the janitor. There is no other evidence, either supportive or contradictory, regarding these assaults. In these circumstances, I accept the plaintiff's testimony regarding these assaults, and find that he was indeed sexually abused by the family friend and the day care janitor.

[25] At trial, the plaintiff presents to the Court as a person who is of at least average intelligence, who has good reading skills, has a good vocabulary, and is articulate in narrative and in dialogue. He has a real awareness of his social, or functional, shortcomings, and speaks frankly about those matters. He has low self-esteem, and is lacking in motivation, in particular with respect to a) maintaining regular employment, and b) making a committment to long-term treatment for his addictions.

[26] As will be discussed in more detail later in these Reasons there is trial evidence from psychologists that the plaintiff currently suffers from one or more disorders or conditions — Post Traumatic Stress Disorder, Anti-Social Personality Disorder, Polysubstance Dependance, and depression.

[27] In this lawsuit, the plaintiff claims against the defendant's R.C., F.E. and YTG general damages and special damages. No special damages were proven at trial. On the matter of general damages, the plaintiff says that as a result of the torts of these three defendants, he suffers from mental and/or personality disorders, substance addiction, and also, flowing therefrom he has suffered a loss of employment income, past and future.

Abuse by F.E.

[28] The defendant F.E. was born on December 22, 1965, and is thus today 42 years of age. She is the youngest of eleven siblings. One of her older siblings is the plaintiff's mother, [J.E.], formerly [J.E], born July 12, 1950. F.E. was made a permanent ward of the state in 1968 at age 2 ½, with her parents' consent, and remained so until she turned 18 in 1983. During the time that she was a ward of the state she visited at the home of her sister, [J.], in particular during the period 1978 - 1981 when [J.] and her family, including the plaintiff, lived at the […] Street home.

[29] The plaintiff recalls that F.E. regularly visited his family's home on […] Street, including during his kindergarten year. He also recalls that F.E. would, at times, babysit he and his older sister [C.], and would take them out to playgrounds, to the clay cliffs, to stores and to parks. He says that he spent a lot of time alone with F.E. He states that she abused him when he was 5 - 7 years old. The first abuse, he says, was physical abuse and it occurred in the bathroom, when he was in the bathtub taking his bath. He says F.E. would be in the bathroom with him, and was smoking cigarettes, something she was not supposed to do. He says that F.E. would threaten him not to tell his parents about her smoking, and, in particular, would a) hold his head under water, and also, b) force him to take a drag on the cigarette. He recalls that he was terrified when this happened.

[30] The plaintiff states that later, the abuse turned to sexual abuse. He says, again at bath time, F.E. would "make me play with myself", masturbate, and also that F.E. would herself play with his penis. He states, further, that F.E. would take him for a walk by the clay cliffs, would take him to a spot in the bushes where no one could see them, and she would a) make him perform oral sex on her, and also b) take his pants off, put him on top of her and "pump", simulating intercourse. The plaintiff recalls feeling scared, and not knowing what he was doing or what it all meant. The plaintiff cannot recall how many times he was sexually abused by F.E., but testified that it was "quite a bit" and "a lot more than once". He says this sexual abuse by F.E. started around the commencement of his kindergarten year and continued into his Grade 1 year. He says there was no sexual abuse by F.E. after January 1981 which was the date that he and his family moved from the […] Street address out to […]outside of Whitehorse.

[31] The defendant F.E. did not file a Statement of Defence in these proceedings. She did not participate in the trial other than as a witness called by the plaintiff. She did not attend at the trial after the conclusion of her testimony. She admitted to sexual contact with the plaintiff. She says it occurred at the […] Street home over a period of approximately one year at a time when she was about 12 - 13 years old, and the plaintiff was 5 - 6 years old.

[32] F.E. herself had a difficult childhood. She was a ward of the state from age 3 to 18, and lived in a variety of places at the direction of YTG's social services personnel — foster homes, group homes, receiving home, relatives' homes, youth detention facilities, etc. In her testimony she related details of sexual abuse she suffered at the hands of older boys who were also wards of the state and with whom she was placed in various group homes. She says the abuse started when she was 10 years old, continued for a number of years, consisted of fondling, oral sex, full vaginal

intercourse, and other sexual activities and involved at least 5 or 6 different boys who she named. There were departmental records introduced into evidence at trial indicating that F.E. was frequently "AWOL" from her placement residences and in her testimony F.E. confirmed that she ran away quite often.

[33] F.E. testified that she did some "not nice things" to the plaintiff when he was 5 - 6 years old. With respect to physical assaults, she used the words "torture" and "torment". She specifically mentioned the bathtub incidents when she was babysitting him, and that she would try to get him to smoke cigarettes, and also would hold his head under the water and then bring his head back up and try again to make him smoke. She says she would take him to the clay cliffs and pretend to push him over just to make him cry.

[34] With respect to the sexual contact, F.E. says she would fondle his penis, would put him on top of her to simulate intercourse, and also, she says she "attempted" to get him to perform oral sex on her but he would not do that. She says the sexual contact only took place in the family home on […] Street.

[35] When asked at trial why she did these things to her young nephew back then, she responded that she did the physical acts of cruelty because she wanted someone else to feel her pain, to put someone else through what she was going through, she wanted to see him cry, and it would make her giggle when he cried. She does not know why she did the sexual contact except that she thought "that's what you did".

[36] F.E. states that after the plaintiff, her nephew, grew older, he often visited in her home, at times babysat her own children, and, at one point, as an adult, he lived with her and her family in her home. She says they have had a cordial relationship as adults.

[37] F.E.'s testimony was presented in a credible and forthright fashion, albeit with some embellishment. The evidence of W.E. of having been sexually abused by F.E. is thus confirmed by the sworn evidence of F.E. herself.

[38] On all of the evidence I am satisfied that the defendant F.E. intentionally had sexual contact with the plaintiff when she was 12 - 13 years of age, and the plaintiff was 5 - 6 years of age, thereby committing the intentional tort of assault and battery, or, as it is sometimes described, sexual battery. It is clear that a 13 year old child can commit an intentional tort. It is not the age of the child that matters, but rather the capacity of the child to understand and appreciate, and whether the child acted intentionally. See *Tillander* v. *Gosselin* [1967] 1 O.R. 203 and *T.O.* v. *J.H.O.* 2006 BCSC 560.

[39] I find that the sexual battery consisted of fondling of the plaintiff's genitals, of positioning the plaintiff on top of her to simulate intercourse, and of forcing the plaintiff to position his head in her genital area. I find that there was more than one incident but am unable on the evidence to make a determination as to how many incidents of sexual battery occurred. I find that all incidents occurred in the plaintiff's home on […] Street and that the incidents occurred over a time period of approximately one year when the plaintiff was 5 - 6 years of age. F.E.'s tort of sexual battery constituted a violation of the plaintiff's dignity and a serious interference with his personal integrity and autonomy.

[40] As noted above, both the plaintiff and F.E. also gave evidence of other physical abuse by F.E., e.g. the holding of the plaintiff's head under water in the bathtub. This is also evidence of an intentional tort of assault and battery; however not of a sexual nature. This additional tort is thus statute-barred by the *Limitations Act*. See the 1998 amendments to the *Limitations Act* which provided that no limitation period applies to a cause of action based on sexual misconduct.

Allegations against R.C.:

[41] The plaintiff testified that when he was in kindergarten (mornings only) and also when he was in Grade 1 (full days) at Whitehorse Elementary, he was regularly subjected to bullying and physical beatings at the hands of other children — both native and non native — on the school grounds. He says that the school principal, the defendant R.C., would often intervene, and protect him from the bullies. He says often R.C. would take the plaintiff inside the school building, in order that the plaintiff might escape or avoid such encounters, and that this was usually at a recess period or over the lunch period. He recalls being taken to a room that was not a classroom, and not an office. He recalls that there would usually be some other kids there too. He recalls there was a closet associated with this room, and also mattresses, gym mats, bean bags, etc. He recalls that this room was in the basement level of the school building. He recalls that he and the other kids would play there for awhile, and then they would go to their classroom. He recalls feeling safe, as R.C. was protecting him from the children who were beating him up. But then, he says, things changed. He says that when he was in Grade 1, R.C. took him into that room, a dark room, or a dark closet, and sexually assaulted him by rubbing the plaintiff's penis and also by rubbing his body up against the plaintiff's buttocks. He says after the assault, R.C. would leave the room, and the plaintiff would be left there alone in the dark room. He recalls feeling confused and scared.

[42] The defendant R.C. testified at the trial. He is now 70 years of age. He was a teacher/principal/counsellor in the Yukon education system for more than 30 years, and retired in 1996. He recalls the plaintiff being in kindergarten and the early grades at Whitehorse Elementary, and recalls that he had a nickname, […]. He does not recall when the plaintiff left Whitehorse Elementary, and he has no recollection of seeing the plaintiff subsequent to that time, except for one occasion 5 - 7 years ago when a young woman pointed out W.E. among a group of friends she was with at a downtown location. R.C. denies ever touching W.E. in any sexual way. He denies, or does not recall, taking W.E. to his office or to any other room in the school building. R.C. testified that in 1978 - 1980 when he was, firstly, principal and later, temporarily, counsellor, at Whitehorse Elementary, both his principal's office and his counsellor's office were on the main ground floor of the school building (i.e., not the basement level). Adjacent to his counsellor's office, he recalls, was a storage room used by the gymnastics club, where such things as pommel horses and gym mats were stored. He testified that at times his duties included being present on the playground during recess and lunch to assist the teachers in supervision of the school children.

[43] The Court thus has conflicting evidence regarding the allegations of sexual abuse by R.C.

[44] The plaintiff makes a serious allegation against R.C. His allegation is not corroborated by any other evidence — not that corroboration is required in meeting the civil standard of proof. It is a characteristic of sexual assault cases that such assaults generally occur when only the victim and the abuser are present. Rarely are there witnesses who can be called upon to corroborate or challenge either side of the conflicting evidence, especially when the serious allegation arises from events of thirty years ago.

[45] Given the gravity of the allegation of misconduct by R.C., the Court must take great care in scrutinizing the evidence presented. See *Continental Insurance* v. *Dalton Cartage* [1982] 1 S.C.R. 164 and *P.B.* v. *R.V.E.* 2007 BCSC 1568.

[46] Each of the plaintiff and R.C. testified with firm conviction.

[47] I do have some unease, or concern, however, with certain aspects of the plaintiff's testimony. There are some inconsistencies between the plaintiff's trial evidence and earlier narratives, either at examination for discovery or at psychological assessments. At trial he testified that he was uncertain how many incidents of abuse by R.C. occurred. At a December 2006 discovery, he stated that there were four specific, discrete incidents. He has thus moved from clarity or certainty, on this point,

to vagueness or uncertainty. At one point, he stated that the abuse by R.C. only occurred at lunch time, at another point he stated that the abuse occurred at other times as well.

[48] The plaintiff has stated that he had no memory of his childhood sexual abuse until his adult years. His first disclosure was made to his mother in 2002, and he implies that even then he did so with some reluctance. His allegation against R.C. results from recovered memory. Evidence from psychology experts at trial inform that the phenomenon of recovered memory exists albeit rarely. The plaintiff's narratives conflict with respect to whether he had a memory, at age 12, of the earlier childhood sexual abuse. His recovered memory, or at least his 2002 disclosure, occurred at a point in time in his life subsequent to both his common-law partner [T.] and his older sister making similar disclosures of childhood sexual abuse.

[49] The plaintiff did not make any complaint to police regarding childhood sexual abuse.

[50] There is a possibility that the plaintiff, operating with recovered memory, is intermixing details regarding four different alleged abusers. I note some similarity between his allegations against R.C. and his reported abuse by the janitor at the day care facility.

[51] In the course of the within litigation proceedings, the plaintiff was assessed by three different psychologists in 2004, 2006 and 2007. Each, to varying degrees, offered the opinion that the plaintiff currently suffers from an Anti-Social Personality Disorder, or features of that disorder. One of the characteristics of that disorder is that the person regularly uses deceit and manipulation for personal objectives. Apart from that theoretical attribute, the plaintiff in his evidence acknowledged that he has, on many specific occasions during his adult life which were drawn to his attention in the documentary evidence, provided misleading information, incorrect and untruthful information to police authorities and hospital authorities, for personal benefit or personal reasons.

[52] There are other aspects of the plaintiff's evidence not dealing directly with abuse by R.C. which were inconsistent, either internally or with other evidence. At one point the plaintiff stated that the first sexual abuse he suffered as a child was perpetrated by the daycare janitor, at another point he stated that the first abuse was by F.E. His narrative of the locations where the F.E. sexual abuse occurred differs starkly from the evidence of F.E.

[53] Many of the plaintiff's responses, when testifying at trial, followed leading questions posed by his counsel on contentious issues, and not merely non-contentious issues.

[54] In all of these circumstances I do have a certain level of discomfort regarding the reliability of the plaintiff's testimony, when I am confronted, as I am, with a direct conflict between his testimony and that of R.C.

[55] As stated, R.C. was firm in his denial of ever having sexual contact with the plaintiff. That denial was not directly challenged on cross-examination, although opposing counsel did ask many questions of R.C. on other matters such as the physical layout of the school, the frequency of bullying incidents on the school playground thirty years ago, and the incident at the T & M Hotel in recent years when, he says, W.E. was pointed out to him. Although R.C. did display some nervousness and/or frustration during cross-examination, I attribute this to the repetitive nature and adversarial nature of some questions and understandable confusion about details of a) events of thirty years ago and b) a non-significant or inconsequential event at the T & M hotel 5 - 7 years ago. R.C. was a long-time educator in the Yukon prior to his retirement in 1996. The only evidence adduced at trial as to his career is that it was exemplary. There is no evidence of any blameworthy conduct, similar to the allegations of the plaintiff, or otherwise.

[56] Upon careful consideration of the evidence of the plaintiff and of R.C., I am unable to conclude that it is more probable than not that R.C. had sexual contact with the plaintiff.

[57] The civil standard of proof, i.e., on a balance of probabilities, has not been met by the plaintiff. The test is not whether he honestly believes that he was sexually assaulted by R.C. but rather whether he has proven to the standard that the law requires that he was sexually assaulted by R.C. Put another way, it is not that abuse by R.C. has been proven <u>not</u> to have occurred, but rather that abuse by R.C. has not been proven, to the required standard, to <u>have</u> occurred.

[58] The plaintiff's claim against R.C. must accordingly be dismissed.

<u>Liability of YTG</u>

[59] The plaintiff claims that the defendant YTG is responsible for the harm caused to him by F.E. by virtue of the fact that F.E. was at that time in the care and control of

the Director of Child Welfare. In this litigation YTG acknowledges that it was at all material times *in loco parentis* with respect to the child F.E.

[60] This claim by the plaintiff is premised on the allegation that YTG knew, or ought to have known, that F.E. was a sexual predator, and failed to warn the plaintiff or the plaintiff's parents of the danger to W.E. However, there is no evidence to support that allegation.

[61] There was evidence at trial that F.E. was sexually abused by older boys who were also in the care and control of YTG. In particular, there was evidence of a time when F.E., a young girl of 11 - 12 years of age, was placed in a group home in Whitehorse, a residence with upstairs accommodation and downstairs accommodation. For part of the time that F.E. lived there, the group home parents and their family occupied the upstairs bedrooms and F.E. and 5 boys occupied the downstairs bedrooms. This is when the boys took advantage of the situation and on a regular basis, individually and together, sexually abused F.E. F.E. says in her testimony that on one occasion she complained to the group home mother that she was being "bothered" by those boys. She says her complaint was "sluffed off". She says that she did not mention the sexual details to the group home mother, only that those boys were "bothering" her. When asked at trial whether she at any time told any of the social workers with whom she had contact about the sexual abuse by the boys or about engaging in sexual activity, she answered that she did not.

[62] There was another occasion when the fact of the boys having sexual contact with F.E. was brought to the attention of the group home parents. A witness T.C. was one of the boys living downstairs in the Whitehorse group home for several months in 1979 and confirms that, led by one other older boy L who was cruel and abusive, there were instances of sexual abuse perpetrated upon F.E. He stated this happened in the downstairs level of the group home and also during a group vacation trip to Alberta in summer of 1979. He told his mother of the sexual contact with F.E. when he was returned to her care in B.C. later in 1979. T.C.'s mother also testified at the trial, and stated that upon hearing of this disturbing activity, she telephoned to the group home father in Whitehorse and related it to him and understood that the group home father would deal with it. There is no evidence before the Court that the group home parents or any YTG official or employee did anything in particular as a result of these two "complaints" made about the sexual abuse being perpetrated upon F.E.

[63] Entered as trial exhibits were a large number of documents from the records of the Social Welfare Branch of YTG with respect to the child F.E. The plaintiff draws the Court's attention to several entries in particular:

(a) A Child Assessment Form dated July 6, 1976 with respect to F.E. Under "Development" there are entries stating "physical development somewhat advanced" and "sexually curious child, wanting information".

(b) A Quarterly Review dated August 27, 1976. Under "Areas of problematic functioning" there is an entry stating "precocious somewhat around sex information".

(c) A Group Home Monthly Report dated October 20, 1976. Under "Major Areas of Concern" there is an entry stating: "[F.] should not be in a group home. She is exposed to things a 10 year old child should never have to see".

(d) A Group Home Monthly Report dated February 1978. Under "Health" there is an entry indicating that F.E. was taken to see a doctor "when she had a skin infection on her finger and inner vagina area". There is also an entry indicating that the doctor "mentioned that she should be considered for birth control pills". At the time F.E. would have been 12 years old.

(e) A Quarterly Review dated January 12, 1981. Under "Health" there is an entry stating "[F.] contacted vaginal herpes this fall. She was diagnosed with it and realizes the serious implications". Under "Special Interests and Activities", the entry reads "[F.] has no constructive interests at this time that she is pursuing. Activities consist of drinking parties, some drugs and sexual activity". Under "Areas of problematic functioning", part of the entry reads "[F.] is an insecure young girl who turns to sexual activity as a means of feeling wanted. She is not discriminative about her sex partners and will not discuss birth control, saying she does not want it or need it, but says she can look after herself". (The plaintiff's mother, [J.E.], testified that F.E. was living in the […] Street residence with her and her family in the fall of 1980. The plaintiff's mother was aware of the genital herpes incident, was aware of F.E.'s sexual activity with a boyfriend at that time, and did not seem concerned).

[64] Thus, it would seem that there were a number of "red flags" that should have alerted YTG officials to the fact that F.E. was engaging in sexual activity at a very young age, and was being harmed. YTG clearly owed a duty of care to F.E., and may well have breached that duty. However, F.E. is not a plaintiff in this litigation.

[65] In support of its submission that YTG is liable for the tort of the child F.E., the plaintiff cites the case of *Segstro* v. *McLean* [1990] B.C.J. No. 2477, and the following passages in particular:

> " ...because parents are in a position to govern the child's behaviour they have a corresponding duty to use reasonable care to prevent foreseeable harm to others by proper supervision. Liability may arise for negligence in the exercise of that control should injury or loss occur (Smith v. Leurs (1945) 70 C.L.R. 256). Such liability is not strict.
>
> ...
>
> Where it can be demonstrated that a child has a propensity to act destructively (Thibodeau v. Cheff (1911) 24 O.L.R. 214 (Div. Ct. App.)) then the duty to supervise (and to take other reasonable steps to avoid foreseeable loss) is heightened. At p. 221 the learned Judge stated that a parent is exposed to liability:
>
> > "... if he the [parent] knows of a child's frequent wrongdoing in a particular direction and, by his inaction (when he is able to restrain and confine the child), he indicates his willingness that the misconduct should be repeated."
>
> Special circumstances must be proved, however, and the parent is not accountable for every action of a child.
>
> To succeed a plaintiff must show (1) that the defendant child had a dangerous propensity; (2) that the parents knew of the propensity; (3) that the parents could reasonably anticipate another occurrence; (4) that reasonable steps could have been taken to avoid a recurrence, and (5) that the parents failed to take such steps. (Streifl v. Strotz et al (1958) 11 D.L.R. (2d) 667 (B.C.S.C.))."

[66] It is the evidence of F.E. herself that she did not commit sexual battery or sexual abuse against other younger children (other than W.E.).

[67] There is simply no evidentiary foundation that F.E., at age 12 - 13, had any dangerous or predatory propensity to inflict harm on younger children, and accordingly, no evidence that YTG knew or ought to have known of any such propensity. The commission by 13 year old F.E. of a sexual battery against a younger relative was not reasonably foreseeable.

[68] The child F.E. was, at times, in the plaintiff's home on […] Street and acting as a babysitter presumably at the request of, or invitation of, or agreement of, the plaintiff's parents. There was also a 4 month period in 1980 when F.E. was in the

direct care of the plaintiff's own mother in the […] Street residence and not in the direct care of some other departmental agent or contractor.

[69] As stated earlier in these Reasons, the child F.E. committed an intentional tort of sexual battery against the plaintiff while visiting in the plaintiff's home. A parent, or anyone *in loco parentis* (such as YTG), is not liable for every intentional tort of the child merely by virtue of the parent-child relationship. See *Moon* v. *Towers* (1860) 141 E.R. 1306, and *Segstro*, *supra*. There must be something more, or, in the words of the *Segstro* decision, "special circumstances", before liability can be placed on the parent. No such circumstances have been proven in this case against YTG.

[70] Counsel agree that the *Segstro* decision sets out the applicable test in cases where a parent or person *in loco parentis* is sued in negligence for an intentional tort committed by a child. As discussed above, I find that the plaintiff herein has not met that test.

[71] Plaintiff's counsel, however, also relies on the "*B.D.* line of cases" (referring to *B.D.* v. *British Columbia* [1997] B.C.J. No. 674) which deal with the liability of government for the negligence of its social workers in failing to adequately inform others who are to come into contact with a troubled child who is a ward of the state (e.g. being placed in a foster home, as in *B.D.*). In my respectful view, this alternative approach to make YTG responsible for harm committed by F.E. upon the plaintiff cannot succeed, for the same reason discussed above in the context of the *Segstro* case, i.e., there is no evidentiary foundation for it. There is no evidence that the social workers had any knowledge that F.E. was an abuser, or likely to be an abuser (as opposed to some knowledge that they had, or should have had, that F.E. was being abused). On the evidence before the Court, it cannot be said that social workers in the employ of YTG and assigned to F.E.'s wardship in 1978 - 1980, could have acted any differently to protect the plaintiff.

[72] For these reasons the action must be dismissed as against YTG.

Psychological Assessments:

[73] In the course of this litigation, the plaintiff was assessed by three psychologists. William Stewart, a Whitehorse psychologist, assessed the plaintiff in February 2004. Dr. Berendt, a Calgary psychologist, assessed him in February 2006, and Dr. Colby, a psychologist based in Vancouver, B.C. assessed the plaintiff in November 2007. All three prepared written reports of their interviews, test results, diagnoses and opinions, and these were entered as exhibits at trial. Each of them also testified at trial, Mr.

Stewart and Dr. Colby for the plaintiff, Dr. Berendt for the defendant YTG. Each gave his opinion evidence in a fair and balanced way, without embellishment or bias or in any adversarial fashion. Each has his professional opinion, sincerely held, as to the plaintiff's personality and his behavioural characteristics.

[74] Mr. Stewart's interview and assessment of W.E. in 2004 focused on the reported childhood sexual abuse by F.E. He is of the opinion that that abuse has likely been "a contributing factor in his current litany of symptomatic functioning including: chronic and distressing levels of depression, anxiety, shame and anger, unstable relationships, mistrust of others, distorted sense of responsibility, tendency to reenact or repeat self-defeating behavior, aggression towards others, self-harming behavior, chronic substance abuse, a limited capacity to self-regulate, antisocial personality features and his limited capacity to trust and collaborate with others". Mr Stewart says that W.E.'s symptoms are consistent with a type of anxiety disorder entitled Post Traumatic Stress Disorder (PTSD). He says W.E. also qualifies for a diagnosis of Major Depression Disorder, and Anti-Social Personality features. Mr. Stewart also diagnoses Polysubstance Dependance.

[75] Dr. Berendt conducted an extensive psychological and vocational assessment of W.E. in February 2006 in Whitehorse. Many tests and "Inventories" were administered. A number of these psychometric instruments have internal "validity scales" which purport to be able to detect a negative response bias. Dr. Berendt says that W.E. had an elevated score on virtually all of the validity scales. It is Dr. Berendt's conclusion that W.E. displays a strong tendency to exaggerate the nature of his symptoms. He states: "As a result of his response tendencies, the current assessment test results may underestimate his true cognitive abilities, including his academic skills, and may overestimate his degree of psychopathology, particularly with respect to his emotional functioning".

[76] Dr. Berendt's opinion is that the plaintiff fully meets the criteria of a Anti-Social Personality Disorder and also of Polysubstance Dependence.

[77] In his written report Dr. Berendt refers to professional research which clearly shows that the effect of abuse, including childhood sexual abuse, on an individual's development is an "extremely complex matter".

[78] It is Dr. Berendt's opinion that factors such as the plaintiff's "learning disability and poor school performance, his feelings of alienation from both aboriginal and non-aboriginal groups, being regularly beaten up by school bullies, drug and alcoholic dependence, heredity factors related to having a biological father who probably was

an alcoholic and had angry behaviors, and parental style are all likely important contributors to his development." It is Dr. Berendt's view that to assume that the plaintiff's childhood sexual abuse (whether by one or more abusers) is the sole cause of his problems "is likely erroneous".

[79] Dr. Colby did his psychological assessment of the plaintiff in November 2007, and prepared a comprehensive written report dated December 10, 2007. Preparation of his report included a review of existing relevant documentation, including transcripts of the plaintiff's examination for discovery, and also the previous Stewart and Berendt assessment reports.

[80] It is Dr. Colby's professional opinion that the plaintiff meets all criteria for a diagnosis of Post Traumatic Stress Disorder, and most criteria for a diagnosis of Anti-Social Personality Disorder.

[81] Dr. Colby states that the plaintiff's anti-social behavior and criminal behaviors throughout his adolescence and adult life are not inconsistent with those of victims of sexual abuse; however, he clarifies that not everyone who has anti-social and criminal behavior similar to the plaintiff's have been sexually abused. The plaintiff's symptoms are not the inevitable consequences of sexual abuse.

[82] Dr. Colby agrees that the plaintiff's elevated scores on the validity scales within the assessment tests that he administered indicate that the plaintiff was exaggerating his responses on those tests. Both Dr. Colby and Dr. Berendt state that the validity scale results do not inform, however, as to the reason or motivation for the bias or exaggerated responding. Dr. Colby's interpretation is that the plaintiff's exaggerated responses was a "cry for help", as opposed to a complaining or malingering in self-interest, as perhaps is inferred by Dr. Berendt.

[83] I do not find it necessary to adopt one or other of the formal labels for the plaintiff's current behavioral attributes or his social functioning characteristics or his emotional disorders. I need not determine that one diagnosis is correct or that another is incorrect.

[84] All three of the expert witnesses agree that there are many things in the plaintiff's troubled life that could have caused his current symptoms, his current level of social development and functioning, whether these are labelled Post Traumatic Stress Disorder or Anti-Social Personality Disorder.

<u>Causation</u>:

[85] Can the plaintiff's present situation, i.e., his troubled personality, his emotional anxieties or handicaps or disorders, his substance dependance, his reduced employability, be attributed to the sexual battery committed upon him by F.E. when he was 5 - 7 years of age? With respect, I find that it cannot. On the evidence before the Court, the plaintiff has not established causation with respect to these attributes of his present life condition.

[86] Last year the Supreme Court of Canada reiterated the test to be applied with respect to causation in negligence cases in *Resurfice Corp.* v. *Hanke* 2007 SCC 7:

> " First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.
>
> This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey* v. *Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater* v. *Plint*, at para. 78, "[t]he rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."
>
> The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell* v. *Farrell*, at p. 327, *per* Sopinka J.
>
> However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.
>
> First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied,

> because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach."

[87] Upon a careful consideration of the evidence in the present case, including the expert evidence, I find that the plaintiff has not satisfied either the "but for" test or the "material contribution" test, with respect to F.E.'s tort committed in 1978 - 1980. (The causation principles enunciated in *Resurfice* are primarily intended to apply to the tort of negligence. Indeed, with respect to the application of the "material contribution" test as described above, it is particularly difficult to do so in the context of an intentional tort of sexual battery committed by a 13 year old child.)

[88] There are other events in the plaintiff's life, other traumas suffered by him additional to the sexual battery by F.E. in 1978 - 1980, other risk factors that possibly or likely caused the negative attributes of the plaintiff's present life condition, including:

- bullying and physical assaults by other school children when the plaintiff was a child of tender years;
- a learning disability in his school years, coupled with slow progress and eventual cessation of his formal education, and his sense of "belittlement" by school authorities;
- intrusive sexual battery committed by family friend [R.V.] when the plaintiff was a child of tender years;
- intrusive sexual battery committed by the day care janitor when the plaintiff was a child of tender years;
- a serious dependency on alcohol and drugs, which remains untreated or unaddressed;
- a lifestyle in adolescence and adult years characterized by serious physical violence, often involving weapons, and resulting in many injuries to the plaintiff.

[89] On this latter point, there is agreement among the three psychologists who testified at trial.

[90] The plaintiff has simply not proven on a balance of probabilities, that F.E.'s tort caused the damage or injury from which he has suffered and now suffers and for which he now claims substantial general and aggravated damages, damages for past loss of income and loss of future income and damages for cost of future care. F.E.'s conduct has not been shown to have been a necessary cause of any subsequent condition or injury suffered by this plaintiff.

Measure of Damages:

[91] As the plaintiff has not established that his current problems were caused by the childhood sexual battery by F.E., I find that I can only award nominal damages for the violation of the plaintiff's personal dignity and integrity that is inherent in the sexual battery itself. I say nominal, knowing that it is difficult if not impossible to place a dollar figure on the violation of a person's dignity, or one's personal autonomy or bodily integrity.

[92] There are three types of damages that can be awarded for an intentional tort of sexual battery:

> a) general damages, the object of which is to compensate the plaintiff for the harm or injury done, insomuch as money can do so,
> b) aggravated damages, as an enhancement of a general damages award, to account for any aggravating circumstances or aggravating features of the defendant's conduct that was particularly high-handed or oppressive, and
> c) punitive damages, the object of which is notsomuch to compensate the plaintiff victim but rather to punish the defendant tortfeasor and to deter others.

[93] In my view the present case against F.E. is not a case that calls for aggravated damages or punitive damages. The plaintiff does not seek punitive damages against F.E.

[94] In the determination of general damages, there are a number of factors that must be considered, e.g.:

> a) the nature of the sexual battery,
> b) the number and frequency of occurrences,
> c) the duration of the activity,
> d) the ages of the victim and of the perpetrator, and the relationship between them;
> e) the degree of force or violence used,
> f) the effect and consequences on the victim.

[95] With respect to the last listed factor, as I have already discussed at paragraphs 85 - 90 of these Reasons, I am not satisfied that F.E.'s intentional tort committed 30

years ago caused the plaintiff's present psychological condition, his depression, his low self-esteem, inability to maintain employment, etc.

[96] As to the nature, frequency and duration of F.E.'s tort, I have made findings at paragraphs 38 - 39 of these Reasons. Although these incidents have aspects of mere sexual activity between children, F.E. was seven years older than W.E., and also, was his older family relative and sometimes babysitter. The battery did not involve significant force, or physical violence beyond the inherent violence of, or interference with, W.E.'s bodily integrity and dignity.

[97] On quantum of damages, I have carefully reviewed the cases cited by counsel on this subject, and the many other cases referred to therein.

[98] Taking into account all of the circumstances, and the specific features of F.E.'s tort, I award general damages of $30,000.00.

Summary:

[99] The action is dismissed as against the defendants R.C. and YTG. There is thus no need to consider YTG's third party claim against F.E.

[100] Judgment will enter against the defendant F.E. in the amount of $30,000.00.

[101] In the circumstances, I decline to award pre-judgment interest.

Costs:

[102] Counsel may make written submissions on costs within twenty days of the date of filing of these Reasons.

Richard J.