

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *W.M.L. v. C.H.L.*
2004 BCSC 1509

Date: 20041129
Docket: S064538
Registry: New Westminster

Between:

W.M.L.

Plaintiff

And:

C.H.L.

Defendant

Before: The Honourable Mr. Justice Fraser

Reasons for Judgment

Counsel for the Plaintiff

James A. Hanson

Counsel for the Defendant

Herbert H. Maier

Place of Trial:

New Westminster, B.C.

[1] The plaintiff, W.M.L., seeks damages against the defendant, C.H.L., for sexual assault. At the time of the alleged assaults, between 1983 and 1986, C.H.L. was living with, then married to, Ms. W.M.L.'s mother.

[2] C.H.L. denies that he ever sexually assaulted Ms. W.M.L. The case turns on the evidence of Ms. W.M.L.

"C."

[3] On my own initiative, I have decided to protect the identity of a witness called by Ms. W.M.L. The witness in question is the childhood friend of Ms. W.M.L.'s who was at the wedding between C.H.L. and Ms. W.M.L.'s mother.

[4] This witness seemed to me entirely credible when she testified about the unspeakable sexual abuse visited upon her by her father and his friends, which, apparently, was condoned by her mother. The evidence about the incident at the wedding involving her and some other young people is disturbing. I can see no reason why she should have her name included in these Reasons: she did not initiate these proceedings but is only a witness, she has children and she testified at the trial only out of loyalty to W.M.L., who was her friend in Grade 6, 20 years ago.

[5] In these Reasons, I will refer to her as "C.". This is a name I have of course invented, my sense being that the use of initials is not always a sufficient guarantee of anonymity and because it strikes me as a name that might have been given to a girl born to her parents.

Restraint in the Account of the History

[6] It is necessary in these Reasons to set out evidence which does not make uplifting reading. In particular, I have found it essential to describe at some length the evidence about what happened at the wedding between C.H.L. and Ms. W.M.L.'s mother. However, I decline to retail any but the essential details in this dispiriting narrative. The omitted parts have mainly to do with Ms. W.M.L.'s life after she was taken into foster care at the age of 14.

The Facts

[7] In the account which follows, anything simply stated is a finding of fact. When an assertion is preceded by words like a witness "said" or "testified" as to something, the assertion which follows is not a finding of fact but simply a statement of what the witness testified to. Some such assertions, of course, have the character of admissions.

[8] W.M.L. was born on [...] 1971 in Trail, B.C. Her mother, whose name before marriage was R.B., was married to her

father, C.G.L. They separated when W.M.L. was very little. R.B. was born on [...] 1950.

[9] During W.M.L.'s childhood, her mother went through a succession of relationships with men. Ms. W.M.L. remembers this as a happy time but one in which she "pretty much" took care of herself.¹

[10] C.H.L. was born on [...] 1946. In 1974, he married W.K., in Hamilton, Ontario. Their son, C. Jr., was born on [...] 1975. That marriage ended and C.H.L. was given custody of C. Jr. in 1980. He and C. Jr. moved from Ontario to British Columbia that year.

[11] W.M.L. and her mother moved in with C.H.L. and C. Jr. in late 1981. W.M.L. was 10 years old at the time. C. Jr. was six.

[12] Before she and her mother moved in with C.H.L. and C. Jr., Ms. W.M.L. was misbehaving. She was spending time with older children and, perhaps influenced by them, was using marijuana and alcohol. The event which triggered her mother and her moving in with C.H.L. and C. Jr. was that she and her mother had been evicted from their apartment because of her behaviour, throwing garbage out the window, jumping up and

¹ Trial Transcript 19th April 2004, p. 20, lines 43-49.

down on the bed and smoking marijuana in the underground parking lot.

[13] The three places where the blended family lived were multi-unit dwellings in Surrey. The last of these was a condominium unit in a complex called the G.M. which C.H.L. purchased in 1983. In these three homes, Ms. W.M.L.'s misconduct worsened. C.H.L. testified, and I accept as accurate, that she lost interest in the wholesome facilities offered by the complexes, such as the swimming pools, preferring to run with older children.

[14] Ms. W.M.L. initiated C. Jr. into a sexual game which she called "Pants Down". This involved him lying on his back, naked below the waist and Ms. W.M.L. lying on him, also naked below the waist, rubbing her vagina against his penis. This abuse began as soon as Ms. W.M.L. and her mother moved in with him and his father, that is, when he was six and she was 10. Ms. W.M.L. admits this abuse but denies that it began right away. I find that it did. This has relevance only because it implies that Ms. W.M.L., when she complained of sexual abuse by C.H.L., had knowledge of the mechanics of sexual intercourse.

[15] Ms. W.M.L. testified that her abuse of C. Jr. stopped when she began to be abused by C.H.L. This is significant

because it also implies that, before the alleged abuse by C.H.L. began, Ms. W.M.L. was sexually aware, if not sexually active. Ms. W.M.L.'s mother put her on birth control pills when she was 12. Ms. W.M.L. said, with reference to the time when she says the abuse began, she wasn't "having sex with anybody at that point."² A little later, she said that she had "never done it."³

[16] At first, Ms. W.M.L. welcomed the entry of C.H.L. into her life. He was kind and supportive and he introduced a comfort and stability into her life which was lacking when she was living alone with her mother. Soon, however, she began to resent his attempts to regulate her behaviour, such as insisting that she be home at a certain time of the night, insisting that she do her homework and so on.

[17] She has vague memories of affectionate moments, sitting in his lap. She testified that he fondled her breasts on one such occasion; although, at that time, her breasts had not begun to develop.

[18] Ms. W.M.L. testified that the abuse she complains of started in the G.M. home. Although she was unsure, she places the commencement of the abuse as in 1983. She cannot pinpoint

² Trial transcript, 19th April 2004, p. 47, line 26.

³ Trial transcript, 19th April 2004, p. 57, line 35.

the time, saying that it was perhaps "a little bit past summer".⁴ She would have been 12.

[19] She described the first episode. C.H.L., she said, took her to her bedroom and conducted a ceremony, by candlelight, in which he invoked earth, wind and fire and they exchanged pin pricks of blood, after which he raped her. She said he was wearing an undershirt.

[20] Ms. W.M.L. testified that after this initial rape, she was raped repeatedly by C.H.L. She said these rapes would take place in the evening after C. Jr. was in bed and while her mother was having a bath. Ms. W.M.L. said that, "during the week" (meaning weekdays), "it didn't happen very often" but "at least twice, once or twice, on weekends". Then, she said, C.H.L. "switched his shifts at work and he was at home in the evenings ... [so] it was happening all the time."⁵

[21] The context is that Ms. W.M.L.'s mother was never employed and was home most of the time.

The Wedding

[22] Counsel and I had discussions from time to time about the testimony of C. Was it similar fact evidence? Might it be

⁴ Trial transcript, 19th April 2004, p. 45, line 6.

⁵ Trial transcript, 19th April 2004, p. 48, line 47 to p. 49, line 9.

rebuttal? Because of the uncertainty, the examination and cross-examination of Ms. W.M.L. about the wedding was postponed until after C. had testified. I conclude that the evidence as to the wedding is simply part of the case of Ms. W.M.L.

[23] C.H.L. and R.L. were married on 16th June 1984, a Saturday. The ceremony took place in the gardens of the G.M. complex and the reception after the ceremony took place in their home.

[24] This was at or near the end of Ms. W.M.L.'s Grade 7 year. Ms. W.M.L. and C. had met in Grade 6, in Surrey. Ms. W.M.L.'s friendship with C. had been an issue for Ms. W.M.L.'s mother. C. was by then in the full expression of the rebelliousness and misconduct she told me about — not surprising, it seems to me, for a child with her history of abuse. Ms. W.M.L.'s mother was concerned at that time that C. was a bad influence. At the end of Grade 6, C. and her family moved to Vancouver from Surrey.

[25] Ms. W.M.L. and C. said they could not remember how it was, a year later, that C. showed up for the wedding. The only appropriate inference is that Ms. W.M.L. invited her. Certainly, C.H.L. did not do so.

[26] Despite Ms. L.'s testimony that she did not remember inviting C., it seems to me a reasonable inference that it was the gesture of an unhappy 12-year-old. Ms. W.M.L. did not want her mother to marry C.H.L. Inviting C. to the wedding was her response.

[27] C. showed up at the C.H.L./W.M.L. home on the day of the wedding, scruffy and dressed more or less in rags. Ms. W.M.L. helped her clean herself up, shampoo her hair and loaned C. her best dress. Ms. W.M.L., however, says she remembers none of this.

[28] Ms. W.M.L. and C. drank alcohol at the reception. I accept the evidence of C. Jr. that Ms. W.M.L. persuaded him to steal for her a bottle of alcohol from the bar. Ms. W.M.L. and C. took it outside the home. They met up with two boys they did not previously know and the four of them ended up in a field near the complex, drinking the stolen alcohol and, possibly, some additional alcohol. It is the evidence of C. Jr., who was, I can only suppose, a mesmerized, eight-year-old spectator, that C. took one of these boys whom she had never met before into the woods to have sexual intercourse. C. admitted that this happened. She had turned 13 only two months earlier.

[29] C. somehow arrived back at the complex. Her testimony was that someone who was a relative of C.H.L. helped her from the woods to the front of the complex. No one else testified about this mystery figure. Ms. W.M.L. said that she saw C. lying on a bench near the home, either sleeping or passed out. The testimony of C. Jr., in my view, is more reliable. He saw her in the children's playground area near the housing complex, looking disshevelled and irrational and swinging around and around a playground pole. He ran to tell his father.

[30] C.H.L. came out and took C. upstairs to Ms. W.M.L.'s bedroom. There is a difference as to how he did so which is not important.

[31] The dress that C. had been given to wear was smeared with leaves and dirt. She had vomited on it.

[32] C.H.L. testified that, after having helped C. into the house, he tried to clean her up, in particular, to clean up her feet. To do so, he testified, he had changed from his white wedding suit into more casual clothes. He said he didn't want his new bride to know about C.'s condition.

[33] Apparently, Ms. W.M.L. had returned to the wedding reception some time earlier. She said she saw C.H.L. helping

or carrying C. upstairs. Some time later, Ms. W.M.L. went up to her bedroom.⁶ When she entered the room, she said C. was lying on her back on her bed and C.H.L. was standing nearby. Ms. W.M.L. apparently interpreted the scene as one of rape. She screamed and ran away.

[34] She said, at first, that C.H.L. was wearing "only his undershirt"⁷ but later stated that she could not say whether or not he was wearing underwear.⁸

[35] C.'s testimony was entirely different. She said that C.H.L. raped her, slowly, methodically and calmly and was on top of her and continued to rape her after Ms. W.M.L. came into the room.

[36] Ms. W.M.L.'s testimony is that she ran downstairs and told her mother that C.H.L. was raping C.

[37] Ms. W.M.L. testified that she also told her mother at the same time that C.H.L. had been, before then, abusing her. According to Ms. W.M.L., this was her first disclosure. She testified that she was "absolutely certain"⁹ that she told her mother that day about her abuse. On her examination for

⁶ There is no evidence as to the interval of time between Ms. Loo seeing her friend Crystal being helped upstairs and when she came into the bedroom.

⁷ Trial transcript, 21st April 2004, p. 56, line 28.

⁸ Trial transcript, 29th April 2004, p. 30, lines 42-45.

⁹ Trial transcript, 21st April 2004, p. 14, lines 12-13.

discovery, however, she had said that she was "not sure".¹⁰ She seemed certain that there were witnesses but could not say who they were. She suggested that her two aunts (her mother's sisters) might have been there.

[38] C. stayed in the C.H.L. home that night. The next day, according to C., she and Ms. W.M.L. and various members of the C.H.L. family went on some sort of outing, seemingly as if nothing had happened the day before.

[39] In evidence is a letter written by C. the day after the wedding:

I [C.] am very sorry for getting drunk & saying and accusing C.H.L. of having sex with me. And this will never happen again.

[C.'s signature]

W.M.L. [her signature]

I wrote this on my own free will. To prove that I mean all of this.

[C.] ¹¹

¹⁰ Trial transcript, 21st April 2004, p. 15, lines 38-43.

¹¹ Exhibit 22.

C. and Ms. W.M.L. both said they had no memory of this letter, although both admitted its authenticity and acknowledged their signatures.

[40] Nothing happened as a result of the C. episode. Life went on. According to Ms. W.M.L., it involved her being repeatedly raped by C.H.L.

[41] On 13th February 1986, when she was 14, Ms. W.M.L. told her school counsellor, Brenda Tuele, that C.H.L. had been sexually assaulting her. According to Ms. W.M.L., Ms. Tuele slammed her hand down on the table and exclaimed, "That son of a bitch!" and called in police and social workers.

[42] Ms. W.M.L. was immediately apprehended and placed in foster care.

[43] C.H.L. was charged with sexual assault.

[44] As soon as she was apprehended, Ms. W.M.L. went on a rampage of truancy, drugs, alcohol, promiscuous sex and petty crime. Her grades at school dropped.

[45] Once she experienced foster care, however, Ms. W.M.L. wanted to go back home. She wrote a letter dated 31st March 1986, "To whom it may concern", which read:

I would like to drop all charges against my stepfather (C.H.L.) I am very sorry about anything I have said about him. He treated me as if I were his own daughter. I want to go back home. What I said has happened but my stepfather did not do it someone else did, and I am not willing to tell anybody who he was. I apologize and I am very ashamed. I don't want to go to court I feel very badly about what I have done.

I hope that they
still love me.

Thank-You

W.M.L. ¹²

[46] The next day, she told Nin Mand, her social worker, that she had dropped the letter in the mailbox to her mother.¹³ In fact, she had given the letter in person to her mother and C.H.L. at a pizza parlour, where she and her mother had arranged a meeting. I infer that she felt unable to say this to Ms. Mand because she was forbidden by Ministry workers to see her mother and C.H.L.

[47] In the meeting between Ms. W.M.L. and Nin Mand that day, Ms. W.M.L. recanted her allegations against C.H.L. The notes made by Ms. Mand that day include the following:

W.M.L. stated to me that she wanted the charges dropped. She didn't want C.H.L. to go to jail. She stated that the abuse had never happened with C.H.L. That it had happened before, but he had nothing to do with it. She stated that she did it to get her freedom ... and that because he had given her the strap. ... W.M.L. stated that her mother's ex-

¹² Exhibit 2.

¹³ Trial transcript, 20th April 2004, p. 36, lines 27-40.

boyfriend Reg was that abuser, and that he is now dead.¹⁴

[48] The next day, 2nd April 1986, Ms. W.M.L. was interviewed by the police. She told a Constable McCarthy that C.H.L. had never sexually assaulted her. His notes include this exchange:

Q Why did you lie in the first place?
A So I could get out of the house.¹⁵

[49] The same day she met with Alan R. Adlem, Crown Counsel, at the courthouse in Cloverdale and told him that her allegations against C.H.L. were not true.¹⁶

[50] The upshot was that the charge against C.H.L. was either dismissed or stayed. (The evidence does not disclose which it was or when it occurred.)

[51] However, Ms. W.M.L. was not allowed to go home by the Ministry workers charged with her care.

[52] Ms. W.M.L. resisted counselling in April 1986, because "nothing happened"¹⁷.

¹⁴ Trial transcript, 20th April 2004, p. 36, lines 10-30.

¹⁵ Exhibit 2.

¹⁶ Trial transcript, 20th April 2004, p. 47, lines 6-28.

¹⁷ Trial transcript, 20th April 2004, p. 52, lines 4-5.

[53] Ms. W.M.L. was admitted to hospital in May 1986. She volunteered to the health workers there that the abuse she had accused C.H.L. of "never occurred".¹⁸

[54] The workers on the Ministry file offered R.L. the opportunity to live with Ms. W.M.L. in a place separate from C.H.L. C.H.L. and R.L. agreed that this experiment should be undertaken and they wrote up a contract about the necessary separation that would result. Noteworthy in this contract is the commitment they both express to care for both Ms. W.M.L. and C. Jr. This experiment in the summer of 1986 lasted only two or three weeks; R.L. could neither control Ms. W.M.L. nor tolerate her behaviour. Ms. W.M.L. said that she did not remember this episode at all.

[55] After the failure of this experiment, a Ministry worker told Ms. W.M.L.'s mother that she had to choose between C.H.L. and Ms. W.M.L. The words in the notes made by the worker are:

Advised R.B. that if she chooses C.H.L. now, that W.M.L. will not be returned home.¹⁹

[56] R.L. saw "no other solution but to give her back" to foster care.²⁰ R.L. made her choice: she and C.H.L. remained a couple.

¹⁸ Trial transcript, 21st April 2004, p. 34, line 46 to p. 35, line 22;

[57] As a result, Ms. W.M.L. became a permanent ward of the Province on 12th March 1987. She remained a ward of the Province until her 19th birthday on 20th June 1990.

[58] The Ministry workers had, in Ms. W.M.L., a difficult charge. No one could suggest that they did not work hard on her behalf. The Ministry file for her runs to some 600 pages. With the benefit of hindsight, it can be said that her life in foster care did not help her, a hard reality faced every day by the dedicated line workers who deal with troubled children. Among other things, the persons with whom Ms. W.M.L. was sent to live had no control over her behaviour.

[59] Despite being forbidden by Ministry workers to visit C.H.L. and her mother, the evidence is that Ms. W.M.L. spent time with them frequently at their home before she left the Lower Mainland in 1988, including overnight visits, without incident.

[60] Ms. W.M.L. met a boy called S.M. The two of them ran away to the north of British Columbia, where Mr. S.M. came from. Although it is unclear, this seems to have occurred in 1988, when she was 16. Their son, Shane, was born on [...] 1989, when Ms. W.M.L. was 17.

[61] Ms. W.M.L. testified that Mr. S.M. was extremely violent and abusive and she spoke of criminal activities engaged in by the two of them. Among other things, they used and trafficked in crack cocaine.

[62] Ms. W.M.L., S.M. and little Shane visited and stayed with C.H.L. and Ms. W.M.L.'s mother from time to time during their relationship.

[63] In late 1992, Ms. W.M.L. applied to the Criminal Injuries Compensation Board with reference to her allegations against C.H.L. Her memory of doing so is extremely vague. The Board paid her \$7,100 in 1993. Ms. W.M.L. said this surprised her.

[64] Ms. W.M.L. went to the police in 1993 to renew her allegations against C.H.L. She testified that she did so after her son Shane was killed in a car accident in June 1993. However, the documentary evidence indicates that she approached the police on 23rd March 1993. Ms. W.M.L. says she does not remember doing so.

[65] As a result, C.H.L. was charged again and arrested again. And again, the charge went nowhere.

¹⁹ Trial transcript, 20th April 2004, p. 56, lines 1-3.

²⁰ Trial transcript, 20th April 2004, p. 55, line 47 to p. 56, line 1.

[66] Ms. W.M.L. and Mr. S.M. separated in 1994. In 1995, Ms. W.M.L. began to live with S.Me. This relationship led to the birth of her son C. in 1996. They separated in 1999.

[67] C.H.L. was at all material times and still is an employee of the City of Vancouver. His evidence is that he has always worked the afternoon shift, with the possible exception of several days in 1986. This shift took him away from the home from 2:30 p.m. until after midnight. This is important exculpatory evidence.

[68] The defence led medical evidence from Dr. Kasiyal Kothari, consistent with the contention that C.H.L. could not have raped Ms. W.M.L. C.H.L. testified to the same effect. While not conclusive, this medical evidence has considerable persuasive effect.

Adverse Inferences

[69] Mr. Maier, counsel for C.H.L., contended that the failure of Ms. W.M.L. to have certain witnesses called should result in adverse inferences being drawn.

[70] It would have helped me to reach my conclusions about alleged complaints more easily if someone who was a guest at

the wedding had testified, whether Ms. W.M.L.'s aunts or any other guest. Since my conclusions are consistent with the adverse inference sought by Mr. Maier, I need not draw it.

[71] But crucial is the failure to call Ms. W.M.L.'s mother to testify. The indications are that she did not believe Ms. W.M.L. She could have made a major contribution to this trial. She was there, at all material times. She knew what Ms. W.M.L. was like before and after she and C.H.L. began to live together. She could have agreed with or denied the testimony put forward on behalf of the defence as to C.H.L.'s working schedules. She could have explained why she put her daughter on birth control at age 12. She could have told me whether she habitually bathed in the early evening, these being the occasions which Ms. W.M.L. said gave C.H.L. the opportunity to rape her. She could have told me why it was that she did not go upstairs to Ms. W.M.L.'s bedroom during the wedding reception, something one might think she would have done, had Ms. W.M.L. made the complaint to her which Ms. W.M.L. says she did. She could have testified as to C.H.L.'s medical condition described by Dr. Kothari in his testimony. She could have verified, denied, explained or qualified the assertions attributed to her in notes made by social workers. Without her testimony, these assertions, which appear in some

of the exhibits, remain hearsay and are not admissible, except as admitted by Ms. W.M.L.

[72] The only evidence why Ms. W.M.L.'s mother did not testify came from Ms. W.M.L.:

My mom feels a lot of guilt herself about the -- about the abuse that took place, and it's -- we're working on our relationship and I just don't want to see her have to -- have to deal with it. I don't know if she could do it.

[73] In a case so important to both Ms. W.M.L. and C.H.L., I find this an inadequate reason and I draw the adverse inference that the evidence of Ms. W.M.L.'s mother would have been unhelpful to Ms. W.M.L.'s case.

Discussion

[74] C.H.L. was in the position of attempting to prove a negative, that is, that the sexual assaults alleged by Ms. W.M.L. never happened. Little can be done to lead evidence to back up such a stance, of course, apart from denying the allegations under oath, which he did. His defence necessarily consists in casting doubt on Ms. W.M.L.'s evidence.

[75] Nothing in the demeanour of C.H.L. could lead to a finding of untruthfulness.

[76] Mr. Hanson was particularly scornful of C.H.L.'s testimony that he was trying to clean C. up in Ms. W.M.L.'s

bedroom on the wedding day. I do not find this necessarily outlandish, for a man who had just been married in a snow-white suit.

[77] I move to the testimony of Ms. W.M.L. It was delivered in a straightforward way but various things she said and a certain defensiveness under cross-examination lead me to the conclusion that it cannot be taken at face value.

[78] There were moments during her testimony which suggest to me that rather than making a direct and spontaneous answer to a question, she concerned herself with what she saw as its implications. The following is an example.

[79] Mr. Maier, in cross-examination, drew Ms. W.M.L.'s attention to a statement attributed to her by Dr. Kulwant Riar, a psychiatrist called to testify on her behalf. The statement was:

Started drinking early due to peer pressure.

The following exchange then took place:

Q Would you question the accuracy of what he wrote about what you told him?

A Do you mean -- I mean, I -- I just -- I -- I don't know how to -- you know, I -- I mean, I'm not going to say that -- that I never ever -- I mean, I didn't start drinking -- you know, you have a drink of somebody's -- somebody's beer or, you know, at -- you know, at home, or you have -- I -- I mean, what is "starting

drinking"?²¹

[80] Her description of herself as a "properly behaved"²² child before she and her mother moved in with C.H.L. and C. Jr. is not supported by the evidence.

[81] There is a dramatic difference between Ms. W.M.L.'s testimony and that of C. as to what happened in her bedroom during the wedding reception. C. was exceedingly drunk, so much so that she appeared irrational to C. Jr. That, given her previous history of having been raped many times, makes it impossible to accept her testimony. Ms. W.M.L., too, was intoxicated, although not to the degree C. was. I am unable to find that Ms. W.M.L. was able to describe accurately to me what she saw. The inconsistencies between her testimony and C.'s add a dimension to the uncertainty.

[82] As well, the extreme character of the allegation — that C.H.L., on his wedding day and in his own home, when wedding guests were still present, would be raping a child — makes it necessary for me to approach the evidence as to this alleged incident with great caution. In the end, I am unable to find that C.H.L. sexually assaulted C. on his wedding day.

²¹ Trial transcript, 29th April 2004, p. 17, lines 7 - 15.

²² Trial transcript, 20th April 2004, p. 25, lines 33-37.

[83] I am left with considerable uncertainty about the alleged complaints made by Ms. W.M.L. at the wedding reception. Ms. W.M.L. insisted that it was she who complained to her mother that C.H.L. had raped C. But Exhibit 22, the letter of apology written by C. the next day, seems to imply that it was C. who complained. C.H.L. testified that Ms. W.M.L. "got [C.] to write it". This supports the inference that it was C., not Ms. W.M.L., who complained.

[84] Mr. Hanson, on behalf of Ms. W.M.L., suggested that C.'s letter had been extracted by coercion of some kind, that Mr. or Mrs. L. was attempting to set up a future defence to a legitimate complaint. Given the utter blanks in the evidence of Ms. W.M.L. and C., this contention cannot be sustained.

[85] As well, the logical extrapolation from the coercion argument implies that had Ms. W.M.L. complained on the wedding day to her mother about the alleged abuse by C.H.L. of her, there would have been a letter from her, as well.

[86] I simply do not know who complained about what or to whom and I am unable to make any findings of fact as to complaints on the day of the wedding or the day after.

[87] Of course, whether Ms. W.M.L. complained at this or any other time is beside the point: the issue is whether she was

sexually assaulted, not whether she complained about being sexually assaulted. Why this evidence is important has to do with my assessment of her credibility.

[88] According to Ms. W.M.L., there are important gaps in her recollection of events. While this is bound to be a reality when a witness is attempting to describe events which may have happened almost 20 years ago, some of the asserted gaps are surprising, for example, her testimony that she had little or no memory of the letter she wrote on the 31st of March 1986²³ (the pizza parlour letter) and that she had utterly no memory of the letter written by C. and signed by her the day after the wedding.²⁴

[89] That she professed no memory of the failed experiment of 1986 in which she went to live with her mother is also surprising.

[90] I have some concern, too, as to her description of the first alleged rape. Judges know all too well that for some sexual offenders, usually repeat offenders, the risk involved in the offence is attractive and in fact is part of the gratification. But the norm for offenders who sexually abuse children is to manipulate their victims gradually toward the

²³ Exhibit 1.

²⁴ Exhibit 22.

ultimate abuse. Ms. W.M.L.'s account would require me to believe that C.H.L. vaulted from mild — perhaps no — sexual touching to a bizarre candlelight ritual culminating in rape. Again, this is evidence which I approach with great caution.

[91] Ms. W.M.L.'s recantations must be taken into account. Everyone professionally involved in child sexual abuse knows that a recantation by a real victim can be false. Pressure from the offender or the offender's wife, the fear of breaking up the family and concern about consequences for the offender have been known to lead victims into false recantations.

[92] This does not mean, however, that all recantations are false. In her recantations made to social workers, police and prosecutors on the 1st and 2nd of April 1986, Ms. W.M.L. was adamant that her accusations against C.H.L. were false, she provided a motive for making false allegations — that it was her ticket to get into foster care — and, although she described herself as a victim of sexual abuse, she identified someone else as the abuser. It was enough for Crown counsel.

[93] It was not enough for the social workers charged with her care. None of those persons was called, so I do not know why Ms. W.M.L. was denied permission to go home, whether that arose out of disbelief in the recantations or whether that was seen as the politically safe course for the Ministry. Given

what the notes made by social workers reflect as to what happened to Ms. W.M.L. in foster care, it is difficult to conclude that they could have believed that she would be better off there than at home. Not even Ms. W.M.L. suggests that C.H.L. abused her during her many visits to the C.H.L. home after her apprehension.

[94] I see it as significant that when Ms. W.M.L. was being treated in hospital in May 1986, she volunteered to hospital workers that the abuse by C.H.L. "never occurred".²⁵ Ms. W.M.L.'s recantations of April suggested a motive for making a false allegation against C.H.L. (that she wanted to go into foster care); by the same token, one could say that, because she wanted to go home soon afterwards, she had a motive for making a false recantation. This could be advanced to explain away her recantations to Ms. Mand, Constable McCarthy and Mr. Adlem. But why would she volunteer to people at the hospital that she had lied about the abuse, unless the reality was that C.H.L. had never abused her? The health professionals at the hospital were not involved, so far as I have been made aware, in her wardship.

[95] I am satisfied that Mr. Maier, on behalf of C.H.L., made every effort to have records from the City of Vancouver

produced as to C.H.L.'s hours of work from 1983 to 1986. It is understandable but unfortunate that the City of Vancouver could not produce C.H.L.'s daily time records. From the documents the City was able to produce, I conclude that the testimony of C.H.L. is accurate. This necessarily means that Ms. W.M.L. must be wrong when she talks about C.H.L. having a "shift change", which enabled him to rape her on weekday evenings. Ms. W.M.L. did not say that the shift change applied only to some days in early 1986, nor, I find, did she mean that.

[96] In cases of "historical" sexual assault, like this one, there are typical difficulties in assessing the evidence. The passage of years makes recollection challenging. It can also affect the availability of evidence which might affect the outcome of the case.

[97] There are competing dynamics about testimonial assertions in sexual abuse cases, whether the allegation is historical or not. Judges are often told that the memory of a victim of abuse centers on the abuse, so that the surrounding circumstances fade away and the victim may not be able to recall them. On the other hand, lawyers and Judges know that false evidence as to a wrong complained of tends to be

²⁵ Trial transcript, 21st April 2004, p. 34, line 46 to page 35, line 22;

consistent as to the simply stated principal allegation and that it is only on the surrounding circumstances that the untruthful witness can be challenged effectively. On the surrounding circumstances, the testimony of Ms. W.M.L. was weak.

[98] I find that the evidence of Ms. W.M.L. is, as to a host of the collateral, factual issues, either wrong or incapable of rational support. There is too much which is troublingly doubtful or demonstrably wrong in her testimony for me to accept the allegations of abuse.

[99] The Court of Appeal has said that where the allegations in a civil case are of a criminal nature, the relevant facts to be proved must be proved on standard of a high probability commensurate with the occasion.²⁶ Ms. W.M.L.'s allegations of stepfather incest or rape could hardly be more serious.

[100] None of the evidentiary frailties in the evidence of Ms. W.M.L. is unfamiliar, for a case of this kind. The question to be determined is whether the frailties overcome her assertions. In this case, they do. No one of them was conclusive, although the working history of C.H.L. and the

Exhibit 14.

²⁶ *M.B. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2001 BCCA 227.

evidence of Dr. Kothari come close. It is the cumulative effect of these weaknesses which makes it impossible to find, on the standard of proof mentioned above, that Ms. W.M.L. was sexually assaulted by C.H.L.

Summary

[101] The plaintiff's action is dismissed.

[102] The parties may agree on costs and include a provision in the order or costs may be spoken to.

"G.P. Fraser, J."
The Honourable Mr. Justice G.P. Fraser