

CITATION: Vanderkooy v. Vanderkooy et al, 2013 ONSC 4796
COURT FILE NO.: 59155
DATE: 2013/08/15

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
JAKOB (JACK) VANDERKOOY)	
Plaintiff/Defendant by counterclaim)	R. Gasparotto and M. Polvere, for the Plaintiff
)	
)	
- and -)	
)	
)	
PATRICIA VANDERKOOY aka)	
PATRICIA AMISAL, SARAH)	M.P. Tunley and A. Gonsalves, for the Defendants
VANDERKOOY and JIM)	
VANDERKOOY)	
Defendants/Plaintiffs by counterclaim)	
)	
)	
)	
)	HEARD: October 1, 2, 3, 4, 5, 9, 10, 11, 12, 15, 17, and December 31, 2012

A.J. GOODMAN J.

REASONS FOR JUDGMENT

Introduction

[1] The acrimonious issues raised in this case have all but fractured what was once a close, healthy and generally positive relationship between members of the immediate and extended Vanderkooy families.

[2] The plaintiff, Jack Vanderkooy is the brother of the defendant Jim Vanderkooy and the uncle of defendants Sarah and Patricia (or Tricia/Trish) Vanderkooy.¹ Jack alleges that he was the subject of defamatory statements or comments made by the defendants. The nature of the alleged defamation arises from various oral and written communications made by the defendants to a number of individuals, which had its genesis from a claim of sexual abuse and battery allegedly perpetrated by Jack on both of his nieces.

[3] At the outset of trial, the defendants admitted making or publishing the impugned statements with respect to Jack and that these statements were capable of defamatory meanings. However, the defendants deny any liability for statements of libel or slander and claim among other things, the defence of justification, (truth) or qualified privilege.

[4] Patricia and Sarah also counterclaim for sexual battery as a result of alleged abuse inflicted upon them by Jack when they were young children. Jack does not dispute that if the sexual battery or abuse allegations against him are made out, then the defendants would be entitled to damages in tort and the defence of justification (truth) would apply to negative his claim for defamation.

Issues

[5] The issues in this case are:

¹ With the utmost of respect and solely for ease of reference, I will refer to the parties and the witnesses by their first names.

- A. Have the defendants established that the plaintiff committed a tort of sexual assault or battery or an intentional infliction of mental suffering on both or either of Sarah or Patricia?
- B. Are the defendants' statements defamatory?
- C. Does the defence of qualified privilege arise in the circumstances of this case?
- D. If the defendants have established a defence of qualified privilege, has the plaintiff rebutted the privilege by proving malice?
- E. Dependant on the results, what are the appropriate damages in this case?

Background

[6] The Vanderkooys' have a large and extended family. Jack and Jim immigrated to Canada from the Netherlands with their parents and siblings in 1956, and the family lived on a farmhouse outside Simcoe, Ontario (the farmhouse). Jack and Jim have ten other living siblings. Jim is three and a half years older than Jack. The entire Vanderkoooy clan were generally very close-knit and spent much family time together up until the disclosure of these allegations.

[7] The Vanderkoooy family became part of the immigrant Dutch community and the Christian Reformed Church. The values within this church community identified any sexual involvement outside marriage as sinful, and any discussion of matters related to sex as strictly taboo. It placed great importance on family and on respect for the authority of the Church.

The church promoted a strong tradition of reconciliation. The religious and traditional values of the Christian Reformed Church were adopted by all of the Vanderkooy family members, including the parties to this action.

[8] Jim married Christine (Chris) VanderBoom in 1970, and then in 1973, Jack married Christine's younger sister, Margaret. Christine is four and a half years older than Margaret, and they have one brother, Theo VanderBoom.

[9] In 1975, Jim and Jack went into a partnership together running the family farm. That same year, Jack and Margaret moved into the farmhouse. The farmhouse is described as a two-storey building with three bedrooms and an office on the upper level. Jim and Chris lived with them in the farmhouse for a period of time and then moved into a new house on the south side of Highway 3. From 1976 to 1986, Jack and Margaret lived in the farmhouse, while Jim's family lived just across the road.

[10] Jim and Christine have four children: Sheldon, Michelle, Tricia and Sarah. Jack and Margaret also have four children: Steven, Tim, Rachel and Leisha. The children are all close in age. Tricia and Sarah were particularly close with their cousins, Rachel and Leisha, and with their Aunt Margaret.

[11] In the years including and between 1982 and 1986, when the abuse is alleged to have occurred, both Tricia and Sarah spent a lot of time at the farmhouse. Jack and Margaret's house was like a "second home" to Tricia and Sarah. Sometimes Tricia and Sarah would sleep there because Jim and Chris required babysitting, or they did so simply because the children wanted to have a sleepover.

[12] Until the time Jim and Chris moved to Ancaster in 1986, Tricia and Sarah slept over at Jack and Margaret's house quite often. Although

Margaret was primarily responsible for babysitting Tricia and Sarah, Jack would, on occasion, be left alone with the children at the farmhouse when Margaret had to leave the house to run errands or tend to other activities.

[13] In 1981, the relationship between Jim and Jack was strained by the breakup of their farming partnership. Jack initiated the breakup as he wished to farm on his own. Jim suggested that Jack buy him out, so that he could return to full time teaching. Jim returned to full-time teaching and initially had to commute to work until 1986, when Jim and Chris moved with their family to Ancaster. On days when their parents were working or unavailable, Margaret would usually look after Tricia and Sarah.

[14] After Jim's family moved to Ancaster in 1986, Jack and Margaret continued to live in the farmhouse until 1987, at which point they moved to the bungalow across the highway. In 2002, Jack and his family moved to the St. Thomas area.

Discussion and Analysis

[15] I have taken into account the whole of the evidence when making my assessments, although I have not recounted all of that evidence in the course of undertaking that analysis in these reasons. I have instead drawn attention to that evidence and to those particular instances that form the central foundations for my findings.

[16] During the course of the trial, both parties adduced hearsay evidence in support of their various positions. Moreover, there was excessive lay opinion evidence proffered by both parties through various witnesses with regards to who should be believed, or why one was telling the truth, or why certain events occurred, or how individuals may have reacted; as well as

various personal theories advanced as to the incidents in question. I have given much of this evidence little or no weight, and where a personal opinion was proffered and was clearly inadmissible, I have discounted it entirely.

A. Have the defendants established that the plaintiff committed a tort of sexual assault or battery or an intentional infliction of mental suffering on both or either of Sarah or Patricia?

Position of the parties

The Defendants

[17] The defendants' pretrial motion to present evidence first in this trial was granted. Mr. Tunley, on behalf of the defendants, submits that in this case, despite the young age of Tricia and Sarah at the time the abuse by Jack, there are compelling reasons why their evidence ought to be accepted. Tricia and Sarah's memories of the abuse by Jack are clear and have been consistently described. Those memories clearly identify Jack as the abuser, by direct visual image in the case of Tricia, and indirectly, by clear sense of place and person in the case of Sarah. Neither had any motive to make false allegations when they first confronted Jack, requesting only an apology with a view to reconciliation.

[18] Mr. Tunley submits that Tricia's evidence of her memories of abuse was candid, credible and reliable. She was firm and consistent on what she remembers and she did not embellish or augment her memories in any way. Her testimony about what she remembers was not challenged or contradicted by any previous statements she gave about the abuse.

[19] There are two claims in this case and each of Tricia's and Sarah's allegations is corroborated by the similar allegation of the other. Tricia and

Sarah had separate memories of abuse and independently identified Jack as their abuser. Mr. Tunley submits that it is highly improbable that they would both independently identify the same wrong person.

[20] Mr. Tunley adds that both of their allegations are further corroborated by expert clinical evidence that they suffer conditions, including depression and anxiety, which are medically recognized to be highly correlated or corroborative with a history or pattern of sexual abuse. Their experiences differ but their symptoms experienced by both, include suicidal ideation and attempts, difficulties with sexual intimacy, and difficulties forming trusting relationships. Tricia and Sarah had a nurturing family upbringing and both women have otherwise achieved significant academic and professional success. As such, no other obvious explanations for these clinical symptoms and experiences can be suggested.

[21] Mr. Tunley submits that the plaintiff's challenge to Tricia's and Sarah's credibility is either based upon outdated and discredited stereotypes about child sexual abuse or are unfounded in the evidence. Delayed reporting of sexual abuse, whether due to suppressed memory or to deliberate non-reporting of abuse, are both common, and are not *per se* evidence of recent fabrication. Similarly, recantation shortly after the initial disclosure of allegations is common, particularly in response to reactions and repercussions within a victim's family and does not detract from the abuse as described by both Tricia and Sarah.

[22] Mr. Tunley argues that the suggestion of Tricia and Sarah's memories of abuse are false memories, produced either by improperly suggestive therapy or by suggestive passages in the book, *The Courage to Heal*, is simply neither supported by the evidence, nor consistent with the

consent dismissal of the plaintiff's action against Ms. Cooper. The suggestion of collusion between Tricia and Sarah, in the course of revealing their memories of abuse to each other in early February 2006, is similarly unsupported on the evidence.

[23] Mr. Tunley argues that the evidence before the Court reveals much that calls into question the credibility of Jack's denial of the allegations against him. Jack's evidence-in-chief was contrived, at various times protesting his innocence, professing his religious faith and devotion to family, and playing his posture as a victim, in each case to an implausible degree. In cross-examination, he was frequently caught in a contradiction, or without any satisfactory explanation, when reminded of his discovery evidence. Jack showed a certain carelessness for the truth, and even untruth in his sworn evidence on discovery and at trial.

[24] Mr. Tunley submits that Jack has shown disrespect for the legal process throughout this litigation. At trial he was exposed for failing to give accurate and complete full answers in discovery where the information was damaging to him. Most fundamentally, the defendants submit that Jack's claim to be innocent of the allegations against him is at odds with his own emotional reaction to the allegations, which was predominantly one of anger. His inability to accept the recantation and apology given by Tricia and Sarah, and restore family relations, and his continued questioning of their honesty and credibility, is inconsistent with his claim of innocence. When Jack learned that Tricia and Sarah were again accusing him, his response was to mount a sustained and aggressive campaign. Mr. Tunley submits that this conduct is, simply, not that of an innocent man, properly exonerated of mistaken allegations, rather, it is the conduct of an angry abuser.

[25] Mr. Tunley submits that the evidence of their expert, Dr. Jaffe, was balanced, impartial, clear and reliable. In contrast, Jack's expert, Dr. Merskey was biased, testified according to an agenda, contradicted himself, failed to account for the facts of the case and relied on selective research. Where they disagree, Dr. Jaffe's evidence should be preferred over Dr. Merskey's.

[26] Mr. Tunley cautions the court about the evidence going to "opportunity" as premised upon outdated and discredited stereotypes about child sexual abuse. As the courts have recognized, and as the expert evidence in this case confirms, sexual abuse of children is a crime of opportunity.

[27] The defendants submit that the plaintiff's action for defamation should be dismissed, and the counterclaim allowed. Alternatively, even if the Court were to be unable to find that Tricia and Sarah have established their allegations on a balance of probabilities, the defendants submit that the Court should nevertheless find they both had an honest belief in the truth of those allegations, even if it was a mistaken one. Such honest belief, coupled with the circumstances in which the limited disclosures of their allegations took place, gives rise to a qualified privilege to disclose within that limited sphere. In the absence of malice, for which there is no evidence whatsoever, that qualified privilege constitutes a complete defence to the defamation claims.

The Plaintiff

[28] Mr. Gasparotto submits that with respect to the publications at issue in this litigation, there is no doubt that the defendants have published the words complained of and that the words are defamatory of Jack in both their

plain and ordinary meanings. The inferential meanings to the publications are to the effect that Jack is a child molester and pedophile and cannot be left alone with children.

[29] Mr. Gasparotto submits that, aside from an assessment of their credibility, the totality of the defendants' evidence as to their alleged memories, and given the improbability of their veracity, does not and cannot prove the truth of their allegations of abuse on a balance of probabilities or at all.

[30] Mr. Gasparotto submits that Jack's evidence at trial was given in a clear, cogent and straight-forward manner and that his innocence regarding the accusations is beyond reproach. Jack's evidence regarding his denial of any alleged sexual impropriety against Sarah or Patricia was not shaken, despite the vigorous cross-examination by opposing counsel and attempts to impeach his credibility. Jack answered questions in a frank and honest manner and was straightforward with respect to his recollection of the interactions between the two families during the relevant time period.

[31] Mr. Gasparotto submits that any inconsistencies between Jack's discovery evidence and his *viva voce* evidence at trial did not involve central issues in this litigation and were simply on minor issues; and more an attempt by the defendants' counsel to deflect attention away from the vague and ambiguous evidence given by Patricia and Sarah regarding the alleged abuse.

[32] In contrast to Jack's credibility, the plaintiff submits Patricia's demeanour while giving evidence during the trial appeared contrived and rehearsed. Patricia consistently evaded questions and attempted to overlay

her evidence, to the point where it defied common sense and sounded preposterous. Some of Patricia's over-the-top evidence in the witness box illustrates her insincerity

[33] Mr. Gasparotto submits that Patricia's *modus operandi* has been to either downplay what she has previously written to bolster her own evidence or play-up what she has written to, again, bolster her evidence. Patricia's responses in cross-examination have raised doubts about the veracity of her allegations.

[34] Mr. Gasparotto argues that Sarah's evidence on the issue of her memories was significantly less than clear, cogent and convincing. Her evidence regarding abuse is based on pure speculation and belief rather than any recollection of actual events. Sarah's surreal out of body memory cannot be considered a reliable memory of an actual event, to either identify an abuser, a location, or whether abuse even occurred. Sarah's stubborn belief that the flashback image is somehow representative of abuse of her by Jack – despite her admission that it contains no details or features, is accordingly completely unreliable as proof of the truth of her beliefs.

[35] Additionally, the irrational conviction with which Sarah expressed her belief in her memory has no bearing on its veracity, especially considering her incomprehensible evidence to the court regarding the alleged abuse and her two alleged memories which, despite the best efforts of defendants' counsel, are not connected. Further, her continuous doubt as to the accuracy of her belief, and her contrary belief on August 14, 2006, underscore the unreliability of her evidence with respect to the allegations of abuse.

[36] Mr. Gasparotto submits that other than vaguely accusing Jack of some unspecified sexual abuse at some vague time, Patricia and Sarah refused to provide virtually any factual information whatsoever in support of these serious allegations. The plaintiff was only able to learn about some of the substance of the allegations as a result of this litigation. The defendants' persistent and inexplicable refusal to disclose pertinent particular of the alleged abuse negated Jack's ability to defend himself and respond in any meaningful manner.

[37] Mr. Gasparotto submits that following the August 2006 apology and recantation, in December 2006, the defendants' - in particular Jim - embarked on a surreptitious, and later overt crusade to re-accuse Jack of sexually abusing Patricia and Sarah and re-disseminated the untenable defamatory allegations to various individuals.

Legal principles

[38] The defendants have the onus to prove, on a balance of probabilities, that a sexual assault or battery was committed by the plaintiff.

[39] In cases of sexual assault involving children, courts have recognized that incidents of sexual abuse normally occur in private, and that corroboration may not be available, especially when alleged events occurred in the past. Trial judges are required to assess the totality of the evidence. In some civil cases, it may come down to whether the plaintiff or defendant is to be believed in order to determine whether an alleged sexual assault occurred.

[40] A claimant alleging sexual battery must prove on a balance of probabilities that the defendant intentionally contacted him or her without

consent and that the contact was of a sexual nature.² Unlike battery *simpliciter*, liability for sexual battery does not require the plaintiff to also demonstrate that the contact was “harmful” or “offensive” and liability is not confined to foreseeable consequences.³ The tort is aimed at protecting the personal autonomy of the individual and compensation flows from the violation of the plaintiff’s right.

[41] Sexual battery is actionable without proof of damage;⁴ however, where there is evidence of damages, the Court must consider the particular effect of the assault upon the individual plaintiff and not just the nature of the assault itself.

[42] Some plaintiffs may suffer greater harm than others because of their particular susceptibility.⁵ One important factor to be considered by the Court is the effect of the assault on the victim.⁶ General damages for sexual assault victims must take into account that the injuries suffered by a sexual assault victim differ greatly from those suffered by a victim of a merely negligent defendant, particularly in respect of the psychological and emotional damage suffered.⁷

[43] The lack of physical evidence of abuse does not undermine the credibility and reliability of a victim’s evidence or make it inherently improbable that an abuser sexually abused them. It is settled law that sexual abuse covers a range of conduct, not all of which is physically damaging.

² *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, at para. 26; *M(K) v. M(H)*, [1992] 3 S.C.R. 6, at para. 16.

³ *Norberg*, at para. 45.

⁴ *Norberg*, at para. 45.

⁵ *Gray v. Reeves*, 1992 CarswellBC 45, at para. 99 (SC).

⁶ *P(S) v. K(F)* (1996), 1996 CarswellSask 756, at para. 36 (QB).

⁷ *S(J) v. Clement*, 1995 CarswellOnt 1703, (Gen. Div.) at para. 289.

[44] Analysis of the tort of intentional infliction of mental suffering in the context of sexual abuse is no different from that in any other context. The tort has three elements: (1) conduct by the defendant that is flagrant and outrageous; (2) is calculated to produce harm; and (3) results in visible and provable injury.⁸

[45] While there are several ways to address the questions raised in this case, I chose to consider defendants' counsel's suggested approach to the task, as outlined in his factum. The question of whether the defendants have established their claims for sexual battery and intentional infliction of mental suffering in this case may be answered by assessing the following from the evidence led at trial:

(a) whether the memories of abuse reported by Tricia and Sarah, and their inherent plausibility or implausibility, are sufficient to establish that Jack abused Tricia and/or Sarah;

(b) the credibility and reliability of Tricia's and Sarah's testimony;

(c) whether corroboration should be required in this case, not as a matter of law but rather of common sense or prudence in the circumstances, and whether such corroboration exists;

(d) whether the sufficiency or credibility of Tricia's and Sarah's memories is undermined by any factors such as restricted opportunity, delayed reporting, suggestive therapy, collusion, or recantation; and

(e) the reliability of Jack's denials, taking into account his conduct and the credibility of his testimony and of the evidence adduced generally during the course of this trial.

Patricia's Evidence

⁸ *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474, (C.A).

[46] Patricia and Sarah each testified that the sexual abuse they recall took place was when they slept over at the farmhouse, and they place the events between their respective ages of 4 to 6 years old (1982 to 1986). Patricia testified that she does not recall sleeping in any other room other than the “boys’ room” located on the second floor of the farmhouse. She testified that the boys would typically be in their beds and she would not be alone in the bedroom.

[47] Patricia testified that she has two distinct memories of being sexually abused by Jack. In the first, she remembers being in the bedroom, on the floor between the two twin beds. She remembers waking up but not being fully awake. She testified that she saw Jack’s facial features and Jack was on top of her. Patricia recalls feeling like she was being pinned down. She remembers protesting to Jack “don’t do this to me”, and being pinned down. She recalls sensing pain in her legs or groin, and while she could not identify specifically where the pain was, she believes it was in her vaginal area. In her memory, the pain did not make sense to her; but now as an adult, she believes what she felt was the pain of penetration. She denied that the pain was related to having a full bladder but admitted that she had bed-wetting problems as a child. She also admitted having stomach pains as a child (as reported to her doctor in 1997). She did not know Jack’s position relative to her. She recalls that the room was dark, seeing the green sleeping bag, the window behind her and moonlight through the window. She did not know how long the incident lasted or what she said or did after the event. Patricia did not know what the other children in the room were doing or where they were located, but she knew that the boys would have been in their respective beds. Patricia admitted that she did not complain about the pain to her mother or Aunt Margaret.

[48] In Patricia's second distinct memory, she recalled being on the floor in the same boys' bedroom. She remembers Jack sitting on Tim's bed and pulling her up by an arm. She remembers a sensation of something soft in her mouth which she asserted "may have been his penis". She recalls the specific feeling. In cross-examination, she admitted that there is a degree of "speculation now looking back at the incident" and her believing that the soft object was a penis. She testified that she could only relate to the feeling of something soft in her mouth. As with the first memory, it was night time and she had been sleeping on the floor. Patricia admitted that other children were likely in the room but doesn't know how Tim would not have been woken up by Jack's actions. Patricia testified that she has always remembered this incident as sexual and she does not know if the two memories are part of the same event or different.

[49] Patricia testified that her memories of abuse are not just "images". She remembers the feeling of pain. Patricia testified about other memories relating to the time Jack and Margaret lived in the farmhouse, some of which in retrospect she associates with her memories of abuse. While she does not remember specific abuse in those memories, she recalls that she felt anxious and scared of Jack at the time. Patricia testified that she has always had the memories of abuse. There were times in her life when she thought about it less; however, she thought about it more at family events. Patricia testified that she felt responsible and that it was something she could not talk about. She treated these memories as a secret and was scared that her parents would find out and would leave her.

[50] Patricia added that she coped with her memories by minimizing the abuse she suffered and by trying not to think about it. She testified that she

was close with her cousins and Aunt Margaret, and for the sake of family relationships, she did not disclose the abuse as she did not see any benefit in reporting it. She did not want to admit that it had affected her. She testified that throughout her entire life she was very uncomfortable around Jack.

Sarah's Evidence

[51] Sarah admitted that she has no recollection of sleeping anywhere else but the boys' bedroom in the farmhouse and has no recollection of sleeping alone in the boys' room. Sarah testified that she has two memories of being sexually abused by Jack. In the first one, she remembers herself as a very young girl, in the boys' bedroom. Sarah described the memory as a static image, like "a snapshot", "an out-of-body experience". It is dark and she sees the dark shape of a man lying on top of a small child. Sarah described looking down on herself, as if from the upper corner of the bedroom ceiling near the door, and seeing herself as a child on the floor with the dark shape of a grown man on top of her. She cannot see the child's face or distinguish any features. Sarah also could not see the man's face, or any other identifying features however, Sarah testified, "I know it is Jack". She explained that in the memory, it is as if she is the little girl she sees and she knows where she is and the man on top of her. Sarah does not know if there are other children in the room. She does not know if the man had his clothes on or off or if she had her own clothes on or off. Sarah testified that she does not know if there was penetration, as there was no action to this memory and she does not recall experiencing anything.

[52] Sarah's second memory came to her in the fall of 2006, after the August 12, 2006 confrontation of sexual abuse. She was dating a man at the time and when they were intimate, Sarah claimed that she had a sensation or

feeling of Jack being on top of her. Sarah testified that when her boyfriend would touch her vagina, she would have a flashback and suddenly in the “snapshot”, Jack was on top of her. Sarah testified that she would see Jack on top of her. Sarah testified that she does not see Jack’s face but, as with the first memory, she knows it is Jack. She described the memory as a sensation and she feels the weight of a grown man on top of her. Sarah does not know if there was penetration or fondling. Sarah added that the man on top of her is not the man she is being intimate with.

[53] Sarah explained that she was not comfortable around Jack for reasons she could not explain at the time, but which she now relates to the abuse. For example, on one occasion after Jim and Chris moved to Ancaster, Jack came to pick up Sarah for a sleepover at the farmhouse and Sarah became upset and did not want to go with Jack. Sarah testified about another occasion when she was between 11 and 13 years old, she sat in the front of Jack’s truck with him and testified that she was terrified. On another occasion, Sarah and Jim were with Jack on his boat. Sarah was in her bathing suit at the front of the boat and recalls feeling very exposed and vulnerable about being around Jack.

[54] Sarah testified about her childhood temper tantrums. When Sarah was in high school, she sought treatment for depression and low self-esteem. She recalled feeling suicidal one night. Sarah sought counselling when she attended Calvin College to address issues of depression, anxiety and difficulties she was having with friends. On several occasions, Sarah reported to her doctor that she was feeling depressed and “panicky”, with low self-esteem and fatigue.

[55] Sarah testified that she did not remember Jack abusing her as a child until March 2002, when she travelled to the Dominican Republic with her parents and Tricia for a vacation. One night, she went out on a date with a man who worked at the resort where they stayed. The man was sexually aggressive towards her and sexually assaulted her. The experience was, no doubt, traumatic for Sarah. Within a day after that sexual assault, Sarah testified that she started to experience an intrusive, recurring “flashback” image of the first memory. Sarah testified that this memory would play over and over.

[56] By the spring of 2003, Sarah continued to have recurrences of her first memory of Jack’s abuse. She testified that around that time, she disclosed the abuse to a close friend, Naomi Baker. Sarah testified that she specifically told Naomi that since her near-rape experience in the Dominican Republic, she was having flashbacks of Jack abusing her in the upstairs bedroom of the farmhouse.

[57] Sarah sought therapy from Jessie Cooper in early May 2005. Sarah testified that she did so because she had been experiencing panic attacks. Sarah testified it was not her intention to talk with Jessie about the abuse. However, at the first counselling session, Sarah disclosed to Jessie that she had a “recurring image” of her uncle Jack abusing her as a child. Sarah also told Jessie about the memory she has of Jack coming into the room with a wooden spoon and that she felt on edge with him. As part of therapy, Sarah started a journal and also wrote letters to Jessie Cooper.

Disclosure of the abuse

[58] In January 2006, Tricia's family learned that Tricia's relationship with her husband, Edy, had become abusive. In late January, Tricia came home to Ancaster and Sarah spoke with Patricia privately. Sarah testified that she initiated the conversation because she was worried about Trish. Sarah testified that she knew that Trish had difficulties growing up and did not know if Trish had also been abused. Sarah testified that she told her sister that she had been sexually abused as a child. Sarah did not remember the exact words she used.

[59] Patricia testified that when Sarah told her she had been abused, she immediately asked whether it was by Jack or Rick. Rick was one of their cousins. Patricia testified that she had also always had an uneasy or uncomfortable feeling about Rick, but that she had not been abused by Rick. Sarah recalled that at the point when Tricia mentioned Rick, she responded that it had been "Jack". Patricia testified that she then told Sarah that she too had been abused by Jack as a child, but that she did not provide details. Patricia recalled telling Sarah that she had also been abused by Jack. Their discussion was described as meaningful, however, Sarah and Patricia did not exchange details about their respective memories.

[60] A few days after Sarah and Tricia disclosed to each other that Jack had sexually abused them as children, they agreed that Sarah would tell their parents. Sarah told her parents that both she and Tricia had been sexually abused by Jack in the farmhouse and that she was 99.9% certain that it had occurred. Her parents, Jim and Christine were in disbelief and did not ask Sarah for details. Jim and Christine both spoke with Tricia who advised them that Jack had sexually abused her in the farmhouse when she was a child. Patricia and Sarah's siblings, (Sheldon and Michelle) were apprised. When

they both decided it was time to confront Jack, Sarah wanted to tell Jack that they both remember the abuse and that they wanted an apology. In preparing to confront Jack, Sarah read a section of the book *The Courage to Heal* dealing with confrontation. She claimed that the book suggests it is not always helpful to give details of the abuse to the person being confronted.⁹

The confrontation

[61] On August 12, 2006, Tricia, Sarah, Sheldon and Michelle arrived at Jack and Margaret's house. Margaret answered the door. Michelle, Tricia and Sarah started crying. Margaret asked "what is this about?". Sheldon responded, "Jack knows". Jack was sitting at the table in the kitchen and Margaret turned to him and asked if he knew what this was about. Jack responded that he did not know.

[62] Sarah and Tricia testified that they sat down at the table in Jack and Margaret's kitchen. Sarah asked Jack for an apology for abusing her in the farmhouse when she was a little girl. Tricia then asked Jack for an apology for abusing her in the farmhouse. Although Jack and Margaret claimed they did not hear Sarah or Tricia's words distinctly, they both admitted that they came away from the meeting with an understanding that Tricia and Sarah had accused Jack of sexual misconduct with them in the boys' bedroom at the farmhouse.

[63] Sarah, Tricia, Margaret and Michelle were all extremely emotional. Jack and Sheldon were not visibly emotive. Tricia testified that Jack made a comment about them not having any evidence. Sarah, Tricia and Sheldon all

⁹ Jim testified that he also read a very small segment of this book particularly the portion regarding disclosure of abuse. Patricia later conceded reading this particular reference. I will address this workbook later in my judgment with regards to the disclosure of allegations.

testified that Jack said: “I can’t apologize for what I don’t recollect”. Jack testified that what he said was “I cannot apologize for something I did not do”. After this short exchange in the kitchen, Sheldon noted they were not getting the apology they came for, and that they should leave. As they were leaving the house, Sheldon told Margaret that she should be careful about her grandchildren.

[64] Margaret spoke with Tricia and Sarah outside the house. Tricia and Sarah again confirmed that it had happened in the farmhouse. Margaret was crying. After they left the kitchen, Jack testified that he sat for a time and reflected on what had happened. He got angry and went outside where Sarah, Patricia and others were about to depart. In response to Sheldon saying to him “all we need is an apology”, Jack replied “all I need is a lawyer”.

[65] Later that evening, Tricia and Sarah composed and sent an email to Steven, Tim, Rachel and Leisha disclosing to them directly the fact that they had been sexually abused by Jack when they were children and that they had confronted Jack that afternoon and requested an apology. By the time they saw the defendant’s email, Steven, Tim, Rachel and Leisha were already aware of the events that had occurred earlier that day from Jack.¹⁰

[66] Sarah and Tricia testified that they sent the email because they had been exceptionally close with their cousins and wanted to tell them directly what had just happened. Leisha and Steven both responded angrily to the email, suggesting among other things that Tricia and Sarah should have spoken to them in person, and should have provided much greater detail to support such serious allegations against their father.

¹⁰ Ex. 7, tab 1, email dated August 12, 2006.

[67] Jack also communicated about Sarah's and Tricia's allegations to a number of his siblings. Jack testified that he made the calls because he assumed they would soon hear about the serious allegations made against him. Jack phoned Jim last and told him: "I want you to know that I'm not guilty of what your daughters accused me of." Jim replied that the matter was between Jack and Patricia and Sarah.

[68] On August 13, an email was sent out from Patricia (with Sarah's concurrence) to various family members and other individuals. The email also included the following statement: "We do not want anyone else to be sexually abused."¹¹ Following the email, Leisha spoke with Sarah and she asked if she could come to the house as Leisha wanted to discuss the situation with both Sarah and Tricia. Sarah testified that when Leisha arrived at the house, to her surprise, other uninvited members of Jack's family were in the same car. In any event, the meeting turned into a highly emotional, angry and dysfunctional session.

The events of August 14, 2006

[69] Following the highly emotional events of August 13, Jim and Chris decided they wanted to meet with Margaret and Jack face to face to discuss the events of the past two days and try to bring some order to the chaos. Jim testified that at the time, the family structure had suddenly been blown apart and they were feeling the loss and they thought they might be able to help. Jim was hoping to facilitate the apology that his daughters had requested on August 12.

¹¹ Ex. 7, tab 2 and ex. 8 tab 6, email dated August 13, 2006.

[70] At approximately 7:00 a.m., Jim called Margaret and requested the meeting. Margaret agreed to meet on the condition that Jim and Chris were open to the possibility that Jack was not the abuser to which Jim agreed. Chris also agreed because she wanted the abuser to be someone else and although she believed her daughters, she did not want it to be true and was willing to listen to Jack. They agreed to meet at a hotel in Woodstock in the early afternoon.

[71] Jim testified that during the drive to Woodstock, he spoke with his sister Corrie by phone. During the call, Corrie brought up the topic of a sexual incident that had occurred between Jack and Jim when they were children, which she had only learned about from Jack the previous night. Jim was surprised with this news because he had never discussed the incident with Corrie. While en route to the Woodstock meeting, Jim testified that he was upset that the incident with Jack had been raised and he told Chris for the first time about the incident.

[72] Jack and Margaret arrived at the hotel first and were in the room when Jim and Chris arrived. When Jim and Chris entered the room, Jack said, "I'm not a pedophile". Jack was emotionally wrought, and weeping extensively. A brief discussion ensued about a historical sexual incident involving Jim and Jack. While there was some disagreement about the nature of what happened and their respective ages at the time, nonetheless, Jim apologized to Jack.

[73] After further intense and emotional discussions, Jim eventually told Jack that he believed Jack was innocent and that Jack did not sexually abuse Tricia or Sarah. Shortly thereafter, Chris also said that she believed Jack did not assault her children. Chris testified that she could no longer take the

pressure, that she was sleep deprived, exhausted and rattled and was trying to make order out of the chaos. Jim testified that going into the meeting, he had no doubt that Tricia and Sarah were being truthful. Jim stated that his announcement to Jack was influenced by a number of factors. He testified that he was in a state of shock, partly because of the call with Corrie, that he had little sleep the night before and that he had been drained by the onslaught of anger from Margaret, Steven, Tim and Leisha. Jim added that he had never seen Jack in such a state of anguish.

[74] After Jim and Chris told Jack that they believed him, Jim and Jack then discussed other matters from their past. To conclude the meeting, Jim led them all in prayer. Jim and Chris realized they needed to tell Tricia and Sarah that they believed Jack. They decided they would all go back to Ancaster and Jim and Chris would talk to Tricia and Sarah at their home first, and then call Jack and Margaret to come over.

[75] At roughly the same time of the Woodstock meeting, Tricia and Sarah were in Ancaster. Tricia testified that she was upset that this matter, which was so private and personal to her had become widely shared within the family. Sarah testified that since August 12, she was struggling with doubt about whether she and Tricia should have come forward and disclosed the abuse. Sarah testified that they thought the matter could have been resolved between the families. Sarah set up an appointment with Jessie Cooper in the afternoon of August 14 and invited Tricia along. It was the only meeting Tricia ever had with Jessie Cooper.

The retraction

[76] When Jim and Chris arrived back home from Woodstock, Sarah was informed by her mother Chris, to the effect that, "I believe you were abused but it wasn't Jack". Sarah testified that at that moment, her world fell apart and she did not know what to do. Patricia testified that she went "completely numb" now that her parents did not believe her. Patricia recalled feeling angry at Sarah; that the confrontation with Jack and his family had been a mistake.

[77] Jim and Chris explained to their daughters that at the Woodstock meeting, Jack was crying – which was unusual – and he emphatically told them he had not sexually abused Sarah and Tricia. Patricia added that she then experienced panic and despair that she was going to lose her whole family. She testified she felt she had no choice but to meet with Jack and Margaret. Shortly thereafter, Jack and Margaret came to Jim and Chris's house. Within moments of Jack and Margaret entering the house, Jack told them that he was not a pedophile and Sarah and Patricia both came forward one after the other and told Jack that they believed him.

[78] Sarah testified that on August 14, when she told Jack that she believed him, she trusted her parents, and she assumed that her memories must have been wrong. Sarah explained that once her parents' support had disappeared, she felt so alone and overwhelmed.

[79] Jim and Jack agreed that Tricia and Sarah would draft an email to the extended family offering an apology and withdrawing the allegations against Jack. Margaret testified that they all accepted that Tricia and Sarah had been sexually abused as children and that it had happened in the

farmhouse.¹² Chris and Patricia both recalled that during this meeting, Jack and Margaret also agreed to try to assist them and find out who was the perpetrator of this abuse.

[80] As Jack and Margaret left Jim and Chris's house on August 14, Jack placed a letter on the table. This letter was produced; however, there is no dispute between the parties that the letter left on the table included a reference to the sexual incident between young Jim and Jack. On August 15, 2006, in an email to his sister Elizabeth, Jim wrote: "Our girls feel so betrayed by their minds. I hurt for them so deeply for the events that transpired so many years ago."¹³

[81] Patricia testified that she felt compelled to write the email that had been agreed upon by everyone. While Jim had begun to write the email, Patricia took over and composed it. Sarah and Jim reviewed it, and they sent it to Jack for his approval. Jack approved the email without any changes. Patricia sent the email to the family.¹⁴ The email stated, among other things, that Tricia and Sarah "now know and fully believe that Jack was not our abuser." It also said:

We have vivid memories of being sexually abused as children. In both of our cases, we remember being abused in the upstairs bedroom of the farmhouse in which Jack and Margaret lived. We now know that as children, we had inappropriately associated Jack as the abuser. Jim, Chris, Jack and Margaret all agree that we have suffered abuse in that bedroom at the farmhouse, but the real perpetrator is still unknown to us.

¹² Later in time, Margaret and Jack started to disbelieve that any abuse had actually occurred in their farmhouse.

¹³ Ex. 8, tab 21.

¹⁴ Ex. 8, tab 9, 11.

[82] While on route back to Miami, Patricia subsequently sent an email letter to Jack offering a heartfelt apology personified with regrets and explanations.¹⁵ There were numerous other discussions or emails involving apologies, appeals for forgiveness and seeking reconciliation. Despite the retraction and related apologies, relationships between the two families continued to be somewhat mellow and perhaps strained into the fall of 2006.

Renewal of the allegations

[83] Sarah testified that she began to have lingering doubts and shortly after the retraction, at least by the fall of 2006, she realized that the August 14 apology was a mistake. She spoke with her sister about her concerns. Sarah had some communication with Rachel and Leisha towards early December 2006 and a meeting was set up for December 9. During the meeting, there were many questions posed that remained unanswered, and according to Leisha, Sarah began to renew the allegations.¹⁶ In early 2007, the defendants continued to address their lingering concerns about Jack and before and shortly after their grandmother's funeral, the defendants re-affirmed their belief of Jack's abuse. Jim had mentioned the abuse to a number of siblings, friends and other individuals as a result of discussions he had with his two daughters.

[84] By March 2007, various family members and unrelated third-parties became involved due to the allegations resurfacing. Bob Roberts sent emails to the defendants and family members requesting clarification about the allegations that had resurfaced. The various email exchanges between the

¹⁵ Ex. 7, tab 3, email dated August 16, 2006. This email was sent by Patricia to other individuals, including the exchange between Tricia and Leisha of August 20 and September 8, 2006.

¹⁶ Ex. 8, tab 47, emails of December 11 and 12, 2006.

parties were somewhat antagonistic and did not resolve the concerns. Throughout the spring of 2007, the defendants sent originating or responding emails to various individuals, in effect validating the renewal of their allegations of Jack's abuse.¹⁷

Expert evidence

[85] While I have considered the entirety of the evidence of both experts and their reports, I have only referenced select segments in this judgment.

[86] The defendants called Dr. Peter Jaffe as a witness. Dr. Jaffe is a forensic psychologist and has a specialty in the area of childhood sexual abuse and childhood trauma. He was qualified as an expert in psychology relating to allegations of childhood sexual abuse including impacts on survivors, effects of trauma on memory, recall, recantation and delayed reporting, and the behaviours or perpetrators of child sexual abuse.

[87] Dr. Jaffe conducted clinical assessments of Tricia and Sarah. He prepared two reports, one for each of Tricia and Sarah, setting out his findings, conclusions and opinions. Dr. Jaffe testified that a traumatic event that is not stored in the conscious memory can come back through triggering events that may be associated with aspects of the original trauma. Drawing on Dr. Jaffe's evidence, Sarah's traumatic experience in the Dominican Republic may be understood as such a trigger. Memory can come back as sensation and Dr. Jaffe opined that sexual intimacy can trigger memories of sexual abuse suffered in childhood.

¹⁷ For example, ex. 7. tabs 7-11; emails dated March and April 2007; ex. 8, tab 59, tabs,78, 81, 87.

[88] Dr. Jaffe testified that there is a similar degree of accuracy between continuous memories and memories that were forgotten and then recalled. A traumatic memory that was forgotten and then returns later in life is not inherently less reliable than a continuous memory. Dr. Jaffe testified that most victims of sexual abuse do express doubts about their memories and victims do not want to believe because the reality is too painful. It is common that the victim might find the reality unbelievable and have doubts.

[89] Dr. Jaffe testified that recantation is also common among sexual abuse victims. Recantation happens very often in the criminal context. Reporting often makes life more complicated for the victim, who has to describe the abuse over and over, but also has to expose her entire life. When the abuse occurs within a family context, disclosure can affect family relationships. Dr. Jaffe did not equate recantation in a criminal context with false memory or false allegations of sexual abuse. Dr. Jaffe referred to numerous later studies, which concluded that the frequency of “false” allegations is actually around 6%.

[90] According to Dr. Jaffe, there is general agreement that sexual abuse may affect men and women in a number of ways over a lifetime. Common sequelae include anxiety, depression, problems with trust and sexual intimacy, and not wanting or enjoying sex. A history of sexual abuse is associated with an increased risk of multiple psychiatric disorder. The DSM-IV recognizes that sexual abuse in childhood may lead to Post-Traumatic Stress Disorder, flashbacks, nightmares, intrusive thoughts and experiences, suicide attempts, poor self-esteem, and self-blame.

[91] Dr. Jaffe assessed Tricia’s memories in his clinical assessment, with the understanding that it is the role of the Court to decide the credibility and

reliability of her memories. In his capacity as a clinical psychologist, Dr. Jaffe noted that Tricia reports always having the memory. Dr. Jaffe noted that he found Tricia to be someone reluctantly dragged into talking about her memory. In Dr. Jaffe's opinion, Tricia's memories are similar to what victims of sexual abuse remember at four or five years of age. They often remember the gist of what transpired but they might not be able to offer rich details about place and time that a court might normally look for. Adults who remember traumatic events from when they were children tend to remember certain sights, certain feelings or sensations. Dr. Jaffe testified that Tricia's evidence is consistent with other adult victims of childhood sexual abuse who are often reluctant to tell what happened.

[92] Dr. Jaffe administered different psychological tests to Tricia. The tests have built-in validity scales which allow the assessor to determine whether the subject is malingering or exaggerating or minimizing their report or symptoms. Dr. Jaffe testified that Tricia's test results do not indicate any such impression management, whether positive or negative – in other words, her responses were neither under-stated nor over-stated.

[93] In Dr. Jaffe's opinion, the circumstances Tricia reported to him are consistent with a history of sexual abuse. Those circumstances include her reluctance in disclosing the abuse, her continuous memory and the consistent description of what she remembers from her childhood, the fact that her sister reported a similar experience in childhood with the same alleged perpetrator.

[94] Dr. Jaffe explained that Sarah's explanation of her memory as an "out of body experience" is quite common for traumatic memories. In the context of a fearful and traumatic event, an individual may go into a

dissociative state and the memory of the event later in life may be one of watching it happen to yourself. People who have traumatic memories may give a third-person account of the traumatic event because they have a dissociative memory. Dr. Jaffe noted that Sarah remembers where she was and who she was with but the memory lacks details. Dr. Jaffe noted that he is suspicious of someone whose memory has a lot of detail because it may have been inflated through repeated interviews.

[95] Dr. Jaffe found that Sarah has anxiety and depression. She has poor self-esteem and had difficulty trusting men. Sarah is in the superior range of intelligence, which is a positive factor in her prognosis. Given her intelligence and successes, Dr. Jaffe opined that one would expect higher self-esteem than she reports. In Dr. Jaffe's opinion, the circumstances Sarah reported to him concerning her memories are consistent with a history of sexual abuse. From a clinical perspective, he found it compelling that the recollection came back after the traumatic sexual assault she experienced in 2002. Her sister had "similar" recollections of adverse events with her uncle.

[96] Dr. Jaffe also testified that "flashbacks" are a reality. He explained research on cases where abuse is known to have occurred and the victims experience flashbacks. Dr. Jaffe strongly disagreed with Dr. Merskey's opinion about false memories. In cross-examination, Dr. Jaffe testified that flashbacks are not always reliable, yet they are not inherently unreliable either.

Dr. Merskey

[97] Dr. Harold Merskey is a psychiatrist and was qualified as an expert to give opinion evidence in the fields of psychiatry, memory generally,

memory related to traumatic events, adult and childhood memories of trauma, repressed suppressed, recovered as well as false memories.

[98] Dr. Merskey testified that memory is a reconstruction which is selective and is shaped by subsequent events. He expressed the opinion that recovered memories of childhood sexual abuse are unreliable and should be qualified or corroborated in order to be accepted.

[99] While Dr. Merskey and Dr. Jaffe disagree about the ability of the human mind to repress and later report a memory of a traumatic personal experience of physical or sexual abuse, Dr. Merskey testified about a number of basic principles regarding memory. Specifically, he testified that memory is a reconstructive process in which recollection of an event is subject to influences arising during the period between occurrence and recall; there may be gaps in memory filled to create the narrative; it is not physically possible for a person to remember an event that occurred at age three or earlier. In the absence of confirmation, there should be grave concern about the reliability of distant memory recalled at age fourteen by persons about events that occurred when they were age three or four. Confirmation means independent evidence that would tend to confirm that it is more likely that the event, as recalled, actually occurred; and the passage of time impacts and the accuracy of ordinary memory.

[100] Dr. Merskey testified that a person with flawed memories of distant or recovered events, if believed, can give all appearances of authenticity. The focus should therefore be more on the reliability of the testimony than on the credibility of the witness. Dr. Merskey referred to the Brandon article to the effect that “memory is constructive and reconstructive rather than reproductive.. it is fallible, altered by the passage of time and subject to error

and distortion”.¹⁸ Dr. Merskey was highly critical of Dr. Jaffe’s clinical assessment of both Patricia and Sarah and his stated conclusions.

[101] The defendants’ submit that Dr. Merskey was highly selective in the research he chose to provide to the Court. Dr. Merskey was not an objective or impartial expert. The defendants submit that on numerous occasions throughout his testimony, Dr. Mersey overstepped his role as an independent expert. Rather than explaining to the Court his opinions based on assumed or investigated facts, with reference to his expertise, he went through the record in minute detail and stated what evidence he did not find reliable. Dr. Merskey refused to accept any memories of sexual abuse that are not corroborated by physical injury or other external corroboration. The defendants argue that Dr. Merskey rejected Sarah’s memories as being not detailed enough and Tricia’s memories as being too detailed, while also lacking “appropriate” detail. Again, Dr. Merskey focused on the need for therapists and professionals to seek some confirmatory evidence in situations such as found here.

[102] Dr. Merskey did agree with defendants’ counsel that there is nothing inherently implausible about the circumstances in which Sarah first recalled the abuse. Dr. Merskey also acknowledged that recovered memories of sexual abuse may be true, and where there has been a continuous memory there is not the same requirement for accepting corroborating reports.

[103] Overall, I am persuaded that Dr. Merskey tended to advocate his position rather than provide an objective opinion. Generally, I prefer Dr.

¹⁸ Ex. 18, tab G - *Recovered Memories of Childhood Sexual Abuse*, S. Brandon, J. Boakes, D. Glaser and R. Green, British Journal of Psychiatry, (1998).

Jaffe's testimony and opinion evidence over Dr. Merskey's where there is a disagreement between the experts.

Credibility of witnesses

[104] The assessment of credibility is often the primary and the most daunting task that the trier of fact faces in trial, involving determinations of the truthfulness of witnesses and an assessment of their reliability. It requires a determination of whether their recollections are accurate regardless of the sincerity of their beliefs. However, reliability must be considered as well as credibility.

[105] Ultimately, there are no fixed rules to which I can look to guide my assessment of the credibility of witnesses in this case but a number of elements may be considered. These include the perceptions of the witnesses, their memory, how reliably and accurately do they recall the events, the manner in which the witnesses' perceptions have been communicated to the Court, and whether the information has been presented in a sincere, complete and truthful manner. I will look to the witnesses and assess whether they are being sincere and frank or biased, honest or careless with the truth, and reticent or evasive in the evidence that they have provided. These, and other factors, when combined, are what we describe as "credibility".

[106] Inconsistencies in the evidence of witnesses on relatively minor matters or matters of detail are, of course, normal. They are to be expected. Indeed, I would observe that the absence of such inconsistencies may be of even greater concern, for it may suggest collusion between witnesses in their evidence or fabrication or excessive rehearsal and regurgitation of a set

story. However, where an inconsistency of a witness involves a material matter central to the elements of the alleged offences and about which common sense dictates that an honest witness is unlikely to be mistaken, the inconsistency can demonstrate carelessness with the truth that may undermine the whole of a witness' evidence.

[107] As a trier of fact, I may believe all, none or some of a witness' evidence. Accordingly, I am entitled to accept parts of a witness' evidence and reject other parts, and similarly, I can accord different weight to different parts of the evidence that I do accept. At the end of the day, the best approach to the assessment of credibility is for me to ask myself as trier the same questions that we admonish juries to ask when we ask them to assess the credibility of witnesses, the reliability of witnesses, and to determine the truth. I have asked those questions and applied those principles in this case.

[108] At times, Patricia's testimony appeared to be contrived. Her testimony was inconsistent with respect to her belief as expressed in the email of August 14. Despite composing the email stipulating that Jack was innocent, Patricia testified that she only meant what she wrote at the time and furnished several justifications for her earlier stance. For example, she admitted not being truthful at the time she wrote the email and she then added that she was also not true to herself throughout the entire period leading up to the disclosure of abuse. These latter statements appear to be self-serving in nature and in cross-examination, she was evasive during this line of questioning.

[109] Patricia also tried to distance herself from the email letter of August 16 she composed to Jack while on route to Miami. She wrote, *inter alia*, "the abuser was a dark figure of a man. I remember seeing you across the

breakfast table and “knowing” as a child what I now realize was a mistaken thought that you had hurt me”. Later she writes, “...and I realized that I had made a terrible mistake, one of the worst that can be made”. Patricia explained that when she wrote “even as I struggle with the idea of a loving God who could sit by and watch a little girl be traumatized and an innocent man be wrongfully accused”, her response in cross-examination was “this is the standard God paragraph”.

[110] Patricia testified that at the time she wrote and sent the August 16 email, she did not, in fact, believe Jack was innocent. She knew that he had sexually abused her and she had always known it. However, she said those words in her letter because she wanted to take back her secret as she felt completely responsible for having disclosed the abuse, which caused reactions of anger from her family. She claimed that she was attempting to salvage “some dignity here”. Despite composing and sending it to Jack, Patricia denied that this letter was accurate. When asked if she meant any of the words expressed in her letter to Jack, again Patricia obfuscated and claimed that she wrote the letter in order to “sell it”. In essence, she described the various comments of apology and reflections in her letter to Jack as “hyperbole”.

[111] I am satisfied that Patricia was not under any influence or pressure from her parents or anyone else to write this email letter to Jack. It seemed to me that this witness sought to wrap herself in a cloth of mendacity for all of her actions at the time as if to justify her conduct. These and other examples suggest to me that she is either misleading this court as to her true intention at the time or is tailoring her evidence with respect to explaining away her true belief. Her credibility on these and other points is in serious doubt.

[112] Patricia was equally evasive in response to plaintiff counsel's questions about the Bob Roberts' letter referring to accusations that could destroy an innocent man's life and the requirement of some supporting information. In a somewhat tortured and protracted response, Patricia provided no plausible explanation why she did not provide any details to close family members, in particular Sarah or even Leisha (whom she conceded she had been close with in the past). Patricia advanced the accusation against Jack but testified that she wanted to keep the details to herself; in my view, either for reasons of self-interest or because she did not have any factual information to share.

[113] Patricia also denied the statements attributed to her in Sarah's February 5 letter to Jessie Cooper. While Patricia was not the author of the writing, her evidence was replete with excuses when confronted with the letter. One specific comment purported to originate from her to Sarah was: "She looked at me and said she has no distinct memory but always wondered if something had happened, if there was a way it was possible". Patricia testified that the comment attributed to her by Sarah was erroneous. She steadfastly maintained that she always had the memory of abuse and that she did share her information, not the details. Patricia asserted that her memory was better or as good today than it was 6 years ago when referring to the conversation she had with Sarah.

[114] Albeit to a lesser extent, I also have some concerns about Sarah's credibility and the reliability of her evidence. She could not answer straight forward questions like 'did you call Jack a child abuser'. Sarah agreed that her journals were an accurate account of her thoughts and beliefs, yet she was evasive in her responses to plaintiff's counsel with respect to her

journaling. For example, Sarah wrote that she had “suspicions” in her journals, yet during her testimony she denied that she had “suspicions”.

[115] Sarah was somewhat dismissive about Jessie Cooper’s reference to a question mark regarding their discussion, quoting: “uncle sexually abused me?” Of course, Sarah cannot speak to what her therapist wrote and to her credit, Sarah later admitted that throughout her therapy she advised Jessie Cooper that she had doubts and, at one point, she was worried that she might have identified the wrong perpetrator. Sarah admitted in cross-examination that through her therapy she acknowledged “there was a very real possibility that I was wrong, however the memory stayed the same”. She agreed that she told Jessie Cooper over the course of therapy that “I have lots and lots of doubts”.

[116] In the February 5, 2006 letter to Jessie Cooper, upon advising her sister Trish about the abuse of her by Jack, Sarah wrote: “So I told her I have been sexually abused as a child by Uncle Jack. I told her I wondered if it had happened to her and if that was why she was where she was. She looked at me and I don’t know if I will ever forget that look”. Sarah also wrote: “I told her [Patricia] that I don’t have vivid memories but that God has given me enough. When I told Trish and she shared her dislike of this uncle, it gave me confirmation in my spirit that I have not made up a lie and that together we will heal.” Sarah goes on to write: “On Thursday (the day she went back to Miami) it became clear to me that Trish was turning a corner in her perception of the events. She told me she was having some memories (not of abuse specifically) that helped her point her in the belief that something has happened.” In response to a question in cross-examination, Sarah was

unable to corroborate her testimony with her writing when she claimed that Patricia actually told her about recalling alleged abuse.

[117] Despite the defendant's submissions, I am convinced that Sarah's letter to Jessie Cooper of February 5, 2006 is powerful and persuasive evidence. In her testimony, despite never forgetting the look on Patricia's face and recording the details of their conversation at the time, Sarah claimed that the letter to Jessie Cooper was composed during a very stressful time in her life and she dismissed the accuracy of the letter with respect to her sister's comments about any non-recollection of abuse. I find Sarah to be somewhat disingenuous when she testified that her letter to Jessie Cooper was a "therapeutic letter", implying that it was either not reliable, accurate or deserving of any merit. Even though writing to a therapist whom she trusts and had no reason to withhold information from, Sarah steadfastly attempted, but in my view, failed to explain away these fundamental inconsistencies. I find that the journal writings and her letter to Jessie Cooper are inherently reliable and honest. I am satisfied that during their initial disclosure meeting, Patricia relayed to Sarah that she did not have any distinct memories of abuse.

[118] Sarah also wrote, "I don't have vivid memories" in *The Courage to Heal* workbook. In the same letter to Jessie Cooper of February 5, 2006, after Sarah informs her parents, she writes: "The questions came and I am honest in saying I don't have very clear memories". Even today, Sarah still maintains not having "vivid memories". Clearly, Sarah did not know or is having serious doubts about her memories. The evidence about the events of abuse appears to be vague, mixed with doubts and interspersed with some speculation. However, as mentioned, I do not find Sarah to be totally

untruthful. In my view, Sarah did her best to recall the events as her recollection would permit. To her credit, she appeared sincere in admitting some doubts about her allegations of abuse.

[119] Overall, I reject Sarah's and Patricia's explanations presented at trial with respect to their emails and the Jessie Cooper letter. Both Sarah and Patricia's evidence was inconsistent with their stated actions leading up to and following the emails sent in August 2006.

[120] I reject Christine's evidence. In my view, she was a totally biased witness who was argumentative with counsel during cross-examination. Points that ought to have been easily conceded were not, at least not without a tortuous explanation. I am perplexed at the depths Christine attempted to portray Jack as an abuser. Reaching into the bowels of irrelevancy, Christine drew an example of Jack's purchase of a "penis painting" on a trip to Holland - a painting at which everyone including Christine laughed - to suggest that Jack is a sort of person to be a sexual abuser. She could not concede other reasonable explanations for her daughter's stomach aches. She attempted to step well back from her stated belief in Jack's innocence on the August 14 date. Christine's testimony was overreaching and I do not find her evidence to be credible or reliable.

[121] I find Jim's evidence as principally self-serving and inconsistent with respect to his belief and actions leading up to and following August 2006.¹⁹ He was evasive in addressing his change of opinion and comments regarding his belief in Jack's innocence. I also do not accept his assertions that he may have pressured his children to recant their allegations. Both

¹⁹ For example, see Ex. 8, tab 15, August 15, 2006 letter to Elizabeth.

Patricia and Sarah are highly intelligent, educated and successful women in their own right and I am not convinced that they would succumb to their parents or be so easily influenced to the extent promoted by Christine and all of the defendants.

[122] The defendants submit that the credibility and reliability of Tricia's and Sarah's claims is also supported by the fact that they had absolutely no motive to lie or fabricate their abuse allegations. While I cannot say for certain the impetus for their motivation, on the evidence, I find that they were both strongly inspired to embellish their allegations even against a close relative. Sarah and Patricia admitted that they did not like their Uncle Jack. They were also seeking answers to questions that gave rise to their various psychological and socialization issues.

[123] I accept that Jack and his family were only provided some "details" about the alleged abuse upon the commencement of this action and not during the confrontation, the recantation or the renewal of the allegations. Over time, perhaps with the prompting of several individuals, and having now faced a law suit for defamation, in my opinion, the defendants have attempted to develop some specific "details" about a sexual assault. What is telling to me is the continual lack of details of the alleged events the Patricia and Sarah failed to provide to Jack and his and their own family prior to the litigation.

[124] Corroboration, while not a legal requirement in this case, begins with the fact that both Tricia and Sarah remember being sexually abused by the same relative and person in authority, in the same room. While their evidence on some events at which they were both present was substantially the same, Sarah and Patricia have admitted confirming these issues with

each other. It is my view that some collaboration is at play here and I am not entirely convinced that they have not developed their testimony in consultation with one another.

[125] Defendant's counsel argues that Jim, Chris and Sheldon were all clear in their evidence that Sarah told them that both she and Tricia had been sexually abused by Jack. Sarah did so because Tricia had disclosed to Sarah the fact that she too had been abused. The plaintiff is not advancing a claim of recent fabrication *per se*, and repetition of the complaint to others is not helpful and is marginal if not inadmissible evidence as it is clearly oath helping. Repetitions of memories or events to other persons do not necessarily make them true.

[126] Both before and during the litigation, the plaintiff has argued that Sarah's and possibly Tricia's memories of abuse are false memories induced by suggestive therapy and/or *The Courage to Heal*. From my reading of Jessie Cooper's notes,²⁰ Sarah was a troubled young woman and was seeking explanations for issues in her life. While I have some questions about Jessie Cooper's apparent validation of Sarah's symptoms and circumstances related to memories, and the use of *The Courage to Heal* workbook; in the context of what I am required to decide, I am not prepared to opine on the legitimacy of the workbook or the therapy offered by Jessie Cooper.

[127] However, what I find disconcerting is the defendants' attempt to refer to one passage in the workbook regarding disclosure of the allegations as

²⁰ Jessie Cooper's notes, transcripts and related materials were entered into evidence on consent, without the necessity of calling this individual as a witness. I am mindful that I can only conduct a limited evaluation of this evidence.

their crutch or excuse to avoid providing specific details of the abuse to Jack and his family. It was disingenuous for Jim to claim that he read one or two pages of the entire book and on that basis, believe that he did not have to reveal or make any inquiries about details of the allegations and was merely supporting his daughters.

[128] Patricia quibbled with counsel as to whether or not she had actually read a portion of *The Courage to Heal*. Patricia and Sarah also engaged the specific passage in the workbook to substantiate and explain away their rationale for not disclosing any details. Patricia and Sarah testified that they did not want any attention from the accusation and dreaded the attention that resulted. At the time of the confrontation, the defendants claim that they were asking for nothing but an apology as a means to reconciliation. Yet, Sarah's and Patricia constant and dogged refusal, (in part, shielding their actions by reference to the *Courage to Heal* book), to provide even the most essential details gave rise to questionable motives on their part.

[129] The defendants submit that evidence of Dr. Jaffe and Jessie Cooper both confirms that Tricia and Sarah exhibit certain clinical conditions that have been highly correlated with a history of sexual abuse as a child. According to Dr. Jaffe, who conducted a clinical assessment of both Tricia and Sarah, they each have signs and symptoms of having experienced trauma consistent with female survivors of sexual abuse.

[130] Both Sarah and Patricia have been in therapy or counselling and have taken anti-depressants or other medications at various times. Patricia had been bullied in school, had experienced migraines, nightmares, emotional and physical abuse in her marriage to Edy, and had bouts of anxiety and depression. Sarah has had feelings of low self-esteem, distrust

of others and difficulties with intimacy. She has also experienced depression, tension and anxiety as both as a teenager and an adult. I have reviewed medical, therapeutic and counselling reports about Sarah and Patricia's social, physiological and psychological issues. I have no reason to doubt the clinical assessment that both Patricia and Sarah have experienced events including possible sexual abuse in their lives that have precipitated some of these symptoms. It is the nexus to Patricia's and Sarah's symptoms and consequences to the claim of abuse by Jack that needs to be carefully examined. Indeed, there may be other root causes for these symptoms.

[131] At the same time, I acknowledge that the presence of one or more of these conditions in both Patricia and Sarah may or may not be supportive of historical sexual abuse. Dr. Jaffe appears to have accepted Sarah's memories as being true to Sarah, yet, in my view does not add any corroborative endorsement to those non-specific recollections. With respect to Patricia, Dr. Jaffe testified that Patricia always seemed to have the memory of abuse. As I have doubts about that premise, Dr. Jaffe's clinical assessment must be carefully scrutinized.²¹

[132] Generally, I accept Dr. Jaffe's evidence in so far as it relates to his clinical findings and the concepts of continuous and recovered memory. Dr. Jaffe's evidence about the frailty of memory is instructive and admittedly not irrefutable.²² In cross-examination, Dr. Jaffe principally agreed with the caution for external verification advanced by Professor Roberts in the American Medical Association's statement on recovered memory.²³

²¹ Aside from the evidence, despite potential opportunities to do so, I note that Patricia never disclosed any prior abuse to anyone including her therapist, Crystal Zeyl, or Dr. Lavon Zwart.

²² Dr. Jaffe's testimony, October 4, 2012. In this area, I acknowledge Dr. Merskey's caution about the reliability of recovered memories as it relates to taking any action outside of the therapeutic context.

²³ Dr. Merskey's Reply Expert Report at p. 12.

However, Dr. Jaffe was dismissive in its application to this case as he opined that there were elements of corroboration. As I have some doubts about the corroborative aspects in this case, again I must treat this part of Dr. Jaffe's opinion with care.

[133] Dr. Jaffe testified that some memories do fade and they may be reconstructed by intervening life events. I have no concerns about any delayed disclosure in the context of this case, however I have some difficulty with Dr. Jaffe's opinion that but for the abuse, both Sarah and Patricia would not have the underlying problems they continue to experience. This appears to discount the severity of the abuse and does not appear to fully take into account other possible contributing or precipitating factors.

[134] While Dr. Jaffe testified that traumatic events such as sexual abuse often lead to dissociative memories, and such memories are intrusive, I am not convinced that this assists the defendants in adding to the quality of the narrative of the sexual abuse as described. Dr. Jaffe fairly conceded that while he conducted various psychological tests with their inherent validity markers, he could not opine on the ultimate veracity of these allegations. Dr. Jaffe also agreed that sexual abuse is not the only cause for depression or anxiety. Dr. Jaffe conceded that if an individual believes they were abused yet there was no abuse, they could possibly demonstrate similar symptoms of depression and anxiety. I accept that a person with flawed memories of events long past, if believed, can give all the appearances of authenticity.

[135] I reject the defendants' position with respect to their rationale leading up to the apology and the subsequent "recantation" as entirely self-serving. I

am not convinced that it was a product of exhaustion, emotion, manipulation and pressure applied by Jack and Margaret through Jim and Christine. The emails and the evidence of what was said during and after August 14 speak for themselves. It was not merely Jack's persuasiveness or his tears that lead to Sarah and Patricia apologizing. It is more likely that the defendants were not certain it was Jack who committed the abuse and they truly questioned their memories. I find that the defendants acted honestly and sincerely at the time and are now trying to distance themselves from the apology and recantation for their own self-interests or to advance their litigation position.

[136] From the time of the confrontation on August 12 forward, it is my view that Jack behaved in a manner that is consistent with his claims of innocence. His immediate reaction upon being confronted by Sarah and Tricia is understandable after being confronted with shocking and serious allegations. I prefer his evidence about what had occurred at his home during the confrontation on August 12, 2006 and I give little credence to his emotional display as defendants urge me to do. I am satisfied that Jack has a cool detachment and is not an emotional man. I reject the defendants' submission that someone who had been falsely accused would be shocked but not be angry. Individuals confronted with such serious allegations may indeed react in varying ways.

[137] The defendants submit that Jack conducted a persistent pursuit of obtaining details of the abuse and they suggest that this behaviour is perplexing. It is entirely understandable why someone who has suffered abuse would not want to be forced to provide details of events so personal, private and traumatic. However, once having disclosed a bald, albeit serious,

allegation of abuse, why over time Patricia or Sarah would not provide any details to immediate and close family members is disconcerting. Intuitively, an innocent person who has been accused of abuse would want to receive some details as there is no onus on an individual to explain away an event to which he claims he knows nothing about.

[138] I disagree with the defendants' argument that one would also assume that an innocent person would have respected Tricia's and Sarah's privacy, and been sensitive to the risk of re-victimization that can arise from forcing them to disclose details when they are not prepared to do so. The defendants argue that one would also expect that close family members would have no desire to learn about such details. Yet having published these allegations, this circular argument runs afoul of the very position the defendants advance with respect to the qualified privilege issue in disseminating or providing some details to other family members for emotional support and advice or to warn others who may be in harm's way.

[139] In any event, I disagree with the defendants' assertion that Jack's lack of interest, concern or compassion for Sarah or Tricia or the trauma they experienced, is not suggestive of the actions of an innocent person. The fact that Jack was not empathetic to Sarah and Patricia does not detract from his credibility. Someone who had been falsely accused would not likely want those allegations to spread however, realizing that the information was going to be disseminated, a reasonable course of action would be to make efforts to minimize the harm to one's reputation.

[140] Defendants' counsel is clearly overreaching in his factum by suggesting that Jack's credibility is further undermined by the disrespect he

has shown for the legal process. In particular, several examples are provided:

He [Jack] gave inaccurate information in discovery about the time period during which Margaret attended school board meetings. That inaccurate information was withdrawn prior to the start of trial in response to information identified by the defendants, but Margaret only admitted that she attended the meetings during the early 1980's when defendants' counsel obtained copies of the minutes and confronted her with them on cross. Jack was asked in discovery to produce phone records for relevant time periods. He did not produce them. At trial, Margaret testified that she reviewed those phone records and obtained from them information relevant to the litigation. Jack ambushed Mary Guldmond after she provided information to the defendants. This was a deliberate attempt to interfere with a potential witness in the case and prevent the defendants from obtaining relevant information. Jack is well rehearsed in proclaiming his denials. He testified that he used "as sincere a voice [as he] could muster" each time he professed his innocence on August 12, 2006. He tried "to conjure up all [his] energy" and "persuasive power" at the Woodstock meeting. He made those same efforts at trial.

[141] I reject all of the defendants' assertions as it pertains to an assessment of Jack's credibility and the veracity of his testimony. In my opinion, Jack's evidence was clear and unequivocal. He testified and answered questions in a generally straightforward manner, and he did not embellish his evidence or minimize his behaviour. Under cross-examination, Jack was steadfast and his evidence was not fundamentally contradicted. Any inconsistencies in his evidence at trial were minor in nature. I find that Jack's evidence is credible and that he is a valid historian of events that he could recall, given the passage of time.

[142] I was also singularly impressed with Margaret's testimony. It was delivered in a forthcoming and candid manner and she candidly conceded points to counsel in cross-examination. She did not embellish or present as a biased witness and I find her testimony as entirely credible.

[143] Turning to the inherent plausibility or implausibility of the events, it is clear that over the relevant timeframe in question, there were at least sixty occasions on which Tricia and/or Sarah slept over at the farmhouse while Jack and Margaret lived there. While Margaret admitted that she does not have a specific memory of each of those sleepovers; which children slept over; where they slept; what she was doing; or what Jack was doing, I accept Margaret's evidence that she took care of the children and if she was away, it was only for a brief period. I accept that Jack was not involved in the domestic chores, and taking charge of his or other children was not his domain. I find that Margaret was never inattentive and that she was in charge of the domestic responsibilities and that she looked after Patricia and Sarah and her own children in her home.

[144] While ever mindful of Mr. Tunley's caution, and despite the defendants' urging, I do not conclude that Jack had the opportunity to act on those or any other occasion. The defendants' various speculative scenarios and timelines including some suggestion of Margaret's selective absence from the farmhouse do not stand up to judicial scrutiny. I accept the 1985 photograph of one sleepover as reliable evidence of the "typical" sleeping arrangements at the farmhouse during the relevant time frame.²⁴ I draw the logical inference that the photograph, in conjunction with the dimensions of the house, the lack of other rooms or space for the children to sleep, the

²⁴ Ex. 8 tab 1.

limited distance between the master bedroom and the boy's room, the testimony from various witnesses who I accept, (including Margaret, Leisha, Rachel, Steven, Amy-Lynne Boekee, Melissa Yarkie), are cummutively reliable evidence in support of what did not occur at any of the numerous sleepovers over the 5-year period in question.

[145] I accept that all of the young children slept in the boys' room and there would have been at least two to four other children located in very close proximity to where Patricia and Sarah were sleeping. In order to commit the sexual assaults, Jack would have to stealthily and gingerly manoeuvre himself around the other children and not make a sound to avoid waking up the other children, or his wife Margaret, as the case may be. In my view, this evidence adds credence to Jack's testimony and supports the inference that Jack could not have sexually abused Patricia or Sarah because he had no reasonable opportunity to do so.

[146] If vaginal penetration occurred as described by Patricia, there was no evidence of physical trauma that either Margaret or Christine would have readily observed at the time. There was no evidence of external bruising or injury as a result of the "searing pain" experienced by Patricia. While the lack of physical evidence must not be over-emphasized in this case, I also accept that there was never a complaint made by young Patricia to anyone regarding any pain or discomfort following this event.

[147] While the evidence as to Tricia's memories do not provide a complete narrative of the events, I cannot conclude that the only reasonable inference open to the Court is that the contact was of a sexual nature. One reasonable explanation may be that Patricia had bedwetting and bladder issues. She would routinely be taken to the bathroom prior to going to bed.

Being half-asleep and in order to lift her, Jack would have pulled her up by an arm. Patricia admitted having a recollection of being carried to the bathroom on the first floor. In response to a question about it possibly being a blanket, Patricia stated: "Well I mean it was soft. I remember it feeling soft ...I've always filed it under like something sexual". The sensation of something in her mouth could and was likely a blanket or other object. Patricia's recollection of this memory and associating the soft item in her mouth with a penis is admittedly speculative.

[148] Patricia has testified that she always had a clear visual memory of the adult male perpetrator as her uncle Jack. This bald assertion flies in the face of Patricia's and Sarah's heartfelt initial disclosure discussion and follow-up letter to Jessie Cooper, as well as Patricia's own conduct leading up to and continuing beyond the recantation. The facts supporting or underlying this allegation are simply not believable in this case.

[149] The defendants concede that Sarah admits she has no distinct visual memory of Jack as the perpetrator, she clearly identifies the perpetrator as Jack, indirectly, by clear sense of place and person whom the expert evidence recognizes may be present in a given memory. Sarah testified that her memory has been consistent since it first returned to her. Sarah's memory is a dissociative memory and she sees the event happening to her from a third-person perspective. Sarah described the flashback memory as a "snapshot, an out-of-body experience, ...not a movie, ...not a play-by-play, ...it is not a sensation, ...I can't feel anything." Sarah's second memory is an experience of a sensation of an adult male (Jack) on top of her and touching her sexually when she is intimate with her partner. At its highest, I conclude that Sarah experienced an out-of-body memory and she

was viewing the “snapshot” from above, seeing a young child, whose face she cannot identify, but believed it is her, and a man, who cannot be identified, but believes it is Jack.

[150] Even if true, I disagree with the defendants’ that the only reasonable inference open to the Court is that there was physical contact and such contact was of a sexual nature. Upon a review of the evidence of both Dr. Jaffe and the discovery transcript of Jessie Cooper, I do not find any validation or support as to the issue of the identification of the perpetrator. Even at the conclusion of trial, I have little idea what acts specifically occurred to Patricia or Sarah, and the issue of the identity of the perpetrator is left unresolved. I do not find that the picture that emerges from these cumulative symptoms is corroborative of the claim that Jack actually sexually abused them in the farmhouse.

[151] To an extent, Sarah and Patricia have firmly held beliefs as to what they have perceived or claimed they have seen, recall or felt. Even assuming for the moment that I accept that Sarah and Patricia were assaulted or abused, I conclude that the events as described by both Sarah and Patricia in the farmhouse are inherently implausible. Even on the defendants’ own evidence, I am not satisfied on a balance of probabilities that Jack committed a sexual assault on either Sarah or Patricia at any time in or near the boy’s bedroom in the farmhouse. When I add Jack’s testimony to the equation, and whose evidence I prefer over the defendants, I specifically find the sexual acts or abuse alleged by the defendants were never perpetrated by the plaintiff.

[152] Therefore, I find that the evidence adduced at trial was not of the clear and cogent nature required to substantiate the defendants’ claim of

sexual abuse. With respect to intentional infliction of mental suffering, I do not find Jack's conduct amounted to any flagrant or outrageous conduct. I reject the defendants' claim for intentional infliction of mental distress.

[153] If I were required to award damages for sexual assault and battery including the intentional infliction of mental distress, I would assess general damages to both Patricia and Sarah in the amount of \$35,000.00 each. I would not award punitive or aggravated damages. Based on the evidence adduced at trial, the claims for Patricia's loss of income are speculative and I am disinclined to award any compensation. I would award special damages to Sarah in the amount of \$1,200.00 and to Patricia in the amount of \$14,085.00.

B. Are the defendants' statements defamatory?

[154] The onus of proof is on the plaintiff to plead and prove a publication, the contents of the publication and that the defendant was responsible for it. In this action, the defendants have admitted publishing the statements as set out in their admissions.²⁵ This includes the emails dated August 12, 2006, August 13, 2006 and April 5, 2007. There were also various oral and written statements made by the defendants about these events during the latter part of 2006 and into the Spring of 2007.

[155] A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is

²⁵ Ex. 1.

judged by the standard of an ordinary, right-thinking member of society: *Colour Your World v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (C.A.).

[156] Truth (or justification) is a complete defence to an action for defamation at common law. Thus, if I find on a balance of probabilities that Jack sexually abused Patricia and/or Sarah, Jack's claim for defamation in respect of any statements as to the fact of such sexual abuse, by any of the defendants, must be dismissed because the statements were true.

[157] A defamatory statement published or repeated by a defendant is to be treated the same as if he or she originated it. A defendant who has reported another person's defamatory allegation about the plaintiff cannot succeed in a plea of justification merely by proving that the allegation was made; he or she must prove the truth of the underlying allegation. No one is justified in stating false facts about another merely because someone else has done so. Those who give currency to a defamatory report are responsible for its truth.²⁶

[158] Defamatory words are presumed to be false. In this case, the plaintiff has pleaded only the natural and ordinary meaning of the defamatory words. The ordinary and natural meaning is the "plain, obvious and literal" meaning of the words. This involves a question of law, and is determined on an objective standard. The inquiry is whether a reasonable, fair minded person with no special knowledge of the facts could infer the meanings

²⁶ Brown, *The Law of Defamation in Canada*, at pp. 10-19 to 10-27 *E.(L.) v. P.(W.)*, 1998 CarswellBC 1074 (B.C.S.C.), at para. 68.

alleged by the plaintiff. I have applied the test and have considered all of the words in this context.²⁷

[159] A defendant is liable for defamation whether or not he or she intended to make any statement or one which carried a defamatory imputation, or whether or not the defendant intended or reasonably believed it would not convey a false meaning, or refer to the plaintiff, or cause him any damage. The innocence, good faith, motive, belief, reasonableness or intention of the defendant is generally irrelevant to the question of liability.²⁸

[160] The defendants concede the publication of the defamatory words.²⁹ The published words “We were sexually abused as children by Jack” in the August 12 and 13, 2006 e-mails, the words spoken by the defendants and the identified words at issue in the April 5, 2007 e-mail are defamatory of Jack in their natural and ordinary meaning. The further identified words at issue, “We do not want anyone else to be sexually abused”, published in the August 13, 2006 e-mails, were intended to evince the defamatory meanings that Jack is a sexual predator, likely to reoffend and is not to be trusted or left alone with children.

[161] I am satisfied that the aforesaid words, including subsequent statements in the context in which they were published, further manifested and where intended to be understood to bear the defamatory meanings that Jack: has engaged in criminal and illegal conduct or is wrongful and morally reprehensible conduct; is disreputable; and is undeserving of his standing in the community and within his immediate and extended family.

²⁷ *Laufer v. Bucklaschuk* (1999), 181 D.L.R. (4th) 83 (Man. C.A.).

²⁸ *The Law of Defamation in Canada*, 2nd Edition, Raymond Brown, tab 6 at pp. 3-3 to 3-6.

²⁹ Ex. 1. Although from the evidence adduced at trial, I find that the publications went beyond those individuals specifically listed in the defendant’s admissions.

[162] On the totality of the evidence, I am more than satisfied based on a natural and ordinary meaning of the words used by the defendants in reference to Jack that they are capable as a matter of law of supporting the defamatory meanings pleaded. I am also satisfied that the statements were in fact understood by reasonable persons that they were clearly defamatory that Jack is a child molester and pedophile.

[163] To successfully establish truth as a full defence, the defendants must displace the presumption of falsity and need only demonstrate that the statements are substantially correct. The justification established must meet the gist or sting of the defamatory statement.³⁰ If the defendants prove that the gist or sting of each statement is true, then slight or minor inaccuracies in the facts will not preclude this defence.

[164] To meet the threshold for proving the truth of the statements, the defendants' evidence must always be sufficiently clear, convincing and cogent to satisfy this Court that the abuse occurred on the balance of probabilities.³¹

[165] As I have dismissed Patricia's and Sarah's counterclaim in tort, I am equally not satisfied on a balance of probabilities, that the gist of the defendants' defamatory statements were or had been justified or that they were substantially true. The defendants' have not met their onus and I reject the defendants' pleading of truth or justification to the defamatory statements at the time of their publication. Therefore, I must go on to the next question.

C. Does the defence of qualified privilege arise in the circumstances of this case?

Legal principles

³⁰ Brown, *The Law of Defamation in Canada* pp. 10-31 to 10-45.

³¹ *F..H. v. MacDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53, at paras. 45 and 46.

[166] Qualified privilege may act as a defence to defamation where it has been established that the comment was otherwise defamatory (ie. it was a false statement which defamed the named, or otherwise identified, individual, and was communicated to a third party or parties). Qualified privilege attaches to “the occasion when the defamatory statement is made, not to the statement itself”, (*RTC Engineering Consultants v. Ontario et al* (2002), 58 O.R. (3d) 726 (C.A.), at para. 14; *Whitehead v. Sarachman*, 2012 ONSC 6641 (CanLII), at para. 29).

[167] In *RTC*, at para 16, Laskin J.A. held: “At the heart of the defence of qualified privilege is the notion of reciprocity or mutuality. ...[a] defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it”.³² The defence of qualified privilege is aimed at serving the public interest in the sharing of information, rather than the private interests of either the defamer or recipient: *Macintosh v. Dun*, [1908-10] All E.R. Rep. 664 (P.C.), at 667.

[168] According to the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at pp. 1188-1189, citing the House of Lords decision of *Adam v. Ward*, [1917] A.C. 309 with approval, a privileged occasion is one in which “the person making the communication has either an interest or a legal, social, or moral duty to make it and the person to whom the communication is made has a corresponding interest or duty to receive it”. The Supreme Court in *Hill* noted that this element of “reciprocity”, between the duty on the defamer to make the impugned statement and the duty on the recipient to receive it, is “essential” (*Hill* at p. 1189). Such reciprocity accords with the underlying purpose of the qualified

³² See also Brown, *The Law of Defamation in Canada*, 13-47 to 13-65.

privilege exception to liability articulated in *Reynolds v. Times Newspapers Ltd.*, [1999] 3 W.L.R. 1010, at 1017 (H.L.):

The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source.

[169] The defence of qualified privilege attaches only to the extent that the communications were reasonably appropriate in the context in the context of the circumstances at the time the information was given. According to Cory J. in *Hill*, at pp. 1189-1190:

Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. As Loreburn E. in *Adam v. Ward*:

... [T]he fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when the information was given... [Citations omitted]

[170] The reciprocity of duty and interest between publisher and publishee must actually exist in order to give rise to the privilege. It is not a privileged occasion if the publisher communicates a defamatory statement to a publishee in the honest but mistaken belief that such publishee has a corresponding or reciprocal duty or interest to receive it. In other words, the state of the mind of the defendant yields to the subject and circumstances of the publication. An actual duty must exist that arises from the occasion of the publication. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have

considered it a duty to communicate the information to those to whom it was published.³³

[171] In determining whether the communications are protected by qualified privilege, the judge should:

...consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion (*Sapiro v. Leader Publishing Co. Ltd.*, [1926] 2 W.W.R. 268, 20 Sask. L.R. 449 at 453 (C.A.)).

[172] The onus is on the defendant to prove all facts and circumstances as are necessary to bring the impugned words within the scope of the privilege.

2. What is the scope of the ‘interested class’ covered by qualified privilege?

[173] In *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15 (H.L.), Lord Buckmaster made it clear that “the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact”. Rather, the scope of the ‘interested class’ which can properly receive an otherwise defamatory statement will change depending on the nature of the surrounding circumstances. In determining whether the communication was made to an appropriate recipient, or class of recipients, the court applies an objective test: “The issue is not whether the defendant had a right to make the communication or thought that he or she had a duty to make it, but rather whether a reasonable person would feel

³³ Brown, *The Law of Defamation in Canada*, at pp. 13-5 – 13-14; 13-33 to 13-85.

compelled by a duty to make the communication” (*Halls v. Mitchell*, [1928] S.C.R. 125). Flowing from the nature of this privilege, the case law has generally recognized four key contexts in which qualified privilege may be found to exist: “(a) protection of one’s own interest, (b) common interest or mutual concern, (c) moral or legal duty to protect another’s interest, and (d) public interest” (Allen M. Linden, *Canadian Tort Law*, 5th ed. (Toronto: Butterworths, 1993 at p. 665). For example, persons such as parents and therapists have traditionally been held to fall within the scope of qualified privilege as sharing in a reciprocal duty and interest to receive important communications from their children or patients: *L.G.C. v. V.M.C.*, [1996] B.C.J. No. 1585 (S.C.), at para. 11.

[174] In the case of *P.B. v. R.V.E.*, 2007 BCSC 1568, the Court considered the defendant’s claim of qualified privilege in the context of a sexual assault allegation. The defendant, *RVE*, was the adopted child of the plaintiff father (P) and her mother (J) and alleged that P had sexually abused her while she was aged 10 to 14. It was not until *RVE* was a grown woman with grandchildren that she first mentioned the sexual abuse to anyone else. Shortly before the defamatory comments at issue were made, the defendant heard that her five-year old granddaughter was found in bed with P. The defendant became fearful for the safety and well-being of her relatives and worried that P’s abuse would continue. The defendant sent a series of letters and emails to her own parents and to each of her siblings and their spouses. The letters contained defamatory statements, alleging that P sexually and physically abused *RVE* as a child and that J was aware of the abuse and did nothing to prevent it.

[175] After the defendant refused to apologize for her statements, the plaintiffs sued for defamation. The defendant counter-claimed, alleging sexual assault by P and breach of fiduciary duty by J and in the alternative, the defendant pled qualified privilege as a defence to defamation.

[176] The court first considered the allegations of sexual and physical abuse. After a thorough review of the evidence, Sigurdson J., held that the allegations against P were established on a balance of probabilities, but that there was insufficient cogent evidence to find J in breach of her duty to protect the defendant. The court was required to continue on to a consideration of the defendant's claim that her defamatory comments were protected by qualified privilege.

[177] Justice Sigurdson noted the two-part requirement underlying a successful claim to qualified privilege: first, viewed objectively, the statement must have been made on an occasion of qualified privilege, and second, the person receiving the information must have been interested in receiving it. In light of all the circumstances, the judge held that the occasion on which *RVE* made the defamatory comments was "clearly one capable of giving rise to a qualified privilege"; the impugned communications "arose because of her concern for the safety of children in the family and based on her belief... that she had been sexually assaulted by her father, and her belief that her mother knowing of her complaint did not take adequate steps to prevent either sexual or physical abuse.

[178] In regards to the second requirement for finding qualified privilege, the recipient's interest in receiving the communication, His Honour held at para. 352:

On this matter, I find that all family members, particularly adults, share a common interest in potential misconduct by one of their own when young children are concerned. I find that the comments of the defendant were made in a situation of qualified privilege. In other words, the communications were made by *RVE* who had an interest in preventing sexual, physical or verbal abuse in the family and they were made to people, namely her brother, her sister and then to all of her siblings and their spouses who I find would have an interest in receiving this information.

[179] In a case from the Nova Scotia Supreme Court, Trial Division, *R.N. v. S.L.S* (1993), 120 N.S.R. (2d) 228, the plaintiff commenced an action for defamation against his twin daughters after they told family members and others that he had sexually assaulted one of them as a child. Two of his daughters, *S.L.S.* and *S.L.M.* were twins who maintained a very strong relationship. While she was a child *S.L.M.* never mentioned any sexual abuse and she only began to realize she had been the victim of abuse when she had children of her own. After seeking help from a therapist, *S.L.M.* started recording her dreams. While attempting to determine the meaning of her dreams, *S.L.M.* was told by her sister that the plaintiff had asked to visit and sleep in the same bed as *S.L.S.*'s daughter. *S.L.M.* was immediately concerned and confided in her sister that she was suspicious that her father had sexually abused her as a child.

[180] Eventually, *S.L.M.* and *S.L.S.* disclosed their beliefs about sexual abuse involving the plaintiff to his brother, *C.N.*, in the hopes of resolving the family conflict. In addition, *S.L.S.* told a few of her close friends, including her supervisor at work. *S.L.S.*'s evidence was that she was emotionally traumatized by her sister's claims and that she was seeking support from her friends. The plaintiff sued the defendants for defamation. *S.L.M.* counter-claimed for sexual abuse, in the alternative, protection from liability by reason of qualified privilege.

[181] The court in *R.N.* dismissed the counter-claim, concluded that the sister had not put forward the necessary clear and cogent evidence to support the allegation of sexual assault. On the question of qualified privilege, Kelly J. commented on the communications made by each of the two sisters. Regarding S.L.M.'s communications with S.L.S., the court held at para. 87:

Applying this test to statements made by S[L.M.] to S[L.S.], I have no hesitation in finding that she was principally acting "in compliance with a duty or in protection of a legitimate interest." She believed that she was protecting her sister's child and, subsequently, that she was pursuing her treatment as directed by her psychiatrist. I find she was acting in an honest and restricted manner to communicate the allegations to a person who had a legitimate interest. I find she did not act out of malice in the legal sense.

[182] Similarly, the judge concluded that the allegations made by S.L.S. to the plaintiff's brother, C.N., fell within the scope of qualified privilege. C.N. was a respected and trusted member of the family who the plaintiff "authorized to try to determine the nature" of the twins' concerns and acted as an appropriate intermediary to open the lines of communication between the parties.

[183] In dealing with the communications made by S.L.S. to her friend and co-workers regarding her father's potential sexual abuse, Kelly J. found that, despite not being members of the family directly interested in protecting against further incestuous behaviour, the friends were recipients properly covered by qualified privilege. Interestingly, the court found that the qualified privilege in the case was based not on any duty to protect another, but rather on S.L.S.'s need to seek support.

[184] The case of R.N. is not binding on this Court. With respect, I have some difficulty with the legal principles and the broad application of the scope of intended recipients for the qualified privilege to be invoked as determined in that case.

[185] The majority of the cases involving the defence of qualified privilege simply reiterate, without adding more, the excerpt originally laid out in *Adam v. Ward* and adopted by the Supreme Court of Canada in *Hill*, that:

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[186] Little jurisprudence exists on the precise limits of this 'duty to receive'.

The interest and duty was explained by Macdonald J. of the Superior Court of Justice in *Foulidis v. Baker*, 2012 ONSC 7295, at para. 45, as follows:

The interest or duty of the maker of a communication, which is the first part of the test, cannot exist in some general, free-floating form. The interest or duty of the maker must be to communicate to the person or persons to whom the communication is made. To find such an interest or duty is thus to find also what the proper scope of it is, namely the person or persons to whom the maker of the communication owed the duty to communicate the information in issue. The same is also true in respect of the second part of the test. The person or persons to whom the communication is made must have a corresponding interest or duty to receive the information communicated. Again, to find such an interest or duty is to find also what the proper scope of it is, namely the person or persons who had an interest in receiving, or a duty to receive the information communicated.

[187] In the case of *Robinson v. Ontario Society for the Prevention of Cruelty to Animals*, 2012 ONSC 3647, Pelletier J. also addressed this duty at para 14. “The privilege also requires that the information be communicated to the appropriate persons. The privilege will be exceeded if the audience includes a disproportionate number of unintended recipients”.³⁴

[188] In R.N. the trial judge conceded that he faced an “extremely limited” evidentiary record. The nature of the communications to co-workers and friends was unclear. Equally, the rationale provided for such communication outside of therapist and close family members appeared to be based on subjective considerations. I am not convinced that the expansion of the qualified privilege in this case by transmitting information to co-workers and other individuals by the person involved, (or someone who has received a communication and passes it along to others) invokes the reciprocal corresponding duty or interest in having the information received by those intended recipients. In my review of the case, it seems that the trial judge has, in effect, diluted the legal requirements for the requisite duty of communicating and concept of reciprocal interest. The approach taken in the case seems to elevate the publisher’s interest in communicating [it] to a duty. Clearly, what is required is more than mere interest by a party in order to satisfy the legal standard required for qualified privilege.

[189] As such, I am persuaded that the approach in RN, in effect, facilitates a disproportionate number of intended recipients contrary to established principles. In my view, on the occasions in which the communications were made, is not a correct interpretation of the objective test for qualified privilege.

³⁴ See also *Rubin v. Ross*, 2013 SKCA 21, 2013.

[190] Even if the legal principles in RN can be sustained, I find that the facts supporting the imposition of the qualified privilege in both *PB* and RN are distinguishable based on the facts in this case.

Application of legal principles to the facts of this case:

[191] The defendants argue that if the Court is unable to find on a balance of probabilities that any sexual abuse occurred, they submit that Tricia, Sarah and Jim were nevertheless honest in their beliefs in what they alleged, and that Jack's defamation claim ought to be dismissed on the basis that their statements are protected by qualified privilege.

[192] The defendants accept that they bear the burden of proving that the statements at issue were made in circumstances that were privileged. If they satisfy that burden, then Jack's claims for defamation must be dismissed unless he can prove that the words were spoken or written with express or actual malice.

[193] The defendants argue the disclosure of allegations of sexual abuse to therapists and others with an interest in hearing the allegations, such as family members and close friends, has been recognized as an occasion of qualified privilege. The defendants argue that all family members', in particular adults shared a common interest in potential misconduct by one of their own when young children are involved. Defendants' counsel submits that Jessie Cooper testified at Discovery that bringing abuse out into the open is the best path to healing. While Jessie Cooper's position about abuse being brought out into the open may indeed bode well for her clients and her

therapeutic practice, as a matter of legal principle to suggest that this give rise to some wholesale substantiation for protection from liability under the qualified privilege umbrella is not sustainable.³⁵

[194] The defendants' submit that they sent the emails in order to set the record straight after learning that Jack had telephoned all of his siblings. I do not accept that position. First, Jack had told each of his siblings that he had (i) been confronted and accused by his nieces that day or having sexually abused them as children; and (ii) that he was innocent of such allegations. I find that the defendants did not in fact set the record straight, as they only repeated their allegations of abuse and not Jack's position that he was innocent. The defendants repeated the allegations of abuse and they either replied or otherwise promoting their allegations. Second, I am satisfied on the facts in this case that the addition of the words that "they did not want anyone else to be sexually abused", strongly inferring that Jack was a continuing child molester in 2006, and was not germane to any reciprocal duty or interest on the occasion in sending the email. Third, the defendants' published their emails to individuals who had not been contacted by Jack on August 13, 2006, including his siblings' spouses, nieces and nephews, in particular, Rens, Karen, Tim, Teresa, Mark and Dave Vanderboom. It appears that the defendants did not communicate the statements narrowly, rather by wide dissemination and they did not do so as respectfully as possible in the circumstances.

³⁵ For that matter, I reject all of the defendants arguments as outline in their written submissions under the heading "circumstances of communication"

[195] I do not agree that the dissemination of these emails or slanderous statements fell under a situation of any stress or urgency. I am convinced that the statements were not reasonably intended to prevent further sexual abuse to other children. Clearly, by the time of the renewal of the allegations in 2007 and the second series of communications advanced by the defendants, the scope of emotional support and advice had long expired. There was no urgency or corresponding interest in send out the allegations beyond the immediate family, the therapist, counsellors or close friends (as Sarah did in with Naomi Baker).

[196] Jim testified that when Sarah and Tricia disclosed the abuse to him in February 2006, he held an honest belief that Jack had sexually abused Tricia and Sarah when they were children. I do not doubt that as their father, Jim felt a moral duty to protect Tricia's and Sarah's interests. Over the course of time, he communicated that belief to close friends, family members and others. I also disagree with the defendants' assertion that Jim disclosed the allegations to certain of his employers because he feared Jack might tell them about the matter first. The communications by Jim to those individuals were made in order to protect Jim's interests at work and were not protected by qualified privilege.

[197] It may be true that some of the recipients of these emails had a legitimate corresponding interest in receiving the information. With the exception of immediate family members, beginning on August 12, 2006, Sarah and Tricia both made oral and written statements to extended family members and others in the community that Jack had sexually abused them. I do not have cogent or reliable evidence that Sarah and Patricia, by publishing the allegations to various unrestricted parties outside of the

immediate family were seeking emotional support or falling under other criteria for the reasons proffered by the defendants.

[198] The information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when the information was given. In my view that not all members of the family or others had the mutual concern or interest in the allegations. In my view, the defendants were merely disseminating their complaint and they were either reacting to or precipitously publishing the various defamatory statements.

[199] I find that the defendants' emails of August 13, 2006, to the extended Vanderkooy and Vanderboom families, where they were informed that Sarah and Patricia had been sexually abused by Jack as children, and in that context, further stated: "We do not want anyone else to be sexually abused" exceeded any qualified privilege as to the duty to protect, which might have otherwise possibly attached to the occasion.

[200] I conclude that in all these circumstances, and applying the test referred to above, the "great majority of right-minded persons" would not feel it appropriate for a person, who at least, as a result of the timing of the disclosure immediately after confronting Jack, and particularly at the time of the second series of emails, that they were not in such emotional distress to send out the emails on masse for guidance and support in any appropriate way. Even if the defendants' held an honest belief, there was no restricted or limited sphere of dissemination of their allegations of abuse. On the whole, I find that the occasions proven in evidence when the defendants communicated information regarding the plaintiff that could be classified as slanderous, they did not do so in the honest belief that the communication was for the purpose of protecting children, preventing further abuse, for valid therapeutic reasons, for emotional

support and advice or to advance this litigation. I do not find the requisite duty to publish for those whom Patricia, Sarah, and Jim communicated with singularly and collectively to qualify as being qualified privileged.

D. If the defendants have established a defence of qualified privilege, has the plaintiff rebutted the privilege by proving malice?

[201] Although I have found that the defendants have failed in their onus to establish the defence of qualified privilege and while it is not formally required, I nonetheless will briefly address this next question.

Legal principles

1. What is required to establish malice overcoming qualified privilege?

[202] The defendants' honest belief in the truth of what is published on an occasion of qualified privilege is presumed, unless the contrary is proven: (Brown on Defamation). This is a very strong presumption. As the defence of qualified privilege merely creates a rebuttable presumption in favour of good faith of the defamer, the privilege may be defeated if "the dominant motive for publishing is actual or express malice" (*Angle v. LaPierre*, 2008 ABCA 120, citing *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3). The onus rests on the plaintiff to establish malice by the defendant (*Hill*, at p. 1189; *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, at para. 57; *RTC Engineering*, at p. 731).

[203] Malice, in the context of qualified privilege, is used to denote malice in fact, actual malice or express malice. The plaintiff must prove either a lack of honest belief in the truth of the libellous statements, bad faith, or malicious intent: (*Prud'homme* at 57); or use of the privileged occasion for a collateral or improper purpose.

[204] In *Teamsters Union 987 v. O'Halloran*, 2005 ABCA 263 at para. 26, the Alberta Court of Appeal set out five principles that should be applied to the circumstances of the case to determine whether malice defeats the established qualified privilege:

1. The defence of qualified privilege is not absolute.
2. If actual or express malice is the dominant motive for publishing the statement, the privilege is defeated.
3. If the occasion is shown to be privileged, not all statements made on the occasion will be protected by the privilege.
4. A statement which is not reasonably appropriate in the context of the circumstances existing on the occasion will, if defamatory, not be protected by the privilege. A statement will not be reasonably appropriate if it is the product of indirect motive or ulterior purpose or if it conflicts with the sense of duty or the mutual interest that the occasion created.
5. If the defendant is acting in accordance with a sense of duty or in a bona fide desire to protect his own legitimate interests, knowledge that publication of the statement will have the effect of injuring the defendant is insufficient, standing alone, to destroy the privilege.

[205] Once qualified privilege is established, it then falls on the plaintiff to allege and disprove the presumption that the defendants were motivated by actual or express malice or malice in fact.³⁶ To rebut the presumption, the plaintiff must show that the defendants spoke dishonestly or in reckless disregard for the truth. Malice is a state of mind, and requires an inquiry into the motives of the defendant at the time of publication.³⁷

[206] Evidence of malice may be extrinsic or intrinsic. Intrinsic evidence may be found in the defamatory expression itself. A court must not jump too readily to draw a conclusion or inference of malice from mere exaggeration, extravagance

³⁶ Brown, *The Law of Defamation in Canada*, at 16-9 to 16-10.

³⁷ *Davies & Davies Ltd v. Kott*, [1979] 2 S.C.R. 686, at 698.

in the use of language. A court must determine whether the wording was outrageous or excess to the facts it tends to support to form malice. Extrinsic evidence consists of evidence apart from the statements themselves, evidence of the surrounding circumstances that allows the trier of fact to infer some improper motive.

2. Application of these legal principles to this case

[207] I am not to weigh the words published in these circumstances too delicately in considering the defendants' motives and intent.

[208] I accept without any hesitation the evidence from Jack's children to the effect that no abuse ever occurred with them or with anyone else by their father. Specifically, the wording in the email of August 13, 2006 wherein it was stated *inter alia*, "We do not want anyone else to be sexually abused" was clearly unsupportable by any facts. It purported to warn others that Jack is a child molester and that careful and prudent action must be considered where children might be left in the presence of Jack.

[209] I do not find that the defendants had an honest belief that Jack was a child molester and that his grandchildren (or all children for that matter) were in some degree of peril at the time of its publication in 2006. Both Sarah and Patricia had no basis whatsoever to support such an ominous assertion. Patricia merely agreed to Sarah's speculation and Sarah had no information to support the statement other than unfounded speculation. Sarah admitted during her examination in chief: "I didn't believe he [Jack] had access to children". I draw the reasonable inference that Sarah had an irrational fear whether or not there were other children even at risk. Jim acquiesced to his daughter's assertions. I find that both Sarah and Patricia had a reckless disregard for the truth without

any foundation. One can only imagine the impact on Jack and his family members when this specific statement was widely transmitted.

[210] I agree with the defendants' position that there is no evidence that they acted out of malice when they communicated that Jack sexually abused Patricia and Sarah as children. However, when they added the dire warning that "we do not want anyone else to be sexually abused", in the context of the timeframe [in 2006]; the statement was dishonest and excessive with respect to the facts as known at the time, and without substantiation to the seriousness of the matter.

[211] There is some extrinsic evidence of the defendants' motives that includes but is not limited to my consideration that Patricia and Sarah did not like their Uncle Jack. I also accept that they sent out the impugned paragraph in order to vindicate their actions or validate their historical claims of abuse.

[212] Had it been necessary, I am satisfied on a balance of probabilities that the plaintiff has satisfied his onus. I find that the impugned statement contained in the defendants' August 13, 2006 emails to the extended Vanderkooy and Vanderboom families inferring that Jack was a continuing child molester or pedophile was actuated by malice.

E. What are the appropriate damages in this case?

[213] The defendants submit that nominal damages are appropriate.

[214] The plaintiff requests that he be awarded significant damages to reflect the serious nature of the allegations and level of harm suffered by him to his person and reputation. Mr. Gasparotto submits that the quantum of damages as a remedy, while imperative, are secondary to this Court's declaration in favour of Jack and the restoration of the plaintiff's reputation in the community.

[215] I agree with the plaintiff's final submissions in that a good reputation is closely related to innate worthiness and dignity of the individual. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former luster.³⁸

[216] Jack is a man who comes from an extended family and indeed, cherishes family, church and community. As a result of these allegations, I am satisfied that Jack has been shunned by a number of his family members including several of his sisters. Jack had to profess his innocence to his children. Jack had to face these allegations in the public and cope with their affect as it was felt throughout his close-knit religious community.

[217] Allegations of sexual abuse do not die easily and probably never will.³⁹ As the Court stated in *Hill*: "A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation."⁴⁰

A final comment – “Jack’s Campaign”

[218] A significant segment of the defendants' theory imports the notion that beginning on the day Tricia and Sarah confronted Jack about the abuse and sought an apology, he embarked on a concerted, sustained, and aggressive campaign to convince the extended family, religious and community leaders, close friends, and others that his accusers were unreliable, and that their allegations against him were false. The purpose of that campaign was to attack

³⁸ *Hill v. Scientology*, at paras. 110-111.

³⁹ *B.(D.) v. Children's Aid Society of Durham (Region)*, [1994] O.J. No. 643, (Gen. Div.), at para. 121.

⁴⁰ *Hill v. Scientology*, at para. 169. See Brown, *The Law of Defamation in Canada*.

Tricia's and Sarah's credibility, to deprive them of needed support and understanding from their closest family, and to pressure Tricia and Sarah to withdraw their allegations.

[219] I do not accept the defendants' theory that Jack's campaign started on August 12, 2006, when he phoned each of his siblings and, in "gross disrespect" of Tricia's and Sarah's privacy, informed them that his nieces had accused him of sexually abusing them as children and continued from that date. Jack had just been accused of one of the most horrific accusations one can make against a family member- being a child molester. In my opinion, Jack acted reasonably to seek out information and to minimize the impact of such an out-of-the-blue and destructive accusation. It may be a situation where one may find himself protesting one's innocence may lead people to think that Jack protested too much.⁴¹

[220] The defendants' fiction about Jack's campaigning activities continued with their claim that Jack's concerted efforts to undermine them remained constant before and throughout these proceedings. While Jack's decision to make contact with Jessie Cooper to discuss these allegations was entirely ill-advised, I do not conclude that Jack's interventions were anything more than an attempt to search out facts to address the allegations against him or resolve the matter.⁴² In fact, I accept that Jack did not orchestrate much of the alleged "campaign" in that much of the activity surrounding the impugned conduct was actually undertaken by Margaret and Jack's children; some of these activities were unbeknownst to Jack at the time and were clearly not initiated at his behest.

⁴¹ See *B.(D). v. Children's Aid Society of Durham (Region)* at para. 124.

⁴² Ex. 8, tab 93. I accept Jack's email of April 12, 2007 as just one of many examples of his efforts to resolve the issue.

[221] I disagree with the plaintiff's resolute assertion that Jack orchestrated an entire campaign in order to undermine Sarah and Patricia and such demonstrates the intimidation, domination and arrogance of an abuser. In my opinion, there is conjecture but little foundation for the defendants' claims about any "campaign" by Jack. Quite the contrary, in my opinion, it is the defendants who singularly and collectively set out on both covert and public course of action to tarnish an innocent man's reputation within and without the large Vanderkooij family, as well as in the community-at-large. Notwithstanding my judgment, Jack's reputation in the community may continue to be irreparably smeared.

Conclusion:

[222] For the aforementioned reasons, judgment is granted in favour of the plaintiff.

[223] I do not find that the plaintiff committed a tort of sexual battery or assault against either Sarah or Patricia. If a sexual assault ever did occur, I am satisfied that it was never as a result of Jack's involvement or conduct. The defendants' counterclaim is dismissed.

[224] I find that the plaintiff has satisfied his burden to establish a case for defamation against all of the defendants. I find that the defendants have failed in their onus to prove the defence of justification (truth) or qualified privilege on a balance of probabilities. Even if I were to find a qualified privilege, I am satisfied that the plaintiff has satisfied his onus in demonstrating that the privilege has been defeated by malice on the part of the named defendants.

[225] The plaintiff is entitled to general damages in the amount of \$125,000.00 with costs.

[226] If the parties cannot agree on costs, I will consider brief written submissions. These cost submissions shall not exceed three pages in length, (not including a bill of costs or any offers to settle). The plaintiff may file its costs submissions within 10 days of the date of this judgment. The defendants may file their costs submissions within 10 days of the receipt of the plaintiffs' materials. The plaintiffs may file a brief reply within 5 days thereafter.

[227] I commend both counsel for their professional advocacy in this very emotionally-charged and difficult case. The *facta* were of great assistance to me and I am grateful to counsel for the thoroughness of their written materials.

A.J. Goodman J.

August 15, 2013

CITATION: Vanderkooy v. Vanderkooy et al, 2013 ONSC 4796
COURT FILE NO.: 59155
DATE: 2013/08/15

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAKOB (JACK) VANDERKOOY
Plaintiff/Defendant by counterclaim

- and -

PATRICIA VANDERKOOY aka
PATRICIA AMISAL, SARAH
VANDERKOOY and JIM
VANDERKOOY
Defendants/Plaintiffs by counterclaim

REASONS FOR JUDGMENT

A.J. GOODMAN J.

August 15, 2013