SUPREME COURT OF QUEENSLAND

CITATION:	*BYM v The Corporation of The Trustees of The Roman Catholic Archdiocese of Brisbane (No 2)* [2024] QSC 106
PARTIES:	**BYM** (plaintiff) **v** **THE CORPORATION OF THE TRUSTEES OF THE ROMAN CATHOLIC ARCHDIOCESE OF BRISBANE TRADING AS BRISBANE CATHOLIC EDUCATION ABN 49 991 006 857** (defendant)
FILE NO/S:	[**REDACTED**]
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 May 2024
DELIVERED AT:	Brisbane
HEARING DATES:	27 November 2023 to 6 December 2023
JUDGE:	Williams J
ORDERS:	**1. The plaintiff's claim is dismissed.** **2. The parties be heard further in relation to costs.** **3. The parties are provided with a confidential not to be published version of the reasons and are to agree a Schedule identifying any further information to be redacted in a version of the reasons to be published, to be emailed to the Associate to Williams J, by 13 June 2024.**
CATCHWORDS:	TORTS – VICARIOUS LIABILITY – NON-DELEGABLE DUTY – NEGLIGENCE – allegations of child sexual abuse on school grounds – where the plaintiff claims damages for psychiatric injury from an alleged assault on the basis of vicarious liability and/or negligence – where the alleged assault constitutes a serious criminal offence against a child – whether the assault occurred as alleged – whether the defendant is at law vicariously liable for the conduct of alleged perpetrator – whether the alleged perpetrator was acting in the course of his employment – whether the assault, if found to have occurred, has a sufficiently strong connection with the employment – whether the alleged perpetrator was placed in a position of authority, power and trust such that he was able to

achieve a substantial degree of intimacy – whether on the balance of probabilities the defendant breached the non-delegable duty of care to exercise reasonable care for the safety of the plaintiff as a student

EVIDENCE – civil standard of proof – approach to assessment of credibility – burden of proof to the Briginshaw standard – where a key issue in dispute is whether the alleged assault occurred as alleged or at all – where the key issues concern the credit and reliability of the plaintiff and other witnesses – where there is a substantial period of delay between the alleged assault and the trial – whether the necessary degree of satisfaction is reached in respect of the plaintiff's claim raising serious allegations of assault

Criminal Code Act 1899 (Qld), s 245

Bird v DP [2023] VSCA 66
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
BYM v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (No 1) [2023] QSC 298
CCIG Investments Pty Ltd v Schokman (2023) 97 ALJR 551; [2023] HCA 21
Double v Salvation Army (Victoria) Property Trust [2023] VSC 452
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22
Gersbach v Gersbach [2018] NSWSC 1685
GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 97 ALJR 857; [2023] HCA 32
Jones v Sutherland Shire Council [1979] NSWLR 206
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60
M v M (1988) 166 CLR 69; [1988] HCA 68
Nguyen v Cosmopolitan Homes (NSW) Pty Ltd [2008] NSWCA 246
Prince Alfred College Inc v ADC (2016) 258 CLR 134; [2016] HCA 37
Watson v Foxman (1995) 49 NSWLR 315
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12

COUNSEL: Mr G Mullins KC and Ms C Campbell for the plaintiff
Mr R J Douglas KC and Mr K Howe for the defendant

SOLICITORS: Maurice Blackburn Lawyers for the plaintiff
MinterEllison Gold Coast for the defendant
Ms R Drew of Holding Redlich for CD (witness)

[1] The plaintiff claims damages for an alleged assault on the basis of vicarious liability of and/or negligence by the defendant, together with interest and costs. The defendant denies liability.

[2] At the commencement of the trial, both liability and quantum were in issue. During the trial, an agreement was reached in respect of quantum only.

[3] The plaintiff suffers from a significant psychiatric condition and that is not in dispute.

[4] The central issue is whether the assault occurred as alleged by the plaintiff and, if so, is the defendant liable for the injury caused to the plaintiff on one or both of the identified bases.

Non-publication order

[5] On 6 December 2023, orders were made including as follows:

> "(2) Subject to:
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> (a) the exceptions in s 194(2) of the *Child Protection Act*; and
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> (b) further order of the Court,
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> identifying information (as defined in s 194(4) of the *Child Protection Act*) about the plaintiff must not be published.
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> (3) Subject to:
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> (a) publication or disclosure for the purposes of conducting this proceeding and any appeal;
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> (b) publication or disclosure for the purpose of an investigation into a complaint made by or on behalf of the plaintiff to the Queensland Police Service;
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> (c) publication or disclosure required or authorised by law; and
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> (d) further order of the Court,
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> the name of, and other information which may identify, the person described as CD in the Further Amended Statement of Claim, and who was a witness at the trial, must not be published or disclosed." (**Non-publication Order**)

[6] The reasons for making these orders were delivered ex tempore on 6 December 2023 and published at *BYM v The Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (No 1)* [2023] QSC 298.

[7] Accordingly, these reasons are prepared on the basis that a version of the reasons is publicly available in accordance with the principles of open justice, but identified parts are redacted pursuant to the Non-publication Order in place.

Issues in dispute

[8] The parties have agreed the issues in dispute, as follows:

(a) ***Issue 1*** - whether the alleged assault occurred as alleged or at all.

(b) ***Issue 2*** - whether the defendant is at law vicariously liable for the conduct of CD.

(c) ***Issue 3*** - whether CD was acting in the course of his employment and whether as a matter of law the defendant is liable.

(d) ***Issue 4*** - the nature and extent of any duty of care owed by the defendant to the plaintiff.

(e) ***Issue 5*** - whether the defendant had breached any duty of care.

[9] During the trial, the parties agreed causation and the assessment of damages. Accordingly, issues 6, 7, 8 and 9 do not need to be further considered, namely:

(a) *Issue 6* - The nature and extent of damages, of and including:

(i) Past and future economic loss;

(ii) Past and future care and assistance;

(iii) Past expenses;

(iv) Future expenses.

(b) *Issue 7* - Whether any alleged injuries relate to the alleged assault.

(c) *Issue 8* - What injury or injuries, if the alleged abuse occurred, are attributable to the alleged assault.

(d) *Issue 9* - If the alleged assault occurred as alleged or at all, what loss or otherwise the plaintiff has suffered as a consequence.

Matters not in dispute

[10] Prior to trial, the parties also agreed certain matters that are not in dispute, namely:

(a) The plaintiff:

(i) Is a female:

(ii) Was born on [**REDACTED**] and is now aged 33 years;

(iii) Was enrolled in and attended EF,[1] a school in the State of Queensland, (the **School**) in 1999 for the compulsory education of the plaintiff as required by the *Education (General Provisions) Act 1989* (Qld).

(b) The defendant:

(i) Is an entity capable of being sued;

(ii) Operated multiple schools within the Archdiocese of Brisbane and employed teachers, cleaners, groundskeepers and other staff to work within those schools;

(iii) At all material times, owned and operated the School.

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1 [**REDACTED**].

(c) During the 1999 school year, the plaintiff's classroom teacher was [**REDACTED**].[2]

(d) CD:

(i) Is a male;

(ii) Was born on [**REDACTED**] and is now aged [**REDACTED**] years;

(iii) Was employed by the defendant at the School in 1999.

(e) The nature and extent of the plaintiff's general damages.

(f) The plaintiff has complied with the pre-court procedures and requirements of the *Personal Injuries Proceedings Act 2002* (Qld).

[11] During the trial, the parties agreed that if the alleged assault occurred, causation and assessment of damages are agreed at $1 million.[3]

Plaintiff's pleadings and witnesses

[12] The Further Amended Statement of Claim dated 6 December 2023 (**FASOC**) sets out the material facts relied upon by the plaintiff in respect of her claim. The Amended Reply dated 12 December 2022 (**Amended Reply**) joins issue with the defendant's amended pleading.

[13] The following witnesses gave evidence as part of the plaintiff's case in respect of liability:

(a) The plaintiff;

(b) [**REDACTED**], the plaintiff's sister;

(c) [**REDACTED**], the plaintiff's mother;

(d) [**REDACTED**], the plaintiff's father; and

(e) [**REDACTED**], the plaintiff's brother.

[14] Dr Joseph Mathew, psychiatrist, and Mr Stephen Hoey, occupational therapist, also gave evidence in respect of causation and quantum. Some of this evidence remains relevant to liability.

Defendant's pleading and witnesses

[15] The Amended Defence dated 4 November 2022 (**Amended Defence**) sets out the matters relied upon by the defendant in defence of the plaintiff's claim.

[16] The defendant called the following witnesses in defence of the plaintiff's claim:

(a) [**REDACTED**], referred to as CD, the alleged perpetrator;

(b) [**REDACTED**], a student at the School during the relevant period;

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2 Now [**REDACTED**].

3 T6.2.12-15; Plaintiff's closing submissions at [12], page 3; Defendant's amended closing submissions at [9], page 11.

(c) [**REDACTED**], a teacher at the School during the relevant period;

(d) [**REDACTED**],[4] the plaintiff's teacher;

(e) [**REDACTED**], [**REDACTED**] of the School, during the relevant period;

(f) [**REDACTED**], counsellor of the School, during the relevant period; and

(g) [**REDACTED**], [**REDACTED**] of the School, during the relevant period.

[17] Dr Benjamin Duke, psychiatrist, gave evidence in respect of causation and damages. Some of this evidence may remain relevant to liability.

Nature of the claim

[18] The nature of the plaintiff's claim is that on a school day in 1999, the plaintiff obtained permission from her teacher to leave the classroom to go to the toilet. The plaintiff left the classroom unaccompanied and entered one of the girls' toilet blocks at the School.

[19] The plaintiff alleges that while she was in one of the toilet cubicles, CD entered that toilet cubicle and assaulted her, including digital and penile penetration.

[20] The plaintiff did not complain about the alleged assault immediately after the event. In 2017, the plaintiff disclosed the alleged assault to her mother. Subsequently, the plaintiff made a "partial" disclosure to a psychologist, Ms Daile Martin.

[21] The plaintiff claims that the defendant is vicariously liable for the alleged assault by CD and/or directly liable for breach of a duty of care owed by the defendant to the plaintiff as a result of the alleged assault by CD.

Standard of proof given the nature of the claim

[22] It is not contentious that these are civil proceedings and:

(a) the plaintiff bears the persuasive onus of proof on all issues; and

(b) given the nature of the claim, the higher evidentiary standard as articulated in *Briginshaw v Briginshaw*,[5] and as more recently explained in *M v M*,[6] is required to be satisfied.

[23] This is a case where the Court is faced with two versions of events: the plaintiff's version and CD's version. Ultimately, the evaluation of that evidence is critical to the consideration of the issues in dispute, particularly Issue 1.

[24] The plaintiff submits that the Court should approach the evidence by reference to the factors identified by Sir Richard Eggleston in the textbook *Evidence, Proof and*

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4 While the plaintiff's teacher was known as [**REDACTED**] at the time of the alleged assault, for ease of reference, these reasons will refer to the plaintiff's teacher as [**REDACTED**], being the name under which the witness gave evidence.

5 (1938) 60 CLR 336.

6 (1988) 166 CLR 69.

Probability.[7] Those factors are typically taken into account by judges in assessing witness credibility and include:

(a) Inherent consistency of the story;

(b) Consistency with other witnesses;

(c) Consistency with undisputed facts;

(d) The credit of the witness;

(e) Observation of the witness; and

(f) The inherent probability, or improbability, of the story.

[25] The defendant contends that it is appropriate to consider the authorities in more detail to ascertain what is required to satisfy the higher evidentiary standard. Given the critical nature of the evidence and the serious nature of the plaintiff's allegations, it is appropriate to specifically consider the guidance provided by the relevant authorities.

[26] The starting point is the case of *Briginshaw v Briginshaw*[8] where the High Court considered the standard of proof in divorce proceedings on the ground of adultery. The case at first instance depended entirely on evidence of conversations, with no evidence in writing.

[27] Dixon J's reasons for judgment state the relevant principle:

> "But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences".[9]

[28] Dixon J went on later in the reasons to state:

> "This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues … But, consistently with

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7 Richard Eggleston, *Evidence, Proof and Probability* (Weidenfeld and Nicolson, 2nd ed, 1983). Referred to by Ferguson CJ and Maxwell P in the Victorian Court of Appeal decision in *Pell v The Queen* [2019] VSCA 186 at [56].

8 (1938) 60 CLR 336.

9 At 362.

> this opinion, weight is given to the presumption of innocence and exactness of proof is expected."[10]

[29] The High Court in *M v M*[11] considered the issue in the context of Family Court child custody or access proceedings in which an allegation of sexual abuse was raised. The Court,[12] in a joint judgment, concluded:

> "In considering an allegation of sexual abuse, the court should not make a positive finding that the allegation is true unless the court is so satisfied according to the civil standard of proof, with due regard to the factors mentioned in *Briginshaw v Briginshaw*".[13]

[30] After quoting Dixon J,[14] the Court observed that the remarks had "a direct application to an allegation that a parent [had] sexually abused a child, an allegation which is often easy to make, but difficult to refute."[15] Their Honours went on:

> "No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well founded… There will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place."

[31] These principles were more recently considered by Garling J in *Gersbach v Gersbach*[16] where his Honour commented that:

> "[7] Having regard to contemporaneous events and knowledge about the occurrence in the community and in family settings of child sexual abuse, it would not be appropriate to categorise accounts of such conduct as being inherently unlikely, as Dixon J did in 1938."

[32] The reasons for judgment in *Gersbach v Gersbach* are an example of the trial judge needing to carefully analyse all of the relevant evidence to resolve the "evidentiary differences". Garling J observed:

> "[393] It would be an unsatisfactory basis for the resolution of these proceedings for the Court to simply prefer one account over another solely on the basis of a witness's demeanour whilst giving evidence. A careful observation of each of the lay witnesses whilst they were giving evidence, particularly the plaintiff, the defendant and [the plaintiff's mother], showed that the experience of giving evidence was itself traumatic. … To resolve the evidentiary differences, it is appropriate to proceed by analysis of the evidence, including reference to the surrounding context, and all other relevant matters and

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10 At 362-363.
11 (1988) 166 CLR 69.
12 Mason CJ, Brennan J, Dawson J, Toohey J and Gaudron J.
13 At 76.
14 The passage is quoted at [28] above.
15 At 77.
16 [2018] NSWSC 1685.

> circumstances. It is appropriate to search for and identify any corroboration which may exist, or may be expected to exist."

[33] After undertaking this approach, Garling J concluded that he could not accept the plaintiff's evidence as establishing on the balance of probabilities the alleged sexual and physical abuse. An "integral part" of that conclusion was his inability to conclude that the defendant or the plaintiff's mother were intentionally lying in their evidence.[17]

[34] In *Fox v Percy*,[18] the majority of the High Court[19] recognised the move away from reliance on demeanour as an indicator of truth or falsehood based on "scientific research". Their Honours observed:

> "Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."[20]

[35] Some practical guidance to the resolution of the type of evidentiary differences which arise in this case is also obtained from the High Court decision in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*.[21] Whilst that case considered factors relevant to a permanent stay to prevent an abuse of process, the Court[22] did consider fairness[23] of a trial, particularly in the context of the removal of the relevant limitation period for claims in respect of child sexual abuse.[24]

[36] The majority of the High Court recognised that the adversarial system requires a plaintiff to prove its case and that "the gravity of the fact sought to be proved is relevant to 'the degree of persuasion of the mind according to the balance of probabilities'.[25]"[26]

[37] Further:

> "[b]y this approach, the common law, in accepting but one standard of proof in civil cases (the balance of probabilities), ensures that 'the

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17 See [394] and [395]. The evidence of denying the conduct which constituted serious criminal conduct could not be explained by "forgetfulness or some other innocent reason". For the plaintiff to succeed, Garling J concluded that he must be satisfied that intentionally false evidence was given by the defendant and the plaintiff's mother, and he was not so satisfied.

18 (2003) 214 CLR 118.

19 Gleeson CJ, Gummow and Kirby JJ.

20 At [31].

21 (2023) 97 ALJR 857; [2023] HCA 32.

22 Kiefel CJ, Gageler J (as the Chief Justice then was) and Jagot J.

23 Or in particular, unfairness.

24 In that case, by s 6A of the *Limitation Act 1969* (NSW).

25 *Rejfek v McElroy* (1965) 112 CLR 517 at 521.

26 Whether at common law or pursuant to s 140(2)(c) of the *Evidence Act 1995* (NSW): *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; [2023] HCA 32 at [57].

degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved'[27]."[28]

[38] Particularly relevant to the current context are the comments of the majority of the High Court as follows:

"[59] Common law courts have developed techniques addressing the problems in civil trials associated with the recollection of events which occurred long in the past. For example, the warning which *Longman v The Queen*[29] said may be required in a criminal trial involving events in the distant past has a civil law equivalent. *Watson v Foxman* is frequently cited because of its continuing importance in identifying that ordinary human experience exposes that human memory is 'fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time'.[30]

[60] A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or the trier of fact simply not reaching the state of 'actual persuasion' which is required before a fact may be found[31]. 'To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence … It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard the scrap of evidence as enough to persuade him or her that the contention is correct.'[32] **The evidence must 'give rise to a reasonable and definite inference' to enable a factual finding to be made; mere conjecture based on 'conflicting inferences of equal degrees of probability' is insufficient[33]. As Dixon CJ said in *Jones v Dunkel*[34], the law:**

> **'does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied'**." (emphasis added in bold)

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27 *Rejfek v McElroy* (1965) 112 CLR 517 at 521, citing, amongst other cases, *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

28 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857; [2023] HCA 32 at [57].

29 (1989) 168 CLR 79.

30 (1995) 49 NSWLR 315 at 319.

31 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

32 *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 [51].

33 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.

34 (1959) 101 CLR 298 at 305.

[39] The defendant, in particular, relies on the passage in bold in respect of the current case.

[40] A consideration of the comments in *Watson v Foxman* and *Longman v The Queen* illustrates how trial judges seek to manage the issue of evidence concerning events which occurred years before.

[41] *Watson v Foxman* concerned civil proceedings for misleading or deceptive conduct alleged to arise from words spoken in a conversation. The issue arose as to the required level of satisfaction for the Court to find that the words were misleading.

[42] McLelland CJ in Equity observed:

> "… human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.
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> Each element of the cause of action must be proved to the reasonable satisfaction of the court, which means that the court 'must feel an actual persuasion of its occurrence or existence'. Such satisfaction is 'not … attained or established independently of the nature and consequence of the fact or facts to be proved' including the 'seriousness of an allegation made, the inherent likelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding': *Helton v Allen* (1940) 63 CLR 691 at 712."[35]

[43] In that case, his Honour observed that "serious difficulties of proof" may arise where a party is seeking to rely on spoken words to found a cause of action where there is no "reliable contemporaneous record or other satisfactory corroboration". That was found to be so in that case and consequently the required level of persuasion was not met.

[44] *Longman v The Queen* was a criminal case and included consideration on appeal whether a general direction was required to be given to the jury where there was a long delay in the prosecution of the alleged offending. The appeal was allowed, and a new trial was ordered as a result of the fairness of the trial being impaired as a result of the failure of the trial judge to give a warning to the jury. Factors including the delay in the prosecution of more than 20 years, the nature of the allegations, the age of the complainant at the time of the alleged events and the absence of complaint were significant considerations.[36] In the circumstances, a warning was required by the general law.[37]

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35 *Watson v Foxman* (1995) 49 NSWLR 315 at 319.

36 *Longman v The Queen* (1989) 168 CLR 79 at 91.

37 In contrast to the specific requirement that had been abolished.

[45] McHugh J relevantly observed:

> "The fallibility of human recollection and the effect of imagination, emotion, prejudice and suggestion on the capacity to "remember" is well documented. The longer the period between an "event" and its recall, the greater the margin for error. Interference with a person's ability to "remember" may also arise from talking or reading about or experiencing other events of a similar nature or from the person's own thinking or recalling. Recollection of events which occurred in childhood is particularly susceptible to error and is also subject to the possibility that it may not even be genuine: Hunter, *Memory,* rev ed (1964), pp 269-70.
>
> No matter how honest the recollection of the complainant in this case, the long period of delay between her formal complaint and the occurrence of the alleged events raised a significant question as to whether her recollection could be acted upon safely. The likelihood of error was increased by the circumstances in which the complainant said the incidents occurred… Experience derived from forensic contests, experimental psychology and autobiography demonstrates only too clearly how utterly false the recollections of honest witnesses can be…".[38]

[46] The defendant contends that, consistent with the High Court reasoning in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore*,[39] where there has been a long delay between the alleged occurrence of the event and the trial (particularly such as here where there is no limitation period imposed by statute), the Court is obliged to subject the plaintiff's evidence to scrutiny, more so than in the usual case.

[47] The defendant refers to the recent decision of *Double v Salvation Army (Victoria) Property Trust*[40] as an example of the considerations relevant to a claim involving historical abuse. It is submitted that there are a number of similarities to the current claim.

[48] O'Meara J considered the principles from the relevant authorities, many of which have already been referred to in these reasons. His Honour also noted that:

> "[74] In addition to the question of the applicable standard of proof, of course, it must be borne in mind that the burden of proof in respect of the matters alleged rests upon the plaintiff. In that regard, there can be cases in which the trier of fact is left in doubt such that the only just conclusion is that the burden of proof has not been discharged."

[49] After an in-depth review of the evidence, his Honour concluded:

> "[306] As I have indicated, as a matter of …. binding authority, I am required to be satisfied that the plaintiff has proved her case on the balance of probabilities. In that regard –

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38 At 107-8.
39 (2023) 97 ALJR 857; [2023] HCA 32.
40 [2023] VSC 452.

(a) I am required to take into account, among other things, the gravity of the matters she alleges; and

(b) I must feel an 'actual persuasion' as to the occurrence of those matters before they can be accepted to be proved.

[307] In the present instance, I have no such feeling of persuasion, and cannot be satisfied of the occurrence of the alleged events of grooming and abuse.

[308] In the circumstances, on the essential issue from which the determination of all other issues in the proceeding must follow, the plaintiff's claim must fail."

[50] As to what is meant by something being "probable", the defendant refers to the observations of Mahoney JA in *Jones v Sutherland Shire Council*.[41] Something is "probable" where the decision maker has "the appropriate degree of confidence in its existence or correctness, based on or judged according to reason".[42] Mahoney JA observed:

> "It is in this sense that 'probability' is used in determining whether a particular proposition of fact should be accepted for the purpose of litigation. It was, in my opinion, to this that Dixon J referred in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361. In referring to what constituted proof of a fact, his Honour said: '… the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.'"

[51] The defendant also points to the comments of McDougall J[43] in *Nguyen v Cosmopolitan Homes (NSW) Pty Ltd*[44] as relevant, namely:

> "[55] The position may be summarised as follows:
>
> (1) A finding that a fact exists (or existed) requires that the evidence induce, in the mind of the fact-finder, an actual persuasion that the fact does (or at the relevant time did) exist;
>
> (2) Where on the whole of the evidence such a feeling of actual persuasion is induced, so that the fact-finder finds that the probabilities of the fact's existence are greater than the possibilities of its non-existence, the burden of proof on the balance of probabilities may be satisfied;
>
> (3) Where circumstantial evidence is relied upon, it is not in general necessary that all reasonable hypotheses consistent with the non-existence of a fact, or

41 [1979] NSWLR 206 at 227.
42 At 227-8.
43 With McColl and Bell JJA agreeing.
44 [2008] NSWCA 246.

inconsistent with its existence, be excluded before the fact can be found; and

(4) A rational choice between competing hypotheses, informed by a sense of actual persuasion in favour of the choice made, will support a finding, on the balance of probabilities, as to the existence of the fact in issue."

[52] The approaches contended for by the plaintiff and the defendant are in practical terms the same as they both require consideration of the usual jurisprudential techniques. It is necessary to analyse all of the evidence and to consider whether on all of the evidence the necessary degree of satisfaction is reached in respect of the plaintiff's claim raising serious allegations of assault.

[53] The Court is to look at the entirety of the evidence, including:

(a) Considering "contemporary materials, objectively established facts and the apparent logic of events";[45] and

(b) Other evidence, including that of the alleged perpetrator.

[54] Further, in the particular circumstances, the analysis is to be undertaken mindful of:

(a) the substantial period of delay between the alleged assault and the trial; and

(b) the alleged assault constitutes a serious criminal offence against a child.

[55] The key issues in this proceeding concern the credit and reliability of the plaintiff and other witnesses and ultimately whether the plaintiff has discharged the onus on her of proving, on the balance of probabilities, that the alleged assault occurred.

Issue 1 - whether the alleged assault occurred as alleged or at all

[56] It is necessary to consider the evidence relied upon by the plaintiff and the defendant in relation to the first issue of whether the assault occurred as alleged or at all.

Plaintiff's case

[57] The plaintiff alleges an "assault and battery"[46] at common law. In Queensland, the accepted practice is to adopt the definition of assault in s 245 of the *Criminal Code Act 1899* (Qld) in a civil action for assault or battery.[47] Accordingly, the criminal definition of assault is relevant but on the civil standard of proof, namely on the balance of probabilities.

[58] Relevantly, s 245 of the *Criminal Code* (Qld) states as follows:

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45 *Fox v Percy* (2003) 214 CLR 118 at [31].

46 The relevant common law factors are intentionally creating in another person an apprehension of imminent harmful or offensive contact, and if the threat is carried out: see Fleming on Torts 11th Ed at [2.70].

47 *Origliasso v Vitale* [1952] St R Qd 211; *Grehan v Kann* [1948] QWN 40; *King v Crowe* [1942] St R Qd 288.

> "**245 Definition of *assault***
>
> (1) A person who strikes, touches, or moves, or otherwise applies force of any kind to, the person of another, either directly or indirectly, without the other person's consent, or with the other person's consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without the other person's consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect the person's purpose, is said to assault that other person, and the act is called an ***assault***.
>
> (2) In this section—
> ***applies force*** includes the case of applying heat, light, electrical force, gas, odour, or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort."[48]

[59] The plaintiff's position is that, if the plaintiff's evidence is accepted, then an assault is proven on the balance of probabilities. The issue then becomes, whether the defendant is liable for the assault.

Plaintiff's evidence

[60] At a high level, the plaintiff's evidence can be summarised as follows:

(a) On a school day in 1999, the plaintiff obtained permission to leave class to attend the toilet.

(b) She left the classroom unaccompanied and entered the toilet.

(c) CD followed her into the toilet and assaulted her.

(d) The plaintiff did not complain about the assault immediately after the event.

(e) The plaintiff felt guilty and ashamed.

(f) The plaintiff felt frightened of CD and frightened of what might happen if she did complain.

(g) The plaintiff changed after the assault, including cutting her hair short, no longer wearing frilly clothes, withdrawing from friendships, particularly with boys, and she did not go to the same toilets again.

[61] Chronologically, the plaintiff completed primary school in [**REDACTED**] and moved to [**REDACTED**] for high school in [**REDACTED**]. By this time, the plaintiff had put on weight and was socially withdrawn. This made making new friends difficult and she experienced bullying. Ultimately, the plaintiff was home schooled.

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[48] The issue of consent does not arise on the alleged facts. Further, the defence of provocation under s 269 of the *Criminal Code* (Qld) may be available but does not arise for consideration in the current circumstances.

[62] The plaintiff also relies on the evidence of the plaintiff's mother who was concerned about the plaintiff. The plaintiff's mother organised for the plaintiff to be seen by a psychologist, Ms Amy Howie, in 2013. Further, the plaintiff's mother organised the plaintiff to attend a psychologist, Ms Hayley Quinn, during 2014 and 2015. The plaintiff did not disclose to either of the psychologists any issues relating to the abuse but focused on family related issues.

[63] The plaintiff disclosed the abuse to her mother accidentally in 2017 during the course of an argument. The plaintiff had intended to keep the assault a secret.

[64] The plaintiff's mother organised for the plaintiff to see a further psychologist, Ms Daile Martin, to whom the plaintiff "partially" disclosed the abuse.

[65] The plaintiff's evidence is that the partial disclosure occurred as the plaintiff was afraid she would be judged and did not feel confident she could disclose completely to Ms Martin.

[66] It is necessary to consider the plaintiff's evidence in detail, and also the evidence of the other witnesses called on behalf of the plaintiff.

[67] The plaintiff was born in [**REDACTED**] and was 33 years of age at trial. She currently lives with her parents and her sister at the family home.[49]

[68] The plaintiff gave evidence, including as follows:

(a) In her first few years at school, she loved schoolwork and liked learning.

(b) She had friends and played both soccer and handball.[50]

(c) She had a Baby Spice doll she liked[51] and also loved "frilly floral dresses", anything pink and "really girly".[52]

(d) Her hair was really long and she was proud of her hair.[53]

[69] The plaintiff described the circumstances of her alleged sexual assault in oral evidence.[54] The plaintiff's written submissions state "it is unnecessary to repeat the details of the events in these submissions."[55] Unfortunately, in these reasons it is necessary to not only repeat the details, but also to engage with the detail as part of the required analysis.

[70] The plaintiff gave evidence that she was wearing her day dress, socks, and black Mary Jane shoes.[56] She asked permission of her teacher, [**REDACTED**], to go to the toilet. The plaintiff recalls [**REDACTED**] saying "yes" to her request and adding "just be quick".[57]

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49 T1.36.22-31.
50 T1.41.27-47.
51 T1.43.6-8.
52 T1.43.15-18.
53 T1.43.20-23.
54 T1.48.26 to T1.50.46.
55 Plaintiff's closing submissions at [19], page 4.
56 T1.46.20-21.
57 T1.46.23-28.

[71] The plaintiff gave evidence that she left the classroom and went around the front side of the classrooms to head towards the toilet block. To get to the toilet block from the classroom, the plaintiff gave evidence that she had to walk past at least two other classrooms, the art room on the other side of the walkway, and then there was a turn where the building split and there were more classrooms further on. She also had to walk past the garden.

[72] The plaintiff's evidence was that as she approached the garden and on the approach to the toilet block, she saw CD coming out of the staff toilet. She said, "good morning" and he said "good morning" back. After that, she went straight into the toilet block.

[73] The plaintiff's recollection of the girl's toilet block (on the side that she went into) was that there were approximately four cubicles and the first one or two were locked as a result of other children locking them "for fun".

[74] The plaintiff gave evidence that other students would lock the doors and then slide out underneath the cubicle doors, leaving them locked. The plaintiff has a particular recollection that one or two of the toilet doors were locked on that day, so she thinks she went into the last cubicle.

[75] The plaintiff's evidence was she went into the cubicle and closed the door behind her and locked it.

[76] The plaintiff gave very specific evidence of the lock on the toilet cubicle door being a semi-circle shape with a dent in it and showing whether it was vacant or occupied. She described them as "kind of dodgy" where they could be pressed in and opened. Specifically, the plaintiff's evidence was "you would, like, press them in and sort of, like, move it across, so it would, like, spin to be either locked or unlocked."[58]

[77] The plaintiff reiterated "like, if you were able to push it in the right spot, you could push it and twist it."[59]

[78] In relation to what the lock looked like from inside the toilet cubicle, the plaintiff gave evidence as follows:

> "It was like a big clunky box, and it had the metal lock part that would go through the metal loop on the other side of the door. And it was a twist - I don't know how to explain it. It was like a rectangle twist, and as you would move it, the lock would come in and out … sort of like a slide."[60]

[79] Further, the plaintiff indicated that she locked the door as "if you don't lock them, they would just, like, fall open."[61]

[80] The plaintiff gave evidence that she went into the cubicle, made sure the seat was clean and that there was toilet paper, pulled down her underwear and sat on the toilet.

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58 T1.47.41-49.
59 T1.48.2-3.
60 T1.48.5-10.
61 T1.48.12-13.

Further, as she was "finishing up" she heard someone coming into the "actual room".[62]

[81] In relation to specifically what she recalls hearing, the plaintiff's evidence was:

> "we had, like, these little - little tiles on the floor. And, like, you know, hard plastic wheels from I think it might have been his little trolley thing that had cleaning products on it - I could [hear] it - like, click, click, click, click, click and - over the tiles, …"[63]

[82] The plaintiff gave evidence that the trolley she was referring to was the trolley that she had seen CD with when he was coming out of the staff toilet/the disabled toilet.

[83] In relation to who she thought it was when she heard the noise, the plaintiff's evidence was:

> "I wasn't entirely sure who I thought it might have been. I assumed, because of the sound of the wheels, it would have been CD, but I didn't think anything of it, because, like, he was a staff member. He would clean the bathrooms. He'd always seemed nice to me in the past."[64]

[84] In respect of what happened next, the plaintiff gave evidence that she almost had her underwear pulled back up when the cubicle door opened, and CD pushed his way in. Further, she heard "rattling" and she said "someone's in here. Like, I'm in here."[65]

[85] The plaintiff gave evidence that:

> "I thought he might've thought that the - because of all the doors that would lock, and the kids would slide under, I thought he - maybe he thought it was just another empty stall that had been locked by one of the other kids."[66]

[86] In respect of the opening of the toilet door, the plaintiff's evidence was that it was "a really tight squeeze" but as she was fairly small it would "tap against [her] knees, but it could open past [her]".[67]

[87] The plaintiff's evidence of the events from that point was as follows:

(a) When CD came into the stall, he "sort of sat [her] back onto the seat".

(b) She was panicking at this point and said something like "you - you can't be in here. You can't look at that."

(c) CD said something like "it's all right. I'm an adult. I just need to check something."

(d) The plaintiff thought CD "might've been talking about the actual stall or something." She was confused.

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62 T1.48.26-28.
63 T1.48.31-34.
64 T1.48.42-46.
65 T1.49.2-3.
66 T1.49.3-6.
67 T1.49.9-10.

(e) The plaintiff could not figure out why he was in there because he could have waited until she was out.

(f) CD then reached under her dress, and she tried to cover herself at that point.

(g) CD was touching the plaintiff on her vagina. She told him not to. She told him he was hurting her. The plaintiff told him to stop.[68]

(h) Next, the plaintiff said that CD started getting angry, telling her to be quiet, telling her that no one was allowed to know about what was happening because she should not be letting it happen and she was going to be the one in trouble if anyone found out about it.

(i) The plaintiff indicated that she believed CD because he was an adult.

(j) Further, her parents had told her no one was allowed to look at or touch her and she did think that she would get in trouble if anyone else found out.[69]

(k) When CD first touched her, he asked if she liked it. She said, "no, you're hurting me." His fingers against her were hurting her, his hands were rough, and he was rough.[70]

(l) Initially CD had put his fingers against her vagina and eventually put his fingers inside of her. That hurt. Her evidence was that his nails were rough, and his fingers were rough. When asked further about this, the plaintiff's evidence was "to begin with, one. I think he put a second one inside after. And that's when it did really start to hurt."[71]

(m) CD kept telling her to be quiet as she told him that it hurt. He asked if she was enjoying it. The plaintiff indicated that she did not. It was painful and scary.

(n) CD "took his fingers out" and he started to undo his pants. He pulled down his pants and wanted her to look at his penis, but she did not want to. She knew she wasn't allowed to look at other peoples' "privates" so she looked away as quickly as she could.[72]

(o) Next CD was "kind of touching himself a bit before he started rubbing himself against me." That is, he was "rubbing his penis against [her] vagina".[73]

(p) She was really scared at that point. Further, she does not "know how long he did that for", but after a while, he "actually pushed his … penis into … [her] vagina."[74]

(q) The plaintiff's evidence was that she was terrified and it "really, really hurt".

(r) CD kept telling her that it was her fault. He said words to the effect of "good kids stay in class while class was on. No one can find out about it", he said "it's our secret".[75]

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68 The plaintiff originally said she said, "please stop that", then acknowledged she probably did not say please and that she probably was not being that polite. See T1.49.26-27.

69 T1.49.28-33.

70 T1.49.35-39.

71 T1.49.45-47.

72 T1.50.4-7.

73 T1.50.9-12.

74 T1.50.13-15.

75 T1.50.20-22.

(s) Further, she was told that if she got him in trouble then she would be in trouble too, that her parents would send her to foster care, and no one would ever want to be friends with a "dirty girl". That no one could ever love a "dirty kid."[76]

(t) She did not "know how long that went on for, but he pulled himself back out of me, and he was still touching himself. He wanted me to touch him as well, and I didn't want to, but I did."[77]

(u) CD was angry and the plaintiff's evidence was that she did not want to make him any angrier than he was.[78]

(v) She touched him and that she did not know how long that went on for. Then eventually, CD pulled his pants up, reminded her not to tell anyone and left.

(w) The plaintiff does not know how long she was out of class for, but CD said to her that if she was asked why she had gone for so long to tell [**REDACTED**] that she had "bad constipation" and that if she had blood on her underwear, that she had wiped too hard.[79]

(x) The plaintiff recalled seeing blood on the toilet seat and as she was cleaning herself up there was blood on her vagina and on the toilet paper.[80]

[88] The plaintiff's evidence was that after the assault, the plaintiff went back to "class as quickly as [she] could."[81] She said that she saw CD leaving the toilet block but did not watch where he was going as she did not want to watch.

[89] The plaintiff's evidence was also that she did not use the toilets on that side of the toilet block again. She did use the toilets on the other side of the toilet block, which were closer to [**REDACTED**] office. The plaintiff would use the toilets on the other side in an emergency if she could not "hold it". If she could not use the toilets on the other side of the toilet block, she just would not use any toilet.[82] As a consequence of this, when the plaintiff got into higher grades, she would have to be sent home from school early sometimes if she was menstruating and she could not use the other toilet.[83]

[90] The plaintiff also described an incident when she wet herself at a parent/teacher interview when she was unable to go into the toilets on the other side of the toilet block and she did not know where CD was.[84]

[91] On occasion, the toilets near [**REDACTED**] office were padlocked shut during the day.[85]

[92] Following the events in 1999, the plaintiff's evidence was that a lot changed over time. She cut her hair short in what she described as "really gross sort of short, boyish

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76 T1.50.20-24.
77 T1.50.26-28.
78 T1.50.28-29.
79 T1.50.39-42.
80 T1.50.44-46.
81 T1.51.36-40.
82 T1.52.2-8.
83 T1.52.10-13.
84 T1.52.15-21.
85 T1.52.23-26.

bob cut".[86] She described that she did this as she did not want to be looked at, so she could "just sort of blend into the background" and so that she was as "boring and boyish" as she could be.[87]

[93] Further, soon after the events in 1999, the plaintiff gave evidence that she went through puberty, and it was distressing to her to develop breasts and to get more shape. She "didn't want to sort of be seen".[88] Further, she stopped "hanging out with a lot of the kids", stopped playing soccer with the boys altogether, stopped bringing toys to school and withdrew a lot.[89]

[94] Academically, the plaintiff's evidence was that she still did "pretty okay". She felt safe in the classroom because there were other students there and the teacher was there. She liked study and learning. It was outside the classroom where she started getting "anxious or self-conscious".[90]

[95] In respect of her teachers, the plaintiff had female teachers for the balance of her time at the School. She did not have a male teacher until high school.

[96] The plaintiff also described how her dress changed. She stopped wearing cute little frilly socks and black shoes and would wear blue converse sneakers with her dress instead. Further, she had a pair of men's board shorts in "fluoro orange", and she would wear them under her dress so that they were a bit visible beneath her dress.[91]

[97] The board shorts had both Velcro and a lace tie at the front, so they were hard to get on and off. She reasoned that if she had trouble getting them on or off, that no one else could get them on and off as they were tight around the waist when they were done up.[92] The plaintiff wore the orange fluoro boardshorts to school under her uniform.

[98] The plaintiff gave evidence that her mother hated the boardshorts and tried to replace them with normal bike shorts that could not be seen. But the plaintiff "wanted them to sort of be seen". She explained that is why she went for the men's boardshorts, because "they were that bit longer."[93]

[99] The plaintiff did not tell anyone about the assault, neither when she went back to class immediately after, nor in the days that followed.

[100] The plaintiff's evidence was that when she went back to class she was on autopilot, and scared but did not want to make a scene as she thought she would get into trouble. She tried to pretend to be as normal as she could when she got back to class and to keep it together and get through the day.[94]

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86 T1.52.28-31.
87 T1.52.33-34.
88 T1.52.36-39.
89 T1.52.37-41.
90 T1.52.44-47.
91 T1.53.4-9.
92 T1.53.11-14.
93 T1.53.20-23.
94 T1.53.25-34.

[101] She was scared of others finding out what happened and CD saying something. She believed that she would be the one to get into trouble as he was a grown up.[95]

[102] Further, the plaintiff did not tell anybody at home what had happened as she did not want to go to foster care, did not want to be adopted out and did not want to get into trouble for letting someone do what had happened.[96]

[103] The plaintiff felt, and continues to feel, awful and described how she lives with feeling dirty and worthless and gross. She feels she is not worth people loving her and feels like she did something wrong.[97]

[104] Specifically, the plaintiff did not tell her parents as she was afraid and ashamed that she let it happen. She did not want them to get mad and did not want to go to foster care. She did not want to be considered a "dirty kid that let this man do that to [her]".[98]

[105] The plaintiff described how at the time of the assault she did not know anything about sexual behaviour or sexual conduct. There was no discussion at the School, and no discussion at home until she was older.

[106] In relation to the fear of going into foster care, she was aware of the experience of children in foster care, as her neighbours were "foster kids" and her mother helped look after them for a period of time.

[107] The plaintiff finished primary school at the School and then went onto high school. She went to [**REDACTED**], starting in year 8. She did not have a good experience at [**REDACTED**] as it was a new school, and it was much further away from home. She did not interact with other students and was bullied.[99]

[108] The plaintiff explained in evidence that she was bullied as she was a "strange, quiet, withdrawn kid, because [she] was chubby at that point".[100] Further, the plaintiff explained that she gained weight through overeating, and she did not want to be around boys.

[109] Further, the plaintiff gave evidence that at high school she had a male physical education (**PE**) teacher and for the year and a half she was there she only did approximately two PE classes as she did not want to wear the PE uniform of shorts and a t-shirt. She wore her school uniform with a long skirt or the boxer shorts under her uniform, so she did not have to participate.[101]

[110] The plaintiff said that she did not want her body being looked at and felt uncomfortable wearing the PE uniform.

[111] Whilst she was at high school, during lunchtime she would just sit in the library, read, draw and go on one of the computers.[102]

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95 T1.53.36-39.
96 T1.53.43-45.
97 T1.53.47 to T2.54.1.
98 T1.54.3-7.
99 T1.54.26-46.
100 T1.54.48-49.
101 T1.55.5-10.
102 T1.55.16-18.

[112] The plaintiff said that this just made matters worse as she was seen as a "weird recluse kid".[103]

[113] The bullying at high school included physical bullying and ultimately the plaintiff did not want to go to school. She would say that she had a migraine or had a bad upset stomach so she would not need to go to school. The plaintiff also said that sometimes she got so anxious and worked up that she would physically vomit, and she would cry a lot.[104]

[114] The plaintiff commenced home schooling approximately halfway through grade 9 and completed grade 10.[105]

[115] When the plaintiff was approximately in her late teens, the plaintiff gave evidence that her mother suggested that she see a counsellor or a psychologist because her anxiety and depression were pretty bad.[106]

[116] The plaintiff first saw her GP, Dr Jacovou. The plaintiff discussed with Dr Jacovou being on a mental health plan to see a psychologist. The plaintiff did not discuss with Dr Jacovou what happened in 1999.[107]

[117] The plaintiff explained that Dr Jacovou had been her GP since she was a baby and part of her was scared that Dr Jacovou would tell her parents or Dr Jacovou would think less of her.

[118] When asked what she told Dr Jacovou, the plaintiff's evidence was "depression, anxiety, any family issue I could dig up at the time".[108]

[119] Dr Jacovou was also treating the plaintiff at the time for a gynaecological issue resulting in pain and heavy menstrual bleeding.[109]

[120] In 2013, the plaintiff did see a psychologist, Ms Amy Howie. The plaintiff had discussions with Ms Howie about "having anxiety and depression".[110]

[121] The plaintiff did not tell Ms Howie about what happened in 1999. The plaintiff explained that whilst Ms Howie seemed like a nice person, she did not really feel comfortable with her.[111]

[122] When asked why she did not tell Ms Howie about the events in 1999, the plaintiff indicated that she did not feel comfortable and that she was not ready to talk about it. At the time, there was a lot of shame, embarrassment and she did not know how to put it into words.[112]

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103 T1.55.21-22.
104 T1.55.30-35.
105 T1.55.37-43.
106 T1.55.47 to T2.56.2.
107 T1.56.4-11.
108 T1.56.17-18.
109 T1.56.20-26.
110 T1.56.28-31.
111 T1.56.33-36.
112 T1.56.38-41.

[123] In 2014/2015, the plaintiff saw another psychologist, Ms Hayley Quinn. Again, the plaintiff had discussions with her about "depression and anxiety". The plaintiff did not tell Ms Quinn about the assault in 1999.[113]

[124] When asked why she did not tell Ms Quinn about the assault, the plaintiff explained that Ms Quinn was a "lovely human being but she didn't feel comfortable talking about it". Further, it is something that is "really hard still to even talk about".[114]

[125] The plaintiff indicated that she told Ms Quinn about "every single argument I ever had with my parents. Everything was their fault. I remember being mad at them because I didn't want to actually go and see her, but at that point my anxiety and my depression especially was really bad. I was in the throes of self-harming and whatnot. So they really pushed going and seeing her specifically".[115]

[126] At this time, the plaintiff was self-harming by cutting herself. This started when she was approximately 16, but she has not done it for a while.[116]

[127] The plaintiff gave evidence of having a "complete meltdown" while she was in the shower. Everything became heavy and she had a series of "back-to-back, fully-blown flashbacks and panic attack". Further, she broke down in the shower, felt vulnerable and exposed and dirty. The plaintiff explained that it got to a point that she could not "carry this by [herself] anymore".[117]

[128] The plaintiff gave evidence that she was washing her hair when it happened, and it just hit her. She panicked and got out of the shower as fast as she could.[118]

[129] Following this incident, she went and locked herself away.[119]

[130] Around this time, the plaintiff gave evidence that she was "getting under their skin" and being aggressive and irritable. She wanted her family to just leave her alone.[120] The plaintiff had an argument with her mother. She remembers planning her mum's birthday with her sister and things "unravelled". She started arguing with them and snapped at her mother.

[131] When her mother demanded to know what was wrong with her and why she was acting like this, the plaintiff gave evidence that she reached breaking point and snapped. She told her mother what had happened to her very vaguely. She now cannot remember the exact words.[121]

[132] The plaintiff gave evidence that her mother reacted by being quiet and she thought her mother did not know how to respond. The plaintiff felt that her mother was mad or disappointed but that her mother did seem concerned. The plaintiff's mother

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113 T1.56.43-48.
114 T1.57.1-3.
115 T1.57.5-10.
116 T1.57.12-18.
117 T1.57.33-39.
118 T1.57.41-49.
119 T1.58.1-2.
120 T1.58.4-7.
121 T1.58.9-17.

wanted to help and suggested an appointment with Dr Jacovou to see another psychologist.[122]

[133] The plaintiff gave evidence that her mother wanted her to go to the police at first. However, the plaintiff was, and still is, scared to. Further, the plaintiff explained that she never wanted to tell anybody and wanted to "take it to her grave." However, it just came out.[123]

[134] The plaintiff did go to Dr Jacovou to get some assistance and she was referred to Ms Daile Martin, psychologist. The plaintiff did discuss her mental health with Ms Martin.

[135] The plaintiff's evidence was that she "partially" told Ms Martin about the assault in 1999. The plaintiff indicated that she went to the appointment with the full intention of telling Ms Martin everything but choked. She could not bring herself to "spit it all out".[124]

[136] The plaintiff's evidence was that she had seen Ms Martin's notes about "partial memories" and did not agree with this. The plaintiff explained that she had full memories and that it was a false statement to describe them as partial memories.[125]

[137] The plaintiff further explained that when she spoke with Ms Martin she was trying to "feel it out" and whether she could tell her everything. She explained that it was hard to talk about it still and scary to talk about. This is particularly so when you are "locked in a room by yourself with someone".[126]

[138] The first occasion when the plaintiff explained what had happened in 1999 was when she was yelling at her mum. Then, it was recorded on paper when she saw Ms Martin.[127]

[139] The plaintiff gave evidence as to her employment after school. As quantum has been settled, this is no longer relevant to that issue. However, it is relevant to consider in respect of the wider issues of consistency of evidence.

[140] The plaintiff worked at [**REDACTED**] after she left school, particularly as a retail assistant. She did layby work, but also some other work including at the cosmetic counter and at the front registers. She was employed as casual and initially got consistent work. The plaintiff worked at the [**REDACTED**] store and enjoyed the layby work. This involved her working by herself with infrequent interaction with other staff. She did have to deal with customers.

[141] Interacting with male colleagues or male customers made her anxious.[128]

[142] The plaintiff gave evidence of an incident in [**REDACTED**] when she was working at the registers at the front of the store. A customer came through that had a nosebleed

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122 T1.58.19-23.
123 T1.58.25-30.
124 T1.58.42-45.
125 T1.59.2-5.
126 T1.59.9-12.
127 T1.59.16-17.
128 T1.59.19-49.

and sneezed blood everywhere. She panicked as she had open cuts on her hands and her first thought was "panic mode".[129]

[143] Her supervisor said to brush it off with a tissue and keep working and she became anxious. After that, she moved mostly to the layby area and perhaps one shift on the cosmetics counter.[130]

[144] The plaintiff also gave evidence about another incident in approximately Christmas [**REDACTED**] at the [**REDACTED**].

[145] On that day, the plaintiff was working at the cosmetics counter, and it was very busy. It was close to Christmas and customers had been sent down to her register from the front registers. She was in the middle of serving a customer when someone knocked a snow globe and it smashed on the floor, with water on the floor as a result.[131]

[146] The plaintiff gave evidence that there was a direction to go immediately and clean up, but also a direction if you are signed into your register and you were in the middle of serving someone, you were not allowed to leave your register. As she was there by herself at the time, she made what she describes as a "bad judgment call" and tried to quickly finish serving. An older women slipped in the water and broke her leg.[132]

[147] The plaintiff did not see the incident as it was on the other side of a display, but she did tend to the older woman immediately after. This was very stressful, and the plaintiff felt terrible as she was not sure what she was supposed to do.[133]

[148] After that incident she was "super anxious" about going back to [**REDACTED**] and took time off to get her anxiety under control. She spoke to one of her managers about taking that time off and the manager was okay with it.

[149] However, when she got back to work, different employees came up to her and indicated that they had heard that she was having an emotional breakdown in the carpark. This devastated the plaintiff. She had difficulty going to work after that.[134]

[150] Following a period of trying different duties, including cleaning up after the store was closed, the plaintiff ceased working at [**REDACTED**] in around 2015. Eventually she was let go from [**REDACTED**].[135]

[151] The plaintiff had undertaken a course in nail art and also a Certificate III in Education Support through TAFE.

[152] The plaintiff gave evidence that she wanted to be a teachers' aide. When she was younger, she wanted to be a primary school teacher, and when her aunt started doing a teachers' aid course, the plaintiff's mother encouraged her to do it with her aunt.[136]

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129 T1.60.6-12.
130 T1.60.14-27.
131 T1.60.29-39.
132 T1.60.41-48.
133 T1.61.1-7.
134 T1.61.10-21.
135 T1.61.23-33.
136 T1.61.35-49.

[153] The plaintiff completed the teachers' aide course and then was required to complete 100 hours of vocational placement. She undertook the vocational placement at [**REDACTED**]. It was a little school and she loved it. All the teachers were lovely women.[137]

[154] After qualifying, the plaintiff obtained casual teacher aide work at [**REDACTED**] State School in about 2019. She enjoyed the work there in two separate prep classrooms with two women.[138]

[155] This was paid work, but she did not continue with that work. The plaintiff gave evidence that she did not continue with that work because close to the end of term she crossed paths with the groundskeeper, and he greeted her. She "just panicked, and after that term finished, [she] didn't go back".[139]

[156] She has not worked since that time.[140]

[157] In 2020, she enrolled in a Bachelor of Arts but did not continue with that. After the COVID restrictions, classes were returning to campus, and she did not feel as comfortable with her classes.[141]

[158] For the purposes of the proceeding, the plaintiff was examined by two psychiatrists, Dr Joseph Mathew and Dr Benjamin Duke. The plaintiff visited each psychiatrist once for the purposes of the reports prepared by Dr Mathew and Dr Duke.

[159] The plaintiff gave evidence that she felt extremely uncomfortable with Dr Mathew. However, Dr Duke was not as intimidating, but she still felt uncomfortable being locked in a room with him. The plaintiff gave evidence that she felt she probably clammed up a lot in respect of both psychiatrists.[142]

[160] The plaintiff also gave evidence on two matters of particular relevance to the plaintiff's case:

(a) The plaintiff recalls being given instruction from her teachers to treat staff members with respect and also, if you are asked to do something, to do it.[143] The plaintiff gave evidence that she saw CD most days and would greet him by saying "good morning" or "good afternoon".[144]

(b) If students picked up rubbish through lunchtime and showed CD, he would give the students a Zooper Dooper, being an ice block. The plaintiff did not want to pick up rubbish as she was a bit of a "germophobe". However, a few of her friends used to pick up rubbish and get an ice block.[145]

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137 T1.62.2-12.
138 T1.62.15-22.
139 T1.62.26-32.
140 T1.62.34.
141 T1.62.39-43.
142 T1.67.25-46.
143 T1.68.12-21.
144 T1.44.39-43.
145 T1.45.1-30.

[161] In relation to CD, the plaintiff gave evidence that he used to wear shorts, work boots and t-shirts with collars.[146]

[162] The plaintiff submits that the Court should find that the plaintiff was a reliable and credible witness, and the Court should accept her evidence that the assault occurred as described by the plaintiff.

Other witnesses

[163] In support of this conclusion, the plaintiff also relies on evidence from other witnesses called as part of the plaintiff's case.

[164] It is submitted that the evidence given by the plaintiff's sister, mother, father and brother all broadly support the allegations and history described by the plaintiff.

[165] In respect of the plaintiff's sister, [**REDACTED**], she also attended the School for a period while the plaintiff was there.[147]

[166] The plaintiff's sister recalled the plaintiff as a child being "very girly, fun and outgoing". She also recalls playing sports with the plaintiff. She also recalls having a Spice Girls doll that they would play with.[148]

[167] The plaintiff's sister also gave evidence that the plaintiff changed completely "out of nowhere". This included the plaintiff dressing more "boyish", cutting her hair, and gaining weight.[149]

[168] As to the plaintiff currently, the plaintiff's sister gave evidence that the plaintiff hides in her room most the time and sticks to herself as much as she can.[150]

[169] The plaintiff's sister gave evidence that she recalled being offered a Zooper Dooper from CD on one occasion in exchange for picking up rubbish.[151]

[170] The plaintiff's sister also gave evidence that if she received instruction or direction from a teacher or a staff member, she would be required to follow it.[152]

[171] [**REDACTED**], the plaintiff's mother, also gave evidence. The plaintiff's mother gave evidence that the plaintiff as a child was carefree, happy, skippy and "dancey", a beautiful little girl.[153]

[172] The plaintiff's mother also gave evidence that she noticed a change in the plaintiff. The changes included the plaintiff cutting her hair, which had previously been down to her waist, to neck length. Also, the plaintiff started wearing shorts underneath her uniforms and was withdrawn. In effect, the plaintiff was the total opposite to what she had been previously.[154]

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146 T1.45.32-36.
147 T3.30.3-4.
148 T3.32.38-46.
149 T3.32.48 to T3.33.9.
150 T3.34.8-10.
151 T3.35.47 to T3.36.44.
152 T3.37.27-34.
153 T3.53.32-36.
154 T3.54.32-38.

[173] In relation to the assault, the plaintiff's mother gave evidence that the plaintiff disclosed the assault to her when the plaintiff was 16 or 17. In the lead-up to this disclosure, the plaintiff's mother had said to the plaintiff that she could not go on like this. The plaintiff told her mother that something had happened to her, that she had been sexually assaulted. The plaintiff's mother gave evidence that she wanted the plaintiff to go to the police.[155]

[174] The plaintiff's mother recommended that the plaintiff undertake further treatment and Dr Jacovou also encouraged the plaintiff to have more counselling.[156]

[175] [**REDACTED**], the plaintiff's father, gave evidence that for years when he worked as a tradie, he drank alcohol and would get drunk.[157] He also conceded that he could be loud and obnoxious after drinking.[158] Further, he accepted that he might have punched a hole in the wall here and there, but he said he never laid a hand on his kids.[159]

[176] The plaintiff's father gave evidence that, over the years, he had had arguments with his wife, as they had been together for a long time.[160]

[177] The plaintiff's father also gave evidence that the plaintiff was happy-go-lucky as a young child.[161] Further, his evidence was he did notice a change in the plaintiff and that she became very reclusive and kept to herself.[162]

[178] The plaintiff's brother, [**REDACTED**], also gave evidence that he had a great relationship with his father but had noticed arguments between his mother and father a couple of times a year.[163]

[179] The plaintiff's brother recalled the plaintiff at preschool age being obsessed with Care Bears, including singing and dancing in the loungeroom with the Care Bears' video. He also recalled the plaintiff wearing "little girl's clothes".[164]

[180] The plaintiff's brother also gave evidence that he noticed a change in the plaintiff in that she was not the same and was angry or sad.[165]

Psychologists and Psychiatrists

[181] The evidence and the submissions on behalf of the plaintiff also deal with the issue of failure to disclose the assault to treating psychologists and, the failure to disclose relevant family history to the psychiatrists who prepared reports for the proceeding.

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155 T3.59.32 to T3.60.45.
156 T3.60.44 to T3.61.5.
157 T3.106.23-33.
158 T3.107.2.
159 T3.107.29-34.
160 T3.107.47.
161 T3.109.11-12.
162 T3.109.19-32.
163 T4.46.22 to T4.47.20.
164 T4.48.25-38.
165 T4.48.44 to T4.49.2.

[182] In respect of the failure to disclose the circumstances of the assault to Ms Howie and Ms Quinn, and the failure to disclose fully to Ms Martin, the plaintiff submits that this is explained in the evidence. That is:

(a) The plaintiff did not disclose the assault to Ms Howie because she did not feel comfortable and was not ready to talk.[166]

(b) The plaintiff did not disclose the assault to Ms Quinn as she did not feel comfortable talking about it and it is still hard to talk about.[167]

(c) The plaintiff failed to provide complete disclosure to Ms Martin as she was trying to feel out whether she could tell her everything. The plaintiff also gave evidence that it was scary to talk about and it was really hard.[168] Further, she had a complete memory of the events at the time, but she was not sufficiently confident in her relationship with Ms Martin to make full disclosure.

[183] The plaintiff also submits that the evidence of Dr Duke supports this position in that it is not uncommon for psychiatrists to observe that survivors of sexual abuse do not always disclose their abuse at an earlier time for the reasons similar to those put forward by the plaintiff in evidence.[169]

[184] Ultimately, the plaintiff contends that the failures to disclose to Ms Howie and Ms Quinn, and the partial disclosure to Ms Martin, should not be regarded as forming the basis for a finding that the plaintiff is an unreliable historian.

[185] The plaintiff's submissions also address matters that arise for consideration in light of the plaintiff's failure to disclose to Dr Mathew and Dr Duke. This is in answer to a submission by the defendant that the failure to disclose the extent of her family problems and historical bullying to the psychiatrists supports the plaintiff being unreliable as a historian or deliberately dishonest.

[186] It is submitted that the plaintiff may not have disclosed the full details of her "dysfunctional" family history in part due to her difficulty engaging with males.

[187] The difficulties the plaintiff had in interacting with the psychiatrists included her raising these difficulties with Dr Mathew at the time of her interview.[170]

[188] Further, the plaintiff submits that the failure to disclose the full history of the family's dysfunction to Dr Mathew needs to be considered in light of the broader disclosure to Dr Duke, where the plaintiff did report her mother had a history of anxiety, her father had a past history of alcohol abuse, one of her brothers had a history of alcohol abuse and her other brother had a past history of illicit drug use.[171]

[189] It is submitted that if the plaintiff was deliberately withholding information from the psychiatrist, it would be inconsistent to withhold more information from Dr Mathew than Dr Duke where she had already disclosed a broader history of family dysfunction.

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166 T1.56.38-41.
167 T1.57.1-3.
168 T1.59.4-12.
169 T6.23.21-37.
170 Exhibit 1, tab 4, page 38.
171 Report of Dr Duke, 29 October 2019, Exhibit 1, tab 1, page 5.

[190] The plaintiff also submits that the evidence of other members of the plaintiff's family suggests that the complaints made to Ms Howie, Ms Quinn and Ms Martin were likely to be exaggerations of her circumstances. That is, the plaintiff found it easier to talk about "exaggerated" problems at home being the source of her distress rather than taking about the real cause of that distress.

[191] The plaintiff's submissions also engage with the evidence of CD in respect of the allegations made by the plaintiff. The plaintiff's submissions acknowledge that the evidence of CD was supported in part by the evidence of [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**] and [**REDACTED**].

[192] The plaintiff's submissions address a few particular aspects of CD's evidence, including:

(a) CD was employed as a cleaner and "never ever" undertook cleaning duties.

(b) The locks on the toilet doors and whether they could be opened from the outside.

(c) CD did not hand out Zooper Doopers to students as a reward for collecting rubbish.

[193] The plaintiff submits that despite the emphatic statement that he never undertook cleaning duties, CD did admit he may have undertaken cleaning duties from time to time, particularly if [**REDACTED**] was away.[172]

[194] The plaintiff accepts that CD's primary role was as groundsman. However, it is submitted he may have performed some occasional cleaning duties and, also performed maintenance from time to time.[173]

[195] The plaintiff also relies on CD being regularly in the vicinity of the toilet block where the alleged event occurred as the shed from which he conducted his groundsman activities was in the same building.[174]

[196] In respect of the locks on the toilet cubicle doors, the plaintiff notes:

(a) The evidence of CD that the toilet doors could only be opened by organising a small child to slide under the door and unlock the door, unscrewing the lock or breaking the door with a crowbar or other instrument.

(b) Other defence witnesses gave evidence that they were unaware that the locks could be opened from the outside and did not see any person do so.

(c) Later in cross-examination, CD conceded that the third option, breaking the door open, had never been used.

[197] When asked about whether he observed a teacher using a key to gain sufficient traction to shift the lock, CD answered, "I don't think it'd be very hard to do".[175]

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172 T5.42.25-49; T5.43.18-25.
173 T6.81.8-39 per [**REDACTED**].
174 T7.6.28-38 per [**REDACTED**].
175 T5.53.11. See further discussion of this evidence at [208] to [211] below.

[198] In relation to the Zooper Doopers, CD acknowledged that this would be an activity that might be disapproved of by the principal.

[199] Ultimately, the plaintiff contends that CD's rejection of the matters put to him in respect of these three issues supports a conclusion that his evidence is unreliable. Even making allowances for his health condition and age, the plaintiff ultimately submits that the Court ought not place an ordinate weight on his evidence, if the evidence of the plaintiff is accepted as being credible and reliable.

Defendant's case

[200] The defendant denies that the assault occurred as alleged by the plaintiff and submits that a finding ought to be made that the assault did not occur. The defendant relies on a number of different factors in support of that position, including an in-depth analysis of all of the evidence.

[201] The starting point is that the plaintiff has the persuasive onus, and it must be discharged to the *Briginshaw* standard. This is particularly so in circumstances where there are no eyewitnesses and only the plaintiff and CD can testify as to the alleged assault.

[202] The defendant also relies on the evidence of other staff members and a student from the School in 1999.

CD

[203] In relation to the evidence of CD, the defendant submits that the evidence establishes that he is a married man with [**REDACTED**] children, including [**REDACTED**] daughters. He has an "admirable impeccable reputation" and no allegation of wrongdoing has ever been made, concerning a student or otherwise.

[204] It is submitted that none of this evidence was challenged in cross-examination. Further, CD denies the allegations against him.

[205] The defendant submits that CD gave his evidence calmy and sensibly. His evidence was internally consistent, with an air of authenticity. He gave evidence in respect of key issues including his work role, the toilet door locks and the Zooper Dooper ice blocks.

[206] As to his work role, CD gave evidence as follows:

> "Yes. He was the only one. Not - not working with me. He only worked in the daytime as a cleaner.
>
> And if there was a day where [**REDACTED**] - - - ? - - - Wasn't there.
>
> Yes. Who - - -?---So - - -
>
> Who would do the tasks that he would otherwise do?---Well I probably had to do some of it. I'd empty the bins probably or something. But that's all. I wouldn't clean any houses or toilets or anything.
>
> I see. So when you said earlier on that you would never, ever have undertaken any cleaning task, that wasn't quite correct, was it?---Well,

> you know, I didn't - I never took - as a cleaner I never did it. I was always something to do with the grounds.
>
> So, is your evidence now that as a groundsman, you did some cleaning tasks?---No. I'm not a - well, I did some cleaning tasks to help him out, but that's all. Help them out, help the school out.
>
> Right?---That's all.
>
> So if necessary, if something had to be cleaned, you would step in and fill the breach if there was no one there who was able to help?---For goodness sake. You want to say I'm a cleaner, do you?"[176]

[207] Further, CD gave evidence as to the occasions when he entered the toilets by organising a staff member to investigate first that the toilets were empty and he entered the toilets with the staff member standing outside as follows:

> "How often do you recall that happening?—Like, twice in 20 years, I think. I can't - it might be a different time, because different numbers, but I think - I can only recall twice, and there was once there and once in the admin building."[177]

[208] As to the toilet door locks, the defendant submits that CD's evidence needs to be considered in full, namely:

> "Yes. Now, I suggest to you that the doors could be opened by a person using a small key or some other device; the key not to open the lock, but to effect sufficient traction on the part of the handle that swivelled to undo it?---Well, I don't know. I never did -I never knew that. I don't think it'd be very hard to do."[178]

[209] My recollection of CD's evidence, and my contemporaneous note, was that the witness's answer was that "it would be very hard to do": that is, it would be very hard to unlock the toilet door lock from the outside. The typed transcript reads as though CD's answer was to the contrary: that is, he did not think it would be very hard to do.

[210] I have reviewed the audio recording of this answer and there is a slight change in inflection between the statement "I don't think it" and the statement "would be very hard to do". The two statements run together in the recording, so it is understandable that they have been typed as a single sentence.

[211] However, having listened to the recording of the complete answer as set out above, the meaning is more probably that the witness was conveying he did not know if the lock could be opened from the outside (consistent with the preceding words of "I don't know", "I never did" and "I never knew that"), which was then qualified, that if it could be done, it would be very hard to do.

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176 T5.42.26-50.
177 T5.19.46-48.
178 T5.53.8-11.

Other witnesses

[212] The defendant also submits that the other witnesses called on behalf of the defendant also gave "authentic testimony".

[213] The defendant relies on the evidence of [**REDACTED**] in respect of CD being seen in his shed (which was a part of the toilet block at the opposite end of the toilets where the alleged assault occurred), including as follows:

> "What sort of activities did you observe in that period that [CD] undertook? Be as expansive as you're able to do, please? — I understood that he was the groundsman and that he would - had - he was usually there fairly early in the morning when I arrived, and he'd been out and about the grounds. He was often on a - a ride-on mower. He was in gardens. He was planting trees. He was - yeah, out sometimes on the oval as well. I suppose when there was a - a sports day, [CD] would make sure the - the grounds were neat and tidy. Yeah, mostly around the grounds, and then I saw more of [CD] when I moved in 1998 down to the - my other office, because his room where he'd have morning tea and lunch was - was attached actually to that toilet block. And I would see him. He'd come down the path on the ride-on mower and back in to his shed."[179]

The Plaintiff

[214] In contrast, the defendant submits that the plaintiff's evidence is to be considered in context, including that her "base reliability" is troubling.

[215] The defendant does not deny the plaintiff is suffering from psychiatric symptoms. The defendant contends that there is a clear alternative explanation for that psychiatric condition in the absence of the alleged assault. In this regard, reliance is placed on the psychiatric evidence from Dr Duke and Dr Mathew, including the supplementary opinion following provision of the true history of the plaintiff.[180]

[216] Further, the defendant contends that the plaintiff's own evidence establishes that she is a person who is prepared to be misleading or untruthful where it suits her. It is not necessary to determine conclusively whether this is for her own reasons, whether based on honesty, reliability or her psychiatric condition.

[217] This is consistent with the plaintiff's evidence where she admitted she had previously withheld information from her female General Practitioner, Dr Jacovou, and psychologists Ms Howie, Dr Quinn and Ms Martin. Except for Ms Howie, the plaintiff admitted that she enjoyed a good and reasonably trusting relationship with her psychologists. This was particularly so in respect of Ms Martin. Despite this, the plaintiff did not disclose the assault to them.

[218] Further, the disclosure of the assault given to Ms Martin by the plaintiff is inconsistent with her evidence at trial. In particular, it is inconsistent with the plaintiff's detailed, clear and unequivocal recollection of the assault in cross-examination.[181]

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179 T7.6.28-38.
180 Exhibit 11, para 1. T4.36.7.
181 T1.58.40-55 to T1.59.1-10. See also T2.51.5-45.

[219] The defendant contends that the plaintiff withheld the history of the alleged assault to her treating General Practitioner and psychologists and yet descended to great detail in respect of other aspects of her relationship with her family members and also her own personal circumstances, including bullying in secondary school. Her concern about them "judging" her, which she said explained why she did not disclose the alleged assault, did not extend to those details.

[220] The defendant submits that it is only in 2019, in the detailed attachment to the Notice of Claim,[182] that the plaintiff's recollection of the assault is recorded. There is no evidence that the plaintiff fully articulated her recollections prior to this time.

[221] After that time, the plaintiff met with psychiatrists for the purposes of the proceeding. The plaintiff in meeting with those psychiatrists, did not disclose her family history, and to some extent, the bullying. When the full details of her previous accounts of her family history and bullying were provided to the psychiatrists, this resulted in a shift in the opinions expressed and an expression of concern about her reliability. This is dealt with further, later in these reasons.

[222] The defendant also submits that events after 1999 are inconsistent with the occurrence of the alleged assault. In particular, the defendant points to:

(a) The plaintiff's evidence that in grades four to seven she interacted happily with her teachers and other students.

(b) The disclosed report card reflecting that her academic ability and participation continued unabated and successfully.[183]

(c) The report card in 2002 describes the plaintiff as undertaking leadership status in her class.[184]

[223] The defendant also takes issue with the plaintiff's evidence that she cropped her hair back to look like a boy. The defendant relies on Exhibit 17, being a 2002 school photo as depicting an attractive, feminine child with long well-groomed hair.

[224] In response at the trial, the plaintiff tendered Exhibit 18, being a photograph of the plaintiff taken close to Christmas in 2000 with Santa. The defendant contends that the photograph shows a shoulder length haircut with the plaintiff happily sitting on the lap of a man dressed as Santa, approximately a year after the alleged assault.

[225] The defendant submits that whilst the plaintiff's hair is shorter in the 2000 photograph, it could not be described as "cropped hair, boyish" as described by the plaintiff in her evidence.

[226] Further, the defendant contends that "it defies logic" that a nine-year-old child, making a complaint of serious assault for the first time in 20 years, could remember the precise and detailed events as outlined in the plaintiff's evidence. The evidence was in sequence and as to specific conversations that were had. It is contended that an assault of the nature alleged would diminish an ability to remember such detail, particularly by a child.

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182 Exhibit 9.
183 Exhibit 34.
184 T2.77.25-35.

[227] Reliance is also placed on the plaintiff's evidence that she returned to class following the alleged assault. The defendant relies on this as derogating from her contention that the assault occurred as alleged.

[228] Related to this, the defendant contends that the plaintiff's evidence needs to be considered in the following context:

(a) The plaintiff liked her teacher, [**REDACTED**] and described her as caring and competent.

(b) The evidence from [**REDACTED**] and the other teaching staff was consistent with this.

(c) [**REDACTED**] told the plaintiff when she was permitted to go to the toilet to be quick.[185]

(d) Based on the plaintiff's evidence, she must have been gone for a protracted period, which would have been likely to raise concern with [**REDACTED**].

(e) When the plaintiff returned to the classroom, she was able to completely mask her emotions from what the plaintiff self-described as a "horrible" event. Again, the defendant submits that this occurred where the caring teacher remained oblivious to it.

(f) The plaintiff says that the incident happened in the morning, and consequently she remained in the class for the balance of the day.

(g) [**REDACTED**] gave evidence that as a matter of practice, she was attentive to protracted absences when students went to the toilet and to any upset student. It is submitted that this evidence ought to be accepted. This is supported by other evidence from [**REDACTED**] and others that she was a careful, attentive teacher concerned about children being safe and comfortable.[186]

[229] It is in this context, that the defendant contends that if the plaintiff was away for the time required in relation to the alleged assault, this would have resulted in a response by the teacher, [**REDACTED**].

[230] Not only was the plaintiff on her evidence able to keep her emotional upset and physical bleeding secret from her teacher, but also was able to keep it from her mother after school. This is in the further context that the plaintiff described she had a close relationship with her mother. Ultimately, the defendant contends that this is illogical.

[231] The cross-examination of the plaintiff also addressed a number of physical aspects of the alleged assault. This included evidence in relation to the cubical size and physical positions of both the plaintiff and CD at various times during the alleged assault. Ultimately, the defendant contends that these militate against the Court accepting the plaintiff's evidence, particularly in relation to the penile intercourse alleged. This is considered further later in these reasons.

[232] The defendant also identifies a number of other inconsistencies in the plaintiff's evidence relevant to the ultimate issue to be determined, including:

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185 T1.46.27-28.

186 T6.37.35-45; T6.38.5-25; T6.39.1-5; T6.39.10; T6.41.45; T6.42.35.

(a) How CD was able to immediately enter the locked cubicle. It is only the plaintiff's evidence that the doors could be relatively easily opened from the outside.

(b) The cubicle door was left open during the alleged assault and anyone entering the toilet block at any time could have readily observed what was occurring. This is also in the context where the main school path was only a few metres from the entrance to the toilets[187] and the plaintiff could have screamed at any time, despite being told, on the plaintiff's evidence, to be quiet.

(c) A person with knowledge of this School would appreciate that a child visiting the toilet would be expected back in class promptly. That is, they would be missed if they were absent for a protracted period, and this would be noticed by a caring member of the teaching staff.

[233] It is in these circumstances that the defendant contends that these issues go to the probability of the alleged assault occurring. That is, the probability of a person in CD's position, knowing the school and being familiar with its operation, risking detection of an assault on a child, particularly to the extent of engaging in penetrative penile intercourse.

[234] Another inconsistency identified by the defendant is the allegation that CD handed out ice blocks. This was supported by evidence of other witnesses that they had never observed him doing so. This was strongly denied by CD himself. The evidence in relation to this issue is further considered later in these reasons.

[235] However, central to the evaluation of the plaintiff's evidence is the shift in the evidence of the plaintiff in respect of this issue. The defendant submits that in evidence in chief, the plaintiff gave evidence that she saw CD handing out ice blocks to students for rubbish collection.[188] However, in cross-examination, the plaintiff's evidence was that she never actually saw it but heard about it and may have seen him with ice blocks.[189]

[236] Another contentious issue is the duties undertaken by CD. The defendant contends that at no time was CD a cleaner but only a groundsman. The preponderance of the evidence of the witnesses called on behalf of the defendant is consistent with this. It is only the evidence of the plaintiff and her sister to the contrary. The defendant contends that the evidence of the plaintiff and her sister ought not to be accepted in this regard.

[237] The defendant also points to an inconsistency in the plaintiff's evidence as to what CD wore in 2019. In the 2019 Notice of Claim Annexure,[190] the plaintiff described CD wore "sandy khaki". In her evidence at trial, this was described as a greener colour. However, it is submitted that by the time of trial, photographs had been disclosed which depict CD in a colour more closely described as green. It is submitted in these circumstances that the plaintiff's evidence is disingenuous.[191]

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187 Exhibits 8 and 8A.
188 T2.45.30.
189 T2.84.37 to T2.85.15.
190 Exhibit 9.
191 T2.86.41-45.

[238] In this regard, the defendant relies upon the 1999 staff photo[192] depicting CD wearing green which is consistent with the green that, on the evidence, CD had worn since shortly after commencing at the School.[193] This is also consistent with evidence from [**REDACTED**],[194] [**REDACTED**],[195] [**REDACTED**][196] and [**REDACTED**].[197]

[239] The defendant also relies on a number of other matters relevant to the probability of the assault occurring.

[240] CD worked at the School from [**REDACTED**]. In 1999, when the assault was alleged to have occurred, he had been at the School for approximately [**REDACTED**] years. CD was highly regarded by his peers and no allegation of wrongdoing by him has ever been alleged. CD has retired and faces this assault allegation decades after it is said to have occurred. This has been distressing for CD.

[241] CD gave evidence at the trial and strenuously denied the occurrence of the alleged assault.[198] The defendant contends that despite his overall calm and candid demeanour in evidence, it was plain that CD was incensed by the allegation of the assault.

[242] The plaintiff was nine years of age at the time of the alleged assault and in grade 3. The plaintiff's evidence was that she retained full knowledge of the assault from the time of its occurrence. However, she did not make any complaint of the alleged assault for 20 years. A full statement of the complaint was only made to her solicitors in 2019.

[243] This non-disclosure occurred despite the plaintiff being treated by a trusted long-term General Practitioner and then three psychologists in the period from 2013 to 2017.

[244] In 2017, in sessions with Ms Martin, the plaintiff did make a partial disclosure. The plaintiff had a positive relationship with Ms Martin and the plaintiff's own evidence was that she was determined "to tell her the truth". However, it is contended that what was disclosed was different.

[245] The defendant relies on the inconsistencies in the evidence between what was told to Ms Martin by the plaintiff and the plaintiff's ultimate evidence at the trial. This is further reinforced by the statement, recorded in notes, to Ms Martin in 2017 that the partial disclosure was "triggered" by her mother's own abuse case which settled in [**REDACTED**].

[246] The records of Ms Martin are in evidence and the entry in respect of 11 July 2017 states as follows:[199]

> "- flashbacks – fleeting image/intrusive thoughts/memories – sinking feeling in stomach, feel like forgotten something, 'fear of knowing

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192 Exhibit 1, tab 32, page 768.
193 T5.21.30-33.
194 T6.53.21-23.
195 T6.62.34-37.
196 T7.8.20-28.
197 T7.29.11-15.
198 T5.26.1-10; T5.59; T5.60; T5.61.
199 Exhibit 1, tab 25, pages 402-403.

what I'm forgetting', 'I stomp it down', shut down, tense can't speak, feels like lungs in throat

- Mum's court case (sexual abuse) triggered something
- 'freaked out' as she was naked in the shower

…

childhood trauma:

- partial memories – janitor/groundskeeper at school in the girls' toilet when she was nine years old stated she thinks that something happened stated she had only disclosed this to her mum and was always protective of her little sister doesn't go to toilets and stays away from public toilets."

[247] In her evidence, the plaintiff acknowledged that this was an untruthful statement and ultimately stated:

> "But this person that you were speaking to, Ms Martin, that you say that you were prepared to lie to her; is that correct?---At that time, yes."[200]

[248] In any event, the defendant contends that the statement made to Ms Martin in 2017 is clearly inconsistent with the plaintiff's evidence of her recollection of the alleged assault at trial.

[249] The defendant in submissions also addresses the reliability of the plaintiff's evidence by identifying particular aspects of the evidence in relation to:

(a) Inconsistencies;

(b) Non-disclosure/partial disclosure; and

(c) Lying to treatment providers and doctors.

[250] It is necessary to consider this evidence in detail.

[251] Ultimately, the defendant contends that the Court should conclude that the plaintiff was an unreliable and unsatisfactory witness who was prepared at times, on her own admission, to lie when it suited her purposes, to withhold information and to be selective about what she disclosed. In this regard, the defendant relies upon statements made to the plaintiff's General Practitioner, treating psychologists, and also the two expert psychiatrists who gave reports in respect of this proceeding.

[252] The defendant relies on the number of "compounding improbabilities" as ultimately undermining the plaintiff's evidence.[201]

[253] In respect of Dr Hayley Quinn, the relevant records are contained in Exhibit 1, tab 22, pages 362-381. The entries in the records were put to the plaintiff in cross-examination.

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200 T2.50.44 to T2.52.18.

201 See *Pell v The Queen* (2020) 268 CLR 123.

[254] The relevant transcript extracts include:

"T1.34.39-41:

> Did you tell Dr Quinn that your father's violence was directed not towards you but towards your mother?---My father's never been physically violent towards anyone in my family.

T1.35.5-6:

> Did you tell Dr Quinn that your father used to punch walls?---If that's how she's written it down, that's, I guess, how she's interpreted it. So, yes.

T1.35.40-49:

> I suggest to you that in fact, in truth, he was verbally and emotionally abusive still, in 2014?---At the time of me telling her something like that, I probably would have felt that, yes.
>
> When you say you would have felt that, does that mean it might or might be - might not be true?---When I say that, it's I can't recall my entire feelings at that time. Like, when I go to see these psychologists at the time, whatever is on my mind at that point is what I will tell them. So if I tell them about my family on that day, it's because I would prefer to talk about my family on that day, because I feel like that's what I would rather be speaking about.'

T1.36.2:

> And you're telling the truth?---It's the truth. Probably a bit exaggerated truth.

T1.37.17-31:

> All right. Let's just be clear about this. I suggest to you that you told Dr Quinn that your mother said to you that she didn't want you going anywhere because you might be kidnapped, raped or murdered?---I most likely did say that, because I would – I didn't want to see psychologists in the first place, so I would paint my mum as the villain.
>
> So it was an untrue statement, if it was made?---It's not an entirely untrue statement, because my mum didn't - she never told me I couldn't, but she didn't like the thought or, like, know the area, but it's not the best of areas.
>
> Did your mother say, at some point, something about you being kidnapped, raped or murdered if you went out?---Not to my recollection, no.
>
> Not to your recollection now, perhaps?---Not to my recollection.'

[255] Further, the plaintiff indicated in evidence that Dr Quinn had "misinterpreted what the plaintiff had said."[202]

[256] Similarly, the defendant relies on disclosures made to Ms Howie. The relevant records are in evidence at Exhibit 1, tab 23, pages 382-396. The contents of these records were also put in the plaintiff in cross-examination.

[257] The transcript extracts include:

T1.79.34-49:

> "I'll ask you the question again. Did you tell Ms Howie that your father was an ex alcoholic?---I – I don't recall. Possibly.
>
> Okay. But if you were being asked that now by reference to 2013, that was a truthful statement, wasn't it, he was an ex-alcoholic?---I don't know if he was an alcoholic or not, I just know that he would sometimes drink.
>
> Okay. Did you tell Ms Howie when you attended upon her in 2013 that your father was possessive and explosive?---Quite possibly. Yes.
>
> And I suggest to you that was an accurate description of your father at that time in 2013?---In the moment, as I was feeling it, yes.
>
> Thank you?---But that's also because I tend to take things that I'm feeling or things that are happening at the time and throw that out as the most extreme as I can to stop from talking about what's actually going on in my life."

T1.80.2-19:

> "So are you attempting to explain to her Honour that sometimes you say things which are untrue because you feel you need to say them?---That's not quite what I said, no.
>
> Well, what do you mean?---I mean at the time, say, before I was going to go see the psychologist, that I didn't want to see in the first place, that I felt like my mum or my dad were making me go, then I would paint them as a control freak or something because I would feel that in that moment because I didn't want to go to the psychologists.
>
> So were you - are you saying that, in about 2013 at least, you were prepared to tell a psychologist that you were consulting for counselling; something which was untrue because your parents had forced you to go and see them?---In that moment when I was feeling at its height of emotions, I did feel that it was truth. What I'm saying is that, when emotions are high, you feel things differently to how - once you calm down, they---

---

202 T2.28.15-20.

> So when emotions are high, are you prepared to say you were assaulted in the toilets at [**REDACTED**] in 1999?---No, because that is what happened."

[258] In respect of disclosures made to Ms Daile Martin, the defendant has undertaken a similar exercise. The relevant records are contained in Exhibit 1, tab 25, pages 400-413.

[259] The defendant relies upon the following transcript extracts of the plaintiff's evidence:

T1.75.18-39:

> "Now, did Dr Jacovou and the psychologists ask you many questions about your mental health?---Yes.
>
> And they asked you many questions about your life experiences?---Yes.
>
> Did they ask you questions about your family history?---Yes, they asked a lot of questions about a lot of things.
>
> Yes. And they asked you questions about your school experiences right through to when you left school; isn't that correct?---Yes.
>
> And you knew, didn't you, that it was important for you to respond to those questions truthfully and accurately?---Yes.
>
> And were you truthful and accurate in responding to their questions?---Not always.
>
> Not always. And what matters were you untruthful about?---When I was seeing Dr Martin, instead of disclosing everything, I would only give her partial information.
>
> I'll come to Dr Martin later in some detail, but do you recall that you saw her on about nine occasions?---Around about. Yes."

T2.51.5-49:

> "Did you tell Ms Martin words to the effect, and I quote you, that you had:
>
> Fear of knowing what I'm forgetting.
> I had fear in general of the whole thing, so I sort of said that, yes.
>
> Was that not true?---Not entirely, because I do every day fear in remembering the - the memories.
>
> Well, what part of it was untrue?---How much I told her. I could've told her more, but I didn't.
>
> What were you forgetting?---I wasn't forgetting anything. I was forgetting how to speak, if anything.

So when you said that you were forgetting something when you said 'Fear of knowing what I'm forgetting', was it untrue that you were forgetting something?---Yes.

All right. So you were prepared to tell her an untruth; is that correct?---In - - -

Is that true or untrue?---At that moment, yes.

Did you tell her also, and I quote you:
I need to stomp it down.

?---I want to stomp it down, yes.

No, I need - I'm asking you about what you said to her?---I said that, yes, because I would still like to stomp it down.

Did you tell her - that is, did you tell Ms Martin - that your mother's court case for sexual abuse had triggered something in your mind?---That was an excuse.

Did you say that to Ms Martin?---I said that, yes.

Was that untrue?---It was an excuse, yes.

Was it untrue?---Please don't yell at me.

Take your time. Have a glass of water?---Yes, it was untrue. It brought everything up more to the surface, but it's not that I forgot anything.

So you were prepared to tell Ms Martin an untruth, were you, on your evidence?---I..."

T1.52.1-18 (emphasis added):

"...didn't know her.

You came to know her very well, didn't you, over nine to 10 sessions; isn't that so?---I wouldn't sa - I wouldn't say very well, but I did come to build a, sort of, relationship with her.

I understood you say in evidence that you formed quite a good relationship with her?---Yeah.

To the point whereby you felt a degree of trust in her; is that correct?---I did trust her more than Hayleigh Quinn or Amii Howie, yes.

And you liked her?---As a person she was lovely.

Lovely?---Yeah.

But this person that you were speaking to, Ms Martin, that you say that you were prepared to lie to her; is that correct?---At that time, yes."

T2.53.22-37 (emphasis added):

> "--- on her part. Okay. Did you tell Ms Martin that - when you were sharing, and I quote you, you 'freaked out'?---Yes.
>
> Did you tell Ms Martin words to the effect that you had partial memories of a janitor or grounds keeper at your school when you were 9 years of old - 9 years of age?---Yes. I did tell her that.
>
> And was that, on your evidence, untrue?---That was untrue. I didn't have partial - I knew.
>
> But you were nonetheless prepared to tell Ms Martin a lie about that?---I - as I said, I didn't know her very well at that point, so, yes.
>
> **The answer is you were prepared to tell her a lie?---At that point ---**
>
> **Is that correct?--- - - - yes.**"

T2.54.45:

> "Is that correct? Did you tell Ms Martin when you consulted her words to the effect that - about these partial memories, you thought that something had happened at the time?---I was very vague with her. Yes.
>
> That is, you were very vague with her?---I was very vague with Ms Martin. Yes.
> All right. And on your evidence, was that untrue?---It's untrue."

T2.55.1-20 (emphasis added):

> "Did you say that was untrue?---Yes.
>
> So what you said to her in that regard on your evidence, that was a lie?---A partial lie. It was more withholding ---
>
> It's a partial lie?--- - - - the full extent of the truth.
>
> On the basis of what you could remember of the events that you say occurred in - I should say, 1999, was it not a lie for you to say to Ms Martin that you thought that something had happened in the toilets?---I would have said that 'I thought' instead of 'I know'.
>
> **Was that a lie?---If - yes.**
>
> Thank you. Was it the case, madam, that shortly before you first consulted Ms Martin that you had developed some memories that something may have happened to you at the college in the toilets when you were nine years of age?---I had memories. I didn't know this woman. I wasn't prepared to talk to her openly yet."

T2.68.10-20 (emphasis added):

> "No. Did I understand that that's what you said?---I did say that. Yes.
>
> Thank you. **Well, in fact, lying is what you did on a number of occasions when you were speaking to Ms Howie, Dr Quinn, and Ms Martin, from what you've already told us; isn't that right?---I withheld information from them. Yes.**
>
> **No. You lied to them. You told me this morning that you lied to Ms Martin, didn't you?---Ms Martin I didn't tell the entire truth to. Yes.**
>
> No. You lied to her?---I didn't lie to Ms Quinn or to Ms Howie.[203]
>
> **Did you lie to Ms Martin?---If not telling the entire story is lying, then yes."**

T2.69.20-31 (emphasis added):

> "You were untruthful with her, weren't you?---If I was untruthful with her, if that's - - -
>
> Okay. So it was a lie?---If - - -
>
> Can I start again?---No. I - - -
>
> You were deliberately untruthful to her?---I didn't intend for it to be untruthful. I was scared to go into detail.
>
> **You were deliberately untruthful with her, because you say you were scared to go into detail?---Yes.**"

T2.50.33 to T2.51.1:

> "When you were speaking to Ms Martin in 2004 - in 2017, did you - I withdraw that question. You've already given evidence, haven't you, that when you were just - in 2017, you had a very clear recollection of the events which had occurred in 2009
>
> ?---Yes.
> And you said in evidence yesterday that, when you went to see Ms Martin, you were determined to tell her about the 1999 events?---I wanted to, yes.
>
> And you could've told her if you wanted to; couldn't you?---I tried to the best I could.
>
> You could've told her if you wanted to; couldn't you?---Yes.
>
> Did you say yes?---Yes.

---

[203] The defendant submits that although the plaintiff tried to distance herself from her lie with Dr Quinn, this is inconsistent with her earlier evidence at T2.37.17-21 wherein she describes how she would paint her mother as the villain.

> What you told Ms Martin, didn't you, was that, two weeks before, you had experienced mental flashbacks and intrusive thoughts when you were showering? ... Yes."

[260] Further, contrary to what has been submitted by the plaintiff, the defendant submits that the evidence of the plaintiff's sister, mother, father and brother does not support the allegations and history provided by the plaintiff.

[261] Another area that was analysed in considerable detail in the defendant's submissions are the nondisclosures to Dr Duke and Dr Mathew for the purposes of their reports in the proceeding. Both psychiatrists, having been given further information in respect of the plaintiff's and her family's history, expressed the views that the nondisclosures were of some significance.

[262] In particular, Dr Mathew provided a supplementary report[204] where he stated:

> "At interview, [the plaintiff] did not disclose the intrafamily disturbance. This was a significant omission. Dr Duke and I only came to know of this when provided with additional material. Thus, whether consciously or not, [the plaintiff] minimised the non-abuse-related factors. On this basis, [the plaintiff's] reliability as a historian needed to be considered."

[263] Further, Dr Duke provide a supplementary report[205] where he stated:

> "This inconsistency does raise questions either with regard to [the plaintiff's] reliability as a historian, or with regard to the reliability of her memories of events."

[264] The disclosures, or rather the nondisclosures, to the psychiatrists were put to the plaintiff in cross-examination and extracts of the transcript of that evidence include as follows:

> T2.71.15-40:
>
> > When you went to see Dr Duke in 2019, he asked you about your personal history, didn't he?---Yes.
> >
> > And you told him more, though, didn't you?---Who, sorry?
> >
> > Dr Duke?---Please - - -
> >
> > Dr Duke. I'm focusing on Dr Duke now, not Dr Mathews. He asked you about your personal history as well, didn't he?---Yes, he did.
> > And you told him that your mother had a history of anxiety for which she had consulted a psychologist?---Yes. Yes, I did say that.
> >
> > And that's all you said about your mother?---That she'd had anxiety, yes.

---

204 Exhibit 1, tab 8, pages 75-76.
205 Exhibit 1, tab 2, page 14.

I beg your pardon?---That she had anxiety and was seeking help with it, yes.

And you told him nothing else; do you agree with that? About your mother?---I don't recall anything else.

Did you tell Dr Duke about your father; that he had a past history of alcohol use?---I don't recall. I think so.

You did not tell Dr Duke, though, anything else about your father and his history within your family?---I was trying to answer Dr Duke's questions. I think he did better at asking me more, so I could give him more to work with.

T2.75.35-45:

When you saw Dr Duke, did you tell him that one of your brothers had a past history of drug use, for which he was attending rehabilitation?---I do think that I did, yes.

All right. And you were referring there, weren't you, to your brother [**REDACTED**]?---Yes.

Is it correct to say that you didn't tell Dr Duke anything more about [**REDACTED**], to your recollection?---I don't recall. I'm sorry. It was a stressful situation being there with him.

T2.76.1-49:

Is it correct to say you didn't tell Dr Duke about anything concerning lack of support from your family, which you had felt in the past?---I don't recall. I'm sorry.

Thank you. Is it the case that you did not tell Dr Duke anything about any exchange which you'd had with your brother [**REDACTED**] at any time concerning you self-harming?---I don't recall.

You don't recall whether or not you told Dr Duke that?---I don't because, like I said before, I asked Dr Duke before I went in there if he could lead the conversation, because I'm terrible at articulating words and speaking with men. So I'm not - I'm not sure.

Is it correct that you did not tell Dr Duke anything concerning you self-harming and your discussions about that with your mother?---I don't recall. I thought I did tell him that I self-harmed at that - - -

And involving your mother?---Oh, no.

So it's correct that you didn't have any discussions with him - that is, Dr Duke - telling him about you self-harming and what your mother might have discussed with you on any occasion?---I don't recall. I do remember speaking to him about self-harming, but I'm not sure where the conversation went from there.

Is it correct that you did not tell Dr Duke that you had been anxious even before you commenced school?---I don't recall. I do believe I told him I was a shy kid; grew up, like, very shy. But I don't recall.

Is it correct that you did not tell Dr Duke about the verbal and physical bullying to which you were subjected in secondary school?---I thought I did tell him about that.

Are you saying that you did tell him?---I don't recall. I thought I did.
Is it correct - if I can just go back, please, to now Dr [Mathew]. I'm not speaking about Dr Duke; Dr [Mathew]. Do you understand that?---Yeah, the second.

Is it the case that you did not tell Dr [Mathew] about your verbal and physical bullying when you were at high school?---Again, I thought that I did, but I don't recall. I thought I did.

Coming back to Dr Duke, if I may – so I'm back to Dr Duke; do you understand that?---Yes.
In giving your history to Dr Duke, were you intent on seeking, in answering his questions, to attribute your mental health problems to the alleged abuse of 1999?---I was trying to answer his questions as thoroughly and as accurately as I could.

And was he, to your knowledge, writing a report, in effect, on the same issues as Dr [Mathew] was writing the report? You knew he was covering the same ground?---Yeah, I - I think so, yeah.

T2.70.40 to T2.71.13:

Those things involving the family that you told to the psychologists, they were really stressful things in your life, weren't they?---They were at the time, yes.

Yeah, and when you went to see Dr Mathew in 2019 at the request of your solicitors, you told him nothing about those family matters, other than your mother was anxious?---That is what I said. But when I went to see him as well, I did try to explain to him before we started speaking that, when it came to speaking with especially men, I lock up and I freeze up and I have trouble to speak, so please, when you're asking questions, make them very clear and not vague so I can sort of yes-or-no answer them. Like, I made that request when I saw him.

Do you recall doing that, do you?---I do, because I was terrified to see him. I had my dad sitting outside the - in the waiting room, and I was terrified that he was going to leave.

All right. So Dr Mathew presumably has made a note of you saying that to him?---I hope so.

You don't recall that at all, do you?---Yes, I - - -

Saying that to Dr Mathew?---Yes, I do. Yes, I do.

Did you say it to Dr Duke as well?---I did say it to Dr Duke as well.

T2.67.40-49 to T2.68.1-6:

In the various respects I've taken you through in cross-examination, by reference to apparently what they wrote down; do you agree with that?---Yeah.

But you told Dr Mathew nothing about those matters; that's right, isn't it?---I was trying to answer his questions the best that I could with what he was asking me.

You deliberately withheld that information from him, didn't you?---I did not deliberately withhold anything.

Did you deliberately withhold it from him, because you didn't think it assists your cause in having him say that your mental health issues were due to the 1999 abuse that you alleged?---I didn't intentionally withhold anything from him. I was doing my best to speak to him being a man, in a locked room with him. I really was doing my best, because I wanted the most - you know, I wanted this to be as - I - I don't like lying. I don't like - I've sworn on - I'm a Catholic woman myself. Like, I wanted - for a start, I wanted the help as well.

T2.66.10-36:

Do you agree also that you told him nothing else about your family history?---I don't recall, I'm sorry.

Well, you've read the reports?---I have read the reports.

So can I put to you that you told him nothing about the conduct of your father during the course of your life, that I've asked you so many questions about thus far in the cross-examination?---He would ask me questions and they're about how I felt about my family and such, and I love my family. I don't - - -

All right, can you - can I ask you to focus on the question? I'm sorry?---I'm really trying. I'm really sorry.

Okay. Well, I'll - I'm happy to ask - I said to you at the outset, yesterday?---Yeah.

I'm happy to repeat or rephrase a question?---I'm sorry, I do dissociate a little bit when I'm - - -

Thank you- - - under pressure, and I'm feeling that a little bit.

Okay. Just - that's all right. Just focus on my question. Do you agree that you told Dr Mathew nothing about the conduct of your father in the course of your family life?---Sorry, I'm just trying to think back. Because I'm - I'm sure I've mentioned to

> him that, with Dad being unwell, he could be grumpy and mood-swingy.
>
> Just let me understand that. You're swearing on oath that you are sure that you told Dr Mathew that your father was grumpy and had mood swings?---If he was unwell.
>
> Right?---Because I - I believe I spoke to Dr Mathew about my dad's health and the stressors that came with that.
>
> Did you tell Dr Mathew as well about the fact that your father had been an alcoholic?---I don't recall.
>
> You don't recall? Did you tell Dr Mathew that your father had been violent at times?---I - I don't recall. When I was in the room with Dr Mathew, I was on such high tension, I - - -
>
> All right?---There's likely things I did leave out because I was so worked up, being locked in a room with him by myself."

[265] The defendant also points to a number of other matters after 1999 which are also inconsistent with the plaintiff's evidence.

Maintenance of good grades at the School

[266] Contemporaneous documentary evidence supports the conclusion that there was no deterioration in the plaintiff until the plaintiff was subject to the bullying at [**REDACTED**] high school. This includes:

(a) The School report card from 2002.[206]

(b) Resume of the plaintiff.[207]

[267] The defendant also relies on evidence from the plaintiff which supports this position, namely:

T1.52.44-47:

> How did you perform in class?---Academically, I think I still did pretty okay. Like, I felt safe in my classroom because I had the other students there, I had my teacher there, and like I - I said, I - I genuinely like study; I like learning. I just - it was outside of the classroom where I would start getting anxious or self-conscious.

T2.77.24-29:

> You enjoyed good grades when you were at primary school?---Yes.
>
> And you enjoyed good grades when you were at primary school after Grade 3, namely from Grades 4 to 7?---I did, yes.

---

206 Exhibit 1, tab 33, page 769.

207 Exhibit 13, page 1.

> And you gave evidence about that earlier; didn't you?---Yes, I did.
>
> You were happy at school in Grades 4 to 7; weren't you?---I was happy to learn at school, yes.
>
> And you were happy at school?---While I was in the classroom, yes.

T3.4.18-24:

> And do you recall you said in evidence that- and indeed your evidence-in-chief as well, that your academic performance at school continued as it has previously?---I was good academically. Yes.
>
> Thank you. And your academic performance was good, wasn't it?---Yes.
>
> And that was both before and after 1999?---Yes.

[268] The defendant also points to evidence of the plaintiff's mother which is supportive of this conclusion:

T3.54.9-17 [**REDACTED**]:

> And can you describe her early years of schooling?---She loved school to start off with. Absolutely loved it.
>
> Did you view your report cards?---Yeah. She did well at school.
>
> And how was she doing academically?---Good. Really good. She's a very smart girl.
>
> And to your knowledge, did she have friends at school?---Yes.

Locks on toilet doors could not be 'pushed' open

[269] As indicated previously, there is also evidence in relation to the locks on the toilet doors. The plaintiff's primary evidence was that the door to the toilet cubicle was opened by CD simply pushing it.[208] It is submitted that the overwhelming evidence is that this could not be done as simply as this.

[270] In this regard, the defendant relies on the following evidence:

(a) [**REDACTED**] at T6.59.19-26:

> "Could – can you recall whether you could open them from the outside?---No.
>
> You can't recall or you couldn't?---I can re - no, sorry. It's - you can't open it from the outside.
>
> How do you know that?---Because I used to have friends that would come with me in the toilet and they wouldn't be able to -

---

208 T1.48.48-49.

> if they were trying to get in just for a joke, but they wouldn't be able to get in."

(b) [**REDACTED**] at T7.32.19-26:

> "Thank you. But could you give to her Honour your recollection as to whether there was other - any other means of opening a cubicle door, other than the manner you just indicated, in the primary school toilets?---No. My recollection is that there was no other way of opening the door from the outside. My best recollection is that there was a metal plate, and it did have the occupied or vacant on it. But - and I'm - there were four screws that secured it to the door, and my recollection is that there was no safety means from the outside. I think this was planned and designed in the mid-80s. I don't think they were - the doors were compliant as they are now."

(c) CD at T5.20.9-47:

> "Was there a problem that arose in the toilets from time to time, concerning doors being locked?---Sometimes.
>
> All right. Could you tell her Honour about those problems, please?---Well, your Honour, I'm trying to tell you that, at times, little boys - especially in the boys' room - would lock the toilets, crawl out underneath the partitions and buzz off. So the only way you could get into them was to get the boys back again and say, "Right, fellas" – or the girls. Mostly it was the boys' toilets, that would happen. Get them back in; climb out - underneath the rails again - underneath the partitions, which are those cubicle-type things - and unlock it from the inside. Because that's the only way you could unlock them. Or if I had to, it would take me 10 or 15 minutes to unscrew the lock from the outside.
>
> Would you need to - a piece of equipment or a tool to do that?---I would. I would need at least a big screwdriver or, if I had to, I would have to jerry the whole door open, and it would wreck the cubicle and the door and the lock.
>
> So - - -?---So I didn't like to do that too often.
>
> So if I understand your evidence, short of having someone climb under the door, there were two mechanical methods of undertaking the unlocking of the door; is that correct?---Mmm.
>
> And you've identified one being unscrewing the lock; is that correct?---Correct
>
> And the - - -?---Or otherwise, you'd jimmy it open.
>
> I see. And the second one is jimmying it open?---Yes.

> What sort of tool would you use for that?---You'd need a wrecking bar or something; a small crew - crowbar type of thing.
>
> Was the second more destructive than the first?---It was.
>
> What do you say the - to the suggestion that, in respect of these locks, if a door was locked and you needed to open it, that there was on the outside of the door some sort of slit or space into which you could put a screwdriver or a key or some other instrument to unlock the door?---If there was, I didn't know it. I didn't know anything about it."

[271] It is submitted that the consistent general evidence is that the locked toilet cubicle could be opened by a child crawling underneath the door and unlocking the door, dismantling the lock with a screwdriver, or using a crowbar.

[272] It is submitted that the only evidence that the locks on the toilet doors could be unlocked from the outside is from the plaintiff.[209]

[273] [**REDACTED**] also gave evidence as to an incident where she could not get into a [**REDACTED**] toilet cubicle.[210]

[274] Given the passage of time, the toilet block has been demolished so there was no ability to have any physical evidence about the nature of the locks on the toilet doors.

[275] The defendant contends that the plaintiff's evidence in relation to the locks is contrary to all the evidence adduced. The plaintiff's sister did not give any evidence on this issue.

Zooper Dooper ice blocks

[276] In respect of the Zooper Dooper ice blocks, the ultimate evidence by the plaintiff was that she had never actually observed CD giving out Zooper Doopers herself.[211] The defendant contends that this is a strong part of the plaintiff's case.

[277] The evidence of the plaintiff's sister is the only evidence consistent with the plaintiff's evidence. The plaintiff's sister, who left the School in grade 3, is contrary to the evidence of other adult witnesses including [**REDACTED**],[212] [**REDACTED**],[213] [**REDACTED**],[214] [**REDACTED**][215] and [**REDACTED**].[216]

[278] The defendant contends that the plaintiff's sister's evidence is not independent and should not be accepted.

[279] There are also other inconsistencies in respect of the plaintiff's evidence. When further questioned in cross-examination, the plaintiff gave evidence that students

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209 T2.87.3-34.
210 T7.14.22 to T7.15.20.
211 T2.84.30-45; T2.85.1-15.
212 T6.41.13-17.
213 T6.52.13-16; T6.55.18-21.
214 T6.69.35-37.
215 T7.29.30-33.
216 T7.7.44-47.

would also be given a "Sunny Boy" if they were lucky, rather than a Zooper Dooper. This is a change from that previously given in evidence by the plaintiff and the annexure to the Notice of Claim.[217]

Details of alleged assault

[280] It is also necessary to consider the plaintiff's detailed evidence in respect of the alleged assault. This is particularly so where the defendant submits that the plaintiff's evidence is "riddled with inconsistencies and incredulity, let alone being physically impossible".[218]

[281] Further, the defendant contends that the plaintiff's version evolved from the opening, her evidence-in-chief and then cross-examination.

[282] The plaintiff's evidence-in-chief has been summarised earlier in these reasons. The defendant particularly points to specific extracts from the cross-examination which the defendant says make out this contention. These extracts of the transcript are set out at Annexure A.

Further consideration and conclusion

[283] There is no doubt the plaintiff was clearly distressed by giving evidence in respect of the assault. The plaintiff was given breaks on a number of occasions in order for her to be able to continue with her evidence. This distress does not impact on the credibility of the plaintiff. Giving evidence in the courtroom environment is stressful for witnesses, and more so if they are having to deal with personal and distressing matters such as that addressed by the plaintiff in her evidence.

[284] However, the adversarial system provides for the ability to test a witness, particularly a party's evidence, including putting inconsistencies to the witness. Consequently, the circumstances of the alleged assault, the plaintiff's family's history, and the plaintiff's disclosures of the alleged assault, including her interactions with psychologists and psychiatrists, were examined in detail. This included putting various inconsistencies to the plaintiff during the course of cross-examination.

[285] Counsel on behalf of the plaintiff submitted that, given the plaintiff's distress during cross-examination, any evidence of the plaintiff, including any inconsistencies during the course of the cross-examination, must be approached with caution.

[286] Given the particular nature of this case, for the plaintiff to succeed on the claim, the plaintiff's evidence must not only be accepted as to the alleged assault, but it also must provide the necessary level of persuasion to meet the threshold identified in authorities previously discussed.

[287] Further, the plaintiff commenced these proceedings, and as part of the proceedings, the plaintiff was required to be examined by a psychiatrist to give evidence on her behalf, and also a psychiatrist on behalf of the defence. Accordingly, it is relevant to consider the disclosures made and the version of events given to the psychiatrists for the purpose of them preparing reports for use at the trial.

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217 Exhibit 9.

218 Defendant's amended closing submissions, Annexure C, page 45.

[288] These are factors which are relevant to the analysis of all of the evidence which is required by the relevant authorities.

[289] One of the issues opened by the plaintiff and the subject of evidence was the allegation that CD offered ice blocks to students if they assisted with rubbish collection.

[290] From the line of questioning, it appeared that the plaintiff sought to rely on this as evidence of some form of grooming behaviour. The difficulty is that there is no evidence that the plaintiff ever received a Zooper Dooper herself. The plaintiff's evidence was that she had only heard about it occurring. Further, there is no pleaded allegation of grooming. To the extent that CD was questioned about the ice blocks, that needs to be considered in the context that there is no pleaded allegation of grooming. To the extent that grooming was explicitly or impliedly raised, it cannot not be directly relevant to the plaintiff's claim.

[291] Further, it is difficult to see how this evidence is relevant to the alleged assault on the plaintiff, particularly where there is no evidence to suggest that it was anything other than an opportunistic assault, if it occurred as alleged.

[292] The evidence in respect of the ice blocks at most, if accepted, could arguably put CD and students in closer proximity for the purposes of establishing a position of intimacy as discussed further in relation to Issue 2 below.

[293] There are also a couple of references in the plaintiff's statement attached to the Notice of Claim[219] that may suggest that the plaintiff was alleging behaviour beyond the alleged assault. This was not pleaded and was not the subject of any evidence. Accordingly, that has no bearing on the plaintiff's claim in respect of the alleged assault.

[294] [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**] and [**REDACTED**] were all credible and reliable witnesses. Their evidence was not really challenged. I accept the evidence of [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**], [**REDACTED**] and [**REDACTED**].

[295] CD also gave evidence frankly and credibly. Even accounting for CD's age and the passage of time, he had clear and plausible recollections about his job and the procedures he followed in respect of his entry to the female toilets on the few occasions when that was required. Parts of CD's evidence will be given more particular consideration below. However, generally, I accept CD's evidence.

[296] While I also generally accept the evidence of [**REDACTED**], [**REDACTED**], [**REDACTED**] and [**REDACTED**], there is an additional level of complexity given the inconsistencies between aspects of the plaintiff's evidence and that of her family members that gave evidence. It is impossible to completely reconcile these inconsistencies. However, these inconsistencies tend to reflect on the plaintiff's credibility, rather than these witnesses.

[297] The plaintiff's evidence is troubling in a number of respects. This is particularly so given:

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219 Exhibit 9.

(a) The plaintiff admits that she lied in respect of statements made to the psychologists.

(b) The plaintiff admits that she exaggerated statements made to the psychologists.

(c) The plaintiff's explanation for the lies and exaggerated statements appears to be that it suited her at the time.

(d) The plaintiff admits she did not fully disclose the alleged assault despite having a full memory and giving a partial disclosure to Ms Martin.

(e) The plaintiff was critical of Ms Martin for recording a "partial memory" when that was consistent with the nature of the disclosure consciously made by the plaintiff to Ms Martin.

(f) The plaintiff made no disclosure of the alleged assault in 1999 until the partial disclosure to Ms Martin in 2017.

(g) The first full disclosure by the plaintiff[220] is contained in the attachment to the Notice of Claim dated 1 August 2019.[221]

(h) There are a number of inconsistencies between the partial disclosure to Ms Martin, the Notice of Claim statement and the plaintiff's evidence at trial.[222]

(i) There are also significant inconsistencies between disclosures[223] made by the plaintiff to the psychiatrists preparing reports for the proceedings and the plaintiff's statement to the psychologists and her evidence at trial.

(j) The plaintiff's evidence at trial was highly detailed and was able to be given in chronological sequence, despite the alleged assault occurring approximately 24 years ago, when the plaintiff was a nine-year-old child.

[298] These are all matters which reflect against the credibility and reliability of the plaintiff's evidence.

[299] There are several matters that are also particularly relevant to the plausibility, and probability, of the plaintiff's account of the alleged assault,[224] namely:

(a) The ability to easily unlock the toilet doors from the outside.

(b) The alleged assault occurring in the context of:

(i) the central location of the toilet block such that someone could walk in at any time.

(ii) the toilet door being open during the alleged assault such that the someone could walk in at any time and readily observe what was happening.

(iii) the central pathway near the toilet block and the likelihood that someone passing by could hear the plaintiff or CD during the course of the alleged assault.

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220 At least which is in evidence.
221 Exhibit 9.
222 And between the plaintiff's evidence in chief and cross-examination.
223 Both as to her family dynamic and the circumstances of the alleged assault.
224 But also have an impact on the plaintiff's overall credibility.

(c) The alleged assault was of a nature that the plaintiff was out of class for a period of time such that it was likely to raise concerns with her experienced and insightful teacher, particularly where [**REDACTED**] had instructed the plaintiff on her own evidence to be "quick".

(d) Where the alleged assault included penile penetration and the effects on the nine-year-old plaintiff were likely to be significant:

(i) the plaintiff hid or masked the physical, mental and emotional effects of the alleged assault from [**REDACTED**] for the remainder of the school day.[225]

(ii) the plaintiff hid or masked the physical, mental and emotional effects of the alleged assault from her mother later that same day and from then until 2017, when the plaintiff partially disclosed the alleged assault to her mother.

[300] All of these matters are factors which impact on whether the plaintiff is able to:

(a) Prove her case on the balance of probabilities, taking into account the seriousness of the alleged assault, which is in effect an allegation of serious criminal acts being committed.

(b) Cause the Court to have a "feeling of actual persuasion", to be satisfied of the occurrence of the alleged assault.

[301] Another significant factor that impacts whether the plaintiff's evidence is able to establish these two aspects is CD's evidence and whether there is any basis to find that CD's denial of the alleged assault should not be accepted.

[302] CD gave evidence denying the alleged assault. For the plaintiff to overcome this, in the particular circumstances of this case, I would need to find that CD intentionally gave false evidence. It would not be enough to find that CD's evidence can be explained by "forgetfulness or some other innocent reason".[226] There is no basis to make a finding that CD was dishonest and/or intentionally lying. I do not make such findings.

[303] I do find that CD was an honest, credible witness and gave reliable evidence despite the intervening period of approximately 24 years. The matters raised by the plaintiff in submissions as going to CD's credit do not establish dishonesty.

[304] CD's evidence as to his role is consistent with his understanding that he was a groundsman. He was clearly very proud of the achievements in respect of the School grounds over his time at the School. His possible indignation at being described as a cleaner is understandable: that may be seen as a demotion to a more menial job from his perspective and undervaluing his role in the School community.

[305] CD was willing to accept that he would assist where necessary. However, when it came to the few occasions when he had to enter the girls' toilets, I accept CD's explanation of the process that was followed whereby a female teacher cleared the toilets first and stood outside while he was inside.

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225 The plaintiff's evidence was that the alleged assault occurred in the morning.

226 Consistent with the approach in *Gersbach v Gersbach* [2018] NSWSC 1685 at [395].

[306] The plaintiff's evidence in respect of the locks is implausible in all of the circumstances. If it was so obvious to a nine-year-old child that the toilet doors could be easily and readily unlocked from the outside, the issue of the toilet doors being locked by students would not have been a memorable issue. On the plaintiff's evidence, anybody could easily and quickly unlock the toilet doors thereby solving the problem. The fact that adults had to send students under the toilet doors to unlock the doors from the inside[227] leads to the conclusion that the locks were not easily or readily unlockable from the outside.

[307] As discussed above, the evidence in respect of the Zooper Dooper ice blocks can only really be relevant on the pleaded claim to the position of intimacy relevant to establishing vicarious liability. However, the evidence in respect of CD providing Zooper Dooper ice blocks is in very general terms. If the plaintiff's sister's evidence is accepted, it establishes one occasion when she was given an ice block by CD for picking up rubbish. The plaintiff's hearsay evidence of "others" getting ice blocks from CD is not highly probative.[228]

[308] This has to be weighed against the evidence of other witnesses from which it can be inferred that giving out ice blocks in the manner alleged was not part of CD's role and was not observed by others including a proactive, engaged and involved [**REDACTED**].

[309] The evidence of the School's teaching staff in regard to the School ethos was quite compelling. This is relevant to this issue but also the factors identified at [299] above. The evidence of the defendant's witnesses supports a finding that the management of this School was proactive and "hands on". [**REDACTED**] evidence was that he regularly walked around the School and was aware of what was happening. The teaching staff, particularly relevantly [**REDACTED**], were caring and supportive. [**REDACTED**] was a sensitive and intuitive teacher, alive to the needs of students in her [**REDACTED**] class. I accept [**REDACTED**] evidence that she was attune to the differences between students in her class and would make an assessment on a request to go to the toilet based on the particular student.[229]

[310] [**REDACTED**.] The layout of the buildings resulted in the toilet block being fairly centrally located to classrooms and the main pathway through that part of the School. The plaintiff (and equally CD on the plaintiff's evidence) would likely have been visible approaching the toilet block as surrounding classrooms had windows facing in that direction.

[311] The proximity of the toilet block to the main pathway and, also that the staff toilet was located just outside the entrance to the side of the toilet block where the alleged assault occurred, means that any unusual noise or disturbance would more likely have come to the attention of someone passing by or entering the toilet block.

[312] Another relevant factor is the actual acts constituting the alleged assault. The plaintiff alleges acts of indecent touching, two distinct acts of digital penetration and penile penetration. The defendant makes much of whether the act of penile penetration was

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227 Or to consider other options such as unscrewing the lock.

228 The change in the plaintiff's evidence from her evidence in chief to her evidence in cross-examination also goes to the plaintiff's credit.

229 See discussion of this evidence at [369] to [372] above.

possible given the detailed evidence of the plaintiff as to the physical positions of the plaintiff and CD. I do not find that the act itself was impossible. Unfortunately, acts of this nature do occur in unlikely locations and places. However, the inconsistencies in the plaintiff's evidence are relevant.

[313] What is also compelling is whether it is likely that the series of acts and the various statements could have occurred as alleged given the very real risk of detection given the various matters identified above.[230] [**REDACTED**] expectation of a "quick" return to the classroom and the risk of someone walking in or hearing the alleged assault all tend against the probability of the alleged assault occurring as detailed in the plaintiff's evidence.

[314] The allegation of penile penetration of a nine-year-old girl is a significant part of the alleged assault. The probability of the alleged assault occurring is also diminished by the likelihood of such a serious assault being able to be hidden from a caring and intuitive teacher and the plaintiff's mother when it is likely that the alleged assault would have had a significant effect on the plaintiff physically, mentally and emotionally.

[315] I do not find that the plaintiff was dishonest. Her evidence was very real to her and obviously very distressing. It is not disputed that the plaintiff has a significant mental health condition. However, I am not satisfied on the plaintiff's evidence that the assault occurred as alleged.

[316] This conclusion must follow from:

(a) the plaintiff's own evidence that she has lied and exaggerated statements over time, requiring careful scrutiny of the plaintiff's evidence.

(b) the effluxion of time since the alleged assault and that the plaintiff was a nine year old child at the time, also requiring careful scrutiny of the plaintiff's evidence.

(c) the acceptance of CD's evidence denying the alleged assault.

(d) the factors making the alleged assault more improbable and unlikely, including the risk of detection and the physical nature of the assault and the plaintiffs being able to return to class and mask or hide the likely physical, mental and emotional effects of an assault of the nature alleged.

(e) the inconsistencies in the plaintiff's account of the alleged assault.

[317] Taking into account all the evidence and my findings in respect of the witnesses, and mindful of the relevant standard, I find that:

(a) The plaintiff has not proved on the balance of probabilities that the alleged assault occurred, particularly considering the serious nature of the allegation; and

(b) I have not reached a feeling of "actual persuasion" that the alleged assault occurred.

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230 And to be recalled in such specific detail by the plaintiff approximately 24 years later.

[318] In the circumstances, as this is the essential issue relevant to liability, the plaintiff's claim must fail.

[319] However, it is appropriate to proceed to consider the other issues.

Issue 2 - whether the defendant is at law vicariously liable for the conduct of CD

[320] Despite the conclusion reached in respect of Issue 1, it is still necessary to consider Issue 2 and make findings in case I am wrong and the matter proceeds to an appeal.

[321] In respect of Issue 2, it is appropriate to start with identifying the legal principles governing vicarious liability.

[322] The plaintiff relies on vicarious liability to hold the defendant liable for the alleged misconduct of CD, without needing to establish that the defendant was at fault. The liability arises out of a relationship of "controlled employment".[231] This concept of an employer ('master') being liable for an employee ('servant') incorporates that the superior or employer can tell the employee *what* to do, as well as *how* to do it.[232] The test has evolved to take into account changing works practices and terminology, including whether a person is an employee or an independent contractor.

[323] Even when there is the relevant employer/employee relationship the employer is not vicariously liable for all acts. The employer will be liable for authorised acts or acts which are ratified, but also for wrongdoing within the "course of his employment". The concept of "course of employment" provides some limitation on what unauthorised wrongdoing of an employee an employer will be held liable for but there remains some imprecision.[233]

[324] Both the plaintiff and the defendant rely on the decision of the High Court in *CCIG Investments Pty Ltd v Schokman*[234] in respect of the course of employment test. The case concerned two employees who were required to share accommodation and one employee (H) urinated on the other employee (S) in the middle of the night, while drunkenly seeking the bathroom. Employee S sued the employer for negligence alleging breach of duty of care as well as vicarious liability for the tort committed by employee H.

[325] At first instance, the employer was found not to be liable. On appeal, this was overturned. The employer sought, and was granted, special leave to appeal to the High Court in relation to an employer's vicarious liability.

[326] The majority of the High Court[235] in a joint judgment confirmed that in the determination of the question whether an employee's wrongful act was committed in the course or scope of employment, the correct approach is to first consider decided cases for guidance as to when vicarious liability may arise.[236] That is:

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231 Fleming on Torts 11th Ed at [17.30] and [17.50] at 498-499.
232 Fleming on Torts 11th Ed at [17.50] at 498.
233 Fleming on Torts 11th Ed at [17.100].
234 (2023) 97 ALJR 551; [2023] HCA 21.
235 Kiefel CJ, Gageler, Gordon and Jagot JJ.
236 At [17]-[19].

> "A reference to a previous decision, the circumstances of which may in some relevant respects bear a similarity to the case at hand, may be helpful. It is part of the method of the common law and the means by which it develops."[237]

[327] Further, the majority recognised:

> "[20] In the context of vicarious liability, and the rule that the employee's tortious act must have been committed in the course or scope of the employment, decided cases also provide assistance by way of a test which has been developed. A body of cases … point to a logical enquiry which may be made as to **whether the tortious act in question has a sufficiently strong connection with the employment, and what is entailed in it, so as to be said to have been done in the course of that employment**. Two points should be made. First, a test of vicarious liability requiring no more than sufficiency of connection must be constrained by the outer limits of the course or scope of employment[238]. Second, the statement in *Prince Alfred College*[239] that a 'test of connection does not seem to add much to an understanding of the basis for an employer's liability' **reinforces the need to undertake analyses in determining the course or scope of employment described above whilst recognising the use of past cases as a guide**." (emphasis added)

[328] That is, an employer will be liable for authorised acts as well as unauthorised acts that are "so connected" with authorised acts that they are in effect "modes" of doing them.[240]

[329] On the facts in *CCIG Investments Pty Ltd v Schokman*, the employment created the opportunity for the wrongful act – that is, the physical proximity between the two employees in the share accommodation – but that was too tenuous. On the facts, there was not a sufficiently strong connection with the employment to give rise to vicarious liability.

[330] In reaching this conclusion, the majority of the High Court stated:

> "[31] The test stated in *Dubai Aluminium Co Ltd v Salaam*[241] was approved in *Various Claimants v WM Morrison Supermarkets Plc*.[242] In the process of attending to a request by the defendant company's external auditors for a copy of the payroll data, the internal auditor employed by the company unlawfully copied the data and uploaded it to a publicly accessible website in order to cause harm to the company. Employees whose data was disclosed brought claims against the company on the basis that

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237 At [19].
238 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; 335 ALR 1; [2016] HCA 37 at [83].
239 Ibid at [68]. See also *New South Wales v Lepore* (2003) 212 CLR 511 at [213].
240 Albeit improper modes. See Fleming on Torts 11th Ed at [17.120] at 511.
241 [2003] 2 AC 366 at 377 [23].
242 [2020] AC 989 at 1016 [25].

it was vicariously liable for the acts of the internal auditor. Lord Reed PSC observed[243] that the provision of the data to the internal auditor enabled him to make a private copy. But, his Lordship said, the mere fact that his employment provided him with an opportunity to commit the wrongful act was not sufficient to warrant the imposition of liability.

[32] This is consistent with the view stated by Diplock LJ in *Morris v C W Martin & Sons Ltd*,[244] that for an act to be said to be in the course of employment something more is necessary than that the employment has merely created the opportunity for the wrongful act to take place. And as was observed in *Prince Alfred College*,[245] this is a view which has been consistently applied.

[33] Where no more can be pointed to than that the employment provides an opportunity for the employee's wrongful act to take place, the connection with the employment is tenuous. Such a circumstance is to be distinguished from that where an employee is placed in a special position by reason of the employment so that the act in question may be seen as one to which the ostensible performance of the employer's work by the employee 'gives occasion', to adopt the words of Dixon J in *Deatons Pty Ltd v Flew*.[246] In such a circumstance the requisite connection would be present.[247]

[34] In *Prince Alfred College*,[248] it was explained that in determining whether vicarious liability arises for an act of sexual abuse of a child that took place in a school or other institution, **regard may be had to any special role the employer has assigned to the employee. Features of the employment such as authority, power, trust, control and the ability to achieve intimacy should be considered. Clearly a role embodying features of this kind may point to a strong connection between the employment and the wrongful act. The employment may be seen to provide more than a mere opportunity for the act to take place; it may provide the very occasion for it**.

…

[37] The most that could be said to arise from the circumstance of shared accommodation was that it created physical proximity between the two men. It therefore provided the opportunity for Mr Hewett's drunken actions to affect Mr Schokman. But, as has been seen, the cases hold that mere opportunity provides an

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243 *Various Claimants v WM Morrison Supermarkets Plc* [2020] AC 989 at 1018 [34]-[35].

244 [1966] 1 QB 716 at 737.

245 (2016) 258 CLR 134 at 151 [52], referring to *Jacobi v Griffiths* [1999] 2 SCR 570 at 598 [45], 600 [51], 619 [81], *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 229 [25], 235 [45], 237 [50], 241 [59], 244 [65], 247 [75], 249-250 [81]-[82] and *New South Wales v Lepore* (2003) 212 CLR 511 at 546 [74].

246 (1949) 79 CLR 370 at 381.

247 See *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 152-153 [55]-[56].

248 (2016) 258 CLR 134 at 159-160 [80]-[81].

> insufficiently strong connection with the employment to establish vicarious liability."

[331] It is recognised that there are some difficulties in applying this reasoning in respect of sexual abuse cases, being intentional torts.[249] Sexual abuse cannot properly be described as an "unauthorised mode of doing one's job". In *CCIG Investments Pty Ltd v Schokman*, the majority of the High Court particularly commented in respect of sexual abuse cases:

> "[22] It was observed in *Prince Alfred College*[250] that in some cases something more than sufficiency of the connection between the wrongful act and the employment may be necessary to better explain the basis for an employer's liability. That is particularly so in cases of the kind there in question, involving sexual abuse in institutions such as schools, where much may be explained by reference to the special role assigned to the employee who was the abuser.
>
> [23] The matter may be one of focus. The basis for liability spoken of in *Prince Alfred College*[251] may be explained by reference to connection. Another way of understanding the relevance of any special role created by the employment is, of course, that it may connect the act undertaken to the employment. The reasons of the principal joint judgment in *Prince Alfred College* do not deny this. They deal with cases in which the test of connection has been applied. And their Honours did not deny the general importance of the test in assisting the resolution of the question whether an act was done in the course or scope of the employment."[252]

[332] It has been suggested that the approach of focussing on "authority, power, trust, control and the ability to achieve intimacy" involves some consideration of risk, in that these factors are relevant to the victim being placed at peculiar risk of abuse, or a result of an "increase in the risk".[253]

[333] The plaintiff also relies on the decision of the Victorian Court of Appeal in *Bird v DP*.[254] In particular, the plaintiff relies on the joint judgment of Beach, Niall and Kaye JJA in the following respects:

(a) [133]: "It has long been accepted that a principal may be vicariously liable for a tort that is committed by an employee or agent, notwithstanding that the tort is constituted by criminal acts committed by that employee".

(b) Adopted the High Court's approach in *Prince Alfred College Inc v ADC*,[255] particularly paragraphs at [80], [81] and [84] which states:

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249 Fleming on Torts 11th Ed at [17.50] and [17.160].
250 At [68].
251 (2016) 258 CLR 134; 335 ALR 1; [2016] HCA 37.
252 See also statement of the majority at [34] quoted above.
253 Fleming on Torts 11th Ed at [17.160] at 520.
254 [2023] VSCA 66 at [132]-[147].
255 (2016) 258 CLR 134; [2016] HCA 37.

> "In the present case, the appropriate inquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the [College] actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children."

(c) The role of assistant priest of the parish provided the opportunity and the occasion for wrongful acts, being the sexual abuse of the respondent.[256]

[334] Relevantly, the Victorian Court of Appeal was satisfied on the evidence that, in respect of the principles in *Prince Alfred College*, by virtue of the role as assistant priest, Coffey was placed in a position of "authority, power and trust in respect of his parishioners, such that he was able to achieve a substantial degree of intimacy with them and their families". This provided "not just the opportunity but also the occasion" for the wrongful acts.[257] The indecent assaults done in these circumstances rendered the Diocese vicariously liable to the respondent.[258]

[335] If the assault is found to have occurred, the defendant could be vicariously liable for the assault if the plaintiff also establishes that CD was acting in the course of his employment and was placed in a position of "authority, power and trust … such that he was able to achieve a substantial degree of intimacy" with the plaintiff.

Issue 3 - whether CD was acting in the course of his employment and whether as a matter of law the defendant is liable

[336] Despite the conclusion reached in respect of Issue 1, it is still necessary to consider Issue 3 and make findings in case I am wrong and the matter proceeds to an appeal.

[337] Here, it is not contentious that CD was employed by the defendant. However, factually there is some dispute as to CD's specific role. CD undertook work as a groundsman, that is uncontentious. The plaintiff alleges he was also a cleaner: this is denied by the defendant and by CD in his evidence at the trial.

[338] The scope of CD's employment is relevant for determining what is in the "course" of his employment.

[339] The plaintiff contends that the work that was to be undertaken by CD included, from time to time, work in the children's toilets. Further, the plaintiff contends there was no express written regulation of those duties and consequently the informal restrictions referred to in evidence could be "bypassed".

[340] The plaintiff also submits that the factors of "authority, power, trust and control" were present as follows:

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256 Ibid at [148].
257 At [153].
258 At [164].

(a) Students were instructed to treat CD and other staff with respect and to follow instructions, including ancillary staff.[259]

(b) CD had regular interaction with children at the School in an informal way, including children greeting CD as he walked around the pathways.[260]

(c) CD had access to the children's toilets, including entering the toilets from time to time following a staff member investigating the toilets were empty and the staff member standing outside.[261]

(d) CD was regularly in the vicinity of the children's toilet block.[262]

(e) It was not unusual to see CD in and around the toilets and entering the toilets while the plaintiff was in there.[263]

(f) CD had authority, power, trust and control over the plaintiff.

[341] It is in these circumstances that the plaintiff contends that the performance of CD's role gave him the "occasion" for the wrongful act and CD took advantage of his position with respect to the plaintiff.

[342] The plaintiff's position is that this is sufficient to conclude that the wrongful act was committed in the course of, or scope of, employment and the defendant is thereby vicariously liable for CD's wrongful act.

[343] If the assault is found to have occurred, the defendant contends that:

(a) The sexual assault was not in the course of the employment of CD as groundsman or at all.

(b) The plaintiff would need to demonstrate that the defendant placed CD in a "position of … intimacy" with the plaintiff in order for the criminal act to be the subject of vicarious liability.[264]

(c) The evidence does not satisfy the test.

(d) CD undertook groundskeeping and property management, including some maintenance, for the School.

(e) The extent of CD's contact with students, of which the defendant knew or ought to have known, was during morning tea and lunch breaks when CD was walking in the vicinity of students. This was the extent of his interaction and proximity with students at the School, including the plaintiff.

(f) CD was not a boarding master, class teacher, teachers' aide, principal, sub-principal, sports teacher, school counsellor or similar, which have the hallmarks of prospective intimacy with a student/child.

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259 Plaintiff at T1.68.12-21 and [**REDACTED**] at T6.61.47 to T6.62.16.
260 CD admitted this at T5.59.4-8.
261 CD's evidence at T5.19.37-49.
262 [**REDACTED**] at T7.6.28-38.
263 Plaintiff's closing submissions at [83](e), page 16. This is a contentious summary of the evidence.
264 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 160 [84].

(g) An opportunistic entering of the toilets resulting in an assault would not be an act in the course of employment. Further, such circumstances would not entail the requisite intimacy required by the authorities.

[344] There is evidence that CD's role was documented in the early stages of his employment as a cleaner with a toilet allowance for the purposes of the structure of his pay.[265] The consistent evidence, apart from the evidence of the plaintiff and the plaintiff's sister, is that CD did not fulfil the role of cleaner.

[345] CD did accept he did some maintenance work and also emptied bins when necessary, but did not use a mop and bucket.[266]

[346] Given my finding in respect of the evidence in respect of Issue 1, I find that CD's role was as a groundsman, and he did not fulfil general cleaning duties.

[347] Further, I find that the course of CD's employment did not place him in a position of intimacy with students, and in particular the plaintiff.

[348] The course of CD's employment may have resulted in some interaction with students, but this was not at the level akin to a boarding master, class teacher, teachers' aide, principal, sub-principal, sports teacher or school counsellor.

[349] Whilst CD was a member of staff and an adult at the School, he did not have in the course of his employment any particular "authority, power, trust, control and the ability to achieve intimacy".

[350] Considering whether CD had "authority, power, trust, control and the ability to achieve intimacy" in the context of all of the evidence, there is no basis to conclude that the plaintiff was placed at peculiar or increased risk of assault.

[351] The evidence of the plaintiff and her sister in relation to the Zooper Dooper ice blocks, even if it is accepted, does not place CD in the necessary position of intimacy. The evidence about students greeting CD, and CD greeting them in response, also does not place CD in the necessary position of intimacy or that he had the necessary "authority, power, trust [or] control".

[352] While CD's "shed" may have been proximate to the toilet block, that also does not give rise to the necessary position of intimacy. At best it could possibly provide the "opportunity" but not the "occasion", as discussed in the authorities.

[353] Accordingly, if the alleged assault is found to have occurred, the evidence does not establish that CD was acting in the course of his employment and was placed in a position of "authority, power and trust … such that he was able to achieve a substantial degree of intimacy" with the plaintiff.

[354] Consequently, if the alleged assault is found to have occurred, the defendant would not be vicariously liable for the alleged assault.

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265 Exhibit 1, tab 30, page 656.

266 T5.24.30-42; T5.28.26-38; T5.43.18-25.

Issue 4 - the nature and extent of any duty of care owed by the defendant to the plaintiff

[355] Despite the conclusion reached in respect of Issue 1, it is still necessary to consider Issue 4 and make findings in case I am wrong and the matter proceeds to an appeal.

[356] The plaintiff contends that the defendant is further or alternatively liable for negligence on the basis of a breach of a direct duty of care owed by the defendant to the plaintiff as a student of the School operated by the defendant.

[357] It is not contentious that:

(a) the defendant owed the plaintiff a duty to exercise reasonable care for the safety and welfare of the plaintiff and other students at the School from foreseeable risk of injury.[267]

(b) the duty of care is a non-delegable duty of care.[268]

(c) the *Civil Liability Act* 2002 (Qld) does not apply to the plaintiff's claim.

[358] The defendant accepts that a duty of care was owed by the defendant, being a non-delegable obligation to exercise reasonable care for the safety of the plaintiff as a student, in respect of the foreseeable risk of her suffering psychiatric injury from assault on the School campus.

[359] Accordingly, if the alleged assault is found to have occurred, it is necessary to consider whether in the circumstances the defendant breached the duty to exercise reasonable care for the safety and welfare of the plaintiff and other students at the School from foreseeable risk of injury.

Issue 5 - whether the defendant had breached any duty of care

[360] Despite the conclusion reached in respect of Issue 1, it is still necessary to consider Issue 5 and make findings in case I am wrong and the matter proceeds to an appeal.

[361] The plaintiff contends that:

(a) The common law test for breach of a duty of reasonable care is that as summarised by Mason J in *Wyong Shire Council v Shirt*.[269]

(b) It was reasonably foreseeable that the plaintiff may suffer physical harm or sexual abuse by persons within the employment of the defendant as:

(i) The plaintiff was a child of primary school age and vulnerable by reason of her age.

(ii) The defendant knew that there were sexual predators who were employed by it, working at schools operated by it.

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267 FASOC at [8] and Amended Defence at [51].

268 FASOC at [9] and Amended Defence at [51] and [52]. However, the defendant goes on to contend that the duty does not extend to a duty to prevent intentional or criminal activities.

269 (1980) 146 CLR 40 at [47].

(iii) If the plaintiff was left unsupervised or unaccompanied during the course of a school day, she was vulnerable to being physically or sexually abused by the defendant.

(c) The defendant was in breach of its duty of care to the plaintiff by:

(i) Permitting the plaintiff to go to the toilets on her own and unaccompanied during the course of class time in an ordinary school day.

(ii) Failing to prohibit students from going to the toilet or walking about the School unaccompanied during the course of the School day while classes were being conducted.

(iii) Failing to give instructions to teachers employed by the defendant that students were not to leave class to attend the toilet or to otherwise walk about the School unless they were accompanied by another student or an adult.

(iv) Failing to undertake an appropriate risk assessment to determine the risks associated with permitting students to walk about the School during class time unsupervised and unaccompanied.

(v) Failing to create, implement and enforce written policies relating to the circumstances in which a child could leave the classroom and to publish those instructions to both students and teachers to ensure that students and teachers understood the circumstances in which a child could leave a classroom during class time unaccompanied and unsupervised.

[362] Further, the plaintiff submits that:

(a) A reasonable response to the risk was to only allow a child to leave the classroom with another child or teacher. The expense, difficulty and inconvenience of this response was minimal.

(b) The failure to undertake a risk assessment also breached the defendant's duty of care. No formal assessment of risk or written policy was considered or put in place, despite changing circumstances in other schools.

[363] If the assault is found to have occurred, the defendant contends that:

(a) A duty of care was owed to the plaintiff as a student of the School, and the duty was a non-delegable obligation to exercise reasonable care for the safety of the plaintiff as a student, in respect of the foreseeable risk of her suffering psychiatric injury from assault on the School campus.

(b) There is an absence of, or at the highest a paucity of, evidence of breach of the duty by the defendant, by its School staff failing to act in a manner in which a reasonable person in their position would do.

(c) No expert evidence was called by the plaintiff of the practices a reasonable person would have adopted.

(d) The plaintiff's pleaded assertion that there had been "paedophiles" working in schools operated by the defendant was admitted. However, the plaintiff did not adduce any evidence to take the issue further.

(e) There is no basis to conclude that the defendant was negligent on the basis there were paedophiles, particularly where there was no suggestion that they were known to the defendant at the time.

(f) At most there is support for the need to protect children from the risk of abuse by staff, which was recognised in the policies adopted by the defendant, which are in evidence.

(g) The plaintiff's case appears to be that at the School at least Grade 3 students ought not to have been permitted to go to the toilet without being accompanied by another child. However,

(i) There is no independent evidence of such practice being in place or that it was reasonable for it to be adopted.

(ii) There is evidence that there was not such a practice at the time and it was not a common practice in the approximately 24 years since the alleged assault.[270]

[364] In the Exhibit 1 bundle of documents[271] there are a number of policies adopted by the defendant. These were not challenged and there was no evidence that these were unreasonable or inappropriate. This also needs to be considered in the context that the alleged assault, if it is found to have occurred, occurred in 1999. It is not appropriate to consider the policies with the mindset of current thinking or requirements.

[365] The policies in place were directed at the general risk of sexual abuse of children by staff. There is no evidence to find that there was any known or particular risk of paedophiles as contended by the plaintiff.

[366] In respect of whether a Grade 3 student ought not to have been permitted to go to the toilet without being accompanied by another child breached the duty of care, again, there is not much evidence in relation to this.

[367] The plaintiff questioned some of the defendant's witnesses in cross-examination but did not lead any positive evidence to establish that requiring a Grade 3 student[272] to be accompanied by another student when going to the toilet from class was a practice at the relevant time or that it was reasonable.

[368] The evidence of [**REDACTED**], [**REDACTED**] and [**REDACTED**], which I have accepted, was that there was no such practice in 1999.

[369] The evidence of [**REDACTED**] was that the plaintiff had been in her class in [**REDACTED**].[273] In respect of her Grade 3 students requesting to go to the toilet during class time, [**REDACTED**] gave evidence that her approach in 1999 was:

(a) To consider whether the request was from a student trying to get out of work.

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270 [**REDACTED**] T6.42.31 to T6.43.11; [**REDACTED**] T6.83.41-42; [**REDACTED**] T7.42.19-24.
271 Exhibit 1, tabs 37-39, pages 784-1338.
272 At least.
273 T6.34.15-17.

(b) If the student genuinely needed to go to the toilet, to allow the students to go to the toilet but to monitor the time of how long they had been gone.[274] Usually this would only be about three to five minutes.[275]

(c) Sometimes if two students needed to go they may go together, but sometimes it was just one "so long as they were quick and back."[276]

[370] [**REDACTED**] acknowledged that "now it is recommended to send them in pairs"[277] and also that "each school might have its separate policy".[278] In her experience, it has only been the last few years that students have been sent in pairs.[279]

[371] Given that the class was a [**REDACTED**], [**REDACTED**] also gave evidence under cross-examination that in 1999 at the School she would consider the age of the student in deciding how to deal with the request of the student to go to the toilet. For example, [**REDACTED**].[280]

[372] But also, in relation to Grade 3 students, she would have to "pick and choose" who would "not be silly" while they were allowed out of the classroom.[281] That is, she would make a decision on a case-by-case basis, particularly in a [**REDACTED**], including whether she would allow a student to go to the toilet on their own.[282]

[373] The plaintiff refers to a failure to undertake a risk assessment. While there is no evidence that a formal written risk assessment was undertaken by the defendant, the evidence of [**REDACTED**] was that she in effect did a form of risk assessment in deciding whether to allow a student, including in particular a Grade 3 student, to go to the toilet alone during class time.

[374] If the alleged assault is found to have occurred, considering all of the evidence, the plaintiff has not established on the balance of probabilities:

(a) that the defendant breached the non-delegable duty of care; and

(b) that the defendant failed to exercise reasonable care for the safety of the plaintiff as a student, in respect of the foreseeable risk of her suffering psychiatric injury from assault on the School grounds.

Orders

[375] In light of the conclusion reached in respect of Issue 1, the plaintiff's claim must fail.

[376] Accordingly, the appropriate orders are:

1. The plaintiff's claim is dismissed.

2. The parties be heard further in relation to costs.

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274 T6.38.42-45.
275 T6.38.47-48.
276 T6.42.31-34.
277 T6.42.37.
278 T6.43.13-14.
279 T6.43.16-18.
280 T6.47.40-42.
281 T6.47.45-48.
282 T6.48.1-4.

3. The parties are provided with a confidential not to be published version of the reasons and are to agree a Schedule identifying any further information to be redacted in a version of the reasons to be published, to be emailed to the Associate to Williams J by 13 June 2024.

Annexure A

[377] Extracts of cross-examination of plaintiff regarding the alleged assault:

(a) T3.10.1-48 (emphasis added):

> Thank you. And, apparently, he seemed to have - sorry, I withdraw that. Were you conscious of [CD] being outside the door of the toilet before he opened it?---Yeah. You could hear his boots on the tiles.
>
> I beg your pardon?---You could hear his boots as he walked.
>
> All right. And did you see his boots under the - through the gap under the toilet door before he entered?---I don't recall.
>
> In any event, it was a short time?---It was a short time.
>
> Thank you. Now, was [CD], to your recollection, quite a tall, well-built man?---He was taller, like, I thought he was tall at the time being - - -
>
> Sure - - -?---a kid so I took him as being tall.
>
> He wasn't a small man by any means, was he?---Back then I didn't think so. No.
>
> No. Thinking back, he wasn't a man small in stature, as it were?---No.
>
> Do you agree with that?---Yes.
>
> You're saying yes?---Yes. Sorry.
>
> Thank you. The cubicles, they're children's cubicles, are they?---They were - they weren't like the preschool toilets, where they were really, like, low. They were normal-sized toilets.
>
> And was the cubicle the same size or smaller than the cubicles that you might see in public toilets or something like that?---They were about the same size.
>
> Okay?---They were just standard.
>
> They were slightly smaller, weren't they?---They were about standard. I thought that they were standard.
>
> After [CD], you say, came into your cubicle, did he leave the door open, or did he shut it?---I don't think he could get the door closed.
>
> All right. **Did he leave the door open, or did he shut it?---It was open.**
>
> All right. **So your best recollection is it was left open by [CD]; is that correct?---Yes.**
>
> **So that being the case, then at any time, had anyone else entered the girls' toilets, they would have readily seen [CD] standing in or about the doorway or just inside the doorway of your open**

cubicle; isn't that so?---If I was lucky enough for that to happen, yes, they would have.

(b) T3.11.26-49 (emphasis added):

It must have been very cramped in the cubicle, as the assault proceeded?---It was. That's - I couldn't get out past him. That's - - -

Did you remain seated at all times during the assault?---Not the whole time. He sat me back down, but there was times when I would try and get up, so I wasn't a consistent seated - - -

When the various - sorry, during - I'll start again. I withdraw that. During all aspects of the assault about which you're giving evidence continued, were you seated?---There were periods where I was seated.

Well, were there points in time during the assault when you weren't seated?---There were times when I tried to get up. Yes.

So was it only times when you tried to get up that you weren't seated?---He was a big man. I was scared of - - -

Would you - - -?---- - - him, so I would - - -

Would you please focus on my questions. Were the only times that you weren't seated during the assault that he perpetrated when - was when you tried to get up?---Yes.

Do you remember how many times you tried to get up?---No.

(c) T3.12.1-49 (emphasis added):

When you tried to get up, do you say that he pushed you back down?---Yes.

So is it the case that as soon as you tried to get up at any point, he would push you back down immediately?---Yes.

Is it correct then that for almost the entirety of the assault which ensued that you were seated on the toilet seat?---The majority, yes. Well, almost the entirety?---I just said yes, the majority.

You've given evidence of the various sexual acts that occurred, haven't you?---Yes.

Right. **And one of those sexual acts was you say that he - and I'm sorry if I distress you - he placed his penis inside of you; is that correct?---Yes.**

So were you seated on the toilet seat when that sexual act occurred?---Yes.

That must have been very physically difficult, as a physical act, to occur, I suggest to you?---It was very cramped. I would assume that the whole thing would have been hard.

The whole thing would have been a - - -?---Would have been difficult. It was a small room - - -

Right?--- - - - to begin with as well. So - - -

Well, how was he - I'm sorry to ask you about these things, but it's your allegation that I have to deal with. Do you understand that?---Yeah.

All right. We'll get through it. How did he physically go about placing his penis into your vagina, with you seated on the seat?---Yeah. I'm sorry. There's - I don't want to even have to ask this, but how do you mean?

Well, it - you are seated. I'll withdraw and start again briefly. **You have told her Honour as I understand it that when the event occurred whereby [CD] placed his penis into your vagina, that you were seated on the seat?---Yeah.**

Is that correct or incorrect?---No, that was - yes.

Is that correct?---Yes.

Thank you. And in order for him to undertake such an act, it would have been necessary for him to place himself in a position whereby he could physically undertake that act. Do you agree with that?---Yes.

Well, did he seem to encounter some physical difficulty in doing that?---Yes.

How did he - what was his stance in order to undertake that act upon you while you

(d) T3.13.1-49 (emphasis added):

are sitting on the toilet seat?---He got as close as he could. He was - bent his knees.

I'm sorry. I can't hear the witness?---Sorry. He - - -

Just take your time. Have a glass of water. Well, I - we'll need an answer to that question. Take your time?---He was - he got in very, very close. And I guess he bent his knees to sort of get closer to my height. So - - -

I need to take you through this, I'm sorry - - -?---Yeah, I know. I know.

- - - subject to her Honour's direction?---I understand. I'm sorry. Sorry.
That's all right. Take your time?---So I guess, as I said, he got in close and sort of - it was extremely uncomfortable for I would say both of us, because he had to sort of bend down.

Again, I'm sorry to distress you, but I need to ask you these questions if I may?---I understand.
And we'll get through it. You at the time, on your evidence, were a grade 3 girl; correct?---Yes.

And you were prepubescent; correct?--Yes.

And you were average size, but perhaps a little taller or larger than average size for the - for any other grade 3 girl?---I was average to small.

Thank you. All right. I'm just going on the basis of your photograph that's in your school photo. Thank you. So you were, on your evidence, an average-sized nine year old girl; correct?---Yes.

And is it fair to say that having regard to your recollection, your - in your prepubescent state, your vagina was quite tight; is that correct?---Yes.

And indeed it was relative to your age at the time; is that not so?---Yes.

And you've already given evidence, haven't you, that you were seated on the toilet seat; correct?---Yes.

And is it also your evidence that [CD] had pushed you back on the toilet seat; correct?---He pushed me back down onto it. Yes.

It's also your evidence that [CD] was not a man of small stature but at least average stature; is that not so?---I guess.

Is it the case that at all time, to your recollection, that [CD] remained standing?---Standing, crouching.

If he was crouching, he would need to crouch in front of the toilet - - -?---Like - - -

(e) T3.14.1-5 (emphasis added):

- - - wouldn't he?---Yeah. Yes. Yes, like, bending.

If he was crouching in front of the toilet, his penis couldn't get anywhere near your vagina.

(f) T3.17.29-49:

Now, I want to ask you just a couple more questions, if I may, about what you allege about [CD] in a cubicle, okay?---Okay.

Now, is it correct to say - I'm sorry. I want to ask you questions about his physical positioning or stance at any time, if I may, please. Do you understand that?---Yes.

Do you understand that?---Yes.

Thank you. Now, is it correct to say that at various times, he was standing?---At some points he was standing. Yes.

All right. And is it correct to say at other points, he was squatting?---Sort of, like, leaning.

Well, was he not squatting?---Not full but close to the ground squatting. No.

Are you - when you say he was lean - you said lean or leaning, I'm not sure, did you mean to convey by that that at other points in time while standing, he was leaning forward?---He was leaning bent.

Was he bent at 90 degrees, was he bent at some less - something less than 90.

T3.18.1-27:

degrees?---It would be less cause he was able to get close.

Do you understand when I say 90 degrees, if one's erect, it's zero degrees and if he's bent such that he bends over at the waist fully, such that his upper body is horizontal, that that's 90 degrees? Do you understand what's meant by that?---Yes.

That's your understanding of it?---Yes.

Well, on your evidence, at various times, was he standing erect at zero degrees?---There were times when he was. Yes.

And at other times, was he leaning at some angle between zero degrees and 90 degrees?---Yes.

All right. But with his legs straight still in a standing - - -?---Bent - - -

- - - position?---Bent. Bent.

Bent?---Bent.

All right. Bent in the sense that he's - he had a break at the knees such that he was - his knees were protruding forward?---Yes.

Okay. But still standing?---Still standing.

Now, at any time, did he squat down on his haunches?---As in, all the way, like, full - - -

(g) T3.18.29-48:

Yes?--- - - - squat.

Squat down in the sense that if I am in a standing position and whilst still remaining on my feet, I go down such that my knees protrude forward and my thighs are sitting close to my calves. That's what I mean by squat. Do you understand what's meant - - -?---Yeah.

Is that your understanding of squatting?---Yes.

Okay. At any time, did he squat?---He didn't come to a full heels-to-his-backside squat but he would - he did squat.

Okay. So it wasn't a full squat but some partial squat?---Yes.

So he's still on his feet?---He's still on his feet.

And in this - adopting - sorry. Did he adopt any other stance apart from those two 45 stances that you've described?---He leaned over me.

I beg your pardon?---He would lean over me.

T3.19.1-22:

He lent over you? And did he lean over you while he was still on his feet?---Yes.

But with his legs straight?---I can't remember the position of his legs.

And all this time, you were sitting on the toilet seat?---If I wasn't trying to get up, yes.

And were you back on the toilet seat, that is, with your back towards the - either the cistern or the back wall?---No. I was - I don't want to say how I was sort of - as I was sitting, pulled closer to him than I was to the back.

When he adopted this incomplete squat which you described a short time ago, was he located in front of you?---Yes.

All right. And was he located in front of the nearest portion of the toilet to him ?---Yes.

But he was in a partial squat; is that right?---Partial. Yes.

So was it the case that the front of his two knees were still short of the nearest portion of the toilet? That is, they didn't come up to the nearest portion of the toilet?---No. He would have his knees sort of on either side of where I was.