IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A.B. v. Henry,*
2025 BCSC 137

Date: 20250129
Docket: S179580
Registry: Vancouver

Between:

A.B., C.D., E.F., G.H. and I.J.

Plaintiffs

And

Ivan William Mervin Henry

Defendants

Corrected Judgment: These Reasons for Judgment were corrected for publication purposes on February 5, 2025.

Before: The Honourable Justice Gropper

Reasons for Judgment

Counsel for the Plaintiffs:	K. Gourlay I. Kordic M. Gourlay J. Stanley
Counsel for the Defendant:	M. Sandford A. Tolliday
Place and Dates of Trial:	Vancouver, B.C. January 29-31, 2024 February 1-2, 2024 February 5, 7-9, 12-16, 21-23, 26-28, 2024 March 11-14, 25-28, 2024 April 2-5, 8-11, 16-17, 19, 2024 May 7-9, 13-16, 2024
Place and Date of Judgment:	Vancouver, B.C. January 29, 2025

Table of Contents

Overview

[1] The plaintiffs are five women who were sexually assaulted in their basement or ground-floor suites at knifepoint by a stranger in the middle of the night in May 1981 and between February and July 1982. They allege that they were all assaulted by the same man, Ivan Henry. This action claims damages against him.

[2] Mr. Henry denies that he was the perpetrator in any of the sexual assaults.

[3] Mr. Henry has been before the Courts in British Columbia since his arrest in July 1982. He was arrested for rape, attempted rape and indecent assault of these five plaintiffs (and three others). He represented himself in the criminal trial before a jury in March 1983 (the "1983 criminal trial"). He was convicted by the jury on ten counts related to eight women. In November 1983, still representing himself, he was sentenced as a dangerous offender to an indeterminate sentence. He was imprisoned for almost 27 years.

[4] On October 27, 2010, the British Columbia Court of Appeal allowed Mr. Henry's appeal. The Court determined that he had been wrongfully convicted and acquitted him on each count: 2010 BCCA 462. The Court found that there were multiple errors that undermined a finding of guilt, including errors related to the jury instruction on inferences that could be drawn from Mr. Henry's refusal to participate in a police lineup, the instruction on identification, and the failure to order severance after the Crown abandoned its application for jury instruction on count-to-count similar fact evidence.

[5] The Court also reviewed the identification evidence of each of the complainants (some of whom are not plaintiffs here) by reviewing the transcripts of their evidence at the preliminary inquiry in 1982 and at the 1983 criminal trial, finding it inadequate as a basis to convict Mr. Henry of the charges on the criminal standard of proof: beyond a reasonable doubt.

[6] Following his acquittal, Mr. Henry commenced a civil action against the Province of British Columbia as represented by the Attorney General of British

Columbia, the City of Vancouver, and the Attorney General of Canada—the government entities responsible for Crown prosecutors, the police, and certain post-conviction applications for review, respectively. In that action, Mr. Henry established that his *Charter* rights were breached by non-disclosure of information by Crown Counsel in the course of his prosecution (the "*Charter* Damages Trial"): 2016 BCSC 1038.

[7] In the *Charter* Damages Trial, Chief Justice Hinkson, as he then was, referred to the findings of the B.C. Court of Appeal concerning the inadequacies of the complainants' identification evidence. Mr. Henry's action was based upon the Crown's intentional non-disclosure of relevant documents that could have assisted the defence in cross-examination of the complainants. Hinkson C.J. concluded that had there been proper disclosure, there were aspects of the complainants' evidence that could have been challenged, perhaps successfully. He also found that proper disclosure of all relevant documents may have demonstrated many other weaknesses in the Crown's case that could have undermined a finding of guilt beyond a reasonable doubt.

[8] This action for damages addresses Mr. Henry's liability for the assaults on the plaintiffs, assessed on the civil standard of proof: whether, on a balance of probabilities, the plaintiffs have proved that he was the person who raped each of them.

[9] Mr. Henry does not dispute that all five plaintiffs were sexually assaulted. He denies that he assaulted them. His position is that the plaintiffs' evidence identifying him as their attacker is inadequate and unreliable and it does not demonstrate, on a balance of probabilities, that he was the person who attacked these plaintiffs. He seeks dismissal of this action.

[10] In these reasons, I refer to some events repeatedly. I have attached a chronology of those events as "Appendix A".

Liability

The Plaintiffs' Evidence

[11] The plaintiffs are:

1. A.B., who was sexually assaulted in her ground-floor apartment at #106 – 223 East 16th Avenue, in the Mount Pleasant neighbourhood of Vancouver on May 5, 1981;

2. C.D., who was sexually assaulted in her ground-floor apartment at #3 – 2267 West 7th Avenue, in the Kitsilano neighbourhood of Vancouver on February 22, 1982;

3. E.F., who was sexually assaulted in her ground-floor apartment at #103 – 2142 Carolina Street in the Mount Pleasant neighbourhood of Vancouver on March 10, 1982;

4. G.H., who was sexually assaulted in her ground-floor apartment at #104 - 8750 Osler Street, in the Marpole neighbourhood of Vancouver on March 19, 1982; and

5. I.J., who was sexually assaulted in her basement suite at 433 West 17th Avenue in the Mount Pleasant neighborhood of Vancouver on June 8, 1982.

[12] All of the plaintiffs gave statements to the police after the sexual assaults occurred; all but I.J. participated in a police lineup on May 12, 1982; all of the plaintiffs gave evidence at the preliminary inquiry in November 1982; all but I.J. gave evidence at the 1983 criminal trial. The statements made and the evidence given by each were fully examined in the evidence before me.

[13] The plaintiffs rely on other evidence to support their evidence of identification, including various pieces of circumstantial evidence. They are:

a) Mr. Henry's deceased wife's statement to police, before his arrest;

b) his previous commission of similar acts;

c) his failure to offer alibi evidence at his 1983 criminal trial, when he claimed that an alibi was available in the alibi statement he provided to Crown in November 1982; and

d) his actions in the aftermath of his arrest.

[14] Mr. Henry also gave evidence in this trial. The defence did not commit to calling Mr. Henry as part of its case. He was called as a witness only in the plaintiffs' case. His evidence proceeded first with a four-day cross-examination by plaintiffs' counsel. He was then cross-examined for two days by his own counsel.

A.B.

Background

[15] A.B. and her twin sister were born in London, England in 1948. They both moved to Vancouver in 1969. A.B.'s sister returned to England in 1971.

[16] In 1977, A.B. found a job as a secretary with an investment company. Over the next few years, A.B. achieved her securities licence, and became the assistant to the three most senior people at the company.

[17] A.B. met her partner, in October 1977 and they have been together since.

[18] In 1978, A.B. moved into her apartment at #106 – 223 East 16th Avenue, in the Mount Pleasant district of Vancouver. She and Her partner remained partners, although he lived and worked in Port Moody during the week. He and A.B. would spend their weekends together.

[19] A.B.'s apartment was a small, one-bedroom ground floor unit on the east side of the building. There was access from the living room to the patio by way of a sliding patio door. The bedroom was big enough for her double bed but without much space around it. The head of the bed was against a window. A dim light came in through the window from a small light on the patio.

A.B.'s description of the assault

[20] On May 4, 1981, A.B. estimated that she went to bed at 11:00 or 11:30 p.m. She woke up at about 4:00 a.m. on May 5, 1981 to see a man silhouetted against the doorway. At first, she thought it was boyfriend, as his build and size were similar. At the time, her partner was about 5'9" and fairly broad in the shoulders. When she realized it was not her boyfriend, she screamed.

[21] The man said: "You be quiet." He asked her if she could see the knife. She said no — it was too dark. He came closer so that he was standing about three feet away, halfway up the bed. He was holding the knife in his right hand and put it up towards her left shoulder, saying something like "Now can you see it?" She said yes. She said that the knife itself seemed to have a finish that was not shiny, but dull. Her best guess is that it might have been about four inches long, but she could not say beyond that.

[22] The man said: "I got information somebody living here ripped me off for a lot of money." She told him that he was wrong and to go away. She recalls him saying "I got information," rather than "I've got information" or "I have information." Her attacker started to ask her questions about her boyfriend, and, after some questions, she told him her boyfriend was in Port Moody. During this back and forth, she was still lying on her bed, and he was standing beside it.

[23] A.B. recalled the man pulling the bed clothes back and telling her to take off the knee length nightie that she was wearing. He stood back, still holding the knife, while she did so. He grabbed her breast and touched her pubic area. She recalls he was wearing what appeared to be men's underwear, perhaps briefs or jockey type shorts, and a long pullover, like a dark sweater. He pulled out his penis and told her "Suck it or I'll fuck you." He said, "You know how." He said "fuck" quite a few times.

[24] A.B. recalled that the man smelled very bad, especially his penis. She recalls him saying, "You're not doing a very good job."

[25] The man told her to get out of the bed and to get down on her knees, facing the wall. She was on the floor beside the bed, facing the window. When she did, she was able to see that he was a couple of inches taller than her. She said that she was 5’5”.

[26] The man penetrated A.B. anally. It was very painful for her. There were only a couple of thrusts. She asked him to stop. He put his hand on her head to turn her around. She was still on her knees, facing him, and he told her to do a better job, forcing her to perform fellatio again. He ejaculated very fast. He told her to swallow his semen, but she spit it out on a pillowcase.

[27] The man told her not to phone the police because they would ask her all kinds of embarrassing questions. He said that if she did not call the police, he would not return.

[28] At this trial, A.B. said that the man told her to count to 50 after he was gone. A.B. was aware that she had not said this in her earlier testimony at the preliminary inquiry or the 1983 criminal trial. She said that she was reminded of this when she read transcripts from the 2015 civil trial. That was the first time she had remembered that specific statement.

[29] The man left through the living room and out the patio door, which he left half open. A.B. lay in bed for three to five minutes after he left because she was afraid that he had not gone, as she had not heard him go. She said that he seemed light on his feet.

[30] A.B. got up and tried to shut the patio door but could not lock it. She said she went to the bathroom and washed her mouth out. She cleaned off the pillowcase that the semen had ended up on because it had not crossed her mind to preserve it as evidence.

[31] There was some light in the room although it was quite dark. A.B. said that she did not get a very good look at her attacker who was in her apartment for 15-20 minutes.

[32] A.B. called her boyfriend. She was frightened that her assailant might be listening to see if she phoned the police. Her boyfriend told her to call the police and she did. They came to her apartment and interviewed her. She told the police she did not believe she could identify her assailant based on appearance alone.

A.B. describes her assailant

[33] At 4:00 a.m., the light in the room was limited. A.B. was not making a concerted effort to remember her assailant's appearance because, she said she was terrified and more concerned about surviving.

[34] In terms of his build, A.B. described the man as both a husky and medium build. She said he had a similar size and build to her boyfriend, who was 5'9" in height, smaller at the waist but broader in the shoulders. A photo of Ivan Henry taken in 1978-1979 was entered into evidence. It shows Mr. Henry to be broader in the shoulders and narrower at the waist.

Statements to police

[35] Officer Gibson made notes during her interview of A.B. on May 5, 1981, when the police were at her apartment. The notes are hand-written and say: "Occurred between 4:30 – 4:45; w/m [white male]; 5'5"; 30 yrs.; husky build; navy sweater pull over; wavy hair; possible beard; gruff voice; possible accent; said he had in information that someone that ripped him off lived there; kept repeating 'where is your boyfriend'."

[36] A.B.'s evidence was that she did not tell Officer Gibson that her assailant was 165 cm (5'5"). That was her height and she noticed that he was taller than her, approximately Her partner's height. She said that she thought he was between 30 and 35 years old; that he had a short full beard, not a "possible beard" and curly dark hair that formed a sort of halo around his head.

[37] A.B. heard her assailant's voice as he talked quite a bit. She said that she did not use the term "gruff" to describe her assailant's voice. His voice was distinctive. He did not seem to be speaking with his normal voice. She does not believe that

“gruff” would have been her word as it was not part of her vocabulary. She likely would have said the voice was husky or hoarse, adjectives she understood to be synonymous with gruff but that would have been part of her diction.

[38] A.B. described her assailant as possibly having an accent. She explained that when he became very agitated, he lapsed into a different way of speaking. She could not pick out a particular word or phrase, but she had studied French, German and Russian, noting that languages have a certain cadence or intonation. His voice sounded unnatural, as if he were trying to disguise it, but it was hard to explain.

[39] There are three versions of the police “investigation reports”; two are hand-written and one is typed. If they were dated, the date is no longer clear on the copies of them. The handwritten one appears to have been altered in what is likely the second handwritten version.

[40] In the days following the assault, A.B. said that she was hypervigilant and still in shock about being raped in her home in the middle of the night by a strange man. She saw a man at a bus stop one morning who looked similar to her attacker. She sat near him on the bus and saw a name, “Birch,” and an address of 248 East 17th on an envelope. A.B. called the police and reported it to Detective Sims. A.B. was told that they had looked into it and cleared the individual. On being told that, she was satisfied.

[41] It appears that the information regarding the man on the bus was additional information that was written onto the original handwritten report, which then was added to the typed version of the investigation report, making it appear as though that information was given by A.B. about her assailant on the night of the attack.

[42] Comparing the two handwritten documents side-by-side shows that in one version, a note about “Birch” appears in the middle of the page, as well as a reference to 35, bags under eyes, and hiking boots. It is apparent that was added to the original version after the fact. In the typewritten version, that additional information is added in, making it appear as though A.B. was saying her assailant

had, for example, bags under his eyes and was wearing hiking boots when neither were observations given on the night of the assault.

[43] The address of 248 East 17th is also recorded on the second handwritten report. A.B. said that she was getting on a bus at 17th and Main in the morning on a workday. 248 East 17th Avenue was about five houses east of Main Street—a short half-block from the bus stop.

[44] Both the handwritten and typed versions of the investigation reports refer to the suspect's height as 165 cm (5'5"), with a possible beard and accent. His weight is noted at 72.6 kg (160 lbs). A.B.'s height is noted as 165 cm. Beyond the "possible accent" there is nothing noted about his voice.

[45] The typed version refers to the suspect's age as 30-35.

[46] A.B. said that she did not review or receive a copy of the police notes or investigation reports until she was provided them in 2005 by Darren Hurwitz, counsel for the City of Vancouver, after Mr. Henry's appeal had been re-opened. She immediately wrote Mr. Hurwitz to correct the height of her assailant.

[47] There is a typed statement of A.B. that is undated. A.B. said that she prepared a handwritten statement and provided it to the police; she did not type it. She was not given a template about what information to include or exclude, just to note things that she considered important. In it, there are further details provided about her assailant. Those details included: he had the knife in his right hand throughout; her "impression" was he was wearing a navy/black long sleeve pullover, white/beige shorts (i.e. underwear) and no pants; he was very light on his feet and wearing socks or something like running shoes; he had dark, possibly black, curly hair; a beard; and he talked in a deep, threatening whisper.

[48] The statement records A.B. quoting her assailant as saying "I've got information someone living here ripped me off for a lot of money". In her evidence, A.B. was adamant the man said "I got", not "I've got".

[49] A.B. attended a lineup on October 21, 1981. The police apparently had a suspect. A.B. could not identify anyone in the lineup and did not write anything down on her ballot.

A.B. identifies Ivan Henry as her assailant

[50] On May 12, 1982, A.B. went to the police station to view another lineup. In the middle of the lineup there was a man who was acting up and was being restrained by police officers. He was wearing a number on his chest that said "12". He had manacles on and was yelling "fuck" and "How fucking long is it going to take?"

[51] This time, A.B. wrote Mr. Henry's number on her ballot. She wrote: "#12 (?) right size + build also French accent (slight) noticed."

[52] A.B. explained that the lineup was not a fair opportunity to identify someone because the man in the middle was raising such a commotion. She could not properly see his face and hearing him was affected by the arm around his neck.

[53] A.B. noted similarities between number 12 and her assailant were: his same basic size and build; his speech, with almost a vague accent, with its different intonation or cadence; and his voice and tone of voice were the same.

[54] Following the lineup, A.B. spoke with Detective Marilyn Sims, whose notes of the conversation are: "[A.B.] – rt size & bld. – slight accent." A.B. thought number 12 had a French accent. She said "…he was the only one that was the right size and build." A.B. said that Mr. Henry's hair had been shorn off and dyed. She said: "he seemed a rough type and that fits in with the guy but I can't swear that that's him for sure. The pent up violence in the guy …our guy I felt that he could kill somebody."

[55] The defence says that A.B. formed the opinion, based on Mr. Henry's behavior and resistance during the May 12 lineup that Mr. Henry was a "bad man" and a "rough type" trying to get away. Whatever she observed about Mr. Henry on that day informed her description of her assailant thereafter. What she observed

about Mr. Henry became the attributes of her assailant that she describes in greater detail each time.

[56] On August 16, 1982, A.B. gave a statement to Detective Harkema. She said that when she first awoke, she thought it was her boyfriend in the room. Among other things, her assailant said "I got information someone living here ripped me off for a lot of money." The build and size of her assailant were similar to her boyfriend's. A.B. told Detective Harkema that her assailant was wearing jockey-type underwear white or light in colour; a long pullover, navy or very dark sweater up to the neck; it very likely had not been washed for a week because he smelled badly, especially his penis; he was probably a couple of inches taller than her and that she stood along side of him; and he was very light on his feet.

[57] A.B. did not see Ivan Henry between the May 12, 1982 lineup and when she saw him at the preliminary inquiry on November 1, 1982. She does not recall him sitting at all times with his counsel; instead, he was sitting a few rows back.

[58] When giving her evidence in direct, A.B. had not yet heard him speak. She was asked if she could identify her attacker in the courtroom, she said:

> A: I can't honestly say that I could identify that man one hundred percent sure because the conditions under which I saw him, you know, and he may have changed his appearance somewhat after a year and a half. There is no one in this courtroom that has the beard and everything that – that I saw.
>
> Q: Well, give us your opinion about what you see.
>
> A: I can't honestly say that was him and yet it could be him. …

[59] Crown Counsel did not ask A.B. whether she could identify the voice of Mr. Henry.

[60] A.B. confirmed that she had identified him at the lineup primarily based on his voice. She explained that the man who attacked her had "something peculiar about his way of speaking…it's like he lapsed into an accent. He talked—he was Canadian….then towards the end and at some point when he was agitated…he

lapsed into some sort of an accent." She explained that in the lineup, she heard the same sort of lapse, and he was also the right build.

[61] During the cross-examination of A.B., Mr. Henry interrupted, giving her the opportunity to hear his voice. The outburst occurred in the course of his defence counsel, Mr. White, questioning A.B. on what she had written on her ballot. The exchange is as follows:

> A: No, I didn't write a sentence. I wrote, I think as far as I remember, 'right build—
>
> The Accused: Your Honour, I don't want to keep repeating this.
>
> Mr. White: Excuse me, Your Honour.
>
> The Accused: Your Honour, I think it's gone far enough.
>
> Mr. White: Your Honour, if there's going to be an interruption I would ask the witness be excused.
>
> The Court: No. If there's going to be an interruption and he disturbs the witness' testimony, he'll be removed from the courtroom and be brought back each time. I've warned you already. I'm conducting this, you're not. And in the course of conducting this—
>
> The Accused: Well, then do it on your own.

[62] After that opportunity to hear Mr. Henry speak, A.B. said that she was certain Ivan Henry was her assailant. She said that it was that opportunity, combined with her visual identification, that allowed her to be certain of her identification of Mr. Henry as her assailant. She recalled the exchange quoted as being longer. A.B. testified in this trial that her impression was that he was agitated in the same way he had been when he was assaulting her. She testified that for a long time she relived the experience to keep it fresh in her mind so she could testify against him.

[63] Before the 1983 criminal trial began, A.B. swore an affidavit at the request of the prosecutor. She swore:

> THAT on November 1st, 1982, I gave evidence at the Preliminary Hearing of Ivan William Mervin Henry in the within proceedings.
>
> THAT at the Preliminary Hearing I had the opportunity to hear Ivan Henry's voice during my cross-examination and I am now satisfied and prepared to swear that his voice is the voice of the man who indecently assaulted me on May 5th, 1981.

[64] The defence points out that once again, A.B. considered Mr. Henry's behaviour at the preliminary inquiry and the judge's admonishment of him in the preliminary inquiry to conclude that he was the bad man in the lineup who raped her a year and a half earlier.

[65] A.B. gave evidence at Mr. Henry's criminal trial on March 3, 1983. She spoke of her process of identification at that time. In addition to the preliminary inquiry, she had had a further opportunity to hear Mr. Henry speak at a *voir dire* in the 1983 criminal trial. His voice was more in control, and he spoke normally, with regular intonation, compared to the other occasions when he was under pressure and agitated. His voice at the *voir dire* was not entirely the same as the one she heard during her attack, but the husky hoarse part was evident when her attacker gave instructions.

[66] A.B. described her process of identification:

> Q: What about his voice in this period of about fifteen minutes he was in your presence, for what portion of that time would he have been speaking to you?
>
> A: He did speak quite a lot, I mean to tell you how many minutes he spoke, I couldn't tell you that but we did have quite a lot of conversation back and forth and I don't think now I can remember even all of it.
>
> Q: How would you describe his voice?
>
> A: It was a deep threatening whisper, it was very husky, and he wasn't talking with a natural intonation, it was like he had learned his part and phrases would come out all at once, he wouldn't be breathing like as if he were talking, like "You be quiet" and things like that, so he wasn't talking in a natural way, he had a very menacing attitude, the way he was talking.
>
> Q: Do you know if you would recognize that voice if you heard it again?
>
> A: Yes.
>
> Q: On May 12th, 1982, did you-have an opportunity to hear Mr. Henry speak?
>
> A: Yes.
>
> Q: And you gave testimony at the preliminary hearing in respect of this matter?
>
> A: Um hmm.

> Q: And did you have an opportunity on that occasion to hear Mr. Henry speak?
>
> A: Yes towards the end of my testimony.
>
> Q: And what was his tone of voice at that time?
>
> A: He was again very agitated and it was again very husky, monotone, and that was when it really struck me that this was his voice, not so much when I heard him on the first occasion but when I heard him in the courtroom on November 1st, that was his voice.
>
> Q: Whose voice?
>
> A: The man's voice that attacked me.

[67] A.B. testified in this trial that Ivan Henry was her attacker, based on her own observations of him. She said:

> A: Well I mean I identified him only when I was sure that that was the voice of my attacker at the trial. And I held that belief unconditionally for very many years. As I say, I've heard him on TV during the civil trial and different things. It's his voice.

[68] The defence says that A.B.'s evidence about Mr. Henry has evolved over time. Each time she described him, it was with greater detail than she was able to give the police just after her attack. As one example, she described Mr. Henry's voice now as a "deep, threatening whisper."

The defendant on May 5, 1981

[69] The sexual assault of A.B. occurred while Mr. Henry was on supervised parole in Vancouver. As a result, there are supervision reports prepared by his parole officer, Jerry Philipson. The plaintiffs assert that the supervision reports are of assistance in determining Mr. Henry's situation at the time of A.B.'s assault. Mr. Henry also addressed his situation in his testimony.

[70] In his January 21, 1981 report, Mr. Philipson states that Mr. Henry was a labourer/construction worker but was struggling to hold onto a particular job for very long. He writes that until approximately one week prior (January 14, 1981) Mr. Henry had been living with his ex-wife, Jessie Henry, and their two children at their home at 5248 Canada Way in Burnaby. He had been asked to leave the home by his ex-wife who found him too difficult to live with. Since then, Mr. Henry had

taken up residence at a motel in Burnaby. He would continue to spend time at the Canada Way residence but no longer lived there.

[71] On March 27, 1981 Mr. Philipson reported that Mr. Henry "resides at the Woodbine Hotel on Hastings Street in Vancouver." He remained separated from his wife and children but was seeing the family fairly frequently and stayed overnight occasionally. While there seemed to be a good deal of affection between him and his family, living together did not seem possible at that time.

[72] Mr. Philipson's next report is dated May 26, 1981, three weeks after A.B. had been assaulted. At that time, Mr. Henry's relationship with his family remained the same and he continued living in the Woodbine Hotel on Hastings Street. He had been commuting to and from Chilliwack on a job.

[73] Mr. Henry was questioned by Detectives Sims and Campbell on May 12, 1982, about the May 5, 1981 assault on A.B. He said this:

Campbell:	Can you remember where you were on certain times?
Henry:	Yes.
Campbell:	Well, one of these incidents occurred on May 5, 1981; a B&E and assault on a woman in the 200 block West 18th, in Vancouver.
Henry:	I was living on Canada Way. That's a fucking long time ago. She was assaulted…She was sleeping?
Campbell:	Yes.
Henry:	That's my old fucking M.O., right? Can you give me the details?
Campbell:	Yes. This was a ground level apartment; a 33 year old woman; in the early morning hours, a male person came in by forcing the patio sliding door, said he was looking for somebody. There was an act of fellatio do you know what that is?
Henry:	A blow job.
Campbell:	Then there was attempted anal intercourse.
Henry:	You can fucking throw that one out because I know I didn't do it.
Campbell:	Are you telling me that there are others that you did?
Henry:	No, I'm [not] saying anything.
Campbell:	That lady identified you as the person.
Henry:	That's good for her.

[74] Mr. Henry later suggested that he knew where he was and what he was doing on certain dates, he said that he keeps “track in [his] mind diary.”

[75] At trial, Mr. Henry was asked about his statement to the detectives that he was living on Canada Way at the time of A.B.’s assault:

> Q: Okay. Sir, where -- at the top of the page where he gets the address wrong and says West 18th instead of East 16th, you respond and say "I was living on Canada Way" and the date he had just given was May 5, 1981. That wasn't true, was it, sir? You weren't living on…Canada Way.
>
> A: You have -- you have to -- you have to realize that my wife lived on Canada Way 1981. 5248 Canada Way. May. She lived there. That place was in my name. I don't care what she says, what you say, or what anyone says. That place was in my name. And I did live there. But I don't live there because she doesn't want me there, but it's still my place. And if I made a mistake, I'm sorry about it, but we're talking a year later. I lived on Woodbine. I went back and forth. I was doing the siding over there with Joe Cosgrove.

[76] After this exchange, the Philipson reports were canvassed with Mr. Henry. It was put to Mr. Henry that he lied about it to put himself further away from A.B.’s assault:

> Q: Yes. You were living in the Woodbine Hotel alone in May of 1981?
>
> A: Correct.
>
> Q: And the reason you said to the police –
>
> A: Oh, I see. Now you're –
>
> Q: -- on May 12, 1982 -- in response to being told that a woman had been assaulted in the 200-block of West 18th on May 5, 1981, the reason you told them you were living on Canada Way was because that would put you much farther away from that assault than if you were living in the Woodbine Hotel. Is that correct, sir?
>
> A: Well, you're lying to me anyway on the assault. It's not -- it's not West so-and-so; it's East. So it's -- so you're lying to me right away.
>
> Q: I agree with you, sir, that the … police officer appears to have had the address wrong.
>
> A: Correct.
>
> Q: But the suggestion remains, sir. You were being told that a woman had been assaulted in 200-block West 18th on May 5, 1981, and in response, you say "I was living on Canada Way." And I'm going to suggest to you, sir, that you said that because it would put you further away from that rape than where you were actually living, which was the Woodbine Hotel. Is that correct, sir?

A: No. You put me across the street there. That's what you did in -- in -- in the -- in the letter to Doust. You put me across the street in 1981. So who's at fault here?

Q: When you say "you put me across the street" --

A: Well, the police put me across the street in March 1981, and I never lived there in March 1981 with my so-called Mrs. I lived there in 1982.

Q: Sir, I'm going to ask the question again … because I don't think I've gotten a response. I'm going to suggest to you, sir, that on May 12, 1982, when you were told that there was an assault that occurred on May 5, 1981, on a woman in the 200-block of West 18th in Vancouver, you responded "I was living on Canada Way." You were, in fact, living alone in the Woodbine Hotel near Main Street, and you said you were living in Canada Way because it would put you further away from the rape?

A: No, you're -- you're putting -- you're giving me -- no. Absolutely not. I'm faced with something a year later. I'm -- I'm going -- anyway. I can't answer to that. That's -- that's demeaning to me. I can't answer to that. All I know is I'm saying what I'm saying and I -- that's just the way it was. Be it I was wrong, I'm sorry, but that's just the way it was.

[77] Mr. Henry prepared an alibi statement that he provided to Crown in November 1982. In it, he wrote: “I started the job in Chilliwack with Mr. Joe Cosgrove doing siding on his house. So I would be running back and forth at this time.” Later in his alibi statement, he said: “May 5/81 Was still in Chilliwack working for Mr. Cosgrove. I was staying at a cheap Hotel Woodbine on the 5 Block East Hastings and leaving each morning at 5:30 after picking up my friend and going to work at home.”

[78] At his 1983 criminal trial, in his evidence in chief, he stated: “In May of 1981 I would be in Chilliwack. I would be building a house out there for a guy named Joe Cosgrove.”

[79] Mr. Henry denies that he raped A.B. on May 5, 1981.

Summary of facts re A.B.’s identification of Henry

Plaintiff

[80] A.B. was 33 years old when she was sexually assaulted on May 5, 1981. By that time, she was a career woman working as an executive assistant at a well-known local investment firm.

[81] A.B.'s opportunity to observe her attacker was such that she was not confident in her ability to identify him based on appearances alone. There was some light in the room, but it was quite dark. She was careful not to identify her assailant until she was certain of her ability to do so, and this came only after she had the opportunity to hear him speak at the preliminary inquiry.

[82] Previously, A.B. had seen him at the lineup but, for reasons she explained, and given the seriousness of the moment, the lineup was not a fair opportunity to identify anyone. She identified him only tentatively, noting on her ballot that he was of the right size and build and with the same type of slight accent that she had perceived her attacker to have.

[83] At the preliminary inquiry, she did not identify Mr. Henry based on appearance alone, because she felt it unfair. She instead identified him as the man that she had tentatively identified at the lineup, as his voice was the same and he matched the build and size of her assailant.

[84] Hearing Mr. Henry speak at the preliminary inquiry, when he interrupted during her cross-examination, allowed A.B. to be certain that he was her attacker. She subsequently swore to this in an affidavit and testified that Mr. Henry was the man who raped her, first at the 1983 criminal trial, and then again in this Court.

[85] When initially confronted with the allegation, Mr. Henry lied about where he was living at the time of A.B.'s assault, claiming to be living on Canada Way, in Burnaby when, in fact, he was living alone at the Woodbine Hotel. It was either a very short drive or a manageable walk, primarily straight up Main Street, to where the assault occurred. No alibi evidence to substantiate his testimony was offered, either in the 1983 criminal trial or in this Court.

Defence

[86] Mr. Henry points out that in preparation for this trial, A.B. has gathered as much information as possible. A.B. has studied the transcripts of the 2015 trial before Hinkson C.J. in the *Charter* Damages Trial. For example, A.B. described for

the first time at this trial, that her attacker instructed her to count to 50 after he left. A.B. said that the transcript jogged her memory from 34 years earlier.

[87] The defence suggests that A.B.'s report to police on the height of her assailant as 5'5" reflects very poorly on her credibility. As a result, she has modified her evidence since to suggest that her attacker was taller than her and was Mr. Henry's height.

[88] A.B. has now added details like her visceral reaction to Mr. Henry on each occasion that she has seen him. The defence suggests that one's visceral reaction cannot play a part in identification evidence.

[89] The defence reiterates that A.B. has conflated her attacker and Mr. Henry based upon her observation of Mr. Henry since the May 12, 1982 lineup, starting with his being a bad man. It has tainted her evidence since then. She has altered her description of Mr. Henry to fit what she observed about Mr. Henry each time she saw him. A.B. said that she was not lying and is not mistaken in her identification of Mr. Henry. She may believe that, but it does not prove that Mr. Henry was her attacker.

C.D.

Background

[90] C.D. was born in 1960. She was raised in Vancouver and lived with her parents and siblings until she moved out of her family home in 1980.

[91] After C.D. graduated from high school in 1978, she intended to go to university. As she took university courses, she worked at various jobs including for the federal government and a resource company. She enrolled in university in September 1981 having already achieved two years of university credits.

[92] In 1981 she moved to a studio apartment at #3 - 2267 West 7th Avenue in the Kitsilano district of Vancouver. The suite was on the ground floor of the building. It

had a small patio surrounded by a low wall of cement blocks. The patio was accessed from inside the apartment by a sliding patio door which had curtains.

[93] On the left-hand side of the small studio apartment was space for a single bed where C.D. slept. She covered the bed up during the day to use it as a couch. The suite also had a small kitchen and bathroom.

C.D.'s description of the assault

[94] February 21, 1982 was a Sunday. After a day of socializing, C.D. came home at about 5:30 p.m., made dinner and then continued to work on an essay for her English class. She said that she fell asleep on her bed around 10:30-11:00 p.m. while working on the essay, with both the lamp light and the TV on.

[95] C.D. recalled that she woke up around midnight. Her bedside light and the TV were both still on. She got up, turned the TV off, and went to the bathroom to get ready for bed. As she was coming back into the main area of the apartment, she remembered she had left her suede boots out on the patio. It was raining and she decided to bring them inside.

[96] C.D. opened her curtains part way and heard a clattering. She had terracotta pots stacked up in the corner of the patio and thought it might be cats coming through them. She looked out but could not see anything. C.D. opened the door about shoulder width, crouched down, and reached out to grab the boots. As she did so, she turned to her right and saw a man inside the enclosure of the patio with his back pressed against the side of the building, his head tipped up a bit. C.D. said: "Oh my god". The man said: "Now be quiet, I'm here for a reason."

[97] The man was in dark silhouette, with dark clothes. He had bushy hair and face. C.D. looked down and said: "I'm not going to scream, just go." The man was right in front of her. She could see his hands pulled up into his jacket and in one of them was something metallic that had a gleam to it. She described his hands as big, dirty, and kind of beat up.

[98] The man then said, with this metallic object about six inches from the base of C.D.'s neck: "Do you see what I have in my hand?" She responded, no. He said: "It's a knife." The man said something about her doing something and said if you do not do this "I'm going to slit you from ear to ear."

[99] The man moved with C.D. into her apartment through the patio door. She recalled standing by her bed, close to the sliding door. The bedside lamp on the floor was in front of her and between her and her assailant, who was about four feet away from her. C.D. said she assessed the man and whether to resist him. She concluded that she could not; he was taller and heavier than her.

[100] The man asked C.D. to turn off the light. She did not do or say anything right away. She said that she took an inventory of his features, thinking that she may have to identify him later. She saw, around his face, an aura of frizzy hair that seemed dark brown, to his shoulders; a lot of facial hair with noticeable sideburns; full moustache; and thick lips. She saw he was taller than she was (she was 5'7"). She observed his clothing as dark, dark pants, a navy windbreaker, and a belt with a big oval belt buckle.

[101] The man again told C.D. to turn off the light. She said, no. There was a pause. Then he said: "I'm not going to tell you again, turn off the light". C.D. turned off the light. C.D. said that the light had been on for about two minutes while she stood facing her assailant, with the light between them.

[102] The defence points out that previously C.D. estimated the time the light was on as one to two minutes, "2 minutes tops". In this trial, C.D. was firm that the light was on for two minutes.

[103] Once the bedside lamp was off, some light still filtered in from a streetlamp on 7th Avenue. C.D. could not recall if the drapes on her patio door were still open. The outside light was about half the length of the building and the length of a front yard away. C.D. said that it was enough light to allow her to make out the silhouette of her

assailant against the sliding door, curtains and white wall behind him. She could track his movements and watch his body language.

[104] C.D. said that she then sat down on the bed. The man started to pace back and forth in front of the sliding door. She said that he was agitated, jumpy, and he was moving quickly. He began to ask her questions. He asked: “Are you Valerie?” C.D. said, no. He said: “Do you have red hair?” C.D. said, no. He asked her how long she had lived there. C.D. told him about a year and a half. He asked again “Are you Valerie? Are you sure you’re not Valerie? Are you lying to me? If you are, I’ll hit you.” He made some threat to her. C.D. said that she tried to assure him she was not Valerie. The man went on talking about Valerie. He said that he has come down to Vancouver and he has got involved with these men. C.D. understood they were bad men. He said he borrowed some money from these men and now he had to do something to pay them back, that he owes them. He said that what they wanted him to do was go to this apartment (C.D.’s) and get this woman, Valerie. They really wanted to talk to her, “she had caused a big stink,” she had their money, and that is why they want to talk to her. He said that they had paid money for a hot tip, and they had just received the hot tip that day. Earlier that day, he drove by and had the apartment pointed out to him. Later, he was dropped off there and was told to get Valerie.

[105] C.D. said that she asked him, “if they dropped you off, didn’t anybody check the names on the door?” He did not respond. She said: “can’t you just go and tell them that I’m not her?” C.D. said that she thought the man believed her assurance that she was not Valerie. He said: “No, I don’t want them to know anything about you. I’ll go and I’ll tell them I drove by the apartment, looked in the woman, saw a chick and a guy living together and they had wedding bands on their fingers, and it wasn’t them.”

[106] Then the man said “I’m in a bind, they’ve got me over a barrel. I’m doing this for a favour for them because I owe them money.” C.D. told him that “they probably know these hot tips don’t always pay off, if you go talk to them, they’ll get you to do

something else." He also said that when he was planning with the bad men to come to the apartment, he was offered "a piece" by them, which C.D. later understood meant a gun.

[107] C.D. said that she and the man spoke on several different topics but she could not recall the order. They talked about the police. The man insisted that she not go to the police. C.D. told him that she did not like or trust the police and that she was not going to the police.

[108] C.D. explained that from the very beginning, as soon as the man started to pace, she thought this was a bad situation and that she needed to survive. She thought of her mom and dad and her best friend and how none of them would be able to cope if anything were to happen to her.

[109] C.D. said that she was very good at talking people down and she wanted to try to do that with this man. She could tell the level of arousal from his voice, and she was also watching his body language and movement.

[110] The assailant never spoke loudly but with intensity. Sometimes, such as when discussing the police, the level of intensity came down to a more average level. C.D. sensed some de-escalation. Other times he could be subtly very angry, even though not very loud; the intensity carried threat.

[111] The man asked C.D. whether she lived alone. She said "yes". He asked if her parents let her live alone. She said "yes" and that one reason she would not go to police is that they would probably contact her parents, and her parents would make her come back home. He said: "Yes, that's true, police are always doing that kind of thing, always messing things up for people."

[112] C.D. said that she thought there was some drop in the man's arousal; he was a little calmer, and she thought that he was accepting that she was not Valerie. She let him know that if he just left at that point, she would forget about everything. He said "No, I need a guarantee. I need a guarantee you're not going to go to the police.

You could scream." C.D. offered to let him gag her. He said: "You could phone the police". She told him that he could pull the phone out of the wall and tie her up.

[113] The man said no, he needed to do something to embarrass her so badly she would be afraid to go to the police. Then he said: "I'm going to have sex with you".

[114] C.D. said that she started to go into a freeze response and began to shake. She said: "No, no, that's not a good idea. I have a lot of pride, you can't take that away from me." she said that the man got really angry, not loud but intense. He told C.D. to take her clothes off. She recalled just sitting there, unresponsive. The man said: "You can't tell me you've never been to bed with anybody. And if you're lying about this." He made another threat to hurt C.D. She told him that she had been to bed with only one person. C.D. said that the man said: "I'm not going to tell you again, take your clothes off."

[115] C.D. stood up and took off her clothes and then sat on the bed, naked. She described that she was in shock. She recalled that her legs were shaking so hard, they were bouncing two inches off the top of the bed. The man sat beside her and said: "You're freaking, you're going to freak out, you're freaking." He ran his hands up and down her thighs, her arms, and across the top of her body. He reached around and held her and then lay her back onto the bed and started kissing her. He continued to talk as he was kissing her.

[116] The man asked her if she had a boyfriend. She said "yes", even though she did not at this time, hoping that he might think somebody was going to walk in the door. He told C.D. how sweet she was and that he hoped her boyfriend appreciated her. He spoke about other parts of her body and that he hopes her boyfriend appreciates those. C.D. said that he asked her if her boyfriend is a big or little guy.

[117] As he was kissing her, C.D. said that the man looked up for a moment, pulled on his moustache, and said: "My beard's getting in the way." She could feel his jawline on her face. When she first saw the man outside on the patio, she thought he

had a full beard, but now, up close, along the jawline, she could not feel a beard or hair underneath the chin. She thought he did not have a full beard.

[118] The man forced C.D.'s legs apart and told her he was going to "eat her now". He performed oral sex and said that this is the only thing he is good at. When he was done that, he sat back up, pointed to his penis and asked C.D. if she wanted a feel. C.D. said that she did not respond and he said: "Well I guess not." Then he stood up and dropped his pants. He had an erection. He said: "I've probably got you so horny now, you probably don't mind. You probably didn't think you'd be spending your Sunday night like this." He got on top of C.D., and put his penis into her vagina. C.D. said that she disconnected from herself. The sex act did not last very long and she did not think he ejaculated.

[119] The man told C.D. to put her clothes on. C.D. said that it was freezing cold in the apartment. He made a joke about how cold it was outside when he was waiting to come in. He put his clothes back on. He told C.D. how bad it was to leave the patio door open. He said: "You won't see me again unless you want to" and to think of him as not having been there, but having been sexually satisfied.

[120] The man put his clothes on, put his hands back into his jacket and told C.D. to give him 15 seconds. Then he left.

[121] After the man left, C.D said that she was in shock. She got up, locked the patio door, then looked at a clock and saw it was after 2:00 a.m. She thought that the assailant had been there for a little over an hour. She lay on her bed for a while, then ran the bath as hot as she could because she felt disgusted and was very cold. She fell asleep in the bath, woke up in a cold bath, drained it and ran a hot bath again. Afterwards, she lay on the bed for a long time. Eventually, she fell asleep.

[122] C.D. said that the man was speaking most of the time that he was in her apartment. She described his voice and speech as unusual, with a drawly quality. He lengthened the vowels. C.D. gave an example: the way he said Valerie was more like Val-er-ie with a kind of rhythm. He did not speak loudly, but there was a large

range in intensity; from conversational to light (a couple times he when he made a joke) to the highest intensity (when he made threats).

[123] C.D.'s mother called her at 7:30 a.m. on February 22, 1982, as she did every morning, just to check-in. C.D. did not say anything to her mom about what had happened.

[124] C.D. said that she phoned her friend S.W. at about 10:00 a.m. C.D. told S.W. about the assault. She said that she did not want to report it to the police, but her friend persuaded her to do so. S.W.'s brother came over, picked C.D. up and took her to S.W.'s apartment where C.D. met the police. C.D. went back to her apartment with the police the following day. She never returned to live there.

[125] C.D. had a medical exam either the day of or the day after the assault.

C.D. describes her assailant

Statements to police

[126] Two police officers came to speak with C.D. at S.W.'s apartment on February 22, 1982.

[127] There are two completed investigation reports dated February 22, 1982. One is handwritten signed by Constable Strikwerda and the other is typewritten and signed by Constable Harrison.

[128] The investigation report dated February 22, 1982, signed by Constable Harrison, contained information about C.D.: height 5'6", age 21, weight 120 lbs, hair black, eyes brown. C.D. said that she was taller than 5'6", weighed 110 lbs and that her eyes were green.

[129] The report contained a description of C.D.'s assailant as "age 35, male, white, 5'6-5'8", stocky, hair curly dark brown, eyes dark, full beard" and included a description of clothing. C.D. testified that she said 35 or younger and assessed the assailant as taller than her and therefore more likely to be 5'8". She testified that she likely said "full beard" although she knew that she had felt the assailant's jaw line

during the assault. The description of clothing in the report accorded with her memory but was missing the belt buckle that she was sure she mentioned to police.

[130] The report noted: “Victim thought suspect sounded American.” C.D. explained that, to her, there was a drawly quality to the assailant’s voice. She explained that she did not mean that he was American, but that she could not place that drawly quality in any Canadian accent she knew.

[131] The report also referred to C.D. stating the assailant “smelled smoky and he had thick lips,” which is what C.D. recalled experiencing and stating.

[132] A miscellaneous and supplemental report dated February 22, 1982, was authored by Officer Strikwerda, who C.D. recalled speaking to at S.W.’s apartment. The report, on page 1, refers to a suspect Keith Harvey La Verl; C.D. did not know who that was, although the police had asked her whether her attacker could be Indian, which she denied.

[133] This report is in a question-and-answer format. C.D. testified that she thought it was mostly accurate but that some of the wording was not hers and her answers had been paraphrased. For example, she said she never would have used the term “loan shark” and that the assailant never asked “Are you going to police” as is noted on page 2. Additionally, C.D. denied she said she “believes he is American,” as is indicated in brackets on page 5. Rather, she was trying to describe the drawl she heard and the quality of the assailant’s voice. She testified she meant to convey that the assailant’s hair at the side of the face was four inches long and around the face, not that he had a four-inch-long beard.

[134] On February 24, 1982, two days after the rape, C.D. went to the police station at Oakridge, and provided a more detailed statement. Later that same day, the police called C.D. to come back to the station as they had a suspect in custody they wanted her to look at. C.D. looked into a room to view the suspect. She advised the police that this was not her assailant.

[135] On February 26, 1982, C.D. went back to the police station again, this time to meet with a sketch artist with the goal of providing a description of her assailant that would enable the artist to make a composite sketch. She assisted the sketch artist. Beneath the sketch is this description:

> W/M, 30-35 yrs., about 5'8'', big (heavy) chest, substantial build, medium complexion, big hands, broadened squat nose, hair very thick and bushy, resting on shoulders, dark brown, coarse, curl at bottom, hair desc. as "ratsnest" in middle, probably unparted, looked as if would be hard to get comb through, male did not smell dirty, moustache to top of lip, thick lips. Moustache was full, same color as hair, blended into a brown beard. Sounded American, used "honey" a lot, prominent cheekbones, quite small eyes, poorly educated.
>
> Wearing waterproofed jacket, dark blue, which he had to pull over his head to get on, hip length, brown wide belt with large oval-shaped buckle. Mackinaw-type shirt, some black squares in it, with poss. some green. Wearing another shirt underneath which showed white around neck.
>
> Had something clenched in hand, probably knife. Right-handed. Knife had "pinkysilver" blade.
>
> Susp. smelled of smoke of some kind, a lot of it, associated with being closed up for a long time.

[136] The composite sketch that resulted was, in C.D.'s view, about 30% accurate.

[137] C.D. clarified in her evidence at this trial that there was no long beard under the chin, but that her assailant did have facial hair. She did not recall saying that the assailant used the word "honey" a lot, which is noted under the sketch.

[138] A few days after the attack, the police took C.D. on a walkabout on Main Street as they thought a possible suspect might work there. She visited many shops but did not see her assailant. She pointed out some men only to indicate they had some similar features.

[139] C.D. also attended the police station sometime in April 1982 to look at photographs of suspects on a computer. She did not identify anyone in this process.

C.D. identifies Ivan Henry as her assailant

[140] On May 12, 1982, C.D. attended the police station to view a lineup. She said that she saw the men standing against the wall. One of them was struggling

violently. He was held on either side by two large policemen. One policeman had his arm around the man's neck. The struggling man was constantly trying to pull his head down while the policemen were trying to pull his head up.

[141] C.D. said that she could not see the face of the struggling man full-on. She said that she had never seen unleashed male violence before in the way that she saw it in the struggling man. She described the sound of his voice as overwhelming to her. His voice was an expression of rage. When she saw the struggle and heard his voice, C.D. described herself as "triggered". She said that she went into flight mode and felt she needed to leave the police station as quickly as possible.

[142] In her evidence at this trial, C.D. said that she was trying to do what she was asked to do, which was make an identification of anybody in the lineup. The struggling man was crouched over. The number on his chest was 12. The other men in the lineup were laughing, smirking and not taking the matter seriously. There were men who looked nervous handcuffed on either side of the struggling man. C.D. said that she was confused by the entire event. She felt she could not go through a comprehensive, conscientious and thorough identification. She said that she could not believe that somebody this violent, this dangerous, and this evil could have raped her.

[143] C.D. said that she left her ballot blank and left the police station as soon as she could. She did not stay to be interviewed by anyone after the lineup.

[144] On September 1,1982, C.D. provided a further statement to Detective Harkema. She explained why she did not identify anyone in the lineup. She told Detective Harkema that she did not think that the man wearing number 12 was her attacker. She said "I realized later that a part of me didn't allow myself to make an I.D." She added that number 12 was the same size and weight and had the same cheekbones as her attacker. The shape of his face appeared to be thinner but that "could have been affected by the beard." She did not notice his hair, but thought of it as being different.

[145] The defence says that C.D. formed an opinion of Mr. Henry based upon how he behaved at the May 12 lineup. She described it as unleashed male violence. His voice was overwhelming to her. She said that his behavior was violent, dangerous and evil. Her description of her attacker morphed into what she had observed about Mr. Henry in the lineup. She also added details to her description of her attacker, which became more like Mr. Henry.

[146] C.D. testified at Mr. Henry's preliminary inquiry on November 4, 1982. She described her assailant as "about 35 and about five nine, five ten, not a tall person, and quite heavy in the chest, really quite heavy in the chest." She estimated his weight as: "About a hundred and sixty, maybe a little bit more." She based that on her approximation that he was about 50 pounds heavier than her.

[147] The transcript of the preliminary inquiry shows that C.D. said she "thought initially he probably had a full beard" when he was outside on the patio, but that later, when he was next to her inside her apartment, "it did look like as if he sort of had a lot of facial hair, just sort of rough but not like a full beard." He had a moustache.

[148] C.D. testified that her assailant's "hair was quite long, about not quite shoulder length, and really bushy, and sort of not curly exactly but a little bit frizzy." She explained that outside on the patio, she had seen his hair as dark brown, but when he came inside, into the light, it appeared lighter brown.

[149] When asked at the preliminary inquiry whether she could identify anyone in the courtroom as her assailant, C.D. asked for Mr. Henry to stand up, as she thought that would assist her in making a thorough assessment. Mr. Henry stood up and said, twice: "All you are doing is playing a game". The judge told Mr. Henry to keep his mouth shut and threatened to remove him from the courtroom. The judge also told Mr. Henry to stop smirking.

[150] C.D. then identified Mr. Henry as her assailant in the preliminary inquiry. At this trial she explained that she could do so because:

> I was now in this context, which was calm and orderly, able to make a thorough comprehensive identification of a number of identifying features of the attacker. I can't recall what specific features from the list I'd made, but I'd been able to assess what I'd seen in the light, I was able to assess the movement pattern, I was able to see him from squatting to standing, I was able to see his hands. I was also able to hear his voice and the voice was in the same range, it didn't have the aggressive qualities of the man in the apartment, but he wasn't always overtly aggressive. It was in the same range, social range, conversational, and I could hear the drawly quality of some of the elongated vowel sounds. And that sets up an intonation pattern and I could hear that. And the overall sound now of that voice, in that range, was the same. That full composite of features. Yes, this matches the features of my attacker. This is the person who raped me.

[151] The defence says that for the first time, C.D. described her assailant's movements to conform with what she observed about Mr. Henry's movements in the preliminary inquiry, including squatting and standing. She gave more details about Mr. Henry's voice and how it matched the assailant based upon "intonation patterns". She had not mentioned such patterns in any of her statements or in the evidence that she had given at the preliminary inquiry.

[152] At the preliminary inquiry, C.D. was asked about her eyesight at the time. She testified that she could see well to a distance of about 30 feet and needed glasses for night-time driving. She testified she could not see well at the lineup due to a combination of her eyesight and the person struggling and not wanting to be seen.

[153] C.D. testified at Mr. Henry's criminal trial on March 3 and 4, 1983. She described it as a harrowing experience. She said that she felt that Mr. Henry was looking at her throughout her testimony in chief with a lascivious smile on his face. She felt unsafe and terrified. Mr. Henry was representing himself and he cross-examined her. She said that when he did, he was moving around the courtroom, moving quickly and erratically. He seemed jumpy. He was coming right up to the witness box, into her personal space and leering at her. The smirking never stopped. A couple of times he asked questions relating to the attack and she felt as if it were a joke to him.

[154] C.D. provided a description of her assailant at the 1983 criminal trial. C.D. said that he was about "thirty-nine years old, about five nine, five ten, about 160

pounds, stocky, sort of big chest." He had very wide cheekbones, sort of a reddish colour hair and the hair was quite—quite bushy."

[155] In her evidence at this trial, C.D. said that she did not know why she said 39, as she had always said 35, or 35 or younger, regarding her attacker. She realized this was a discrepancy and thought maybe there was a crossing of sounds, as she said 5'9" right after. She agreed that the reddish colour was not something she had stated before.

[156] C.D. identified Mr. Henry as her assailant at the 1983 criminal trial, despite being afraid. She said that she was afraid of Mr. Henry and identifying him because, during the assault, she had promised not to go to the police, and she had, so she expected him to come back to hurt her.

[157] C.D. explained the difference, for her, between the lineup, the preliminary inquiry and the 1983 criminal trial. She had just turned 23 when the 1983 criminal trial took place. She explained that the lineup was not an opportunity to make a comprehensive, thorough identification because she could not see Mr. Henry's face in full-view. Instead, it was either in profile or tucked down and in constant movement. She said that she was also terrified. By contrast, the preliminary inquiry was orderly. All of the features that were obscured in the lineup were now available to be observed. She was "able to hear his voice and identify those particular qualities that had stood out to [her], plus the overall quality, characteristic of the voice. And [she] knew there was a match to the attacker."

The defendant on February 22, 1982

[158] Mr. Henry gave some evidence about where he was on February 22, 1982. This rape happened a few weeks after Mr. Henry completed his mandatory parole period. It was shortly after Mr. Philipson's final report of January 26, 1982 that stated that Mr. Henry did not have any concrete plans about his future.

[159] The rape of C.D. happened at a time when, according to Mr. Henry, he was living on East 53rd Avenue with Clem Doust and about a week before he would move back in with his ex-wife, Jessie Henry, and his daughters.

[160] In Mr. Henry's alibi statement of November 20, 1982, he does not mention the charges related to the rape of C.D. on February 22, 1982. He prepared his alibi statement while reviewing various charges from the indictment. He sought to explain the omission at this trial by suggesting a page was missing:

> Q: And, sir, I don't see any specific reference, at least to February 22, 1982, in your alibi statement. Do you, sir?
>
> A: No, I don't see -- I don't see January either. So I think -- I think we're missing page 3. Page 3 is not a numeral, but page 3 is 3, and I see that missing. And then I have something behind it who I -- were going to call as witnesses. Those were my witnesses that I was going to call. I don't see the police in there because I called five police. So I -- I -- I know I got my signature there, but I don't -- I believe there's a page missing.
>
> Q: So, sir, your belief is that your alibi statement did provide an alibi for February 22, 1982, but that that page is missing from the document that's now marked as Exhibit 50?
>
> …
>
> Q: I'm going to suggest to you, sir, that this is your alibi statement and that you did not provide any alibi in your alibi statement for February 22, 1982. Would you agree with that?
>
> A: No, I don't.
>
> Q: And the reason you don't is you believe there are pages missing from this?
>
> A: Well, I'm -- unless I'm really -- unless I was really crazy at that time because I would -- I had the indictment in front of me. 19 charges. And I went through each of these charges trying to vision where I was at the pacific [sic] time each time each crime was done. It was a pretty difficult endeavour, if I might use that word, because we're going back 18 to 20 months, and that's a long too remember. You know, if you had a funeral there or that kind of stuff and -- and nothing was really out of place in my life through this whole time other than what my wife was doing or my car was doing…

[161] Mr. Henry's alibi statement begins on page 1 by addressing dates in reverse chronological order. It proceeds at the bottom of the page from March 6 and 10, 1982 to October 17, 1981. There is no reference to February 22, 1982.

[162] On the third page, Mr. Henry provides a list of his alibi witnesses, followed by further detail for each of the offences. On page 4, he covers from March 1982, then back to October 1981, with no reference to February 22, 1982.

[163] Mr. Henry was taken to his discovery evidence and his 1983 criminal trial testimony where he said that in February 1982, he had been living with Clem Doust at 2251 East 53rd Avenue and working in the 5500 block of Earle Street with a guy named Vince Sauley. Mr. Henry said that Mr. Doust is the individual who brought Mr. Henry into his home because he was concerned that Mr. Henry was drinking a lot and potentially getting into trouble. Neither Mr. Doust nor Mr. Sauley were called as witnesses at his 1983 criminal trial, although the former was listed as one in the alibi statement.

[164] The rape of C.D. on February 22, 1982, happened about a week before Mr. Henry moved in with Jessie Henry in the apartment that she had rented at 248 East 17th Avenue.

[165] Mr. Henry denies that he raped C.D. in her apartment on February 22, 1982.

Summary of facts re C.D.'s identification of Henry

Plaintiff

[166] C.D. was three days shy of her 22nd birthday when she was raped on February 22, 1982.

[167] Unlike A.B., C.D. had enough opportunity to observe her attacker that with the help of a police sketch artist, she was able to prepare a composite sketch of her attacker that looks remarkably similar to Mr. Henry's appearance in February 1982.

[168] C.D. said that she was traumatized and was not able to identify Mr. Henry at the May 12, 1982 lineup in the bizarre situation that was before her. She rushed out of there without being interviewed by Detective Sims, as others were.

[169] C.D. identified Mr. Henry at the preliminary inquiry. She said that she was cautious and careful in doing so and explained why she was able to do so. Her identification, although in court, is supported by her earlier description.

[170] Mr. Henry offers no alibi for the night of February 22, 1982.

Defence

[171] The defence points out that C.D.'s evidence evolves from her first report to police officers, her second statement on February 24, 1982 and in her meeting with the sketch artist and provides several examples, some of which are timing changes and the description of the perpetrator's hair. She is now more convinced by Mr. Henry's movements although she had not mentioned them before.

[172] In her preliminary inquiry evidence, C.D. asked Mr. Henry to stand up and said that when she heard Mr. Henry's voice in his exchange with the judge, she was able to identify Mr. Henry by his voice. She had heard his voice before at the May 12, 1982 lineup, but could not make a positive identification then.

[173] The defence points out that C.D.'s identification of Mr. Henry at the preliminary inquiry is tainted by his behaviour at the May 12 lineup, where C.D. concluded that the man wearing number 12 was violent, dangerous and evil. It was also tainted by the exchange between Mr. Henry and the judge because she observed Mr. Henry to be reprimanded by the judge.

E.F.

Background

[174] E.F. was born in Montréal in 1948. She was raised in Montréal and completed her education there. In 1976, she moved to Vancouver where she quickly found a job at a property insurance company. She became the first woman to work in the firm's underwriting department.

[175] In 1979, E.F. commenced employment at the Insurance Corporation of British Columbia (ICBC) in Langley. Two years later she was promoted to a position in

Vancouver and in January 1982 she moved to #103 - 2142 Carolina Street, in the Mount Pleasant district of Vancouver. Her goal was to work in personal injury claims at ICBC. She was studying at night with the Insurance Bureau of Canada. She never finished that course.

[176] E.F.'s apartment at #103 – 2142 Carolina Street was a one-bedroom unit on the main floor, facing north. The living room was on the right, with a sliding door onto the balcony. The narrow bedroom was on the left. E.F.'s bed was in the far-left corner, with the head of the bed against the north wall. A tall window, approximately two to three feet from the end of her bed, looked onto the balcony.

E.F.'s description of her assault

[177] E.F. went to bed on March 9, 1982 at 9:00 or 10:00 p.m.

[178] On March 10, 1982 at around 2:45 a.m., E.F. was asleep on her back, in her bed when she was awakened to a hand on her throat. At first, she thought it was a nightmare and began to struggle, but the hand on her throat got tighter and pushed harder as she continued to fight. She felt that this struggle lasted a couple of minutes before she realized it was real, not a nightmare. She woke up, struggled harder and started to scream. She was strong, but she said that she was surprised that she could not fight off this hand.

[179] E.F. said that she looked up and saw a tall dark shadow over her and heard a deep, guttural growl . As she continued to struggle, the man said "Jesus, Jesus" and other swear words. He said: "Stop screaming, or I'll cut you, I'll cut you" . E.F. stopped fighting. She could not get a good look at it, but she saw some kind of pointed object in the man's right hand.

[180] The assailant put a pillow over E.F.'s face and said: "If you hadn't stopped screaming, I would have cut you where it was coming from". He started to ask questions. He said he was looking for Valerie. He said he was looking for somebody who owed him some money and "I'm here to get money for somebody else." He asked E.F. for her name and she told him. He then said: "You're the wrong one, did

somebody else used to live here?" E.F. said she was still getting mail for somebody called Veronica. The assailant then asked E.F. whether Veronica had brown hair. E.F. replied yes. He asked whether Veronica had a big boyfriend. He was also saying "Valerie", he's looking for someone named Valerie. E.F. said "sure, Valerie", thinking that either the assailant did not know the name, or she had mis-heard him. The man asked how he could find Valerie and E.F. replied that he could ask the landlord. He asked who the landlord was; E.F. gave him the landlord's name and the assailant said he had heard of that name. He made comments about E.F. being foolish to not lock her balcony door.

[181] The assailant then told E.F. that "you're not the one, but I have to do something to ensure you don't go to the police." He said that he had to embarrass her so that she would not go to the police. At this point, he took the pillow off her face and said: "I don't want to have intercourse with you because the police will persecute you; that's the way the law is now, and it will be better someday."

[182] E.F. sat up on the bed. She was in just her underpants. She said that she felt embarrassed. The assailant's penis was out of his pants. She started to cry. The assailant helped pull a blanket over her shoulders while still in front of her. She was looking at his erect penis. He then told her to put it in her mouth. She did. She was crying. The assailant put his hand on her shoulder and said, "We can have intercourse". E.F. responded, "No, no, no."

[183] E.F looked up at her assailant for a few seconds when she was sitting on the side of her bed. In her mind, she was taking a picture of his face. She thought that if she lived, she was going to make sure she identified him. She described him as having very wild hair, curly and a mess. She said that his face was distinctive, he has a wide face, wide cheekbones, small eyes, high eyebrows, no facial hair. She thought that he was approximately 5'10" with wide shoulders and a slight forward hunch to the shoulders. He was wearing a kind of trench coat, light coloured, maybe tan. E.F. could not remember the shirt, but did remember that he was wearing polyester pants with small checks and no belt. The waist curved in slightly or bent

slightly from a belly that was hanging over it. His hands were rough and he had dirty fingernails. He smelled badly of sweat as somebody who did not bathe often. E.F. detected another smell she suspected was alcohol. He pulled his collar up after he saw her looking at him.

[184] During the assault and while E.F was making these observations, there was no light on in the apartment, but E.F. said that light was filtering in through the bedroom window. The window was about three feet wide and five feet high, with sheer curtains that she kept open slightly. It was to the left of her bed and the assailant was standing in front of that window. A streetlight was directly across the street, 60 feet from the window. E.F. testified it was quite bright in the bedroom.

[185] The assailant ejaculated in E.F.'s mouth. He pushed her down on the bed and she was laying on her back again. He told her to wait five minutes and not call the police. E.F. then saw the assailant visiting with her cat. He said, "You've got a cute cat. I used to have a cat once, but I don't anymore. I can't have one." As he left, the man lectured her on how foolish it was that her balcony door was unlocked. E.F. heard his footsteps, softly, in the living room and crossing over to the balcony. E.F. then heard a thump as of somebody jumping from the balcony and hitting the ground. Then she heard a car start. It didn't click on the first try but did on the second try. She heard it drive away.

[186] After the man left, E.F. got up, locked the balcony door as best she could and called the police, who attended soon after.

[187] She estimated that the assailant was in her apartment for about 25 minutes, having come in around 2:45 a.m. E.F. looked at the clock after he left, and it was 3:10 a.m.

E.F. describes her assailant

Statements to police

[188] E.F. said that she got up and locked the balcony door and called the police. Two officers came to her apartment very quickly.

[189] The first police investigation report, hand-written, was prepared at 3:14 a.m. on March 10, 1982. That investigation report was transcribed to a typed version. E.F's description of her assailant is:

> W/M [white male], late 20s, 178cm (5'10"), 72.6 kg (160 lbs), broad shoulders, regular build, dark hair, curly/wavey, very thick (approx. 2" thick), s/l, face "surprisingly wide", no facial hair noted but Victim not sure, strong body odor (victim states smell from dirt not other sources) accent described as similar to Chinese who speaks poor English but she feels it was being put on by Suspect.

[190] E.F. described that her assailant "walked softly, gruff voice, raspy breathing".

[191] E.F. prepared a hand-written statement on March 10, 1982. In that statement she described her assailant's voice as "gruff with a sort of Chinese accent" that she described as "affected" and said he also had "a bit of a wheeze." She elaborated and explained that when she was struggling with him, he was making that sound, which was more a growl rather than a rasp. In writing this statement she used quotation marks when trying to quote the assailant's words. In this statement she also described her assailant as "5'10, heavy build, smelled terrible, hands were dirty, hair was dark and longish, seemed curly or wavy, stood out from his head similar to a loose Afro, seemed dark Caucasian not Chinese as his accent suggested."

[192] Also on March 10, 1982, the police prepared a miscellaneous and supplementary report after a second interview with E.F. It contained more details about statements made by the assailant and E.F.'s observations of him. E.F. confirmed the words in quotation marks generally, and specifically: "Oh well you can't be the same one. I'm over a barrel for someone else to pick up the money she owes him. She was living here comfortably on someone else's money." She believed those words were what was said by her assailant.

[193] E.F. also confirmed her observation at the time that the assailant was circumcised and that he wore no underwear.

[194] On March 11, 1982, E.F. provided a statement at the police station. In that statement E.F. is reported as saying that the assailant definitely used the phrases “over a barrel” and “don’t freak out on me.”

[195] There is also an undated statement of E.F. describing her conversation with the assailant. E.F. said that she did not create this document and does not know who did. She described the contents of this statement as “pretty close but not everything that I remember saying. I thought there was more – but it was a long time ago.”

[196] E.F. testified that the police instructed her to call them or make a report if she happened to see anyone who resembled her attacker. She understood that they were looking for somebody who had some resemblance so they could put together a picture. She did contact the police on two occasions, to let them know she had seen somebody who resembled her attacker. On March 23, 1982, E.F. saw a man at her bus stop who resembled her attacker but was not him. On April 3, 1982, E.F. called the police regarding a man she saw at Safeway who resembled her attacker but was “most definitely not him but resembled him so closely but he was far too short and had very dark hair.”

[197] After this, E.F. recalled looking at books of photographs on one occasion. She did not identify her assailant in any of those.

[198] E.F. was also shown a composite sketch but thought that the hair was not the same, that her attacker’s hair was sticking out more. The man in the sketch had facial hair and her assailant did not. She testified that she does not really see in two dimensions and could not translate it into a person.

[199] In her evidence in this trial, E.F. explained her suggesting that the assailant had a Chinese accent. She said that he had a stilted, awkward way of speaking. It was distinctive. The language used was unusual. It changed as he continued speaking. It started out sounding like someone who did not speak English well, but

became more fluid as he talked about somebody ripping him off. It was clear to her that he was Caucasian and used rough language.

E.F. identifies Ivan Henry as her assailant

[200] E.F. was contacted by police to attend a lineup on May 12, 1982. When she got to the police station, E.F. was put in a room with a dozen or more women who were also there to view the lineup. One women told E.F. that there was a suspect that was acting up and not co-operating.

[201] When E.F. went into the booth to view the lineup, she could hear someone yelling behind the wall. It took a long time but eventually the men began to move into their place in the room. She observed a man who was towards the middle, slightly to her left. Two police officers were holding him, and he was struggling. He had skinny legs that were moving around. One of the police officers had him by the head, one hand over his forehead and the other at the back of his neck, trying to get him to face the viewers. A third person was trying to keep the man steady. At first there were struggling noises. Then the man started growling and he made a very strange noise. E.F. said that it was the same noise that she had only heard once before or since, and that was in her bedroom on March 10, 1982. She heard the growl, and there was swearing in the growl sounds. The man making the growling sounds was wearing a number on his chest: 12.

[202] E.F. thought that the man was trying to affect the process either to prevent his being identified or if he was, that the identification could be brought into question. At one point, the officers got the man in a position where E.F. could see his face, but it was distorted by the men trying to hold his face up and it was bright red. His eyes were closed. His hair appeared bright red.

[203] E.F. marked 18 on her ballot, the number of the man on the farthest right. In her testimony at this trial, E.F. explained she did so because her mind was paralyzed. The overall experience of the lineup was chaos and E.F. felt overwhelmed, confused and very frightened. Despite marking number 18 on her on

the day of the lineup, E.F. thought that number 12 was her attacker, based on the sounds coming from him.

[204] On August 17, 1982, E.F. provided a statement to Detective Harkema. The defence points out that in this statement E.F. said, for the first time, that she was awoken to the sound of the intruder's voice that she described as growling obscenities. E.F. had not described his voice like that in her previous statements. In this statement, she described the intruder as a "big, dark, shadow of a man." His voice was "very gruff."

[205] The defendant also refers to E.F. saying in this statement that the pointed object that she thought was a pen was in the man's right hand, and he held her with his left hand. She had not previously identified what he did with each hand.

[206] E.F. said that she realized right away the man was very firm and powerful. She got the impression the man was really angry. She had not said this in her previous statements.

[207] E.F. spoke about having initially struggled with the man, which she had not previously described. She now claimed, for the first time, that he had said "Jesus. Jesus."

[208] When the intruder demanded that E.F. put the pillow over her face she refused to do so initially, and they debated the point. She says the man put the pillow on her face: in her earlier statements she said she put the pillow on her own face at his command. E.F. had not previously described a struggle or a debate. At the point the pillow went onto her face she had not seen the intruder's face.

[209] The man was wheezing "as if catching his breath." She had earlier described his wheezing but not the catching of the breath. She now said that the man had a stilted sort of accent, a very strange little accent that she had previously described as the Chinese accent.

[210] E.F. claimed that when he told her to sit up and he removed the pillow from her face, she stared at his face so as to remember him. She now added that the man was not wearing a belt.

[211] E.F. said that the man was uncircumcised. She had previously claimed he was circumcised. At this trial, she said that she could not remember if it was or not and acknowledged that she had said different things at different times about this.

[212] E.F. said that the man complimented her on her body, which she had not said in previous statements.

[213] E.F. said that the man reeked of cigarettes but not alcohol, he also smelled of docks, there could also have been a smell of body odour, it was her impression he had not washed. The cigarette smell and dock smell were new details in this statement.

[214] E.F. also explained that Mr. Henry was a 9 out of 10 as a match for her attacker, based mainly on the sounds coming from him at the lineup. She told Detective Harkema:

> I viewed the line up with 11 other women. I froze when they brought these men out. They had to drag one man out. (We had been cautioned before NOT to be prejudiced by any behavior we would see.) He wouldn't stand up. I tried to be objective. This man in the middle of the line up was struggling with the police. He wouldn't stand up. I tried to ignore him. I looked at all of the men as carefully as I could. While I was looking at the other men, I heard this sound I had heard before. It was that growling slur of words where you couldn't make out any specific words. You knew they were obscenities. You could make out they were obscenities. You could pick out the occasional obscenity. I was paralyzed with fear. I'd heard that sound before. It was the same sound as the time of my attack. That was the only time I ever heard that sound ever before or since. The guy who was making the sound was the guy who was behind held by the police. With all things considered – the only thing that I have as a doubt is the fact that his face was distorted. I'd give it a 9 out of 10. Everything else is right.

[215] E.F. testified at the preliminary inquiry on October 27, 1982. In this trial, E.F. said that before she gave her evidence, she spent time studying Mr. Henry's face. At one point Mr. Henry looked right back at her. She said that "the face was it". It aligned with her memory of her assailant.

[216] E.F. was asked by Crown Counsel at the preliminary inquiry whether she could make out the intruder's features. She observed that Mr. Henry's other physical features were also consistent with her memory of her assailant, except for his red hair. She had described her assailant as having dark, wild hair, very thick, wavy, or curly, that stuck out in all directions. She said it was a mess and she had not seen hair like that before, it being about three inches long and no bangs. His hair stuck out straight, he had high eyebrows, wide cheekbones, and broadness to the face. He had no facial hair; and he was about six feet tall and 170 lbs. He was in his late 20s or early 30s, Caucasian, and smelled dirty and of cigarettes.

[217] E.F. identified Mr. Henry at the preliminary inquiry as her assailant. She initially said, "I think it's this man here" and pointed to the defendant. Following this, the defendant interjected "you think?" and was told again by the judge, in the presence of the witness, to "shut up."

[218] In this trial, E.F. testified that when she heard Mr. Henry speak at the preliminary inquiry, she became certain that he was her attacker because: "I finally had a face that I definitely knew was the face. And I heard him speak. It basically put most of it together. This was the man. Between the growl, the speaking, the face, and the general build."

[219] During the preliminary inquiry, E.F. was asked about the differences between her attacker and Mr. Henry. She identified the hair as being different because she always thought of her attacker having dark hair . She also testified that the difference in hair colour was a reason she did not pick him out at the lineup, but that even then, upon hearing the sounds coming from him she knew that Mr. Henry was her attacker.

[220] On March 8, 1983, E.F. testified at Mr. Henry's criminal trial. She described the criminal proceeding as very frightening and stressful, mainly due to Mr. Henry cross-examining her while pacing, getting very close to the witness stand and speaking to her in a manner she found demeaning, threatening and frightening. The judge offered E.F. the option of an adjournment. She declined at first, but the court

was adjourned when she began trembling after Mr. Henry's initial round of questioning.

[221] The defence says that this shows that E.F. continued to demonize Mr. Henry, even after she chose another man in the lineup as her assailant.

[222] E.F. testified in the 1983 criminal trial that Mr. Henry's movements, voice, and distinct way of speaking during the criminal trial further reinforced her belief that he was her assailant. Mr. Henry commented to her: "now you know how I feel, and I don't forget." Crown Counsel intervened to object, suggesting the witness was being threatened. E.F. said that she felt threatened that Mr. Henry was going to make her pay for the evidence that she had given identifying him as her assailant. Mr. Henry also went into a lengthy discussion of locks on balcony and patio doors. E.F. said that she felt threatened by Mr. Henry. These events further convinced E.F. that Mr. Henry was the man that she faced in her apartment a year earlier. She identified Mr. Henry as her assailant.

[223] The defence points out that E.F. provided a description of the intruder at the 1983 criminal trial that included new detail regarding the intruder's appearance and/or details inconsistent with her previous statements and/or testimony: she testified he appeared very broad in the face; she testified he had a very little chin (she had never before mentioned his chin); she testified he had heavy or prominent cheek bones although she had first mentioned his cheekbones at the preliminary hearing, where she described them as wide, she had not mentioned his cheekbones in her police statements, and had never before trial described them as heavy, prominent or remarkable. E.F. testified at the 1983 criminal trial that his eyes were deep-set, half-closed; there was a shadow in the hollow of the eye, which made it difficult to "get a good detail on the eyes"; her attacker had a very slight slant to his eyes. E.F. had not mentioned the intruder's eyes in any police statements nor in her testimony at the preliminary inquiry where she had testified that it was too dark to make out anything about his eyes. She testified the intruder was Caucasian (in her statements to first responders he was described as "quite dark Caucasian"); she

said he was in his late 20s to early 30s, which the defence says reflects the evolution from E.F.'s initial description to first responders that he was in his late 20s.

[224] In the 1983 criminal trial, E.F. said that her assailant's hair was long, wild, quite thick, very curly and dark. It stuck out at the ends and was unlike anything she had ever seen. The defendant notes that this description was new. E.F. could not describe the colour of his skin, noting "he just seemed dark." His fingers had a dry, gritty, rough texture. The defence says that this is a new detail.

[225] In his cross-examination of E.F., Mr. Henry put to her a passage of a statement she had given where she spoke of her assailant looking down at her with the most horrible look of disgust. She had said it was a complete put down and that she had never felt so low in her whole life. Mr. Henry quoted that to her and then said: "Now you know what I feel like, and I don't forget." This prompted Crown counsel to interject and state: "I don't think it's appropriate to have the witness being threatened."

[226] The defendant notes that the plaintiff's evidence regarding odour reflects a "continuous evolution". Initially she told first responders that the intruder had a strong body odour, a smell of dirt and not other sources. In her August 1982 interview she told Detective Harkema the man reeked of cigarettes but not alcohol. He also smelled of docks, there could also have been a smell of body odour and it was her impression he had not washed. At the preliminary inquiry she testified the man smelled very strong and his clothes did not seem clean, he also had a very heavy smell of cigarettes, and he may have smelled of an alcoholic drink that she was not familiar with, though she went on to say as far as she knew there was no smell of alcohol. At the 1983 criminal trial, she did not mention the body odour or dock smell. The only odour she identified was cigarettes, which she had not mentioned to the first responding officers.

[227] E.F. claimed the man was incredibly strong. She said nothing about strength in her police interviews in March 1982.

The defendant on March 10, 1982

[228] E.F. was assaulted in her home at #103 - 2142 Carolina Street, just under two kilometers from 248 East 17th Avenue, where Mr. Henry was staying.

[229] Mr. Henry testified that between March 1 and May 1, 1982, he stayed there about two nights per week. On his evidence, the rest of the time he lived at various places, including the Queensborough Hotel, with Clem Doust, and in 100 Mile House. Mr. Henry does not recall if he was staying at 248 East 17th Avenue on the night of March 10, 1982. He does not have any recollection of where he was that night. He claimed in his November 20, 1982 alibi statement that on March 6 and 10, 1982, he "looked after the girls each night [because his] wife was in the hospital."

[230] Mr. Henry denies committing the March 10, 1982 sexual assault of E.F.

Summary of facts re E.F.'s identification of Henry

Plaintiff

[231] E.F. was 33 years old when she was sexually assaulted on March 10, 1982. Her opportunity to observe her attacker was in limited light filtering through a large window in her bedroom. However, she noted the distinct and unique qualities to his voice right away.

[232] E.F. explained that the lineup was a traumatic experience where she did not have a chance to see Mr. Henry's face. She was terrified by the chaos of the lineup situation and by hearing Mr. Henry's voice emanate in a growl with swearing—the animalistic growl was unique and distinctive and what she had heard in her bedroom on the night of the assault. In her panicked state, E.F. marked a different man's number at the lineup (18). She explained later that Mr. Henry was a 9 out of 10 match for her attacker at the lineup, but not a 10 because she could not see his face.

[233] E.F. first tentatively and then positively identified Mr. Henry at the preliminary inquiry as her assailant. She was tentative at first because she was acting on appearances, then having a better opportunity to see his face her identification became certain and positive upon hearing his distinct voice. She also identified him

at his 1983 criminal trial where she had a further opportunity to see him move and hear him speak.

Defence

[234] Mr. Henry reiterates his position in respect of E.F.'s evidence. He says her evidence is a continuous evolution from the first statement to the police to this trial. It is tainted by the observations that E.F. made of the man wearing number 12 at the May 12, 1982 lineup, as well as his behaviour at the preliminary inquiry and the 1983 criminal trial.

[235] The defence also emphasizes that E.F. chose number 18 as her assailant in the May 12, 1982 lineup arguing that her explanation for having done so, and then identifying Mr. Henry as her assailant is not credible.

G.H.

Background

[236] G.H. was born in Vancouver in 1958. She was raised, along with her sister and brother in Vancouver. She graduated from high school in 1977 and entered UBC that same year.

[237] When G.H. was 19 years old, she moved out of her parents' home. She continued her studies at UBC while working part-time.

[238] In 1981, G.H. moved to #104 – 8750 Osler Street in the Marpole district of Vancouver. It was a ground floor apartment, which was not her preferred choice, but it was the only one available at that time. The suite was located near Oak Street and Southwest Marine Drive. Outside the suite, there were cinderblocks surrounding the small patio. The patio was accessed by way of sliding door from the living room. Behind the living room was a kitchen and behind that was the bedroom and bathroom and the door leading to the apartment building hallway. G.H. said that the bedroom was in the northwest corner of the apartment and contained a single bed. The closet was on the opposite wall. The window was at the end of the bed.

G.H.'s description of the assault

[239] On the evening of March 18, 1982, G.H. was studying in her living room while watching TV. She went to bed at about 1:00 a.m. on March 19, 1982. It was her habit to read in bed until she fell asleep. There was no bedside lamp. She would read with the overhead light on. She would turn that light off before going to sleep, or not. She cannot remember if she turned off the light on March 19, 1982.

[240] There was some light that came into her bedroom through the window. There was a curtain, but it did not cover the whole window, which allowed some light to come in around the sides of the curtain.

[241] G.H. recalled waking up to a man sitting on her bed. She could see him in silhouette. He asked her words to the effect of: "Do you know what that is? It's a knife." She saw a shortish knife, which she later described as pocketknife, in his right hand. As she sat up, she brushed her hand against it and scraped a finger. G.H. estimated that conversation lasted about 10 seconds.

[242] The man told her to put a pillow on her head. She took a cushion that was on her bed and put it over her head.

[243] The man asked for her name and age. She said it was [G.] and that she was 22. He asked her about her boyfriend and where he was. She said that she was really scared but she told the intruder that her boyfriend was at work, he gets off at 3:00 a.m. and that he would be there right after that. G.H. considered that this was an opportunity to say something that might save her. The man asked her boyfriend's name and she said it was Bob. He asked how old he was, and she said he was 30.

[244] G.H. said to the man: "I value my life." He told her to shut up. She believes she said something else that he did not agree with, and he said, "The story is starting to change."

[245] G.H. recalled her assailant's hand going over her stomach and over her clothes. She was wearing a nightgown and a bra. She remembers him pulling the

covers on her bed down and pulling her knees over the side of the bed and him raping her. She does not recall the weight of his body being on her. She felt something warm on her thigh, so she assumed that he had ejaculated. The penetration itself did not last very long. From when he pulled her over the side of the bed to when he ejaculated was no more than a minute and a half.

[246] G.H. said that she had the cushion over her head throughout the assault.

[247] The man told her not to tell her boyfriend because it “won’t look good for you.” He told her to keep the pillow over her head, count to 50 and lock the door next time.

[248] G.H. believed the entire time from when she was awoken until he left the apartment was 5-10 minutes. However, she acknowledged it is difficult to know because time stands still and no clock was visible to her.

[249] When her assailant left the apartment, G.H. counted to 50. She waited until she thought she had heard the patio door closing. She grabbed her housecoat and ran out the front door of the apartment, down the hall, and pounded on the door of her landlady. She told her she had been raped and to call the police. G.H. stayed in her landlady’s apartment until the police arrived and then she and the police officers went back to her own apartment. She spoke to them and was taken to the hospital shortly after.

[250] When asked about how she was feeling and what she was thinking during the assault, G.H. said that what was running through her mind was: “I value my life.” She thought there was a chance that she could die. She knew she had been threatened with a knife before putting the pillow over her head and because of that she decided to go along with anything her assailant wanted without fighting as she thought that was her best chance to survive. When he had asked her about a boyfriend, she thought it was her lifeline and she was trying to save her life any way she could.

[251] G.H. went to the hospital after the assault where the doctor took a vaginal swab which showed a moderate number of spermatozoa. Wet mounts of smears of

the vaginal content showed a number of non-motile spermatozoa. The samples were sent to the Vancouver City Analyst's Lab.

G.H. describes her assailant

Statements to police

[252] G.H. told the officers who came to her landlady's apartment after the attack, that she had been awakened at about 2:30 a.m. Her attacker was already sitting on her bed with his arm across her chest. He said: "Do you know what this is? It's a knife. Put the pillow over your head." She scratched her index finger on the knife.

[253] G.H. told the officers about the questions and answers regarding her boyfriend.

[254] G.H. said that her attacker was standing and she only saw him in silhouette. She estimated his height to be about 173 cm (5'8" to 5'9"), based on the difference in their heights when she was sitting. She was almost 5'7". In her initial report to police she described him as husky, indicating that from what she could see of him, he was broad in the shoulders. She said that he sounded about late 20s. He was Caucasian. His hair was "curly like a perm that was growing out". She did not see his legs. She did not believe she would be able to visually identify her attacker because of the circumstances of the attack.

[255] In her statement to police 10 days later, on March 29, 1982, G.H. said that from the sound of his voice, she thought the attacker was to be in his late 20s. He was a white male, 5'8", stocky build, light brown or blonde hair, like a perm growing out, wide face, no accent, smelled of B.O. He spoke in a half-whispering voice and sounded very nervous. He walked softly.

[256] G.H. explained in this trial what she was trying to convey about her attacker's voice: she was able to hear every word that he said to her. It was like a stage-whisper, not quiet.

G.H. identifies Mr. Henry as her assailant

[257] On May 12, 1982, G.H. was called by police who asked her to attend a lineup later that day. G.H. was familiar with the lineup process. She had attended a lineup before, after the store where she was working at as a cashier was robbed at gun point.

[258] G.H. explained that before going to the lineup, she did not anticipate identifying anybody because she had not had sufficient opportunity to observe her attacker.

[259] In her evidence at this trial, G.H. said that she did not have a direct recollection of participating in the lineup. She remembered parts of it very clearly, including the lineup itself. She refreshed her memory from notes and past transcripts. She recalled being in a little area, with another woman sitting in front of her while she stood behind.

[260] G.H. recalled that the lineup itself was unusual because a man with number 12 on his chest was being held part of the time by police officers trying to get him to participate. She recalled thinking how unusual that was. She took more time to look at the situation.

[261] In the course of the lineup, G.H. heard the man speak. She said that there was "just something about his voice that went right through me." When it came time to mark her ballot, she said that she was careful not to overstate things, knowing that her ability to visually identify her attacker was limited. She wrote on her ballot: "12 by his voice only."

[262] She was interviewed following the lineup. Detective Sims' notes of that conversation state:

> [G.H.] – voice only
>
> There was nobody who looked even close except #12. His hair is just like I described it, growing out. His voice, it just penetrated through me, it hit a familiar chord although he didn't say anything that he said to me. It was the same rasping tone. He was talking at the same level of sound but the way he

> breathed and it was quite loud. There was nobody else that even looked close in that line-up.

[263] Regarding the voice penetrating through her, G.H. said she had had a difficult time describing the voice. She said:

> But when I heard him at the lineup, I recognized it. I recognized it as the voice of the man who attacked me. And, it just, like the gut reaction that you kind of have to something really scary, and really frightening. And it was just, it was the same voice.

[264] Even though G.H. knew from the voice that it was the man who had assaulted her, she did not have visual identification.

[265] At this trial, G.H. stated: "He has a very distinct voice and I recognized it." The defence points out that G.H.'s description of the sound of the assailant's voice went from a half-whisper to "quite loud".

[266] On August 13, 1982, G.H. provided a statement to Detectives Harkema and Rowland, with the following description of her assailant:

> From the sound of his voice, I made him out to be in his late 20's. He was a white male, approximately 5'8", stocky build, light brown or blonde hair – like a perm growing out, wide face, no accent, smelled of B.O. He spoke in a gruff, harsh whisper and sounded nervous. I am a light sleeper but I didn't hear him come in. He walked softly (when he left).

[267] The statement concludes with the following passage:

> On August 13, 1982, Detective Harkema and Detective Rowland interviewed me in my apartment. During a general conversation about the incident, I indicated that a combination of factors, including his voice, appearance, and my own "gut" feeling, indicated to me that the man who had been No. 12 was the person who raped me. Detective Rowland asked me to rate this feeling on a scale of 1 – 10. I said, if all the factors are put together, it would be 10 out of 10.

[268] The defence notes the changes between the March 29, 1982 statement and that of August 13, 1982:

- March 29, 1982: From the sound of his voice, I made him to be in his late 20's. He was a W/M, 5'8", stocky build, light brown or blonde hair, like a perm growing out, wide face, no accent, smelled of B.O. He spoke in a *half-whispering voice*, sounded very nervous…He walked very softly.

- August 13, 1982: From the sound of his voice, I made him to be in his late 20's. He was a W/M, 5'8", stocky build, light brown or blonde hair, like a perm growing out, wide face, no accent, smelled of B.O. He spoke *in a gruff, harsh whisper* and sounded very nervous.

[269] The defence says that the second statement was after the lineup and reflects the "beginning of the evolution" in the description to more closely match Mr. Henry's appearance and his voice.

[270] In this trial, G.H. was asked what combination of factors allowed her to rate her confidence at 10 out of 10. She explained that it was the fact the general description matched Mr. Henry. She recognized the quality and distinctiveness of his voice. This was combined with her body's involuntary reaction to hearing him. She "heard it and recognized it. [She] knew it was him."

[271] G.H. said that she had only vague recollections of giving evidence at the preliminary inquiry in October 1982. She provided a further similar description of her attacker during the preliminary inquiry. She was asked whether she could see the man present in the courtroom and she responded: "No." She said that she did so out of fairness. She had not made a visual identification of Mr. Henry. She relied on the voice identification so she thought it was unfair to say she could see him in the courtroom.

[272] When G.H. was cross-examined at the preliminary inquiry, G.H. had not seen her ballot from the lineup. She was asked what she wrote on the ballot and responded she thought there were two parts, one of which was visual identification. She claims she made a notation that one voice in the lineup was the voice, or very much like the voice, of the person who attacked her. When asked whether she had marked a ballot number down, she responded "I did not mark a number down, I put a notation on it that one of the people in the lineup matched the general description that I had given. And that the voice of a person in the lineup was the voice or appeared to me to be the voice of the person who had attacked me".

[273] G.H. also testified at the preliminary inquiry that it would have been difficult for number 12 to talk during the lineup, and agreed when it was suggested to her that

he had been yelling rather than speaking in a loud whisper on May 12, 1982. In response to further questioning by defence counsel, she said “Yes, he was swearing and indicating that he didn’t want to be in the lineup.” When defence counsel suggested that it was not the same tone of voice as used in the bedroom, she replied “No, but each voice has identifying characteristics even if it’s yelling or a whisper.” She then agreed that in making the identification she was not suggesting that number 12 in the lineup spoke in the same way as the perpetrator did in her room, it was some vocal characteristics that she was picking out.

[274] During the 1983 criminal trial, G.H. was called to give evidence on March 4, 1983. She had not had an opportunity to hear Mr. Henry speak at the preliminary inquiry. At the 1983 criminal trial she was able to hear him both during a *voir dire* and when he cross-examined her.

[275] G.H. recalled the details of the offence and described Mr. Henry. She was again asked about her opportunity to hear Mr. Henry speak at the lineup, but this time she had also had an opportunity to hear him speak at the trial:

> Q: Did you have an opportunity to hear Mr. Henry speak at the line-up?
>
> A: Yes.
>
> Q: And from your opportunities to hear Mr. Henry speak at the line-up on May 12, 1982 and in these particular proceedings, the voir dire that was held earlier this week, what would you say with respect to his voice?
>
> A: There is no doubt in my mind that Mr. Henry’s voice is the voice of the man who attacked me.

[276] Later, G.H. was shown photographs of the lineup and asked to identify the person whose voice she had identified. She identified Mr. Henry in the photographs, then identified him in the courtroom.

The defendant on March 19, 1982

[277] According to Mr. Henry, he was staying at 248 East 17th Avenue, as of the beginning of March, about two nights a week.

[278] Mr. Henry said that he was familiar with the area where G.H.'s assault occurred. He had kept a mailbox very near to there, "down Oak…and then under the bridge," since he moved to Vancouver. He would go there on a weekly basis.

[279] During the May 12, 1982 interview with Detective Campbell, Mr. Henry made certain admissions, describing the method of the attack as his "thing." He then provided a statement about his whereabouts on March 19, 1982. "C" refers to Detective Campbell and "H" refers to Mr. Henry:

> C: This other incident was also in a ground level apartment in the 8700 block Osler Street.
>
> H: I used to live in the 8700 block Prince Edward.
>
> C: Do you remember when you left there?
>
> H: No, I don't at all; maybe January, 1981 I was there and I moved out after that. I am not certain at all.
>
> C: This incident also occurred in the early morning hours, around 2:30, on March 19 of this year. A male broke into a ground level suite by a sliding glass door.
>
> H: O.K. I see you are putting this all together by the sliding glass door.
>
> C: Not completely.
>
> H: And what occurred there?
>
> C: This lady had a pillow put over her head.
>
> H: That's my thing again. You guys are going to use this against me. And what happened? He balled her, he raped her? Ha. Ha. I know I didn't do that one.
>
> C: How do you know that?
>
> H: I was in Regina. I had $7,000.00 in my pocket. I could have had anything. I could pay for it. What day was that?
>
> C: A Friday.
>
> H: O.K. March 17th is Patrick's Day. O.K., that's two out and I didn't' do either one of them.
>
> Sims: Why did you want to know all the details if you know where you were on March 19?
>
> H: Because, when someone accuses you of something, you want to know what.

[280] In cross-examination, it was put to Mr. Henry that he lied to police about his whereabouts on the night of G.H.'s assault when he said he was in Regina with $7,000 in his pocket.

> Q: And that was a lie. You weren't in Regina on March 19, 1982.
>
> A: I – just – it didn't matter if it was a lie or not. That's neither here nor there. I told you – I told what happened. I told you that I was choked when I came up here and was faced with the police department. I didn't know what to say. I didn't know what to do. All I was trying to do is get out of whatever I was getting into. I don't know what I was doing. Scientific evidence proves that I didn't do this crime, so you're wasting my time and you're wasting your own time, per se. I'm eliminated…
>
> Q: Sir, when you told Detective Campbell on March 19th, 1982 -- let's forget the scientific evidence that you believe to exist because you knew nothing about the scientific evidence on May 12 –
>
> A: No, that's –
>
> Q: -- 1982.
>
> A: -- right. That -- that's right. And your people are accusing me of something I didn't do. And of course I got a little stupid, whatever happened. I have no idea what happened.
>
> Q: When you say "I got a little stupid," do you mean you lied –
>
> A: Talking to you guys. I shouldn't have talked to anybody. I should have asked for a lawyer right off the bat instead of being viciously assaulted, carried into an elevator, taken upstairs, and then got on a -- come down on the square and then grabbed and put in -- put into a lineup. That's no good. You can't do stuff like that.
>
> Q: Sir, after the lineup, it's some hours later that –
>
> A: I don't remember none of that stuff. All I remember is the two people there. All I remember is talking to them. I don't know what I said. That's all I got to say to that. If I said something that's derogatory or wrong or stupid or demeaning, I didn't mean it.
>
> Q: Well, sir, this wasn't derogatory. It was simply a lie when you told the police that on March 19th, 1982, you were in Regina with $7,000 in –
>
> A: That's correct.
>
> Q: -- your pocket.
>
> A: But I was in -- I was in Regina in April, so I made a mistake. But I have to go back into my -- into my memory at that time, and we had bought a stereo on the 19th. I know that because her other stereo was -- somebody broke in -- remember June 16th? Took her stereo and all that. Well, that's what happened that time. But this time, I don't know about March 19th. I don't -- that's my -- that's my stepfather's birthday. I knew that. And I know where I was because it was my stepfather's birthday on the 19th of March.

> Q: Yes, sir. And you knew where were you on the 19th of March, and you knew that you weren't in Regina on the 19th of March.
>
> A: Correct.
>
> Q: And you were lying to Detective Campbell about that.
>
> A: I wasn't lying to anybody. I -- that's what I thought, and that's what I said. I didn't lie to anybody.
>
> Q: And you lied about having had $7,000 in your pocket.
>
> A: I didn't have $7,000. I had maybe $700. I -- I might have -- I don't know what I did. I just -- I just did what I did. It was spontaneous. It was stupid. It was whatever. Again, I emphasize I shouldn't have talked to the police because they use that against you like they're using right now.

[281] In his alibi statement, Mr. Henry wrote that on March 19, 1982, he spent the day with Jessie Henry, whom he referred to as his wife. They had gone shopping at the Bay, and he had bought her a stereo. He continued: “We spent the evening together. I don’t understand where this charge came from in relation to have a witness say the day and not be charged with it. Questionable.”

[282] Further down in the alibi statement, he writes: “March 19/82 – Living at 2215 East 53, but this particular day, my wife had got her income tax cheque and we were buying her stereo – stayed the whole day and night at 248 E. 17th.”

[283] Mr. Henry also claimed to be engaged in a “coke deal” with Johnny Brownstone on March 19, 1982. In his May 12, 1982 statement to police he said:

> Q: You had previously said [the coke deal] was March 1982, but now on reflection, you think it might have been earlier than that?
>
> A: March 19, 1982 – March – yeah, that’s right.

[284] As noted, G.H.’s assault occurred right in the period covered by Mr. Henry’s alibi statement regarding where he was staying at the time.

[285] Mr. Henry initially lied to police about being in Regina when the assault of G.H. occurred. Mr. Henry claims that Ms. Henry would have been an alibi for him in the early morning hours of March 19, 1982, but he chose not to call her as a witness. Instead, the evidence we have from Ms. Henry is that Ivan Henry, in the time period at issue, was going out in the middle of the night without explanation, refusing to tell

Ms. Henry why he had been out, and suggesting to her that her refusal of sex was causing him to do these things.

[286] Mr. Henry denies that he sexually assaulted G.H. on March 19, 1982.

Summary of facts re G.H.'s identification of Henry

Plaintiff

[287] The attack on G.H. was the shortest of the five at issue in this case being in her apartment for 5-10 minutes. During that time, she had a reasonable opportunity to observe him and to hear his voice. She estimated his height to be 5'8" to 5'9". She described him as husky, broad in his shoulders and having a wide face. She believed him to be in his late 20s.

[288] G.H. knew that she would not be able to visually identify her assailant, because of the limited light during her assault. However, when she heard him two months later at the lineup, she was able to identify him. She wrote on her ballot: "12 by his voice only." She identified his distinct voice.

[289] In her statement on August 13, 1982, she spoke of the multiple factors which combined to allow her to rate her identification of Mr. Henry as 10 out of 10 including: his voice, what she had been able to observe of his appearance, and her gut feeling.

[290] G.H. did not have a chance to hear Mr. Henry speak at the preliminary inquiry. She identified him instead as the man she had identified by voice in the lineup. She had the chance to hear him speak both on a *voir dire* and during her cross-examination. That left "no doubt in [her] mind that Mr. Henry's voice is the voice of the man who attacked [her]."

Defence

[291] The defence says that G.H.'s description of her attacker changed from statement to statement.

[292] In her March 29, 1982 statement, G.H. described seeing the outline of the man because of the light reflected from the window. She described his hair (like a perm growing out) and his face (wide). She said nothing distinctive about his voice.

[293] In her interview with Detective Sims right after the lineup, G.H. described the voice of number 12 as “quite loud” and it had a “rasping tone”.

[294] The defence refers to the comparison between the description of the perpetrator in G.H.’s August 13, 1982 statement and the description in her March 29, 1982 statement as well as the evolution of the voice that now matches Mr. Henry’s voice from the lineup.

[295] The defence says that in the preliminary inquiry G.H. described Mr. Henry’s physical characteristics for the first time. She described his hair as: frizzy, badly damaged, not in a uniform perm, not naturally wavy, 2” long, sticking out all around his head, sort of thin. In the examination in chief, in response to whether she could identify the perpetrator in the courtroom, G.H. said “no”. Later in that same examination she was asked to point out in the courtroom the man who was number 12 in the photo of the lineup, and she pointed out the defendant. She testified the person who was number 12 fit the general description of the perpetrator and his voice sounded like that of the man who attacked her.

[296] In the *voir dire* preceding G.H.’s evidence in the 1983 criminal trial, G.H. compared Mr. Henry’s physical appearance to that of the man wearing number 12 in the lineup. She said there were similarities. In regard to his voice, while G.H. had said in the preliminary inquiry that number 12’s voice appeared to be that of her assailant, at the trial, having heard Mr. Henry speak, she could say that it was definitely the same voice.

[297] The defence submits that the evolution of the perpetrator’s description given by G.H., is derived from the May 12, 1982 lineup and the in-court identification of Mr. Henry and is tainted.

I.J.

Background

[298] I.J. was born in eastern United States in 1959. She grew up there with her parents and four brothers.

[299] In 1977, I.J. enrolled as a freshman at university. She studied music in her first year and moved into a major in literature the next year, while maintaining her love of music. While at university, I.J. befriended a woman from Vancouver. Her friend returned to Vancouver and became the artistic director of a repertory theatre. I.J. graduated from university in 1981. Following graduation her friend helped her get a job with the theatre company in Vancouver in the summer of 1982.

[300] I.J. stayed with her friend for a week or so before moving to a basement suite at 433 West 17th Avenue in the Mount Pleasant district of Vancouver. This was the first time that she lived alone. I.J. lived in the basement suite for only two weeks before she was assaulted on June 8, 1982.

[301] I.J. described her suite as “rudimentary.” It was a typical basement suite, under a house, with access through the back of the house. There was a desk with a light on it to the left of the entrance with a window above it. Beyond the desk was a kitchenette. There was a separate bedroom that had a bed and dresser lit by a bright overhead light which was operated by a switch on the wall. It was on the shelf above the bed.

I.J.’s description of the assault

[302] On June 7, 1982, I.J. returned to her suite at about 11:30 p.m. She put on some music and went to bed to read a book. She fell asleep with the bright light above the bed still on.

[303] I.J. said that she was startled awake at about 3:15 a.m. She sat up in bed and saw a man. She thought he was moving back from her. I.J. and the man stared at each other. She noticed that his face was very white. I.J. said that at first, she thought that she might know the man but then realized that he was a stranger.

[304] I.J. said that she asked the man who he was. He said “shh”’. The man said that he was looking for Debbie and that Debbie had ripped him off and stolen drugs from him. He asked whether she was Debbie. He let her know he had something in his hand, saying: “I can cut you with this thing, this thing can cut you, are you Debbie?” She told him that she was not Debbie.

[305] I.J. was sitting up in the bed and the man told her to lie down. She complied. He continued to ask her about Debbie and addressed her as Debbie. Then he said “she ripped me off” and “I was told she lives here.” I.J. said that she had just moved there and that she was not from here. She told him she did not think anybody in the house was named Debbie, although she did not know.

[306] I.J. said that the man ran through the same sequence as he moved around the room. The light was still on and he was about two feet away from her, with her at the head of the bed. She recalled that he was casting his eyes around a lot. I.J. said that the man seemed to realize that she was looking at him. I.J. estimated that she was sitting up with the light on looking at the man for a minimum of 30 seconds. Then, the man came over, turned off the light and put a pillow over her face.

[307] I.J. could not say exactly how much time elapsed between her waking up and the light being turned off. The man told her that the thing in his hand could cut her, and cut her up, and he told her, “I can hurt you with this thing.”

[308] The man asked her: “How do I know you are not Debbie, that you didn’t rip me off?” I.J. said that she was not Debbie and told him that there were papers around with her name on them that would confirm that she was not Debbie. I.J. said that this discussion went on for a while.

[309] I.J. asked the man if he was going to hurt her. She said that she had the feeling he was there to hurt Debbie, who had ripped him off, and to get his drugs back.

[310] The man asked her where she was from. She replied: “New York”. He said: “You’re from New York?” He asked her why she was shaking. She said she was

scared. He said: “You’re from New York and you’re scared of me? I’m not going to hurt you unless you make me hurt you.” He asked her: “Where is your face?” I.J. said that she could feel the dread of that question as she thought he was going to cut her face. She put her hands on her face under the pillow. He asked why her hands were there and she said she did not want him to cut her face. She said that she thought about how terrible the first stab was going to be.

[311] I.J. said that she was shaking and thought the man was going to kill her. She thought about how her parents would not be able to handle it. She said that she could not stand the thought of them finding out that she had been murdered in her bed and that they would never see her again.

[312] The man told her that he was going to do something that would make her not want to go to the police.

[313] I.J. recalled the man taking the covers off her and putting his rough hands on her. He pulled down her sweatpants, along with her underwear. He said to her: “you’re wet down there.” She was too scared to say anything. He put his mouth on her; she thought she was going to throw up but was scared that he would kill her if she did. He then penetrated her vagina with his penis. It hurt and she cried out. He was thrusting for a bit, then he paused and asked if she was on the pill. She said no. He pulled out and said: “I don’t want to get you pregnant or nothing.”

[314] The man came to the head of the bed and removed the pillow. He told I.J. that he still had the thing in his hand and said “it can cut you.” He told her he wanted her to give him head. She said “What?” He responded: “I want you to give me head, don’t you know what that is?” She responded: “No.” He said: “I want you to suck my cock.” He pulled her up by her shoulders and said: “No teeth, don’t you dare bite me, I still have a knife.” He said, “Lick it like a lollipop.” He ejaculated onto her mouth and face. He said: “Sorry, I didn’t mean to do that in your mouth.”

[315] I.J. said that after the sexual assault, the man was quite different. He was less threatening. She remembered him referencing God and Jesus Christ. He said to her, “God knows I never meant to hurt you.”

[316] The man told her he was going to leave and that she should to count to 50 and then get up and lock the door because he would not be able to lock it and she would not be safe unless it was locked. I.J. said that it seemed as if he were trying to be a protector. She asked how he got in and he said he came through the door. She asked, “What good is locking it going to do?” and he said: “You should get a chain on that door, the lock isn’t enough.”

[317] I.J. said that she counted to 50 or 100 because she was paralyzed with fear. The man told her not to go to police because he would know and then he would have to hurt her so at about 4:15 a.m., I.J. called her friend. She recalled her friend asking what happened and not knowing how to say it. Her friend asked if he had hurt her and she said yes, then her friend asked if he had raped her, and she said yes. Her friend sent someone to pick I.J. up and bring her to her friend’s apartment downtown.

[318] The following day, I.J. was with her friend who tried to convince her to call the police. I.J. said that she was reluctant because he had made her afraid that he would know if she did. I.J. went to a doctor who examined her. That evening, her friend called the police and asked that a female officer attend to speak with I.J.

[319] After the assault, I.J. moved her things out of the basement suite. She did not return.

I.J. describes her assailant

[320] I.J. believed that her attacker was in her suite for approximately an hour from when she woke up. She described him as between 5’9” and 5’10” tall, with a medium muscular build. He was wearing bellbottom jeans and a jean jacket, with something she described as a cowl, hood or scarf that came up behind his neck. It was the

same colour as his hair. He had a knife or something that looked dangerous in his hand.

[321] I.J. described the man as having “very wild eyes”. She said that his appearance had a quality of someone who might have been drugged. He had small pupils. She remembered him looking around the room. His hair was light to medium brown and frizzy. He had wide cheek bones. His face was wide at the forehead and squared down in the jaw area. He did not have facial hair. She described the man’s voice as “gruff” with a threatening tone. It was a low rough voice.

Statements to police

[322] I.J.’s description, as recorded by the police on the night after she had been raped, was:

> W/M, (5’10) 178 cm, med. Build muscular, mid 20’s, light brown possibly curly hair c/l. Suspect seemed to have something wrapped around head and neck) gry/blue eyes – very wide, clean shaven, smoothish skin. Wearing faded blue jeans, bl. Jean jacket, dark t-shirt.

[323] The police report said that I.J. “is fairly certain she could I.D. suspect.” Regarding her attacker’s voice, the police report says: “All during this time Victim said that Suspect’s voice was very threatening and quite low and gruff and made several references to knife.”

[324] I.J. explained in her evidence in this trial that she estimated her attacker’s age based on her own. She was 22. She knew he was older than her. To her, he looked to be in his mid-to-late 20s.

[325] I.J. recalled that she called Detective Sims a few times after the assault to find out what was going on with the investigation. She had heard that there had been a physical lineup and she was upset about having not been invited. She did not know when the lineup had taken place and was unaware that it was before she was sexually assaulted.

[326] On July 26, 1982, I.J. met with Detective Barnard. He interviewed her using what he described as a “progressive relaxation technique”. She recalled that she

was not capable of being relaxed at that time. Her friend was with her. I.J. recalled that either her chair or her friend's chair broke during the interview. It resulted in her nervously giggling. I.J. said that Detective Barnard was trying get her to close her eyes and pretend to be on a beach. She tried to cooperate but was nervous and fraught. She was not in any sort of hypnotic or trance state.

[327] There is a transcript of that interview.

[328] Detective Barnard asked I.J. the age of her attacker. She said "I'd say he's in his middle to late twenties" She considered his voice as part of the reason she estimated his age as she did. She was asked whether the age estimate she gave was based on voice or on seeing him, and she replied "Ah … because I looked at him and because of his voice." Detective Barnard then said "Okay". She said "… and yeh … he would be … I mean if he were older, he would still look that age".

[329] Later in the session, Detective Barnard said he was going to repeat what she said, and asked her to add or change anything. He then provided a full description on all points he had covered with her, and regarding age said "he's about 25 to 30 years old." I.J. made no comment.

[330] I.J. described her assailant as: "about 5'10—about 5'9" – 5'10"—that's what I would approximate, even not that tall." Detective Barnard said: "You said about 5'9" or 5'10," I.J. responded:

> Yeh. Maybe a little shorter. I'm not very good at estimating heights, but it would be under 6'…He's fair skinned and looks wild in the eyes so you can't really tell what colour they are. They look like they belong to someone with fair colour and they are probably light blue or green.

[331] In describing her assailant's build I.J. said: "Not fat but muscular. Big – I mean he's not skinny. He's medium…Medium to muscular."

[332] Regarding his hair, I.J. said: "It's light brown. The kind of brown that would have probably been on a blond-haired kid but turned dark as an adult…I think it was curly and over the ears and he looked like he had something around his neck." She then said his hair was "Light to medium brown."

[333] I.J. described the man as clean shaven; he had a white face; his eyebrows were nondescript, not something you would notice. “His face was broad. It wasn’t thin faced. I think he had….it’s like he had a circular shape and squared on the forehead and down the jawline…it didn’t come in like an oval face does.”

[334] I.J. said that her assailant’s face was not distinctive:

> I think he had thin lips… or you know…there were no noticeable lips. Like they weren’t gone…but just they weren’t noticeable. So that cancels the mouth being big…. The nose and mouth were bland. There was nothing…The nose looked straight…and it wasn’t like it…had anything wrong with it and it didn’t have anything distinctive about it.

[335] Detective Barnard asked whether he is “average, ugly?” She responded: “He’s not ugly…” When asked: “Good looking?” She responds: “No. Average. He looks like a punk.”

[336] When she was asked about his teeth, I.J. responded: “I couldn’t see his teeth when he talked…His teeth don’t show up much, not that I could notice.”

[337] I.J. described the interview with Detective Barnard. She believes she was a poor subject for hypnosis. She said that she was not in a trance or hypnotized. She was doing her best to answer Detective Barnard’s questions. I.J. did not recall many details of the interview and her evidence was based on her review of the transcript of it.

I.J. identifies Ivan Henry as her assailant

[338] The following day, July 27, 1982, Detective Harkema met with I.J. to show her a photo lineup. I.J. did not know whether her assailant was going to be in the photo array. She assumed all the individuals in the photographs were criminals. She did not think the detective knew who her attacker was. Her impression had been that the police were not doing much and that they were showing her photos in hopes of finding something.

[339] I.J. reviewed the photos carefully, one-by-one. She saw the photo of Ivan Henry. She said that she had an immediate visceral, shaking reaction. She tried to

look at the photo more carefully. He had a moustache, and his hair was different than it had been in her room, so she focused on his eyes. The overall look was the look of the man in her room. She could recognize him from the picture even though the picture was not very good. Although I.J. did not doubt her recognition, she understood the importance and consequences of making an identification of her assailant in the photo. She asked to see other photographs.

[340] I.J. considered that Detective Harkema wanted her to sign the photograph right then. He said to her: “You know it’s him?” She said: “Yeah, I’m very sure it’s him, but I’d like the opportunity to see more photos if, it’s possible.” She was not sure he would follow through with bringing more photos if she signed that photo that day. She knew that he was returning the next day.

[341] When I.J. spoke to Detective Harkema the next morning, he said he could not get more photos. Detective Harkema met with her again and she signed the photo. She explained that she chose to do so without more photos because she had already known it was him, she was just trying to be careful.

[342] I.J. did not ask for additional photos of the other seven men in the photo array. She knew who it was, and she was asking for more photographs only of the person that she recognized.

[343] I.J. said that she did not believe that she was influenced by the background or the foreground of the photograph she had chosen. She thought all the individuals in the photo array looked as if they were in a police station. She did not identify the background in the photograph of Mr. Henry as prison bars. She had only seen the version in the photo array, not a blown up or wider version.

[344] When I.J. signed the chosen photo on July 28, 1982, she also gave a statement to Detective Harkema. That statement deals primarily with the facts of the assault as opposed to her identification of Mr. Henry that had been the focus of Detective Barnard’s interview two days earlier. I.J. did speak to the process of viewing the photo array. She agreed with the typed notes of the interview with

Detective Harkema, although she said that it is not verbatim. He did not get her exact words. He used his own words, but I.J. said that was consistent with what she said in the interview:

> I'm a hundred percent sure that the person I pointed out in the photo lineup is the man who attacked me.
>
> The first thing I did when I saw the photo lineup was scan all the photographs. I went from right to left and his was the last I saw when my eyes hit his photograph, my heart started pounding uncontrollably. I immediately had to look away from it. I studied all the other faces very carefully. I absolutely knew that he wasn't anyone else. I didn't have any reaction to any other face when I looked back to the picture, my brain seemed to push the image away. I had an uncontrollable reaction of fear like I had when I sat up in bed. When I had calmed down a bit, I started to study his face. He had changed his appearance by cutting his hair, by growing hair on his face. When I covered the part of his face that was covered by hair, I looked at just the upper face. My brain started working on this. My conscious impression started to agree with my first reaction of recognition. I hadn't talked about this with [my friend]. I had a shock response in the afternoon and was sick. This is the same reaction I had as the first time. (June 8)
>
> I thought it might be possible to see a full front photo of him before I left the country so I decided to wait and see if another photo would be available, one of the same guy without the changes he'd made in his appearance.
>
> This was not because I wasn't sure of him but I wanted to confront as much evidence as was available. This is because I'm leaving Thursday. I knew last night that I was definitely going to call Det. Harkema to tell him I was positive of the I.D. I phoned at 11 AM, July 28 and told Det. Harkema my thoughts about the [unclear] hadn't discussed that with [my friend]. Det. Harkema hadn't told me it was the guy. Everything written here is the truth.

[345] The day after her statement to Detective Harkema, I.J. returned home to eastern United States.

[346] I.J. returned to Vancouver for the preliminary inquiry. Although her family tried to convince her not to come back to Vancouver and she was afraid, she felt it was important. She did not want anyone else to go through what she had gone through.

[347] The preliminary inquiry took place on October 27, 1982. I.J. had turned 23. She recalled having a prep meeting of some sort but does not believe she was given anything to review. She also recalled being told her friend would not be allowed in the courtroom.

[348] I.J. did not know whether her attacker would be in the courtroom. She said that she was very scared and felt unprepared. She recalled understanding that she should not know about the case, only about what had happened to her. She recalled having to describe her rape in front of the man who did it. In her words, “I can’t even describe how that felt.” She said that to be under oath, answering questions, with him there, was sickening. It was awful and frightening. He would know she had gone to the police; she was describing the crime right in front of him.

[349] At the preliminary inquiry I.J. provided a further description of her attacker: he was “between twenty-eight and – late twenties, early thirties,” about 5’10” or “between five feet eight and five feet ten,” between 155-165 pounds, and medium build. He was slight in the hip area, with a “young man’s build.” He was Caucasian. His skin had an unnatural white colour, which she considered “may have been the shock of my sitting up in the bed before he could turn the light out…” His hair was curly, but not like ringlet curls, and it was, by her hometown standards, very long, growing over his ears and down, collar length. He had wide, defined cheek bones. His nose was an average nose, not distinguishable. His lips were average, and she did not see his teeth. His voice “was low with a gruff or rasping quality to it but it wasn’t a deep or a heavy voice.”

[350] I.J. said that she was asked if she saw the man who attacked her in the courtroom and she said: “Yes, I do” and pointed out Ivan Henry. She said that she identified Ivan Henry in the courtroom because he was the same man that had been in her bedroom. She had no doubt. She understood the seriousness of her identification.

[351] In cross-examination, it was suggested to I.J. that her descriptions at the preliminary inquiry were all intended to make her description more closely match Mr. Henry. She responded:

> I would say I was very consistent in the height, his weight, his age, the look of him, as best I could be. When I elaborated it was not because I suddenly had some wild idea that this person was different than something I had said, it was more that people had asked me to elaborate in different contexts. And I elaborated in order to provide more detail of what I remembered and recalled,

> that detail coming from the experience itself, and the context of being asked about it. So that's how that happened. I think the elaborations were from the contexts of being asked further or different questions. I think what I'm saying is, 5'8" to 5'10" or 5'9" to 5'10", light to medium brown hair, you know, a certain type of look to his eyes, medium to muscular build, these things were true, his hair was frizzy, I think that's still true, those are the best ways I could convey what I saw. He had an average looking look, he wasn't ugly, he wasn't great looking, he was an average looking guy. And I saw him, and I recognized him, that's the best I can do to pull together all the characteristics you're asking me about. I didn't need the additional anything to know that I could recognize him.

[352] In the months following the preliminary inquiry, I.J.'s father suddenly died. It was shocking for her and her family. She fell into a deep depression. She was not able to return for the 1983 criminal trial.

[353] I.J. received a letter from Mr. Henry dated April 18, 1983 at her home address. She was shocked to know that Mr. Henry had her address. The letter was read into the record. I.J. testified that she recalled receiving the letter and questioned how he had obtained her address. Her attacker had told her he would find her and I.J. believed this letter was proof he had done so. It felt dangerous. She was fearful. She testified that because the word "hurt" was in the letter, and her attacker had also used that word, he was "letting her know" that she had broken her agreement not to call the police. She contacted Crown counsel about the letter.

[354] I.J. testified that her attacker used the words "God and Jesus Christ" at the end of the attack and as the same words were used in the letter, she concluded that the attacker and the letter writer spoke in the same manner. She also testified that she asked her attacker if he was going to hurt her and he replied that he was only going to hurt her if she lied to him, and he was not going to hurt her, just humiliate her. She understood the letter to mean that she had broken their agreement that he had not hurt her and she had still gone to the police.

[355] I.J. described the wording in Mr. Henry's letter and the perpetrator's language during the attack as Mr. Henry's language during the attack as unusual cadence or idiosyncratic way of speaking. She had not described it that way before.

[356] I.J. received a letter from a private investigator in 2000 investigating the Ivan Henry case. She had moved from her earlier address and did not know how the investigator found her new address. She did not respond to the letter and it made her fearful. She felt it was inappropriate and scary.

The defendant on June 8, 1982

[357] On June 8, 1982, I.J. was raped at 433 West 17th Avenue. That was approximately six blocks west of where Mr. Henry was living: 248 East 17th Avenue.

[358] Detective Harkema's affidavit provides evidence that there was constant surveillance on Mr. Henry from May 15, 1982, until June 7, 1982. Detective Harkema states:

> [O]n June 8, 1982, at approximately 3:00 a.m., the commission of an offence of rape was reported in the City of Vancouver and is now one of the matters included in the present investigation. That constant physical surveillance was again instituted and has been maintained to the present.

[359] Mr. Henry was very aware of the police presence watching him after the May 12, 1982 lineup. At this trial, he said:

> I got a car down below. I'm watching what – what are they doing down below. You would be watching too if someone was around – hanging around your car, wouldn't you? You certainly would be, and you'd probably be out there, but I'm not going out there.

[360] Mr. Henry confirmed his discovery evidence that following his May 12, 1982, release, he was very aware of the police presence watching him. He also said that they were not very good at it. In his words: "I'm not no Fernando or anybody, but I can get away from you."

[361] Mr. Henry said he was staying at 248 East 17th on June 7 and 8, 1982, six blocks from where I.J. was raped. Mr. Henry wrote in his alibi statement that on June 8, 1982, he was "at home looking after [my] children as my wife was in hospital. My car was not driveable at night." He reiterates on page 3 of his alibi statement: "was living at 248 E. 17th. This particular day and night was watching our children as my wife was in hospital."

[362] Mr. Henry denies sexually assaulting I.J. on June 8, 1982.

Summary of facts re I.J.'s identification of Henry

Plaintiff

[363] I.J. woke up while the light was still on in her basement suite. She saw Ivan Henry in her room and was able to describe him to police. She gave a good and accurate description to police less than 24 hours after the assault, including a description of his "low and gruff" voice. She gave a more thorough description to Detective Barnard on July 26, 1982.

[364] She identified Ivan Henry as her assailant out of a photo array of seven men. She was careful. She asked to see more photographs because the one available was not of particularly good quality. But, when none was available, she was prepared to sign it because she was sure that it showed the man who had attacked her.

[365] She confidently identified Ivan Henry as her attacker during the preliminary inquiry.

[366] In the course of his assault of I.J., Mr. Henry used the term "ripped off" in the context of the lengthier discussions about Debbie, saying to her that Debbie had "ripped him off," and that Debbie had stolen drugs from him.

[367] He also told her "I'm not going to hurt you unless you make me," words echoed in his April 18, 1983, letter to I.J.

Defence

[368] The defence submits that I.J. purports to be confident in her identification, but she should not be.

[369] I.J. does not recall the details of the interview with Detective Barnard. While she insists that she was not hypnotized, I.J.'s evidence about the interview was derived from the transcript, not her recollection. It may demonstrate that she was

hypnotized. It also means that I.J.'s evidence at this trial, based entirely on the transcript of the interview has no weight.

[370] I.J.'s identification from the photo array demonstrates her uncertainty. While she said that she was sure that the photo of Mr. Henry was a photo of her attacker, she only identified him after Detective Harkema told her that they did not have any other photographs of him to show her. Rhetorically, the defence asks how she could not identify Mr. Henry from the photo array without further photographs and then identify him with certainty after she was told there were no other photographs available.

Other Witnesses

Ivan Henry

Background

[371] Ivan Henry was born October 22, 1946. He married Jessie Henry on December 24, 1974. Together, they had two daughters: Tanya Olivares, born February 1, 1973; and Kari Henry, born June 10, 1975.

[372] Ivan and Jessie Henry were divorced in 1979, while Mr. Henry was incarcerated, but maintained an on-and-off relationship, including during the time period relevant to this case. Mr. Henry referred to Jessie Henry as both his wife and his ex-wife during this trial.

[373] Mr. Henry has a significant criminal record. It begins in Regina, Saskatchewan in October 1960. The charges span from 1960 though 1970 and relate to offences committed in Regina. In the 1970s Mr. Henry was charged in relation to offences committed in Winnipeg, Manitoba. His criminal record consists of theft, break and enter, breach of recognizance, fraud, possession of drugs and stolen property, trafficking, and parole violations for which Mr. Henry was sentenced with jail terms of various lengths.

[374] In 1975, Mr. Henry briefly moved to Vancouver. He stayed in Vancouver for two to four weeks, with the intention of working as a hairstylist before he returned to Winnipeg.

The Winnipeg offences

[375] In 1976, Mr. Henry was charged with five offences relating to three separate incidents in Winnipeg which occurred on June 2, June 18, and December 12, 1976 (three separate complainants). On January 21, 1977, Mr. Henry pleaded guilty to the charges stemming from those incidents, including three counts of break and enter, one assault and one attempted rape.

[376] During this trial I granted the plaintiffs' application to tender as similar fact evidence in this trial, Mr. Henry's June 2, 1976 attempted rape of J.J.; Mr. Henry's June 18, 1976, assault of L.A.; and Mr. Henry's break and enter of December 12, 1976 (the "Winnipeg offences").

[377] On June 2, 1976, Mr. Henry had two young daughters at home, aged three and one.

[378] Mr. Henry attempted the rape of J.J. who was 24 at the time. She made a statement to police that same day. (I note that the defendant says that the statements are not admissible under the documents agreement between the parties. I will address the matter under my analysis.) J.J.'s statement was read to Mr. Henry in full at this trial. For the most part, he adopted the facts, and stated: "Well, there – there's ad-libs in there. There – there was no children there, so – I don't know how she said there was children there. So some of the statement I'll – I'll – I'll admit, but some of the statement I won't admit."

[379] Mr. Henry said that his attempted rape of J.J. was not premeditated. It was a loss of control. He described it as "an insane automatism."

[380] J.J. lived about a 20-minute walk from where the Henry family was living. J.J. was a young woman, attacked in her bed in the middle of the night. Although it

appears she had a child, Mr. Henry was adamant that she did not. Mr. Henry said that like these five victims, she was living alone. Mr. Henry threatened to kill J.J. if she saw his face. The sexual assault involved both vaginal penetration and forced fellatio.

[381] J.J. estimated her attacker to be 24 or 25 years old and about 5'11" tall, with medium brown hair.

[382] Mr. Henry committed the assault of L.A. on June 18, 1976, sixteen days after the assault on J.J. L.A. lived less than two blocks from the Henry home. She was 25. She was lying in her bed in her apartment. She opened her eyes to a stranger standing in the doorway, holding something in his hand she thought to be a hammer. She started to scream. He said: "Shhh, don't say anything." She was screaming. He put his hand on her face and pressed. She resisted. He tried strangling her with both hands. He attempted to smother her face in a pillow. She stopped resisting because she was having a hard time breathing. She started to talk to him about anything that came to mind. She found an opportunity to make a break and run for the kitchen, then outside. When she got to the street, she screamed until she saw police.

[383] At the trial before me, Mr. Henry was taken to the statement of L.A. He denied having committed that offence, in spite of his pleading guilty to it.

[384] Mr. Henry was caught for his rape of J.J. because, about seven weeks after it occurred, he was a bar in Winnipeg where J.J. worked. She identified him but was not sure until she heard him speak in a "low gruff voice." She was then certain he was the man who had attempted to rape her. Mr. Henry was arrested that night.

[385] After Mr. Henry was identified by J.J. and arrested, L.A. attended the courthouse and identified him as her attacker. He was released on bail after that incident.

[386] On December 12, 1976, while on bail for the first two Winnipeg offences, Mr. Henry broke into another woman's home, O.G. The records were entered as evidence. On the first page, they describe Mr. Henry as having "shoulder length hair

(brown).” J.J. had also described his hair as brown. Mr. Henry was asked about this and said: “I’ve never had brown hair. Always had red hair, so I don’t know who – who puts this stuff together but – you can’t fabricate people’s hair and you shouldn’t do that.”

[387] O.G.’s sister provided details of the December 12, 1976 offence. She lived in a suite one floor above O.G.’s. She said that at about 2:30 a.m. she heard a crash in the basement. She phoned O.G.’s boyfriend to check on what was wrong. He went to O.G.’s suite and found somebody there. The police came and Mr. Henry was caught on the premises.

[388] Mr. Henry’s explanation for the December 12, 1976 offence is that he was “Mickey Finn’ed.” He said that this meant he was drugged by something a little more dangerous than a date rape drug.

[389] Mr. Henry appealed his convictions, in spite of his having pleaded guilty to all five charges. While he now acknowledges committing the June 2 and December 12, 1976, offences, he did not do so in his appeal. His position before the Manitoba Court of Appeal was that he had “not appreciated the nature of the charges and had not intended to admit guilt” to any of the charges.

[390] At this trial, Mr. Henry provided his explanation for appealing all of his guilty pleas was due to what he described as the “R. v. Ford proposition.” He agreed that in support of that appeal, he underwent a psychiatric assessment with Dr. Fred Shane. Mr. Henry admitted that he lied and exaggerated to Dr. Shane in order to obtain a medical report to convince the court that he was suffering from a mental illness. Mr. Henry said that he was told by his then-lawyer to lie to Dr. Shane. He acknowledged he was lying to Dr. Shane in an effort to mislead the court.

[391] Mr. Henry’s appeal was unsuccessful. He was sentenced to five years in prison on the charge of attempted rape and two years concurrent on the other charges.

Ivan Henry's incarceration and release

[392] Mr. Henry was incarcerated at Prince Albert Penitentiary in January 1977, for 41 months and 16 days.

[393] During his incarceration, Mr. Henry had the opportunity to participate in a sex offender rehabilitation program at the Regional Psychiatry Center (RPC) in the Abbotsford penitentiary. Mr. Henry testified that he chose not to participate. He said that people mocked him because of his hair, some people were jealous and that he was working in the church, as reasons why he did not remain in the group.

[394] Mr. Henry was released from the penitentiary on May 21, 1980. He said that he spent one night with his mother and stepfather in Saskatoon, before departing to Vancouver, alone, by bus. At this time, Mr. Henry believed that the Vancouver Police Department was going to frame him for something. He said that he had been told this by a "bad guy" he knew from RPC.

[395] Mr. Henry established a relationship with Jerry Philipson, who worked with the John Howard Society in Vancouver. Mr. Philipson was his parole supervisor until Mr. Henry was released from parole in January 1982.

Supervised parole in Vancouver

[396] As noted, some evidence is available regarding Mr. Henry's activities and whereabouts in Vancouver and area from the supervision reports of Mr. Philipson. These begin on June 2, 1980, and continue to January 26, 1982.

[397] Mr. Philipson's reports generally confirm that Mr. Henry lived in various short-term accommodations upon his arrival in Vancouver.

[398] On June 12, 1980, Mr. Henry was arrested and charged with possession of marijuana. He was sentenced to three months unsupervised probation.

[399] Ms. Henry and their daughters moved to Vancouver in the summer of 1980. They all lived together in one room at a skid road hotel. Eventually they moved to two rooms. In September 1980, they found a home at 5248 Canada Way, in

Burnaby. Mr. Henry lived there with his family until January 1981. After that, Mr. Henry went to live in variety of short-term accommodations, including hotels and friends' places.

[400] Throughout this period, Mr. Henry said that he was doing a variety of labour and construction work. This included working for CPR, loading boxcars on the night shift, from 9:00 p.m. - 4:00 a.m. He explained that this was not challenging for him because he was pretty strong and can sleep pretty well any place, any time of day. He could get by on limited sleep, explaining that when he was "young and spunky," he only needed five hours sleep.

[401] On March 27, 1981, Mr. Philipson reported that Mr. Henry was residing at the Woodbine Hotel on Hastings Street. In his next report, on May 26, 1981, he states that Mr. Henry's employment and financial situation, as well as the relationship between Mr. Henry and his family, all remained unchanged.

[402] On June 16, 1981, Jessie Henry told Mr. Henry that she did not want anything more to do with him. She apparently believed he was involved in a break-in to her home on Canada Way. The family had limited contact between June 16, 1981 and March 1, 1982, when Jessie Henry and their daughters moved to 248 East 17th Avenue in the Mount Pleasant district of Vancouver.

The May 12, 1982 lineup and interview

[403] Mr. Henry said that around April 30, 1982, Jessie Henry told him that the police had been to their house. She told him "something about a rip off." Mr. Henry acknowledged that, at that time, he was aware he was being investigated for rape. Mr. Henry immediately left for 100 Mile House. From there, he made phone calls to Vancouver, pretending to be a lawyer, to find out if a warrant had been issued for his arrest.

[404] On May 11, 1982, after hearing from an individual affiliated with his probation that there was no outstanding warrant, Mr. Henry returned to Vancouver. Immediately after his return, he was arrested.

[405] Mr. Henry described the events of May 12, 1982. He said that he was the victim of police misconduct, bordering on brutality. He says the police knocked him down in his cell. They grabbed him and put him in a lineup, and by this time he was hysterical. He said that when he gave this statement to Detective Campbell, it was this brutality that explains why he "was crazy" at that time and not in his right mind.

[406] At some point after Mr. Henry was arrested, he put toilet paper in his ears to block out what was being said. He explained this as playing games with the police: "I can play games too, right?" The following day, when explaining how frightened he was as a reason for the statement to Detective Campbell, he compared the police actions to "what they do in Russia." He explained that he did not "want to hear garbage." He was then taken out and placed in a lineup against his will.

[407] On May 12, 1982, many rape victims were brought to the jail to view a lineup. The attendees included all of the plaintiffs with the exception of I.J. whose rape had not yet occurred. Mr. Henry turned the lineup into a farce. He struggled violently with police and had to be restrained. The victims did not have the opportunity to make a lineup identification.

[408] Mr. Henry's refusal to willingly participate and the police actions in response meant that the victims were shown a lineup with Mr. Henry struggling violently. Two photographs of the May 12, 1982 lineup depict that.

[409] Mr. Henry stated before and during this trial, that the photographs of the May 12, 1982 lineup are a fabrication. He said that he did not have a moustache at the time. Another photograph was taken shortly after of Mr. Henry alone standing in front of prison bars. That photograph was in the photo array shown to I.J. Mr. Henry asserted that it too was a fabrication. He insists that on May 12, 1982, he was clean-shaven, with no beard or mustache. In his evidence he added:

> Q: Sir, the -- sir, on May 12, 1982, your hair was -- I'm going to suggest to you, as we see in Exhibit 10 –
>
> CNSL K. GOURLAY: If the witness could please have Exhibit 10.
>
> Q: Sir, I'm going to suggest to you that that depicts the length of your hair on May 12, 1982.

> A: That looks really funny. That looks -- that looks like a goofy guy. That's not me. I said that to you before. That's a fabrication.
>
> Q: So not only do you not accept that –
>
> A: Not only do I not accept that picture, that's an absolute fabrication. And I don't know what to say about fabricating evidence in a civil, but I know you can't do it in criminal, and you couldn't -- if you had a jury right now, you couldn't put this evidence because it's fabricated. And I'll keep saying that. They're fabricated.

[410] Following the lineup, but also on May 12, 1982, Mr. Henry was interviewed by Detectives Campbell and Sims. The exchange is recorded on an eight-page transcript. Among other things, Mr. Henry said:

- When asked why he made such a ruckus going into the lineup, he responded: “I don’t want to go into a lineup. I went into a lineup before and there was a policewoman there who went to Brazil. I am the only redhead there.”

- He told the detectives that he thinks “Don” is putting the police onto him because “he ripped me off for about $600.00….in a coke deal.”

- “I change my face from day to day.”

- “I cut my hair all the time.”

- In response to being told of the May 5, 1981 assault of A.B., he says he was living on Canada Way.

- In response to being told A.B. was assaulted while sleeping, he responds: “That’s my old fucking M.O. right?” He then asks for the details.

- On being told that the rape of A.B. involved attempted anal intercourse, he responds: “You can fucking throw that one out because I know I didn’t do it.”

- On being told about the March 19, 1982, rape of G.H., and that G.H. had a pillow put over her head, he responds: “That’s my thing again. You guys

are going to use this against me. And what happened? He balled her, he raped her? Ha. Ha. I know I didn't do that one."

- Still with reference to the rape of G.H., he says he knows he did not do it because: "I was in Regina. I had $7,000 in my pocket. I could have had anything. I could pay for it."

- He then refers again to his M.O.: "I know that someone is using my M.O. I went to R.P.C. and other people used others' M.O. Honest to God, I didn't do it. I would change my M.O. When you get charged with rape, it is one of the most indecent acts a guy can do. It is trouble for the woman and trouble for the man.

- Mr. Henry referred to the sexual assaults that had taken place and says: "This guy's got lots of jam, hasn't he. I mean, it takes a lot of nerve. You have got to have your exits. Even if you go after a purse, if she starts screaming, you got to have your exits. This guy must have lots of fucking jam."

- "He must be fucking peeping. He must know they are living alone."

- "All you had to do was run my M.O. through and you would see I was a pillow man."

[411] Mr. Henry said that his intention was to cooperate with the police when they interviewed him in May 1982.

[412] Mr. Henry was released shortly after the interview.

[413] Mr. Henry was arrested in 100 Mile House and booked on July 31, 1982. The booking sheet has him listed at 174 cm, which is 5 feet, 8.5 inches tall. The booking sheet indicates he had a tattoo of a knife on his right arm.

The preliminary inquiry

[414] The preliminary inquiry was held from October 27 to November 15, 1982. Each of the five plaintiffs testified and the transcripts of that testimony are in evidence.

[415] On November 15, 1982, Judge Craig committed Mr. Henry for trial on 17 counts.

[416] Mr. Henry's alibi statement is dated five days later, November 20, 1982.

The 1983 criminal trial

[417] The charges proceeded to trial by jury in front of Mr. Justice Bouck, between February 28 and March 15, 1983.

[418] Mr. Henry chose to represent himself. As a result, the complainants who gave evidence were cross-examined by Mr. Henry.

[419] The jury convicted Mr. Henry of 10 offences, involving eight different complainants, including the five plaintiffs.

The Dangerous Offender Hearing

[420] The dangerous offender proceedings took place on November 21 and 22, 1983. The transcripts of that proceeding end with the court adjourning with the intention of returning for Mr. Henry to make his submissions the following morning.

[421] In the dangerous offender proceedings, at the start of G.H.'s cross-examination when she was to be giving evidence about the trauma of her rape, Mr. Henry said to her: "I think you say to me—I'm going to come back at your people for –you know, I swear on my Lord that I'm coming back to –" At that point Justice Bouck interrupted to say: "Well, we are not interested in any testimony you're going to make. You can ask the witness questions, that is all you can do. If you're going to make threats I'm not going to let you ask questions."

[422] G.H. also testified that when she was not in the witness stand, she has a very clear recollection of Mr. Henry saying: “I know where you all live and I’ve got people on the outside.” She took this as a threat against her life. This does not appear on the transcript.

[423] C.D. gave evidence that Mr. Henry had a violent outburst upon sentencing. She could not recall what was said but she remembers the impact of it, being terrified and a feeling of danger, and that one day he would come and harm her. This does not appear on the transcript.

[424] Mr. Henry was sentenced to an indeterminate sentence as a dangerous offender.

Mr. Henry’s release

[425] In 2006, a special prosecutor was appointed by the Criminal Justice Branch to investigate whether Mr. Henry's 1983 criminal convictions had been subject to a miscarriage of justice. The special prosecutor made a number of recommendations.

[426] The B.C. Court of Appeal agreed to hear Mr. Henry's appeal of his 1983 convictions, and in 2009, ordered that he be released on bail pending that appeal. As noted, that Court overturned Mr. Henry's convictions for the sexual offences against the plaintiffs and others and substituted acquittals.

Mr. Henry’s Charter breach trial

[427] Mr. Henry was awarded damages for the breach of his *Charter* rights by Hinkson C.J. in *Henry v. British Columbia (Attorney General)*, 2016 BCSC 1038. The Court found that in 1982 and 1983, the Crown had wrongfully withheld material information from Mr. Henry (and his counsel) that seriously infringed on Mr. Henry’s right to a fair trial and demonstrated shocking disregard for his rights under ss. 7 and 11(d) of the *Charter*. The Court further found that if Mr. Henry received the disclosure to which he was entitled, it would have likely resulted in his acquittal at his 1983 criminal trial, and the avoidance of sentencing as dangerous offender.

[428] This exculpatory evidence included the large volume of material statements made by the various complainants, including the five plaintiffs. Exculpatory evidence including the fact that a tracking device that was placed on his car did not link him to any sexual assaults, that his tools were checked against tool mark impressions obtained from crime scenes with negative results and that a florescent powder placed in his vehicle by police with the intention that he would track it into a crime scene did not link him to an assault that took place after it was distributed. The Crown had not disclosed that exculpatory evidence to Mr. Henry. The police surveillance of him close in time to the offence against I.J. was not disclosed, although its precise timing is unclear.

[429] The VPD provided the Crown with the information it used for the wiretap application. The Crown had records of the results from that wiretap, the DNR, the tracking device and the surveillance of Mr. Henry from May 15 to June 7, 1982, and June 8 to July 23, 1982. Crown Counsel also had Jessie Henry's statement to the VPD and a photograph obtained from her by the police. That material was not disclosed to Mr. Henry.

[430] Neither Mr. Henry nor the lawyers who were engaged on his behalf before the trial from time to time, were provided with notice of the existence of any of the following:

a) the application materials, warrant, and resulting data related to the DNR;

b) the application materials, warrant, and resulting data related to the tracking device;

c) the application materials and the order related to the wiretap application;

d) the VPD police report that detailed the unsuccessful efforts to tie the plaintiff to the sexual assaults through a fluorescent powder test;

e) the VPD reports that showed that 20 sexual assault complainants had been shown numerous photographs and had participated in the RCMP's Witness Suspect Viewing System; or

f) the VPD reports related to the surveillance of the plaintiff by the VPD and its agents from May 15 to June 7, 1982 and again from June 8 to July 23, 1982.

[431] Mr. Henry was not provided the physical evidence of tool marks or any reports related to the seizure of Mr. Henry's tools from his car which took place on May 12, 1982. The tools which were seized without a warrant underwent a tool mark comparison by the VPD, with "negative" results. None of this was communicated to either Mr. Henry or any of his lawyers.

[432] On April 29, 1982, the VPD seized clothing belonging to Mr. Henry from Ms. Henry's home on East 17th Avenue as evidence. Mr. Henry was not advised before or during his trial that a warrant had been executed in relation to the residence on East 17th Avenue. He was not shown any other documentation by the Crown indicating what clothing of his was in the possession of the police, including any information regarding efforts made by the VPD to match his personal clothing to the clothing described by the complainants.

[433] The VPD had Mr. Henry's fingerprints by July 31, 1982. Undisclosed to Mr. Henry and his lawyers before the dismissal of his conviction and sentence appeals was the fact that the police obtained fingerprints from a broken glass at the suite of another complainant (not a plaintiff in these proceedings).

[434] The Crown did not disclose to Mr. Henry the medical, lab and police reports showing that perpetrator spermatozoa had been located for four of the sexual assaults, including the assault of the woman referred to in this trial as G.H.

[435] The Crown did not disclose evidence relating to other suspects, particularly of Donald McRae in May and July 1982, although Mr. McRae had been arrested for

late-night predatory behaviour in two of the neighbourhoods where the offences were occurring.

[436] Hinkson C.J. found that other relevant evidence to Mr. Henry's 1983 criminal trial had not been disclosed including: similar records and statements relating to 15 additional complainants; additional surveillance notes; ballots from some complainants who attended the police lineup; medical reports relating to three complainants that are plaintiffs here and four other complainants whose complaints did not underlie the charges faced by Mr. Henry at trial; VPD property office and identification documents; application materials for a wiretap order obtained by the VPD; and other police documents pertaining to the so-called rip-off rapist.

[437] The Crown did not disclose a memorandum that had been prepared by the VPD, involving other suspects and an opinion of a detective stating his view about whether Mr. Henry was guilty or not.

[438] In this trial, Mr. Henry does not suggest that there has been any non-disclosure by the plaintiffs.

Jessie Henry

[439] Jessie Henry was married to Mr. Henry from 1975-1979. After that, although they were divorced, they had an on and off relationship. They had two daughters who were in their mother's care during Mr. Henry's incarceration from 1977 to 1980 and from 1983, onwards. They were also in their mother's care when Mr. Henry was not in jail. He spent time with Jessie Henry and his daughters when he was available.

[440] Jessie Henry was not called as a witness at the preliminary inquiry in 1982 or the trial in 1983. She died in 1990. The only evidence Jessie Henry provided is a statement that Detective Harkema appended to an affidavit in 1982 in support of the Crown's application to authorize a wiretap. It is typed, but undated and unsigned. According to Detective Harkema's affidavit, Detective Campbell of the VPD

conducted a conversation with Jessie Henry on May 2, 1982 and produced the statement attached to his affidavit.

[441] During this trial, the plaintiffs applied to tender Jessie Henry's statement as evidence. Applying the tests of necessity and threshold reliability, I determined that the statement was admissible. For reasons that I will provide, I have determined that Jessie Henry's statement meets the test of ultimate reliability.

[442] In her statement, Jessie Henry referred to a general timeframe of moving to Vancouver, living with Mr. Henry on Canada Way, and then moving to live with a girlfriend in Richmond before moving back in with Mr. Henry on March 1, 1982, this time at the East 17th Avenue address. Mr. Henry agreed with this chronology.

[443] Ms. Henry stated that "Ivan told me recently that he had been ripped off on a couple of drug deals. ($700.00 on one and, $1,500 on the other)." In his May 12, 1982 interview with Detectives Sims and Campbell, Mr. Henry said that somebody named Don had "ripped me off for about $600.00…in a coke deal."

[444] In her statement, Ms. Henry told the police as follows:

> He has "reddish-brown hair."
>
> He grows a full beard often and shaves it off regularly. He grows a beard quickly, and it is a heavy, coarse growth.
>
> He is right-handed but fairly dexterous with his left.
>
> When he talks to people, he tries not to move his lips so that he covers his teeth. This changes his speech patterns to more of a mumble. His voice is rough, harsh and the tones vary up and down. He talks quickly and has a bit of a lisp. His speech gets weird if he gets excited…"
>
> His hands are fairly large and thick.
>
> He loves the term "Rip-off" and uses it regularly.
>
> He got rid of many clothes about six (6) weeks ago (sweaters, pants, shoes and shirts).
>
> He carries a knife in the car with him all the time.

[445] In the final three paragraphs, Ms. Henry describes her concerns about Mr. Henry's activities, relating them to his behaviour in Winnipeg at the time of the Winnipeg offences, including the attempted rape of J.J. She states:

> I have become concerned about his activities over the past few months. He is following the same pattern that he did in Winnipeg before his arrest there. Since he has been staying with me at 248 E. 17th, he has been sleeping most of the day and is up all night. He has been going out around midnight or later and coming home around 4 a.m. In March, he would go out at least once a week. In the last month, he would go out more often, perhaps three (3) nights in a week and a half. Toward the end of last month, he would often go out two (2) nights in a row. He would spend about a half hour wondering what he should wear, then change into it and go. In the last little while, he was not coming home until 5, 6, or 7 a.m. I would say to him: "The sun is coming up, you finally made it in". He would get very snappy with me if I asked where he had been. He would tell me to mind my own business.
>
> …
>
> If I do not want sex, he says that is the reason he is going out and that I will 'lead him back to jail again'. He also said: "You're the one who's causing me to do these things". He says that after I refuse to give sex or, if he is not happy with the sex.
>
> I am worried about him because of the way he has been acting lately. I do not want to see anyone get hurt. I have been with him eleven (11) years and I know his personality. I think he needs help.

[446] Mr. Henry testified about his wife's substance abuse problems and explained that she would take pills that would cause her to become angry and unstable. He observed her making opium tea from poppies. He said that her substance abuse made it very difficult to communicate with her. She was not caring for the home or the children.

[447] Mr. Henry also testified that he had very little communication with his wife after his arrest and before the 1983 criminal trial. She did contact him to ask for money and on another occasion when he telephoned her, he was advised that another man was wearing his housecoat and learned that Ms. Henry was in another relationship. He confirmed that by the time his "so called defence" began at trial there was "so much wind at me, I couldn't stop that wind" and he felt there was nothing she could do for him to assist as she was at detox on the night in question. He confirmed that his children were placed into foster care after his arrest.

[448] Mr. Henry agreed with Ms. Henry's statement that they moved to Canada Way and believed that it was in September 1980. He did not agree that he got his yellow AMC Spirit vehicle at Christmas in 1980, rather, he initially purchased a

Chevette vehicle in December 1980 and had it approximately a month but returned it because it broke down frequently. He agreed with Jessie Henry's statement about her moving to Richmond and that he lived with his friend Clem on 53rd Avenue where he stayed periodically until March 1982. He did not agree with the statement that there was a lock on the garage that he rented because he shared the storage space with the sister of the owner.

[449] Mr. Henry agreed that he took hotel management courses, kept his hair clean and manageable and that it had not been shoulder length for several years. He agreed that he kept himself clean and was not greasy. He did not wear underwear, and sometimes wore YMCA shorts to work. He is circumcised. He and his wife were not similar in stature and could not share clothing. He did not wear a belt. He did not agree that he spits when he talks.

[450] Mr. Henry disagreed that as of March 1982 he was sleeping all day and out in the evening. He said that he was working during the day selling jeans. He testified that it was not possible to come home late at the East 17th Avenue residence as the landlady lived on the main floor and slept there. She did not want Mr. Henry in the residence and would have objected had Mr. Henry arrived late at night.

[451] Mr. Henry testified that if he was able to stay with Ms. Henry two nights a week in the spring of 1982 he was "doing well" as she would often kick him out. He did not agree he was going out late at night, staying out until the sun came up or making statements about her "leading him back to jail again."

[452] Mr. Henry testified that the best evidence as to his whereabouts on the dates of the assaults would be the evidence he gave at the 1983 criminal trial and the alibi statement he provided in November 1982. His evidence there was similar to that in this trial: he would stay with his family intermittently when they lived on East 17th Avenue. Otherwise he would be at his friend Clem's house on East 53rd Avenue in Chilliwack or at the Woodbine Hotel.

[453] Regarding Ms. Henry's statement that "he is following the same pattern that he did in Winnipeg before his arrest there", this appears to apply to his wife's relationship with Johnny Brownstone.

[454] Mr. Henry described the relationship that he and Jessie Henry had with Johnny Brownstone. Mr. Brownstone's involvement with Mr. Henry began in 1972. Johnny Brownstone was a drug dealer and Mr. Henry believed him to be a romantic partner of Jessie Henry, before she and Mr. Henry got married.

[455] In 1972, Mr. Brownstone offered Mr. Henry $4,000 to pick up a bag of drugs in Gimli, Manitoba. This turned out to be a setup; Johnny Brownstone had been caught with cocaine and was working in concert with police to entrap Mr. Henry. Mr. Henry was caught, charged, and convicted. He was sent to prison.

[456] After that incident, Mr. Henry phoned Jessie Henry one night and found that Johnny Brownstone, the man who had set him up, was there with her.

[457] Following his release from prison in 1975, Mr. Henry married Jessie Henry. In 1976, he believed his wife was again in a relationship with Johnny Brownstone.

[458] Mr. Henry agreed that it was one of the factors that prompted him to act out by attempting to rape J.J. During his direct in the 2015 trial before Hinkson C.J., Mr. Henry said that anger at his wife was one of the reasons behind his attempted rape of J.J. in 1976. At this trial he said it was only "about 2 percent maybe."

[459] Jessie Henry ran into Johnny Brownstone at a bar one night in Vancouver after she moved here in 1980. This resulted in their being in touch again.

[460] In 1981 and 1982, Mr. Henry believed that Johnny Brownstone was in a relationship with Jessie Henry and supplying her with drugs. While Ms. Henry and their daughters were living in Richmond in late-1981 and early-1982, Mr. Henry had to go through Johnny Brownstone to talk to his family. He described his feelings about that in this trial:

Q: Mr. Henry, back in the 70s and early 80s you believed it to be the case that he had set you up?

A: Correct.

Q: And that must have made you furious?

A: Well, not to kill anybody or rape anybody but –

Q: Still must have made you mad?

A: -- I was upset. I was upset, yea.

Q: And then in late ‘81 and ‘82, the fact that the only person – well, the person that you have to go through to contact the mother of your children is the same person that you believe set you up to send to prison and was also having a sexual relationship with that woman?

A: That fact alone, that meant to me that they were working with the police, the two of them. I actually believe that based on that alone.

[461] Mr. Henry said that it was February or March 1982 when the alleged coke deal happened. Mr. Henry believed he was ripped off by Johnny Brownstone.

Tanya Olivares

[462] Ms. Olivares was born on February 1, 1973. Her younger sister, Kari (now deceased) was born on June 19, 1975.

[463] The Winnipeg offences occurred between June and December 1976. During Mr. Henry’s incarceration for the Winnipeg offences, Ms. Olivares was between three and seven years old.

[464] In July 1980, Ms. Olivares, along with her mother and sister, joined Mr. Henry in Vancouver. They lived in a hotel on the downtown east side in July and August, before finding the suite on Canada Way in Burnaby.

[465] The family lived on Canada Way together from September 1980 to January 1981, although Ms. Olivares recalled that her mother frequently kicked her father out. She also recalled that her mother often used narcotics and drank alcohol. Ms. Olivares said that Mr. Henry remained in contact with the family until June 1981. In September 1981, Jessie Henry and her daughters moved to Richmond. There was little contact with her father.

[466] Ms. Olivares said that the family moved back in together on East 17th Avenue at the beginning of March 1982 and lived together until Mr. Henry's arrest in late-July 1982.

[467] From her evidence, it appears that Ms. Olivares lived with her father at least some of the time before age four, when Mr. Henry was imprisoned for the Winnipeg offences. She was seven years old when she lived with him for about six months between July 1980 and January 1981. At age nine, Mr. Henry for a further five months between March 1, 1982 and his late-July 1982 arrest.

[468] While Mr. Henry was in jail, Ms. Henry raised their two daughters on her own. She had significant struggles with substance abuse. Ms. Olivares described that her mother, while taking narcotics and drinking, would be crazy and angry. During this period Jessie Henry would occasionally be hospitalized for rehabilitation.

[469] Ms. Olivares was asked about where her father was living in May 1981. The Philipson reports were put to her. She disagreed with their contents. She said that her father lived continuously with her mother, her sister and her on Canada Way from September 1980 to August 1981, with some exceptions when her mother kicked her father out. During that period, Ms. Olivares was seven and eight years old.

[470] Ms. Olivares gave evidence that on the night of I.J.'s rape, June 8, 1982, they had spent the night with their father. She said that she and her sister were with their father and mother in his car when he took her mother back to rehab at Riverview Hospital. She said, "it was midnight, maybe even later." They got home in the early hours of the morning.

[471] Ms. Olivares' evidence was not previously raised in any documents produced in the action. It was not on her will-say statement nor is it mentioned in the defendant's opening.

[472] The plaintiffs were not able to question Mr. Henry about this in this trial because Mr. Henry's evidence had concluded. Mr. Henry's evidence was that his car

was not driveable at night and that he was at home at East 17th Avenue with his children. Mr. Henry was not recalled as a witness by his counsel to address Ms. Olivares' evidence.

[473] Ms. Olivares' evidence related to two primary matters: first, the alibi she provides her father for the rape of I.J.; and second, the alleged recantation by her mother of the statement she gave to police in 1982, that Ms. Olivares said Jessie Henry told her shortly before her death on October 27, 1990. Ms. Olivares was 17 when her mother died.

[474] In this trial, Ms. Olivares offered an alibi for her father. In her direct evidence, she stated that she recalled she had been with her father on the night that I.J. was raped. She stated she has a recollection that, on the night of June 7, 1982 and into the morning of June 8, 1982, the family drove her mother to a detox facility at Riverview Hospital in the family's AMC Spirit. This happened "really late at night, … I want to say midnight, maybe even later." They only got home in the early hours of the morning and were together with their father after that. The assault of I.J. took place during the early hours of June 8, 1982.

[475] Ms. Olivares said that she had not provided this evidence in 2015 or before, because she had not been asked. She said that it is not mentioned in available correspondence with her father that were entered as exhibits in this trial, because she had mentioned it either in other correspondence no longer in existence or not produced, or in phone calls. Ms. Olivares said:

> No, but I don't think all the letters that I wrote him in all the years are there either. So I don't know, maybe I did write him saying that. Maybe I said it to him over the hundreds of telephone calls we had while he was in prison. We discussed a lot of things over telephone that I don't have in writing either.

[476] Ms. Olivares said that she had known that she was an alibi for her father regarding the events of June 8, 1982, since that date. She understood that this was an important piece of evidence. When asked if she had ever seen it documented anywhere that she and her family had taken her mother to the detox facility that night, Ms. Olivares claimed she was not sure but that she may have told her father's

counsel about it in the previous matters before the Court of Appeal or before Hinkson C.J. She said that she appreciated how remarkable it was that no one asked her about it; she explained that no one had asked her because we "weren't supposed to be sitting here" in litigation and that she had not ever had an opportunity to say it in this setting.

[477] Mr. Henry gave evidence in this trial that his car was not driveable at night in June 1982. When asked about this, Ms. Olivares said: "Well, I mean, I don't know where his thoughts are on this, I can't tell you, but I know what happened, I'm telling you what happened."

[478] Ms. Olivares swore that she was "100% certain" that it was the night of June 7, morning of June 8, 1982. She said she was as certain about that fact as she was about the fact that her father was living with them continuously until the June 1981 break-in incident.

[479] In respect of the second matter, that is her mother's alleged recantation of the statement she gave to police on May 2, 1982, Ms. Olivares referred to a letter she wrote in the 1994-1996 timeframe to her father. By the time of that letter, Jessie Henry had been dead for 4-6 years. It is evident that Ms. Olivares had the Jessie Henry statement before she wrote the letter because it references her father having sent it to her. Some of the items that Ms. Olivares sets out in her letter are:

> I think some of the things she told them was [sic] correct…
>
> I also think that the police took advantage of her statement [*sic*] of mind and changed things she said in their favor…
>
> Also who knows what she meant about you had thrown out all your clothes…
>
> About the circumcision maybe they changed her words she said he was instead of wasn't.
>
> I really think that they made her believe that you were the guilty one and because she was so out of it, it all started sounding like it was the truth.
>
> Like I told you when she talked to me that night she said yes I did tell them I thought he was the one but I was so out of it I didn't know what I was thinking…

[480] In her direct evidence, Ms. Olivares said that her mother had read something in a newspaper and the description sounded like Ivan Henry. Her mother was mad at her father because he did not want her taking drugs. She thought that her mother believed that he had a lady friend and that she wanted to get back at him. Ms. Henry found out there was money involved so she called, had a meeting with a police officer, and was given $1,000.

[481] Ms. Olivares testified that her mother told her that she never said anything earlier because she was an addict and on welfare and she thought that no one would believe her. She also feared that her kids would be put in foster care or that she would get into trouble herself. Ms. Olivares testified that her mother told her that she met the police officer at a payphone downtown and at that time she made untrue statements to the police about Mr. Henry. Her mother felt threatened by the police because she feared they would take the children away from her.

[482] Ms. Olivares said that her mother told her that the police had been looking for a black turtleneck that she recalled the police taking from her in 1983. Ms. Olivares' evidence was it would not have fit Mr. Henry as it was her mother's and her mother is much smaller than her father.

[483] In respect of other matters raised in the Jessie Henry statement, Ms. Olivares testified that she knew her father had a garage for storage but did not know if it was locked. She testified that her father bought her a bike but could not recall if it had a bike lock. She did not recall hearing her father use the word "rip off" in conversation. Ms. Olivares testified that her father is a very clean person and showers twice a day. She observed this when he lived with her following his release from custody in 2009.

[484] Ms. Olivares testified she did not recall ever seeing her father without a mustache. He would grow a beard in the winter and shave it in the summer. She testified that both of her parents had red hair and his was naturally curly. Her father is right-handed. He had a receding hairline and the length of his hair ranged from chin length to short. She did not observe him perming his hair. He smoked. She did

not recall him using the words “honey” or “sweetheart” and did not agree he spits when he gets excited. She did not know if he wore underwear or was circumcised.

[485] Ms. Olivares testified that she did not recall her father wearing new clothes or getting rid of clothes and did not observe him wearing a turtleneck or a belt. She was asked if she observed him sleeping all day and being awake at night and Ms. Olivares testified that her mother did that, but her father was working. Her father took her to school in the morning. She said that he did not come home late or early in the morning in the spring of 1982.

[486] After her mother’s death Ms. Olivares returned to Vancouver from Mexico briefly before moving back to Mexico until July 1994.

Detective Michael Barnard

[487] Detective Barnard testified twice, first on a *voir dire* that was subsequently entered as evidence in the trial proper. On the first occasion, he spoke of his July 26, 1982, interview with I.J. He said that it was essentially a relaxation session where he tried to calm a witness down to then conduct a more detailed interview.

[488] Detective Barnard described that he attended a course in Los Angeles for four days in 1979. As a result of that four-day training and despite that he was not trained as a doctor or psychologist, he used the technique he learned to obtain more detailed evidence from a victim or eye-witnesses. He took a more advanced course a few years later.

[489] Detective Harkema asked Detective Barnard to use his technique on I.J. and he did so on July 26, 1982. He was not provided with information about the offence before undertaking the hypnosis. After the interview, Detective Harkema also created a report titled “Hypnosis of I.J.” He indicated that she was a very poor subject for hypnosis and describes two incidents of hypnosis. During the first, he notes:

> She went into a trance state without any problem at all, but was quite hyper and emotional during the hypnosis interview, The first interview proceeded fine until we started to talk about the incident, when she began to cry.

[490] After a break, Detective Barnard notes:

> She was again re-hypnotized approximately 18:30 hrs. It is the opinion of the operator she obtained only a very light trance and it is quite possible that she was not fully hypnotized. She does admit she had some difficulty, but states that she did remember a lot more than what she previously stated.

[491] The report concludes that the "suspect on the first session did several levitation tests, and on a graph of 1-36 chose number 3. In the second session, no tests were administered and on a graph of 1 to 36, she chose number 8."

[492] Detective Barnard testified that he has no independent recollection of the hypnosis session with I.J. other than what is contained in the report and transcript.

[493] When Detective Barnard returned to give evidence a second time in this trial, he described his time on the sexual assault squad, from March 5, 1983 to March 1984.

[494] Detective Barnard was taken through an exercise relating to the mysterious six case numbers that are handwritten on many of the investigation reports. It became clear when the investigative reports containing mysterious case numbers were reviewed that they were added after the fact, although nobody knew who added those numbers or for what purpose. One of those case numbers relates to G.H.: 82-17341.

[495] Of the many documents on which the six case numbers appear is a report related to a suspect with the initials E.P.L. This is in the file of E.C. and it states that E.P.L. was located, interviewed, and a sample of his blood was obtained. He was found to be an "O" and was eliminated as a suspect with respect to the rape of L.R.

[496] Mr. Henry, who is also an "O" blood type, suggested that he was ruled out as a suspect in G.H.'s assault because G.H.'s case number is written on the miscellaneous and supplementary report about of another rape victim, E.P.L. who was assaulted on November 27, 1983.

[497] In Mr. Henry's September 21, 2023 affidavit seeking a dismissal of the plaintiffs' cases, he swears:

> I also learned, post-conviction, that for one of the women whose assault I was convicted of, plaintiff G.H. in this lawsuit, the police had evidently been able to determine the blood type of the perpetrator through semen identified on an exhibit. I know this as G.H.'s sexual assault police file number was listed on police reports that showed the police had excluded suspects based on the suspect's blood type. In one such report, a suspect in a number of offences, including the assault on G.H., was excluded on the basis of that suspect having blood type "O." I too have blood type O.

[498] Detective Barnard confirmed that he was 5'11" in 1982. He was number 15 in the May 12, 1982 lineup.

Detective Glynnis Griffiths

[499] Glynnis Griffiths is a retired VPD officer. She started with the VPD in 1992 and retired in 2020 as a Detective Constable.

[500] Detective Griffiths was an investigator on the "Smallman Investigation", along with a few others. The investigation originated with the VPD's review in 2002, of cold sexual assault cases. The VPD found some exhibits in storage from unsolved cases and submitted them for lab testing. The testing came back with a DNA match in two cases being that of the same unknown male. These results prompted a further internal VPD review of exhibits and police reports in unsolved sexual assault cases from the late 1970s and into the early 1990s.

[501] Donald McRae, a.k.a. "Smallman" was a suspect in the 1980s in the cases where the DNA matched, as well as others. In 2004, the DNA profile of the unknown male in the two cases was matched to Mr. McRae. The cases were those of L.W. and S.C., who were assaulted on January 25 and March 4, 1987, respectively. Mr. McRae was convicted of those sexual assaults.

[502] Starting in 2002 and working backwards through those case files, the VPD attempted to extrapolate a *modus operandi* (M.O.). The VPD set up a system to provide the investigative team with cold case files to review. The files provided for review were files that appeared to include a similar M.O. A number of people were

reviewing all the files. They were filtered to the investigative team for further review to see if they fit the pattern they were looking for.

[503] The investigative team was looking for: physical similarities; time of day when the assaults occurred - typically between midnight and early morning hours; often ground floor apartments; sliding patio doors; often a knife involved - threatening the victim or put to their neck; the suspect often had his face covered or would cover the victim's face with a pillow; he sometimes made the victim count to 100 or to 50 as he left; he often humiliated the person so that they would be discouraged from speaking of the incident to anyone; similarities in verbiage - things like: "Oh, I'm looking for so and so, they owe me money" or "don't call the police, they'll never catch me"; point of entry/point of exit; blaming the victim by saying "this wouldn't have happened if you'd locked your door".

[504] The investigative team reviewed over 200 files and of those, 25 were presented to the Crown for review as to whether or not to charge Mr. McRae. Out of those 25 files, and besides the two original DNA cases of L.W and S.C, only one further charge was approved as there was one further DNA match made in the case of G.J., who was assaulted on July 5, 1985.

[505] While conducting the investigation, Detective Griffiths and others on the investigative team interviewed most of the victims in the 25 cases selected to be presented to the Crown. There was a positive identification of Mr. McRae by the victims in the three cases where there was a DNA match and only one more case out of the 25.

[506] Detective Griffiths confirmed that the typed version of the 1980s reports were generated by her team by transcribing them from the original paper or microfiche versions. She did not know who may have put the six file numbers, including that of G.H., onto the original versions of the police reports, or why or when it was done. She confirmed that it was not anyone on her team, as they only did the transcribing.

[507] When referred to one document that has the file number placed on it, a miscellaneous and supplementary report in the 1986 sexual assault case of L.K. (one of the 200 files reviewed, but not part of the 25), Detective Griffiths assumed that Constable Meenley, who authored the report in 1988, was adding a note to the 1986 case in 1988, because they were looking at a group of offences that occurred from 1985 to 1987 and had considered "Smallman"/Donald McRae a suspect in those offences.

[508] L.K. was sexually assaulted in the Mount Pleasant neighbourhood in June 1986. The victim provided a description of the assailant and participated in making a composite sketch of him.

[509] Detective Griffiths testified that L.R., who was assaulted on April 12, 1983, was the first case, chronologically, that was put forward to the Crown. Detective Griffiths said this case was selected based on the M.O. that seemed to be consistent, specifically the use of a knife and the idea of placing something over the victim's face, combined with the timing of the assault and the presence of a sliding door. In L.R.'s case, there was also a composite sketch made of her perpetrator.

[510] Detective Griffiths testified that the earliest booking (or any) photograph of Mr. McRae was dated April 8, 1985, and that there were many other subsequent booking photographs, dating from March 12, 1987 to December 31, 2003. She was unable to say what Mr. McRae may have looked like in 1981 or 1982. The March 12, 1987, booking photograph was used in the photo lineup presented to some of the 25 victims.

[511] Detective Griffiths testified that she believed that Mr. McRae received the nickname Smallman based on his stature and that he was recorded to be 5'5" or 5'6" in his booking sheets through the years.

[512] Looking at the "Smallman Summary Fact Sheet," Detective Griffiths confirmed that it contained all the information on each of the 25 cases selected to put forward to the Crown and that she relied on its accuracy regarding details in her

investigation. She confirmed that, in reviewing the specifics of the L.W. and S.C. assaults committed by Mr. McRae, there are many details that were not similar at all, despite the DNA confirmation that the offences were committed by the same person. She also confirmed that, although considered to be generally similar, the rest of the cases had many dissimilarities as well.

[513] Detective Griffiths confirmed that sexual assaults were very common in Vancouver, all over the City, in the 1980s and 1990s. She also said that it was very common for a perpetrator of a crime to have a ready-made excuse for being somewhere they should not be, particularly if they were a career criminal.

[514] Detective Griffiths testified that the file of G.H. was looked at by the Smallman investigative team because her file number was noted on some of the original investigation reports from the 1980s. After finding there was a conviction associated with her assault, the file was put aside. The general rule for file review was to exclude any files that may have had a similar M.O. but had an associated criminal charge or conviction.

[515] Detective Griffiths confirmed that she had conducted no investigation into the circumstances of the cases of the plaintiffs in this case (outside of G.H.); had no familiarity with the circumstances of the offences Mr. Henry was convicted of in 1983 or 1976; had not known of Mr. Henry until after the Smallman Investigation was over; and had never spoken to Mr. Henry.

[516] Detective Griffiths confirmed that in none of the 25 cases her team investigated was the term “rip-off” or the term “got me over a barrel” used by the perpetrator.

Gary Harmor and Paul Norvell

[517] Forensic serology “consists of biological stain evidence, genetic marker typing, and the statistical expression of the significance of the evidence.”

[518] There is no evidence about the blood type of the assailant who sexually assaulted the five plaintiffs. The authorities responsible for investigating sexual assaults in Vancouver did not have the requisite technical expertise at the time of the plaintiffs' rapes.

[519] Paul Norvell was employed at the Vancouver City Analyst's Lab from 1971-1995, when it closed. He testified over three days in November 2015 before Hinkson C.J. His evidence was admitted in this action for its truth, by agreement.

[520] Mr. Norvell completed a B.Sc. in biochemistry at UBC in 1967. He was hired by the RCMP to do blood alcohol analysis and breathalyzer work in 1968. He then joined the Vancouver City Analyst's Lab in 1971, continuing to do breathalyzer work.

[521] After doing breathalyzer work exclusively for about three years, he started doing broader toxicology work that involved analyzing blood and bodily tissues for drugs.

[522] Into the 1980s, the Vancouver City Analyst's Lab was attempting to expand its forensic capabilities. In 1978, it had bought an electrophoresis unit and was increasing its ability to interpret blood stains. The electrophoresis testing is relevant to blood samples but not to seminal fluid investigations.

[523] Interpreting semen samples from sexual assault cases is different than blood sample analysis.

[524] Gary Harmor was called by the defence as an expert witness in the field of forensic serology to provide opinion evidence regarding the process of identification through analysis of human bodily fluids. Serology was used to determine if stain is blood, semen and saliva before the science of DNA became prevalent in investigations. Mr. Harmor said that, in broad terms, the testing of semen samples is more complicated than blood testing, for a number of reasons. These include that about 20% of the population are "non-secretors," meaning that their blood type cannot be detected in non-blood bodily fluids. In addition, exhibits from a sexual

assault typically involve analyzing a mixture of fluids from both the victim and the assailant.

[525] The defence tendered Mr. Harmor's report from 2023. Mr. Harmor also prepared a report for Mr. Henry's claim in 2015. Mr. Harmor gave evidence in 2015, before Hinkson C.J.

[526] A transcript of Mr. Harmor's testimony in 2015 was marked as an exhibit in this trial, and the questions setting out what is needed to determine blood type in a sexual assault case were confirmed by him:

> Q And for these analyses, ABO grouping on sex assault evidence, you need all of the following to get conclusive results by which you could eliminate a suspect; correct? The forensic serologist needs to have all of these things to analyze. The crime scene evidence of course, which, again, as we've said is a mixture of vaginal fluids and semen, usually; right?
>
> A Yes.
>
> Q Blood and saliva samples from the complainant; correct?
>
> A Yes.
>
> Q And that's because you need to find out the 14 complainant's blood type and secretor status; correct?
>
> A Correct.
>
> Q And you can determine secretor status by analyzing the saliva; correct?
>
> A Yes.
>
> Q And you're searching for those antigens in the saliva; right?
>
> A Yes.
>
> Q You would also need blood and saliva samples from the suspect; correct?
>
> A Yes.
>
> Q For the same reasons?
>
> A Yes.
>
> Q And you would also need blood and saliva samples from any recent sexual partners of the complainant; correct?
>
> A Yes.

[527] Mr. Norvell was asked about his knowledge of forensic serological analysis of semen evidence in 1980 and 1981. He said he had "virtually none." There is

contemporaneous documentation of Mr. Norvell's statement. In May 1981, Mr. Norvell was asked to participate in hypothetical test. He was provided with three bloodstained pieces of fabric, one from a victim, one from a suspect, and one from blood on the suspect's shirt. He was given some questions to answer. In his response dated May 21, 1981, he wrote: "We are just beginning to use electrophoresis at this laboratory and are typing only three enzymes at present."

[528] There was a comparable blind trial to identify blood type from an alleged sexual assault victim. In Mr. Norvell's December 15, 1981 response, he wrote:

> I received on November 26, 1981, one piece of bed sheet (brown) marked 81-11B-6.
>
> …
>
> I do not routinely group seminal stains at this laboratory but I gave it a try anyway. The results from the absorption elution and inhibition tests were inconclusive.
>
> I have only recently begun doing electrophoresis and have so far only been involved with blood stains. The enzyme patterns I got from these stains were so weak that I felt I could not call them. At present, we do not have the capability to sub-type P.G.M.

[529] Mr. Norvell explained that this was a blind trial of semen analysis. He did not get any results because "At that time I really didn't know what I was doing. I just gave it a try." His capabilities in terms of semen analysis in June/July 1982, were limited to acid phosphatase (confirmation of the presence of semen) and looking for sperm. To his knowledge, no one else had any capabilities beyond that.

[530] At the trial in 2015, Mr. Norvell was specifically asked about comments made by Mr. Harmor in his report at that time, that "Paul Norvell and/or other personnel of the City Analyst's Laboratory had the capability of conducting ABO testing and more sophisticated typing on or before 1982." Mr. Norvell confirmed that that would be referring to analyzing blood only.

[531] In the 2015 trial, Mr. Norvell was then taken to the passage from Mr. Harmor's 2015 report, which passage is reprinted verbatim in Mr. Harmor's 2023 report presented in this trial: "The documentation provided clearly indicates that prior to

February 1982 the City Analyst's Laboratory had the capability of conducting ABO and enzyme testing routinely used in the analysis of sexual assault evidence."

[532] Mr. Norvell responded:

> Q: What can you say about that statement, Mr. Norvell?
>
> A: That's not true?
>
> Q: Why is that?
>
> A: We didn't have the capability to do it. I didn't know how to do it.

[533] The capabilities of the Vancouver City Analyst's Lab during the relevant time are described in evidence by both Mr. Norvell, who worked there from 1971 to 1995 and Mr. Harmor who admitted that he knew nothing about the lab.

[534] Errors made by Mr. Harmor in his 2015 earlier report were the subject of cross-examination at the 2015 trial but the errors were not corrected in his 2023 report. Acknowledging he had no knowledge of the Vancouver City Analyst's Lab himself, he reached out to a Gary Shutler. Mr. Shutler was formerly of the RCMP. In a March 14, 2014 email exchange, Mr. Harmor asked Mr. Shutler about the testing available at the Vancouver City Analyst's Lab, he wrote:

> The case revolves around a serial rapist from the early 1980's, I believe at least four cases. He was recently exonerated by DNA and is now suing. The lab was the City Analyst's Lab in Vancouver, B.C. The issue revolves around what testing was available to the lab (I don't think they did any genetic marker testing in that lab at that time). Just semen conformations [sic]. So, was the RCMP lab(s) capable of assisting them in testing for ABO, secretor status and possibly PGM in 1983 and the years prior.

[535] In Mr. Shutler's March 26, 2014 response to Mr. Harmor he wrote:

> I did contact my original supervisor and he agrees with me that 1982 is a reasonable estimate of when the RCMP started to offer semen typing services. Also he remembers the Vancouver City Analyst lab as not being well funded and slow to pick up any new technology. They apparently also did other city testing services like water quality so it looks like they were not as specialized in forensic services as one would expect.

[536] Mr. Harmor acknowledged in his cross-examination on his 2015 report that the evidence provided to him by Mr. Shutler should have been included in his report. He did not include that in his 2023 report, but restated his incorrect evidence from

his 2015 report: “I believe that by 1980 the RCMP in Canada was also conducting ABO and PGM typing on sexual assault cases.” His evidence in cross-examination was that his failure to include this information, after previously acknowledging it should have been included in his 2015 report, was simply an oversight.

[537] Mr. Norvell wrote a letter dated December 15, 1981 to Mr. Harmor that directly confirms Mr. Norvell did not have the ability to do blood grouping on seminal stains at that time, Mr. Harmor acknowledged that his failure to include that in his 2023 report was also an oversight.

[538] In October 1983, Mr. Norvell attended a sexual assault analysis course at SERI. Through that course, he learned how to identify seminal fluid and how to determine ABO grouping from a seminal stain. He then was able to do the type of blood typing analysis from a seminal stain that would allow an investigator to potentially determine a sexual assailant’s blood type. Mr. Norvell said that until he completed training in semen identification in October 1983, the Vancouver City Analyst’s Lab was not able to determine blood type from a semen sample.

[539] The only semen sample that was analyzed by the Vancouver City Analyst’s Lab is in respect of the assault on G.H. Mr. Norvell explained the worksheet that he prepared in relation to it. He said that he took one of the swabs and made a wet mount to look for sperm which he observed. He took one of the swabs and did an acid phosphatase test. The result was an “optical density of 0.49,” meaning that there was seminal fluid present.

[540] Mr. Norvell believed that the two swabs related to G.H. would have then been placed in a fridge somewhere in the lab but he could not remember for sure. He believed that they would have, at some point, gone back to the property office. Mr. Norvell confirmed that in 1981/1982, the Vancouver City Analyst’s Lab’s retention policy was that they did not keep any of their samples. This policy changed after he came back from the course in October 1983. At that point, they “started keeping the vaginal swabs or if there was a seminal stain on a piece of clothing….”

[541] Mr. Norvell confirmed that biological exhibits related to the assault of I.J. were returned to the VPD property office within a couple of months of the assault, despite the fact that the police station did not have refrigeration capacity to store biological samples.

[542] There is no evidence about biological samples that may have been taken from the other plaintiffs.

Legal Issues

Standard of Proof

[543] In this case, each of the plaintiffs must prove that Mr. Henry was the person liable for sexually assaulting them on the civil standard of proof: the balance of probabilities. This means that each plaintiff must establish that it is more likely than not that Mr. Henry is the man who sexually assaulted her.

[544] The criminal standard of proof, beyond a reasonable doubt is a much higher standard. It is "much closer to 'absolute certainty' than to 'a balance of probabilities'": *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 36. The burden of proof rests on the prosecution throughout the criminal trial. It never shifts to the accused. The accused can choose whether to give evidence or not; he or she is entitled to remain silent.

[545] As noted in *F.H. v. McDougall*, 2008 SCC 53 at paras. 41-42:

> 41 … The criminal standard is not to be applied to civil cases in Canada. The criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. …
>
> 42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence* (2nd ed. 1999), at p. 154:
>
> > Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.
>
> It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government's power to penalize or take away the liberty of the individual.

Identification Evidence

[546] The jurisprudence involving identification evidence has developed mainly through the criminal law. In those cases, the Crown must prove the element of identification of the offence beyond a reasonable doubt.

[547] In *R. v. Hibbert*, 2002 SCC 39, the Court considered the shortcomings in the trial judge's charge to the jury at para. 52:

> … it would have been prudent to emphasize for the benefit of the jury the very weak link between the confidence level of a witness and the accuracy of that witness …

[548] In *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), Charron J.A. referred to the *Law Reform Commission of Canada Study Paper* (1983) on "Pretrial Eyewitness Identification Procedures", including its conclusion that "eyewitness testimony is inherently unreliable."

[549] At para. 11, the Court stated:

> Eyewitness testimony is in effect opinion evidence, the basis of which is very difficult to assess. The witness's opinion when she says "that is the man" is partly based on a host of psychological and physiological factors, many of which are not well understood by jurists.

[550] In *R. v. Hibbert*, 2002 SCC 39 the Court said at para. 50:

> [I]t is important to remember that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere. The dramatic impact of the identification taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.

[551] At para. 51, the Court referred to the "danger of wrongful conviction arising from faulty but apparently persuasive eyewitness identification" and referred to the Honourable Peter deC. Cory, acting as Commissioner in the Inquiry regarding Thomas Sophonow, who made recommendations:

> … regarding the conduct of live and photo line-ups, and called for stronger warnings to the jury than were issued in the present case (Peter deC. Cory, The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (2001) ("Sophonow Inquiry"), at pp. 31-34).

[552] Despite its frailties, eyewitness evidence can be highly probative even in a criminal case. The assessment of the evidence must consider the factors that allow the witness or victim to identify the individual. The fallibility concerns that may determine that specific identification evidence is unreliable on the criminal standard will not necessarily render that same evidence unreliable on a civil standard. Applying the civil standard of proof, the plaintiffs must show that the eyewitness evidence is probably accurate. The frailties surrounding eyewitness evidence in criminal cases does not mean that the same evidence is not robust enough to meet the balance of probabilities evidentiary hurdle.

[553] *R. v. Shaw*, 2024 ONCA 119, addresses the particular dangers of eyewitness identification at para. 174:

> Particular dangers that may cause concern for reliability of identification evidence include: inability of the witness to provide a description of the person; lack of distinctive features of the person; the conditions under which the observations are made, such as lighting, distance; factors affecting the ability of the witness to perceive, such as a need for glasses, intoxication; and, a short time to observe: [citation omitted] In addition, identification procedures employed by police can impact the reliability of identification evidence…

[554] The factors outlined are not to be taken as a check-list; the court must consider all the surrounding circumstances: *Mezzo v. R.*, [1986] 1 S.C.R. 802.

Pretrial Identification Procedures

[555] The Sophonow Inquiry was instrumental in addressing how the police ought to conduct pretrial identification procedures.

[556] In *R. v. Osborne*, 2012 ONSC 4287, the Court reviewed the pitfalls associated with pre-trial identification procedures, such as lineups and photo arrays. This is addressed at para. 30:

> … the importance of pre-trial identification evidence is that it permits the trier of fact to assess the overall probative value of the identifying witness's evidence. To accomplish this purpose the procedures used must, as far as possible, permit an objective assessment of the eyewitness's ability to identify the culprit…

[557] The Court continues at para. 31 and describes the two dangers that arise from pre-trial identification procedures:

> … The first is that a flawed pre-trial identification process improperly influences the choice made by the witness or their level of confidence in their choice. Such tainting can occur intentionally or inadvertently. However, the concern is that the identification or the level of confidence is not the result of what the witness recalls, but rather is the result of the biased process employed. The second danger flows from the first. The second danger is that once the evidence of the witness has been tainted by a biased process, the process may taint any subsequent descriptions, identifications or statements of confidence made by the witness. Here the concern is that the witness's evidence stems not from the original event, but from the earlier, flawed identification process…

[558] In *R. v. Miller*, 2003 BCSC 118 the Court stated at para. 14:

> In dealing with a photographic line-up at least three prerequisites should be followed:
>
> > (a) It should appear that there has been nothing whatever done to indicate to the witness the person in the line-up who is suspected by the police, either by showing the witness a photograph, or indicating the position of the suspect in the line-up;
> >
> > (b) The selection of the other persons to form the line-up should be fairly made, so that the suspect will not be conspicuously different from all the others in age or build, colour or complexion or costume or in any other particular.
> >
> > (c) The procedure must be fair…
>
> There must be several photographs and the suspect must not be markedly different from the others in the line-up in respect of age and physical appearance.
>
> [Citations omitted.]

[559] At para. 17, the Court referred to the Sophonow Inquiry and its recommendations about photo lineups.

Voice Identification

[560] *R. v. Chan*, 2001 BCSC 1180 specifically addressed voice identification at paras. 28-32, in a helpful summary of the law and in setting out a list of factors to consider in assessing voice identification.

[561] The case notes first that:

> 28 The Ontario Court of Appeal made it clear in *R. v. Williams* (1995), 98 C.C.C. (3d) 160 (Ont. C.A.), that a person testifying that he or she identifies the voice recorded is doing so on the basis of familiarity with that voice, not as an expert in voice identification. Courts do not require that the Crown provide voice analysis by an expert. Rather, the reliability of the identification is a matter of weight. The factors that may undermine the reliability of a person's voice identification undermine the strength of that identification: see *Williams*, at p. 166 In *R. v*. *Rumbaut*, [1998] N.B.J. No. 381 (NBQB)] at para. 47, the court notes the several methods by which a party to a private communication may be identified:
>
> > 1. A lay witness familiar with the voice of the accused may express an opinion as to the identity of the parties in the communication even where the witness heard the tapes before listening to the person.
> >
> > 2. Self-identification on the recording itself (use of address or name that identifies the speaker).
> >
> > 3. Physical surveillance that coincides with the audio-recording to establish the identity of the speaker.
> >
> > 4. Direct evidence, such as a person testifying that he or she was with the accused at the time the accused was part of the communication.
> >
> > 5. Spectrographic analysis.

[562] The Court then refers to *R. v. Reid*, [1993] O.J. No. 3283 (G.D.), at para. 23 where Farley J. cites the following:

> In the same manner that visual identification may be wrong, so may voice identification. In fact, voice identification may be even more subject to error than visual identification because of the limited number of distinguishing characteristics and the fact that voices change with variations in mood. It may be very easy to recognize the voice of a famous person, but describing that voice to another may be virtually impossible.

[563] *Chan* sets out some of the factors that may be considered in dealing with voice identification at paras. 31-32:

> My reading of the cases provided reveals that a number of factors will assist the trier of fact assess the reliability of the witness' identification of the accused's voice:
>
> > a) Are there distinctive or distinguishing features of the voice?
> >
> > b) Did the party to the communication identify him or herself?
> >
> > c) Did the party to the communication provide information that would allow the listener to identify him or her?
> >
> > d) Was there evidence of physical surveillance at the same time as the private communication to allow the speaker to be identified?

> e) Did the witness hear the voices under the same conditions, or was the emotional state different in each situation?
>
> f) What is the length of time during which the witness was able to hear the voice?
>
> g) Was there any reason for the witness to focus on the voices?
>
> h) What was the condition of the witness when he or she heard the voices, alert or groggy?
>
> i) What was the length of time between the times the witness heard the voices?
>
> j) Were there any contradictions in the description given by the witness - did the witness testify that the accused spoke with an accent when he or she did not?
>
> k) Did anything compromise the identification process - was the witness assisted in identifying the voice, or was the witness' opinion tainted by the expectation that the voice was that of the accused?
>
> l) Is the witness' opinion contradicted?
>
> 32 As with visual identification, voice identification suffers from the frailty that a witness may simply be mistaken. This is not a question of the honesty or integrity of the witness. However, honesty and integrity of a witness cannot be relied upon to overcome weaknesses in identification evidence. …
>
> [Citations omitted.]

Victims' Reactions

[564] In *R. v. Simpson*, [1981] O.J. No. 23 (C.A.), the Court heard an appeal from a man convicted by jury on two counts of attempted murder. One of the grounds for the appeal was the defence position that the trial judge had erred in instructing the jury that they "could use the evidence of the reaction of [the victim] on seeing the appellant in the court-room on September 15, 1975, to strengthen her identification of the appellant."

[565] The Court of Appeal rejected that argument. It held at para. 15:

> … the trial Judge cautioned the jury in general terms with respect to the frailties of identification evidence, and also cautioned them with respect to the particular frailties attaching to [the victim's] evidence by reason of the circumstances in which she identified the appellant. …

[566] The trial judge specifically instructed the jury that the physical response of the victim to seeing her attacker may be a "sufficient act of identification which

eliminates the problem of the method of bringing [the suspect] in and the fact that he was hand-cuffed and with the police."

[567] The Court continues:

> We were all of the view that [the victim's] reaction was admissible as part of the act of identification and that the learned trial Judge did not misdirect the jury with respect to the value or weight of that evidence. We think, however, that it is unfortunate that [the victim] was permitted to view the appellant while he was wearing handcuffs and efforts should be made to avoid an accused being viewed for identification in such circumstances, notwithstanding that the accused has refused to appear in a line-up.

[568] *R. v. K.B.P.*, 2011 ABQB 627 is a case involving a home invasion that turned solely on identification. The Court was required to consider the victim's visceral reaction to seeing the accused in a photo lineup. It held at para. 52:

> … [The victim] described approximate age, height, weight, build, complexion, hair colour and ethnic origin. While many of these characteristics may be shared by other young Filipino males, making the identification of an assailant with these characteristics more difficult, [the victim] had a strong, visceral reaction to [the accused's] photo among nine photos of other young men of Filipino origin: This reaction is admissible evidence: *Simpson v. R.* …

[569] The defendant was convicted solely on eyewitness identification. The Court was satisfied beyond a reasonable doubt of the guilt of the accused. The Court was careful to take the care required given the inherent frailties of eyewitness evidence, such care does not "translate into a rule of exclusion or complete probative negation," and that it is "most certainly not the rule that eyewitness evidence – even standing alone – can never ground a proper conviction" (at para. 61).

[570] Two more recent cases have followed *Simpson*.

[571] In *R. v. Mirzoian*, 2020 QCCQ 3611, the strong reaction of the victim was held to be admissible and to have substantial probative value (at paras. 95-97):

> 95 But what really strikes this court is the reaction of the victim, who just got out of a coma the day before, when coming upon the picture of the accused in a photo line-up procedure, performed in accordance with the majority of the recommendations set out by the "Sophonow report". Appearing fairly stable during the explanations of the "Photo identification parade" procedure and the reveal of the first two pictures of individuals, he became instantly agitated when [the officer] showed him the picture that

> depicts the accused. He did not react in such a fashion when the officer kept on revealing the other pictures of the package.
>
> 96 A witness's strong reaction when coming upon a photograph of his or her assailant in a photo line-up is admissible as part of the act of identification: see *R. v. Simpson*.
>
> 97 In this Court's opinion, in these particular circumstances, one cannot plan, premeditate or deliberately simulate the reaction observed. In itself, this evidence has a substantial probative value.

[572] *R. v. Abdulkadir*, 2022 ABKB 700 was a sexual assault case. The complainant identified a photo of her attacker, saying "I'm pretty sure that's him." Her physical reaction to seeing her assailant, her visceral response, was a significant factor in her identification. The Court held at paras. 314-315:

> [314] Her degree of certainty was manifested by her physical and emotional reaction to Mr. Abdulkadir's photograph. She recoiled. She cried.
>
> [315] I am entitled to take the Complainant's physical and emotional reaction into account in assessing her identification: see *KBP* [and] *Simpson v. R.* …

Inferences

[573] The Supreme Court of Canada reiterated that the drawing of an adverse inference is a component of the fact-finding process. The decision as to whether an inference is warranted in a particular case falls within the discretion of the trier of fact, to be determined with reference to all of the evidence: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 52.

Credibility

[574] A summary of factors to be considered in the assessment of credibility is canvassed in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness. Ultimately, the

> validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
>
> [Citations omitted.]

[575] A prior criminal record is a fact that bears on a person's credibility: *R. v. Corbett*, [1988] 1 S.C.R. 670. In criminal matters, the trial judge has the discretion to refuse evidence regarding an accused's criminal record. Introducing an accused's criminal record in a criminal trial is subject to stringent limitations, for example, a finding of similar fact evidence. The rationale for excluding it from a criminal trial is that it may lead the trier of fact to consider that the accused is a bad person that has the propensity to commit the crime with which he or she is charged.

[576] Section 15 of the *Evidence Act*, R.S.B.C. 1996, c. 124, provides a right to question a witness about whether they have been convicted of an offence, and to prove the offence if the witness denies it. The only limitation is found in subsection 4 which provides a discretion to exclude questioning of a witness on past convictions in proceedings before a jury "if the judge thinks that the questioning of that witness would unduly influence the jury."

[577] There is no comparable limitation in civil matters. A person's criminal record is admissible on the issue of credibility and must be weighed along with the other relevant evidence.

Admission of Guilt

[578] Criminal convictions are admissible in subsequent civil proceedings. A criminal conviction ordinarily constitutes a *prima facie*, but not conclusive, proof of the fact of guilt. However, in some cases, the doctrine of abuse of process may preclude the person convicted from contesting the underlying facts. A litigant may mitigate or avoid the effect of a prior conviction in a civil proceeding by: (i) adducing new evidence not available at the criminal trial; (ii) showing that the issues are different; and (iii) showing that there was some lack of fairness or effective representation in the prior proceedings, referring to *Toronto (City) v. Canadian Union*

of Public Employees (C.U.P.E.), Local 79, 2003 SCC 63 and *Hanna v. Abbott* (2006), 82 O.R. (3d) 215 (C.A.).

[579] In those cases, the accused did not enter guilty pleas. They were convicted of the offences charged. Further, the offender in each of those cases was unsuccessful in mitigating or avoiding the effect of the conviction in a subsequent civil case.

Analysis

[580] During the trial I made rulings on applications filed by the plaintiffs and by the defendant.

[581] The defendant has asked me to reconsider some of those rulings, now that I have heard all of the evidence.

Abuse of Process

[582] At the beginning of this trial and throughout the evidence and the defendant's argument, the overarching theme is that this civil proceeding is an abuse of process. Mr. Henry was found not guilty for the sexual offences committed on the plaintiffs and others by the Court of Appeal in 2010. He was granted significant damages for the breach of his *Charter* rights by Hinkson C.J. in 2016.

[583] At the commencement of trial, the defence applied to have the plaintiffs' case dismissed, arguing that these proceedings were an abuse of process. My decision regarding that application addressed the defence argument that re-litigation is an abuse of process because of the previous judicial determinations by the Court of Appeal and Hinkson C.J. I reviewed those decisions. I did not disagree with them or find them to be erroneous.

[584] Among other cases, I referred to the leading case of *Toronto (City).* That case involved a review of an arbitrator's decision relating to whether the griever was terminated from his employment as a recreation instructor for just cause after he was found guilty of sexual assault of a boy under his supervision. The arbitrator hearing the termination grievance accepted the griever's evidence that he did not

sexually assault the boy and reinstated his employment. The Court determined that the re-litigation of issues decided against the accused (the greivor) in the criminal proceedings (i.e. the conviction) could not be re-litigated and to do so was an abuse of process.

[585] The case engaged the different standards of proof in criminal and civil matters. As the griever was convicted of assault beyond a reasonable doubt, he could not be found to have not committed the act on a lesser standard, the balance of probabilities. The opposite is not the case. An acquittal is not a bar to a civil suit. The defendant may be liable on a balance of probabilities despite his acquittal.

[586] In relation to an abuse of process, the Court found that there was an inherent and residual discretion to prevent the abuse of the court's process where subsequent proceedings were “unfair to the point that they are contrary to the interest of justice” (para. 35).

[587] The Court stated that policies that animate the doctrine of the abuse of process through re-litigation include: the desirability of there being an end to litigation; that no one should be vexed twice by the same cause; preservation of the resources of the courts and litigants; upholding the integrity of the justice system by avoiding inconsistent results; and protection of the principle of finality (para. 38).

[588] The Court said the abuse of process is a flexible doctrine and is unencumbered by the specific requirements of *res judicata* or issue estoppel. The focus is less on the interests of the parties and more on the integrity of the judicial decision-making (paras. 38, 42-43).

[589] The doctrine of abuse of process to cases of attempted re-litigation enshrines the principle that re-litigation should be avoided unless the circumstances dictate that it is necessary to enhance the credibility and effectiveness of the adjudicative processes as a whole. In cases where there is not a mutuality of parties, re-litigation may enhance the integrity of the judicial system and accordingly be permitted in the following circumstances: when the first proceeding was tainted by fraud or

dishonesty; when fresh new evidence previously unavailable conclusively impeaches the first results; when the original proceedings were too minor to generate a full and robust response, or there has been inadequate incentive to defend; or, when fairness dictates the original results should not be binding in a new context (para. 52).

[590] The 2010 Court of Appeal decision specifically dealt with the identification evidence tendered at the 1983 criminal trial of Mr. Henry. The plaintiffs in this case were not parties to any of the proceedings involving Mr. Henry in 1983, not in the Court of Appeal case in 2010, and not in the case before Hinkson C.J. in 2015. They were witnesses in the criminal case only.

[591] I considered that aspects of the Court of Appeal's decision invited a conclusion that the plaintiffs cannot be bound by the legal and factual findings regarding identification by either court. Most importantly, those cases addressed the strength of the complainants' (including the five plaintiffs here and others) identification evidence on the criminal standard, beyond a reasonable doubt.

[592] The Court of Appeal reviewed the procedural history of Mr. Henry's criminal case. Beginning at para. 40, the Court addresses the matter of "Consciousness of Guilt". This section addressed Mr. Henry's refusal to participate in the physical lineup that was conducted on May 12, 1982. The Court notes that police officers forced him into the lineup and one officer held him in a headlock, as can be seen by the photographs in evidence:

> Eleven women who had complained of the home-invasion assault viewed the lineup. … These included six of the eight complainants who testified at trial. One trial complainant was assaulted after the date of the line-up and was shown a photographic line-up, a matter to be discussed below.

[593] The Court of Appeal noted that it was the Crown's position at trial that Mr. Henry's refusal to participate in the lineup inferred a "consciousness of guilt". The jury was so instructed by the trial judge. In his charge the trial judge said: "the Crown suggests [Mr. Henry's] obvious reluctance to participate in the lineup leads to

an inference of consciousness of guilt on his part. It is for you to draw the proper inference on considering all of the evidence."

[594] The instruction on the consciousness of guilt was legally wrong at the time. The Court of Appeal found at para. 54:

> This error irretrievably taints the verdicts. I repeat that the identification evidence was weak. An astute juror would have recognized that to be so. With no evidence to shore up identification on any count, conviction by the jury based on a proper understanding and application of the law of identification was unlikely. The legally wrong instruction on consciousness of guilt provided even the astute juror with a comfortable and perhaps irresistible path of reasoning to guilt.

[595] At the 1983 criminal trial, the identification evidence elicited from the complainants, including the five plaintiffs here, was through the questioning by the Crown in chief and Mr. Henry's counsel's cross-examination in the preliminary inquiry and by Mr. Henry in cross-examination at trial. As the Court of Appeal notes, the irresistible path of reasoning to guilt in respect of the element of identification of the accused, would have come from the Crown and the trial judge in the charge. It is likely that this inference played a strong role in how diligent the Crown was in questioning the complainants regarding their eyewitness identification.

[596] Later, under the heading "Unreasonable Verdict", the Court of Appeal notes at para. 112:

> It is not necessary to review the evidence of each complainant as to the details of the attacks. Each complainant was subjected to a terrifying experience at the hands of a dangerous man. However, the evidence of eyewitness identification was not capable of establishing to the standard required by law [beyond a reasonable doubt] that the appellant was that man.

[597] The Court of Appeal provided the following summary and conclusion at para. 154:

> (1) The trial judge erred by instructing the jurors that they could infer consciousness of guilt from the resistance of the appellant to participation in the line-up conducted by the police on 12 May 1982;
>
> (2) The instruction on the element of identification was inadequate;

> (3) There should have been severance of the counts and a mistrial when the Crown abandoned its application for jury instruction on count-to-count similar fact evidence;
>
> (4) Any of these errors, standing alone, would require this court to order a new trial;
>
> (5) The evidence as a whole was incapable of proving the element of identification on any of the ten counts and the verdicts were unreasonable;
>
> (6) The appropriate remedy under s. 686(2)(a) of the Criminal Code is acquittal on each count.
>
> 155 I would allow the appeal, quash the convictions and enter an acquittal on each count.

[598] The Court of Appeal addressed the matter that was before it and found that Mr. Henry was not guilty of the criminal offences of which he was convicted. The Court did not find that he did not sexually assault any of the complainants, of whom five are plaintiffs here. Mr. Henry was found not guilty of the criminal offences, but that does not mean that he cannot be found liable for damages in this civil proceeding.

[599] In this trial, the plaintiffs have had opportunity to fully present evidence, including their eyewitness and other identification evidence. Each plaintiff must prove Mr. Henry's liability for sexually assaulting them on a balance of probabilities. Mr. Henry gave evidence. He was not required to do so in the 1983 criminal trial.

[600] I am not bound by the findings of the Court of Appeal regarding the identification evidence given by the complainants in the 1983 criminal trial. I can agree that the evidence was weak in that context, but I am not bound by that context or the findings arising from it.

[601] The Court of Appeal goes on to review the evidence of each complainant regarding their eyewitness testimony and the transcripts of the 1983 criminal trial and ultimately concludes at para. 139:

> … The photographic line-up was fatally unfair. The physical line-up should not have been conducted at all because, to use the description given in *Marcoux*, it became a farce. There is no telling what influence the prominent display of the appellant by the police officers during that event ultimately had on the six complainants when they were asked in court if they could identify

> the assailant. Police investigators should have prepared a proper and fair photographic line-up instead of forcing the appellant to participate in the physical line-up. Had they done this there might have been arguably reliable identification by one or more of the eight complainants. In that event, if the case had otherwise unfolded as it did, the appropriate remedy on this appeal likely would have been a new trial rather than acquittal.

[602] The plaintiffs readily acknowledge that the May 12, 1982 lineup was a farce because of Mr. Henry's actions. Each plaintiff was deeply troubled by the entire experience. In the context of this civil trial, I must consider the effect that the farce had on each plaintiff's identification of Mr. Henry as her attacker.

[603] Hinkson C.J. made similar findings as the Court of Appeal regarding the weakness of the complainants' evidence on identification at the 1983 criminal trial. He also reviewed their evidence in the criminal proceedings on the criminal standard: beyond a reasonable doubt. The context of that decision is whether the Crown's intentional non-disclosure was a breach of Mr. Henry's *Charter* rights. Hinkson C.J. found that it was. Hinkson C.J. referred to consequences of the non-disclosure and concluded that if Mr. Henry received the disclosure to which he was entitled, particularly the exculpatory evidence, he could have successfully undermined the complainants' evidence at trial and avoided being convicted.

[604] I am not dealing with the same matter as Hinkson C.J. I am not bound by his findings regarding the complainants' evidence in the 1983 criminal trial.

[605] In this trial, Mr. Henry had all of the materials that were not disclosed to him in the criminal proceeding. His counsel used that evidence to demonstrate that the plaintiffs did not meet the balance of probabilities standard.

[606] I reiterate the points made in *Toronto (City)*: there is no mutuality of parties here. There is fresh new evidence including the full evidence of the plaintiffs and of Mr. Henry that was previously unavailable. There is no attempt to impeach the results of the 2010 Court of Appeal decision or that of Hinkson C.J. The plaintiffs are not asserting that Mr. Henry should have been convicted, although I accept that they have opinions about it.

[607] These proceedings provide a fuller and more robust review: there is more evidence and new evidence. Fairness dictates the results of the criminal charges should not be binding in this new context. And, of course, there is a different standard of proof to be applied.

[608] The defendant asserts that:

> The plaintiffs have been provided the opportunity in a protracted trial to lead evidence to demonstrate that the findings in the previous two decisions were erroneous. They have failed to do so. Accordingly, and without detracting from the defendant's primary position that they have failed to prove their case on the merits, the defendant asks this court to find that the re-litigation of the matters previously determined and identified in our abuse process application has amounted to an abuse of the process of the courts.

[609] I remain of the view that these proceedings are not an abuse of process.

[610] The defence reviewed the findings of the Court of Appeal and Charter damages cases in the context of each plaintiff's identification evidence. I have not done so because I am explicitly not finding that they are erroneous. At the same time, I am not bound by them.

Similar Fact Evidence: the Winnipeg Offences

[611] During the trial, the plaintiffs applied to tender the evidence of the Winnipeg offences to which Mr. Henry had pleaded guilty, as similar fact evidence. I reviewed the similarities and the dissimilarities. After determining that the probative value outweighed the prejudicial effect, I allowed the plaintiffs to tender the evidence concerning the Winnipeg offences in 1976.

[612] In this trial, Mr. Henry admitted that he committed the offences against J.J. and O.G. but not against L.A.

[613] In his argument, Mr. Henry asserts the final stage of the application of the similar fact test has not been met. In particular, the plaintiffs have not addressed how the assessment of the evidence of the probative value of the attempted rape of J.J. should be done. The evidence of the past bad acts was held to be admissible for the purpose of allowing the plaintiffs to attempt to prove the element of identity; the

person who committed the previous similar acts was the same person who committed the sexual assaults on the plaintiffs; and that particular circumstances in Mr. Henry's life caused the defendant to attempt to rape J.J. was replicated in Vancouver in 1982.

[614] The defence submits that this final stage in the similar fact evidence analysis requires the plaintiffs to prove that the prior acts on a balance of probabilities, beyond what Mr. Henry admitted in his evidence. The defence argues that police reports prepared regarding the Winnipeg offence are admissible under the documents agreement between the parties. While they contain admissible evidence of steps taken by the police and things observed by them, and the admissibility of statements of the defendant for their truth is not disputed, statements of J.J., L.A. and O.G. and other witnesses are not admissible for the truth.

[615] The defence continues:

> Given no witnesses have been called, and no admissions were made in 1976 by the defendant, and none have been made herein, and no sentencing hearing transcript has been filed, or Reasons of a Court making findings of fact, and given that the Documents Agreement does not allow for the admissibility of statements of witnesses for their truth, there is an evidentiary lacunae.

[616] Do Mr. Henry's guilty pleas to the Winnipeg offences constitute admissions of guilt to each? I will, as the defence suggests, apply the principles derived from *Toronto (City)* and *Hanna v. Abbott* to consider whether Mr. Henry's guilty pleas constitute admission of guilt on the balance of probabilities.

[617] As noted, Mr. Henry appealed his convictions of the Winnipeg offences in 1977. The decision of the Manitoba Court of Appeal, [1977] M.J. No. 52 is succinct, but instructive. The Court began by referring to the proceeding in the Manitoba Provincial Court, at paras. 4-9:

> 4 Henry was charged with five offences, i.e., three break and enter, one assault and one attempted rape. The charges arose out of three incidents on June 2 and 18 and December 12, 1976. The last offence occurred while Henry was on bail for the earlier offences.

> 5 At a hearing before Mitchell, P.C.J., on January 21, 1977, Crown counsel [Mr. Whitley] opened by summarizing the charges. He told the court that he understood Henry intended to elect to be tried in provincial court and would plead guilty. Counsel for appellant [Mr. Greenberg] confirmed that he had been so instructed.
>
> 6 The following exchange took place:
>
> "MR. WHITLEY: ... To those charges I understand my learned friend makes his election before this court and enters pleas of guilty. His client is aware of the charges.
>
> MR. GREENBERG: Yes, those are my instructions. I have been instructed to enter pleas of guilty to these five charges.
>
> MR. WHITLEY: Perhaps the accused should represent that.
>
> THE COURT: He is represented by competent counsel."
>
> 7 Crown counsel outlined the circumstances of each incident, which indicate that the charges were properly founded. He mentioned that appellant had been identified by each of the female complainants in respect of the June offences and described how appellant was caught in the same building where the December incident occurred. After referring to appellant's fairly extensive record (including several counts of break and enter) the Crown attorney suggested a long term in the penitentiary was called for.
>
> 8 When Henry's counsel made his submission, he opened by saying:
>
> "Your Honour, firstly may I say as a result of discussions held regarding this matter with my learned friend, we wish to advise the court in considering disposition, it has been suggested between counsel that a range of sentence in the area of four to six years would be appropriate."
>
> This was confirmed by Crown counsel.
>
> 9 None of the statements by Crown counsel to Mitchell, P.C.J., about the circumstances of the offences were contradicted by Henry's counsel.

[618] The Court referred to the examination and opinion of Dr. Shane (at paras.13-14):

> 13 … Counsel for appellant, with leave of this court, filed a letter from Dr. Shane, a psychiatrist. Dr. Shane had examined Henry on May 18 for 2 1/2 hours. The only other information available to the doctor was material supplied by appellant's counsel regarding the charges and sentences.
>
> 14 In our view the report does not substantiate the submission of appellant that he was disoriented or misunderstood what was going on at the time of the hearing before Mitchell, P.C.J.

[619] In this trial, Mr. Henry admitted that he lied and exaggerated to Dr. Shane in order to obtain a medical report to convince the court that he was suffering from a

mental illness. Mr. Henry said that he was told by his then-lawyer to lie to Dr. Shane. He acknowledged he was lying to Dr. Shane in an effort to mislead the court.

[620] The Manitoba Court of Appeal concluded at (paras. 15-17):

> 15 Appellant was represented by experienced counsel and was present when the submissions (outlined above) were made. Under these circumstances, the argument that the plea should have been taken from the accused rather than his lawyer loses its force. Appellant, in light of his record, cannot be unfamiliar with court process. It is rather facile to apply to this court now and plead absence of intention to plead guilty.
>
> 16 We are all satisfied that appellant has not shown any valid ground for setting aside the convictions. See *R. v. Forde* (1922-3) 17 Cr. App. R. 99 at pp. 102-3, as referred to by Dickson, J., for the majority in *Adgey v. The Queen* (1974) 13 CCC (2d) 177 (S.C.C.).
>
> 17 The appeal is dismissed.

[621] I am satisfied by the reasons provided by the Manitoba Court of Appeal, along with Mr. Henry's admission about lying to Dr. Shane in this trial, that Mr. Henry was aware of the circumstances of the Winnipeg offences when he pleaded guilty to them as suggested in the appeal decision. I am satisfied that his guilty pleas to the Winnipeg offences are an admission of guilt for all five offences. Mr. Henry found it convenient to blame his lawyer for pleading guilty on his behalf in 1976, and continues to, in spite of the reasons given for dismissing his appeal.

[622] Mr. Henry also relies on the principles set out in *Toronto (City)* and *Hanna v. Abbott* to mitigate or avoid the effect of his previous criminal conviction in this civil proceeding. He has not adduced new evidence, he has not shown that the issues were different and he has not demonstrated a lack of fairness or ineffective representation in the proceedings in respect of the Winnipeg offences.

[623] Mr. Henry was cross-examined about the Winnipeg offences. Mr. Henry made admissions about the factual details. He was taken through all the evidence and largely agreed with it, claiming only that the statement of J.J. contained "some ad libs." He also suggested that his condition at the time of the attempted rape was "insane automatism". Regarding the offence committed against O.G., he also admitted the details but claimed that he had been drugged.

[624] Mr. Henry denied assaulting L.A. I do not believe his denial of committing the offence against L.A., for the reasons that I have given. His guilty plea was an admission of guilt.

[625] Regarding Mr. Henry's assertion that there is no admissible evidence from the complainants regarding the Winnipeg offences, as they are not covered by the document agreement, I agree with the plaintiffs' that Mr. Henry's strident approach to the admissibility of those documents is contradicted by his invitation to review the documents in relation to Donald McRae (Smallman). The defendant refers to 23 offences committed between April 1983 and July 1988. He relies on the statements of the complainants in those assaults as admissible for the truth of their contents in this trial.

[626] Mr. Henry made comments to Detective Campbell in the May 12, 1982 interview about his M.O. referring to one of the sexual assaults. He said "She was assaulted…She was sleeping?" He also referred to a pillow over the victims' faces and responds: "That's my thing again. You guys are going to use this against me. And what happened? He balled her, he raped her? Ha. Ha. I know I didn't do that one."

[627] Mr. Henry was sufficiently aware of the facts and circumstances surrounding the Winnipeg offences to refer to aspects of his M.O.

[628] I accept that the statements of the complainants concerning the Winnipeg offences against them are admissible as evidence in this trial.

[629] Like the victims in this case, J.J. was a young woman, attacked in her bed in the middle of the night in her apartment. He threatened to kill J.J. if she saw his face. The sexual assault involved both vaginal penetration and forced fellatio. She estimated her attacker to be 24 or 25 years old and about 5'11" tall, with medium brown hair.

[630] J.J. recognized Mr. Henry by hearing his "low gruff voice" in the bar where she worked approximately seven weeks after the assault.

[631] L.A. was also a young woman attacked in her bed in the middle of the night by a stranger standing in the doorway of her apartment where she lived alone. He was holding something in his hand she thought to be a hammer. He attempted to smother her face in a pillow.

[632] About six months after the attacks on J.J. and L.A., Mr. Henry attempted to break into O.G.'s basement suite where she lived alone, in the middle of the night, while O.G. was sleeping. Mr. Henry was found by O.G.'s boyfriend before he managed to enter her suite.

[633] The records describe Mr. Henry as having "shoulder length hair (brown)." J.J. had also described his hair as brown. The defendant submits that the plaintiffs have failed to prove the fact that Mr. Henry was motivated to sexually offend in Winnipeg and in Vancouver because he was angry that his wife was having a sexual affair with Johnny Brownstone. He asserts that the plaintiffs must prove that there is a causative link between at least one of those offences and an alleged affair between Jessie Henry and Johnny Brownstone, and/or Mr. Henry's distress related to Mr. Brownstone ripping him off being a cause of his assault on J.J.

[634] The plaintiffs have established, on a balance of probabilities, that Mr. Brownstone had ripped Mr. Henry off in a "coke deal". He referred to this in his May 12, 1982 statement to police, although he refers to "Don". Mr. Henry's evidence is that Johnny Brownstone "broke and enter a place" and "got some coke." Mr. Henry was outside as a lookout while he did so and was to be paid $600 for his role. He was never paid for his role. The third person involved was Johnny Brownstone's brother-in-law, "Don." Whether it was Don or Johnny that ripped him off is irrelevant to my analysis here.

[635] The plaintiffs do not assert that one of the precipitating factors of these sexual assaults was Mr. Henry's anger over the coke deal "rip-off". In their application to tender similar fact evidence, the plaintiffs said that Mr. Henry's behaviour in 1976 was motivated in part by his conflict with Jessie Henry, which was again present in 1981 and 1982. Mr. Henry believed that Johnny Brownstone was having an affair

with Jessie Henry (whether it was true or not). The plaintiffs' application proceeded on that basis and specifically cited Mr. Henry's evidence that "he thinks the police are on him because someone named Don put them on him. Asked why, he said: "Because he ripped me off for about $600.00."

[636] I find the similar facts to be probative on the issue of identity. I have referred to the allegations made by each of the complainants in the Winnipeg offences.

[637] I find that the connecting factors of the similar facts are:

a) Time of the day: All the Winnipeg incidents were in the middle of the night, as were the offences here.

b) Location of the victims: All three were women alone in their apartments, as in the offences here.

c) The admitted M.O.: Mr. Henry specifically refers to his "old fucking M.O." when being interviewed by police on May 12, 1982.

d) Conflict with Jessie Henry: Issues with his wife precipitated the attempted rape of J.J. and were again present at the time of these offences.

e) Involvement of Johnny Brownstone.

f) Use of the term "rip-off": Although not in the Winnipeg incidents, it connects the A.B. and I.J. incidents with a similar ruse connecting E.F. and G.H.

g) Number of occurrences: The repeated nature of the offences indicates a pattern of breaking into women's homes and sexually assaulting them.

h) Temporal proximity: During most of the time between the Winnipeg offences and these offences, Mr. Henry was incarcerated. He did not have the opportunity to offend during those times.

i) Intervening events: The defendant entered treatment for sexual offenders while at RPC but refused to participate.

[638] The defence argues that the similar fact evidence is tendered by the plaintiffs' to demonstrate that Mr. Henry is of bad character and is being used to show his propensity to commit sexual assaults, in order to shore up their cases on identification. The defendant's objections are strenuous:

> [The plaintiffs' position] suggests a reversal of the burden of proof should occur in cases where a defendant has a prior conviction for like offences. It suggests that flawed identification evidence should be weighed differently in cases where a defendant has a related criminal history than in other cases, unless the defendant is able to muster evidence that persuasively establishes an alibi or other like defence.
>
> The law does not, and cannot, countenance what the plaintiffs propose. It offends bedrock principles of law related to burden of proof, and propensity. It exposes the fundamental heart of the plaintiffs' claims in this litigation. Those claims rest not on new evidence that called into question the findings of the BCCA and Hinkson C.J. Rather, the fundamental core of the plaintiffs' claims is that the unreliability of their evidence should not matter, because the defendant is a person they say is of bad character. The law should be put aside or modified if a defendant is a person with a prior criminal record for similar offences.
>
> It was just such a view that caused the defendant's wrongful conviction. Rather that provide the disclosure to the defendant at trial the law and constitutional principles required, the prosecutor intentionally chose to apply a different disclosure standard to the case, one that would favor the prosecution. What he did, he did stealthily, without telling the trial judge, Bouck J., and indeed by making assertions on the record about disclosure to the defendant that were misleading found by Hinkson C.J.

[639] The plaintiffs argue that they are not suggesting that the burden of proof should be reversed. They refer to *McDougall* at para. 86:

> In civil cases, in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party.

[640] The plaintiffs acknowledge that even in civil cases there are limitations on the admissibility of similar fact evidence, or propensity evidence. They continue:

> People should not be convicted or held accountable for a certain act because they did other bad things in the past. But it is also true that people typically

> act in a manner that is consistent with their past actions and that coincidence has its limitations as an explanation. The similar fact ruling made in this case gives effect to those realities.
>
> Mr. Henry has previously attempted to rape a woman, previously unknown to him, who was lying in her bed, in her home. He has violently attacked at least one other woman that we know of, also in her bed in her home, and broken into the home of a third young woman. This places him in a very small group of men capable of committing such acts – acts which bear striking similarities to those alleged by the plaintiffs.

[641] The similar fact evidence goes to Mr. Henry's credibility. I must assess his evidence along with all of the other witnesses in this case. As noted, Mr. Henry gave evidence under cross-examination by the plaintiffs' counsel when the plaintiffs considered that they should call him as a witness during their case to avoid him not being called as part of his defence. The defence also cross-examined him extensively, during the plaintiffs' case.

[642] I will address Mr. Henry's credibility in relation to all of the evidence, as instructed by *Bradshaw*. It is not based entirely on my finding that the Winnipeg offences demonstrate similar facts, but on the whole of the evidence.

Evidence of Tanya Olivares

[643] I acknowledge that Ms. Olivares and her sister experienced terrible childhoods. Their mother was troubled and addicted to drugs and alcohol. She was impoverished, and so were they. Mr. Henry said that he did not provide any financial support to his family. From the time that they were very little, Mr. Henry was incarcerated, for some period before 1975; from 1977 to 1980; and then in 1983 for the next 27 years.

[644] Ms. Olivares has been committed to Mr. Henry's position that he was wrongfully convicted of sexually assaulting the plaintiffs and others in 1981 and 1982, apparently since 1990. She was right.

[645] Ms. Olivares assisted her father in whatever way she could while he was in jail and after he was released in 2009. She supported him through the matter before the Court of Appeal in 2010 and throughout the trial before Hinkson C.J.

[646] In this analysis, I must assess whether Ms. Olivares' evidence is credible on a balance of probabilities, in respect of two matters in her evidence before me: the alibi she provided for her father on the night of the rape of I.J. and the alleged recantation of the Jessie Henry statement.

[647] In respect of Ms. Olivares' evidence that she had a recollection that, on the night of June 7, 1982, into the morning of June 8, 1982, the family drove her mother to a detox facility at Riverview Hospital in the family's AMC Spirit. This happened "really late at night, … I want to say midnight, maybe even later." They only got home in the wee hours of the morning.

[648] I must find that evidence to lack credibility for several reasons.

[649] Ms. Olivares' evidence providing an alibi for her father, had not been stated anywhere before she gave it in evidence in this trial. It was not set out in her will-say statement before trial. It was not referred to in the defendant's opening statement that was given on the morning that Ms. Olivares' evidence was scheduled to be given.

[650] This action has been ongoing for several years with her father's liability for the sexual assaults of the plaintiffs as the central issue. Ms. Olivares' suggestion that she did not mention the alibi before she gave her evidence in this trial is incredible.

[651] Although Ms. Olivares says that she is 100% certain of what occurred on the night of June 7 and the morning of June 8, 1982, she was equally certain about the fact that her father was living with them continuously until the June 1981 break-in incident. Mr. Henry did not agree with either in his evidence.

[652] In June 1982, Ms. Olivares was nine years old. There is no evidence about when Ms. Olivares would have first learned of the significance of June 7-8, 1982. At the very earliest, it would not have been until after Mr. Henry's arrest seven weeks later and likely not for a significant period of time after that. This is another reason why Ms. Olivares' alleged alibi is unbelievable.

[653] Ms. Olivares' evidence conflicts with Mr. Henry's evidence. He gave evidence in this trial that his car was not driveable at night in June 1982. When asked about this, Ms. Olivares said: "Well, I mean, I don't know where his thoughts are on this, I can't tell you, but I know what happened, I'm telling you what happened."

[654] Mr. Henry's evidence was that he was at home at East 17th Avenue with his children on June 7-8, 1982.

[655] Mr. Henry was not recalled to address Ms. Olivares' evidence.

[656] I do not believe Ms. Olivares' evidence that provides an alibi for her father during the time of the rape of I.J. in June 1982. I agree with the plaintiffs that the alibi offered by Ms. Olivares can be used for only one purpose and that is to call into question the credibility and reliability of Ms. Olivares' evidence. The alibi she provides demonstrates that she is willing to offer false evidence to help her father's case. She is willing to advocate for him even when that requires her to give false testimony under oath.

[657] Ms. Olivares also offered evidence concerning the reliability of Jessie Henry's statement in 1982. Ms. Olivares provided a letter to her father sometime in 1994-1996, in which she said her mother told her that she gave the police the statement because she was mad at her father, and that her mother met the police at a payphone and they gave her $1000. Ms. Olivares gave her own evidence about some of the things that Jessie Henry said in her statement, saying that she did not recall the same things that her mother described. She was nine at the time. I find it difficult to believe that Ms. Olivares recalled details about her father from May 1982, in 1990, and in 1994-1996 or later.

[658] By the time of her letter to her father, at some point in 1994-1996, her mother had been dead for four to six years. If, on some night in 1990, months before Jessie Henry's sudden passing, her mother had told Ms. Olivares that her statement to police in 1982 was all a lie, Ms. Olivares would have said so in her letter.

[659] The alleged recantation happened at a time when Ms. Olivares described her relationship with her mother as extremely fraught. Ms. Henry's October 1990 death was sudden and unexpected so this was not a deathbed confession. None of the circumstances surrounding this alleged recantation, first offered many years later by Ms. Olivares who was and remains personally invested in the matter, provide any support that it is the truth.

[660] With respect, like the alibi offered by Ms. Olivares for the night of I.J.'s rape, the recantation is also deserving of no weight.

[661] The result is that none of Ms. Olivares' evidence can be relied upon as the truth.

Jessie Henry Statement

[662] I have found Jessie Henry's statement to be admissible in evidence for the reasons of necessity and ultimate reliability. These are my reasons for doing so.

[663] The defendant provided four reasons for his assertion that the Jessie Henry statement ought not be admitted in this trial because it cannot meet the test of ultimate reliability. They are: the provenance of the statement is unknown; Tanya Olivares' evidence demonstrates that Ms. Henry recanted her statement and provides contrary evidence to its contents; the statement is inconsistent and contradictory to the evidence tendered in this trial by Mr. Henry; and the exculpatory aspects of the statement create a challenging evidentiary picture for the plaintiffs' case.

[664] In respect of the statement's provenance, the defence points out that there is little evidence that exists regarding the circumstances under which the statement came into existence. It is unsigned and could have been a draft. It is uncertain if it is based on an interview by the police or whether it may be a record of spontaneous utterances on the part of Ms. Henry in the presence of a police officer. It is uncertain if a police officer created it. It is not recorded on police interview forms. The location where it was made is not indicated. It is undated, unwitnessed, and the document

does not indicate on its face who may have been involved in its creation. There is no evidence that Ms. Henry reviewed its contents or that it accurately reflects what she said. There is no evidence about whether it may be the product of multiple interviews or a single interaction. There is no evidence that Ms. Henry was cautioned as to the importance of telling the truth or whether inducements or promises were made to her in exchange for providing the statement. The content is not in a format that includes the questions asked of her. The defence says that all of these factors weigh against the ultimate reliability of the statement.

[665] In the 2015 trial before Hinkson C.J., Detective Bruce Campbell testified that he “had a conversation” with Ms. Henry and received one photograph of Mr. Henry from her at the same time. He could not recall the date, just that it was some time, perhaps a week before the May 12, 1982 lineup. He testified that his first contact with Ms. Henry was by telephone, after which he drove to Main Street and 16th Avenue in Vancouver and met with her on the corner. His evidence was that he never met with her at any specific house.

[666] Detective Campbell did not give evidence regarding the circumstances in which the statement was created, whether Ms. Henry reviewed it and whether there were any contemporaneous notes of their conversation.

[667] While Mr. Henry referred to his intention to call Ms. Henry as an alibi witness in the alibi statement that he prepared in November 1982, Ms. Henry was not called as witness for the Crown nor by Mr. Henry in the 1983 criminal trial. Her statement was not disclosed to him and it was not led by the Crown.

[668] In the 2015 trial before Hinkson C.J. the Jessie Henry statement was in evidence in accordance with the documents agreement between the parties. The statement was admitted into evidence for the fact that it was made and was not disclosed to Ivan Henry in 1983 at the time of his criminal trial. Several witnesses testified regarding the statement, but no application was made to have it admitted for the truth of the contents.

[669] Detective Harkema testified at the 2015 civil trial that he did not know the particulars, timing or details of Detective Campbell meeting with Ms. Henry. He was aware that the document was a "report from an interview of Jesse Henry." He was not aware of how the document came about and had never seen a signed version of the statement. He was unable to say if the statement resulted from a phone call with Ms. Henry or an in-person meeting. He was sure that Detective Sims or Campbell "probably" took the statement. Detective Harkema testified that he had attended Jessie Henry's home but he did not speak to her. He confirmed that police documents indicated that on April 29, 1982 the VPD seized clothing belonging to Mr. Henry from Ms. Henry's home on East 17th Avenue as evidence.

[670] Detective Harkema swore an affidavit as part of a July 23, 1982 application for a wiretap in which he deposed that Detective Campbell met with Jessie Henry on May 2, 1982 and had a conversation with her. The statement is attached to that affidavit as an exhibit.

[671] I have reviewed the evidence that Tanya Olivares gave in these proceedings about her discussion with her mother approximately two months before she died, in August 1990, seven years following her father's convictions. In approximately 1994, Ms. Olivares wrote her father a letter describing the 1990 conversation with her dying mother.

[672] I have rejected Ms. Olivares' evidence on the basis that I do not believe it. As I did with the alibi she provided for her father's whereabouts on June 7 and 8, 1982, I note that Ms. Olivares is suggesting that she recalls details about her father from April 1982. She turned nine in February of that year. She purports to recall details about her father, his facial hair, whether he had a bike lock on his garage, whether he wore a belt, jewellery or a watch, whether he used the word "rip off" in conversations in 1981 or 1982. Her evidence regarding memories of details about her father from 1982 is not credible.

[673] Similarly, I cannot accept Ms. Olivares' evidence about the alleged conversation with her mother in 1990 or that her mother recanted certain parts of the

statement and said that she was offered $1000 for it. Jessie Henry died suddenly in October 1990. It is curious why she would have had a conversation with her daughter, with whom she was not on good terms, about a statement that she made to police in 1982 about her divorced husband who, by the time she allegedly spoke to her daughter about it, had been in jail for seven years.

[674] In regard to Mr. Henry's evidence about the contents of the statement, he said that he did not agree that he got his yellow AMC Spirit vehicle at Christmas in 1980, rather, he initially purchased a Chevette vehicle in December 1980 and had it approximately a month but returned it because it broke down frequently. He agreed with the statement's description of Ms. Henry moving to Richmond and that he stayed with his friend Clem who lived on 53rd Avenue periodically until March 1982. He did not agree that there was a lock on the garage he rented as he shared the storage space with the sister of the owner.

[675] The defendant agreed that he took hotel management courses. He agreed that he kept his hair clean and manageable and that it had not been shoulder length for several years. He agreed that he kept himself clean and was not greasy. He agreed that he did not wear underwear, and sometimes wore YMCA shorts to work. He is circumcised. He and his wife were not similar in stature and could not share clothing. He did not wear a belt. He did not agree that he spits when he talks.

[676] The defendant disagreed that as of March 1982 he was sleeping all day and out in the evening as he was working during the day selling jeans. Mr. Henry testified that it was not possible to come home late at the 248 East 17th Street residence as the landlady lived on the main floor and slept there. She did not want Mr. Henry in the residence and would have objected had Mr. Henry arrived late at night.

[677] Mr. Henry testified that if he was able to stay with Ms. Henry and his daughters two nights a week in the spring of 1982 he was "doing well" as she would often kick him out. He did not agree he was going out late at night, staying out until the sun came up or making statements about her "leading him back to jail again."

[678] Ultimately, whether I believe Mr. Henry's evidence about himself in April 1982 will be assessed along with his other evidence in this trial.

[679] Finally, the defendant argues that there are further aspects of the Jessie Henry statement, which, if true, seriously undermine the identification evidence of the plaintiffs. I refer to the examples on this point provided by the defendant and my findings about that evidence:

a) Mr. Henry did not wear a belt: C.D. testified her attacker was wearing a brown belt with a large oval shaped buckle. Even if Mr. Henry did not usually wear a belt, he easily could have when C.D. encountered him. Wearing a belt or not is insufficient to exclude him as C.D.'s attacker. I reach the same conclusion about wearing jewelry or a watch. While none of the plaintiffs described the intruder wearing jewelry or a watch, these are easily removed.

b) Mr. Henry's hair is kept clean and manageable: E.F. described the intruder's hair as "messy" and long; C.D. described a "rats-nest" of hair that was thick and bushy. Both descriptions could be true at different times. Would Mr. Henry ensure that his hair was clean and manageable as he set about to sexually assault a woman?

c) Mr. Henry has not permed his hair in several years: A.B. described the man as having what seemed like a perm and G.H. described hair like a perm growing out. Mr. Henry was trained as a hair stylist, so he could have permed his hair. Jessie Henry might not have known, because they lived separately most of the time. Further, Mr. Henry said he changed his appearance in the early 1980s, including his hair and facial hair, depending on his mood.

d) Mr. Henry will not shave off his mustache: I.J. described the intruder as clean shaven. Mr. Henry said that he would shave off his beard regularly. Mr. Henry said the same thing about his mustache. He would change his

appearance frequently and shave off his beard and mustache or one or the other.

e) Mr. Henry liked to keep himself clean and is not greasy: E.F. and G.H. both described body odor, and A.B. described a man who smelled as if he had not washed for a week. They can both be true. Mr. Henry might not have smelled badly when he was with Jessie Henry, but he could have when E.F. and G. H. encountered their assailants in their apartment in the middle of the night.

f) Mr. Henry did not own underwear: A.B. described the intruder as wearing only underwear, which she later clarified were “men’s briefs” and no pants. These statements can both be true at different times.

g) Mr. Henry was circumcised: E.F. advised the police in 1982 that her attacker was uncircumcised. She agreed that she was unsure and that she said different things at different times.

[680] By the time of the attacks on the plaintiffs, Mr. Henry had been convicted and had served time for the Winnipeg offences. He would know that he should not appear to his victims exactly the same way each time. That also makes common sense.

[681] In concluding that Jessie Henry’s statement met the test of threshold reliability, I acknowledged that the test for procedural reliability could not be met and thus applied the test for substantive reliability. I was satisfied that the test for threshold reliability was met, having accepted affidavit evidence that Detective Harkema provided in support of the authorization for a wiretap. He deposed that on May 2, 1982, Detective Campbell of the Vancouver City Police Department conducted a conversation with Jessie Henry, the former wife of the suspect Ivan Henry, from whom she was divorced in 1979. The Jessie Henry statement was attached to Detective Harkema's application as Exhibit B.

[682] I am satisfied that the Jessie Henry Statement meets the test for ultimate substantive reliability. It appears to be common ground that it was the Jessie Henry statement, along with thee photographs and clothing provided by Mr. Henry's arrest that led police to him as a suspect.

Identification by the Plaintiffs

Findings on Common Matters

[683] Before I address the identification provided by each plaintiff, there are matters that apply to all of them.

Statements made by Complainants to Police Officers

[684] A substantial part the defence submissions are based upon the differences in the various statements that each plaintiff gave to police after she had been sexually assaulted. Some were taken immediately after the sexual assaults occurred, some were provided in subsequent interviews or in statements made by the plaintiffs.

[685] All of the plaintiffs were extensively cross-examined about the statements that they made to police shortly after the sexual assaults upon them took place and on subsequent occasions. It is fair to conclude that the defendant has established that the statements contain new or more extensive details.

[686] The defendant points out the evolution of all of the plaintiffs' statements regarding their description of their attacker and their evidence at the earlier criminal proceedings and in this trial, demonstrates a tainting of each plaintiff's evidence to conform with what she observed about Mr. Henry in the lineup and at the court hearings. There are other reasons, beyond tainting to which the evolution could be due. The evolution can be attributed to each plaintiff's memory, her critical review of her previous statements and her having a greater opportunity to describe her assailant in this trial than she had had before. As the defence points out in the submissions, albeit in the context of Tanya Olivares' evidence, "variations in the accounts of events that took place 42 years ago is in fact a sign of its reliability."

[687] The evidence demonstrates that the method the police used for taking the complainants' statements in 1981 and 1982 was that they were recorded by hand by the police officer in his or her notes. The police notes likely varied in reliability. They would necessarily be edited by the officer taking the notes, whether by the speed of the officer's handwriting or by the officer's view of which details were important to note. They were not verbatim. The complainants' statements were brief after the sexual assaults; each plaintiff described trying to do the best she could, having just undergone a horrendous sexual attack by a stranger while alone in her apartment in the middle of the night. It would be natural that with time and further thought, each complainant would recall more details about what took place when they were sexually assaulted and likely recall more details about their assailant.

[688] The officers' notes were taken down in handwriting and then, apparently, typed onto a police form entitled "Investigation Report" or "Miscellaneous and Supplemental Report". In some cases the complainants were interviewed once or more, also recorded in handwriting by the police officer and/or transcribed onto a police form. In other cases the complainant provided further statements that were then put in a typewritten document, often with the questions of the interviewer omitted. They were not necessarily dated or signed.

[689] There are no audio or video recordings of the statements given by the complainants, except of I.J. in 1982 by Detective Barnard. The complainants were not provided copies of their statements to review until they received copies of their statements associated with Mr. Henry's 2010 appeal and the 2015 trial.

[690] That each plaintiff lied in her statement to police or embellished the statements with further details that were fabricated is one explanation for the evolution of the plaintiffs' statements to police. But it is not the only explanation. There are others that are likely, including that some of the statements as recorded by the police contain errors or that the plaintiffs remembered further details about their sexual assaults and the assailant. I will address this as I analyze each plaintiff's identification evidence.

Pretrial Investigation Procedures

[691] Mr. Henry's behaviour in the May 12 lineup was the central issue before the Court of Appeal in 2010. The charge to the jury suggesting that Mr. Henry's behaviour in the lineup demonstrated consciousness of guilt was the basis upon which the Court found Mr. Henry had been wrongfully convicted. The Court found the lineup to be a farce and the Crown's reliance on Mr. Henry's behavior in the lineup as demonstrating a consciousness of guilt to be legally wrong. Mr. Henry's conviction could not be upheld.

[692] The defendant's submission regarding the lineup included that it was a farce and that the farce permeated the plaintiffs' identification evidence. Each plaintiff (except I.J. whose sexual assault had not yet taken place), observed Mr. Henry's behaviour and the police officers restraint of him and each concluded that he was a bad man, evil, vile, violent and dangerous. What they observed about Mr. Henry, along with his physical attributes, translated in their memories to the conclusion that he was the man who raped them.

[693] It is well understood that the lineup was a farce. It was improperly performed by police. That is clear from the Court of Appeal decision and the legal authorities that I have reviewed.

[694] Although he denied it during the 1983 criminal trial, Mr. Henry agreed that he participated in the May 12, 1982 lineup but he asserts that the two photographs of the lineup and a subsequent photograph of him from the waist up in front of prison bars, taken shortly after, are fabrications. The defence has not attempted to reconcile Mr. Henry's evidence with his position that the plaintiffs' evidence was tainted by his behaviour as shown in the photographs or with the subsequent photograph used in the photo lineup presented to I.J.

[695] In its submissions, the defence has not suggested that the photographs were fabricated.

[696] The defendant's submissions with regard to the four plaintiffs' ballots bears some scrutiny. In E.F.'s case, where she identified number 18 on her ballot, the defence argues that she could not identify her attacker; A.B. and G.H. identified Mr. Henry as number 12 by his voice (in A.B.'s case an accent); C.D. did not make an identification on her ballot. The defendant says that all of the four plaintiffs who attended the May 12 lineup revised their evidence to fit what they observed about Mr. Henry while there. The exception is E.F. who identified number 18. In respect of her identification, the defence argues that it means that Mr. Henry was not her attacker (but she changed her evidence to conform with what she observed at the preliminary inquiry and the 1983 criminal trial).

[697] I.J. picked Mr. Henry out of a photo lineup presented to her by Detective Harkema just before she left Vancouver in July 1982. The defendant points out that the photograph lineup was also improper.

[698] The defendant asserts that the evidence of all five plaintiffs was tainted by their observations of Mr. Henry during the preliminary inquiry and during the 1983 criminal trial, based upon his behavior and treatment of him by the judges in each court.

[699] That Mr. Henry's behaviour in the May 12 lineup tainted each plaintiff's evidence and led to each of them identifying Mr. Henry as her attacker in the preliminary hearing and the 1983 criminal trial is one explanation for their identifying him. But it is not the only explanation. Each plaintiff's evidence must be parsed to determine whether her evidence demonstrates that such is the case, on a balance of probabilities.

Voice Identification

[700] Each of the plaintiffs identified Mr. Henry by his physical characteristics, although some had a better opportunity to observe him than others. A consistent theme among all of the plaintiffs was Mr. Henry's distinctive voice.

[701] Mr. Henry was caught for the attempted rape of J.J. in Winnipeg in 1976 because she recognized his voice seven weeks later when he was a patron at the bar where she worked. She recognized him when he looked at her and talked in a low gruff voice that J.J. recognized was that of her attempted rapist.

[702] Mr. Henry's voice was described by each plaintiff as one of the features that she used to identify him. A.B. said he had a gruff voice (or words to that effect), possible French accent; C.D. said that he sounded American, used 'honey' a lot; E.F. said that he had a gruff voice, raspy breathing, accent similar to Chinese, perhaps sounded a bit wheezy; G.H. said that he sounded late 20s, no accent, sounded nervous and spoke in a half-whisper; and I.J. described him as having very throaty voice, low and gruff.

[703] Three of the five plaintiffs used the specific adjective, "gruff," to describe their attacker's voice. This descriptor was used in initial reports, before any of them had seen or heard Mr. Henry at the lineup. It is also the same adjective used by J.J. to describe Mr. Henry's voice in her identification of him in 1976. G.H. also described his voice as a "gruff, harsh whisper" in the August 13, 1982 statement to Detective Harkema (after the lineup).

[704] It is difficult to describe a sound. How does a piano sound except like a piano? It is equally difficult to describe a voice. Each person may use a different adjective to describe the same thing. Here, three of the plaintiffs described Mr. Henry's voice in virtually identical terms, and in terms identical to his earlier rape victim, J.J. This is objective pre-exposure evidence and is corroborative identification evidence.

[705] I apply the applicable criteria set out in *R. v. Chan* at para. 31:

Are there distinctive or distinguishing features of the voice?

[706] The defence asserts that the distinguishing features of the voice before each plaintiff was exposed to her attacker. Each plaintiff heard her attacker's voice before she saw Mr. Henry as a suspect in the May 12 lineup and described it to police.

[707] Mr. Henry gave evidence in this trial over several days. I can agree that he speaks in a low gruff voice and it is distinctive. I have listened to some of Mr. Henry's evidence on DARS (digital audio recordings). His voice gets somewhat gruffer when he gets agitated.

[708] The plaintiffs point out that Mr. Henry also has unusual diction. I agree that it is distinctive, although it is difficult to describe it.

Did the witness hear the voice under the same conditions, or was the emotional state different in each situation?

[709] The conditions and emotional state for each plaintiff varied.

[710] A.B. tentatively identified Mr. Henry at the lineup based on his size and build as well as what she referred to as a "French accent (slight) noticed." However, it was after hearing him speak during her cross-examination at the preliminary inquiry that she became certain of her identification and subsequently swore to that fact in an affidavit and at the 1983 criminal trial.

[711] C.D. described how Mr. Henry's affect changed as he moved from one emotional state to another, at times agitated, then calm, then aggressive. Her opportunity to hear his voice at the lineup was limited because it was muffled and affected by the arm around his neck. At the preliminary inquiry, things were calmer, and she had a better opportunity to hear his voice and identify those particular qualities that had stood out to her. At the 1983 criminal trial, she had a fuller opportunity to hear his voice because he was directly speaking to her.

[712] E.F.'s best opportunity to hear Mr. Henry's voice came at the preliminary inquiry when Mr. Henry spoke. In her words, he "had a face that I definitely knew was the face. And I heard him speak. It basically put most of it together. This was the man."

[713] For G.H., she identified him "by voice only," at the lineup. She did not have a chance to hear him speak at the preliminary inquiry but had a full opportunity to hear

him speak at the 1983 criminal trial, first at the *voir dire* and then when he cross-examined her.

[714] I.J. had a greater opportunity than the other plaintiffs to make a visual identification. She described her attacker's voice as being "quite low and gruff". This is consistent with Ivan Henry's voice and with J.J.'s description of Ivan Henry. I note that I.J. was not in attendance at the May 12 lineup, the 1983 criminal trial or the dangerous offender proceedings. Her opportunity to hear Mr. Henry speak after the sexual assault on her took place, was at the preliminary inquiry.

[715] Because the plaintiffs heard Mr. Henry speak for prolonged periods during their assaults, and then over multiple occasions first at the lineup, then at the preliminary inquiry, then at the 1983 criminal trial (and in some cases the dangerous offender proceedings), they had an opportunity to hear his voice under varying conditions and therefore they had better chance to identify it. As for I.J., her opportunity to hear Mr. Henry's voice was during the sexual assault.

For what length of time was the witness able to hear the voice?

[716] The shortest time was G.H., who heard Mr. Henry's voice for perhaps 5-10 minutes during her assault. For others, it was closer to a full hour including extensive discussions. These were not brief encounters. The victims had an extensive opportunity to hear Mr. Henry's voice.

Was there any reason for the witness to focus on the voice?

[717] There was. That may be particularly true for the plaintiffs that had less opportunity to visually observe their attacker, but for each of the victims (C.D. and I.J. included) there was a prolonged period when they were interacting with their attacker with minimal light or ability to see. Each plaintiff wanted to be able to recall what she could to later identify the man that sexually assaulted her and therefore focused on the voice out of necessity.

What was the condition of the witness when she heard the voice, alert or groggy?

[718] While each of the victims may have had a fleeting moment of grogginess on being awoken, but each described being keenly alert and aware as soon as she realized the seriousness of the circumstances. Each remained alert for the duration of the assault.

What was the length of time between the times the witness heard the voices?

[719] For A.B., a year elapsed between her rape and the May 12, 1982 lineup.

[720] For C.D., E.F., and G.H., it was between less-than-two months to two-and-a-half months between their assaults and the lineup. It was approximately eight months between their assaults and the preliminary inquiry, and approximately one year between their assaults and the 1983 criminal trial.

[721] For I.J., there was slightly over four month between the assault and the preliminary inquiry.

Were there any contradictions in the description given by the witness—did the witness testify that the accused spoke with an accent when he or she did not?

[722] There is no possible contradiction with G.H., C.D. or I.J.

[723] Regarding A.B., the police officer's notes include both "gruff voice" and "possible accent." A.B. explained in her evidence that when her attacker became very agitated, he lapsed into a different way of speaking. She could not pick out a particular word or phrase. She had studied French, German, and Russian. Languages have a certain cadence or intonation. His voice sounded unnatural, as if he was trying to disguise it. Having heard Mr. Henry speak during this trial, it is understandable that it would be challenging to describe his unique manner of speaking.

[724] At the May 12, 1982 lineup, A.B. wrote on her ballot the comment about a slight French accent noticed and explained to Detective Sims that she "caught a bit

of a French accent," from the man in the lineup. Mr. Henry's unique way of speaking was heard by A.B. as indicating some slight accent and, when she heard him speak at the lineup, she detected a similar pattern.

[725] E.F. said that she thought her attacker was trying to fake an accent. From the initial police report, what she reported was: "accent described as similar to Chinese who speaks poor English but she feels it was being put on by suspect." She described it in her evidence as a stilted way of speaking and as somebody who just did not speak English very well and had a limited vocabulary.

[726] Both A.B. and E. F. thought that their attacker was feigning an accent.

Did anything compromise the identification process—was the witness assisted in identifying the voice, or was the witness' opinion tainted by the expectation that the voice was that of the accused?

[727] I will address how each plaintiff was impacted by the identification process individually and then consider them as a whole.

[728] Except for I.J., all the plaintiffs attended at the lineup. Because Mr. Henry chose to physically resist being in the lineup, that does not mean he was not the attacker. As the plaintiffs point out: "Scrutiny needs to be brought to bear on the identifications of the witnesses who were subjected to that spectacle, but Mr. Henry's actions must not nullify their identifications." Mr. Henry is not simply a victim of the May 12 lineup being a farce. He caused it to be a farce.

[729] The plaintiffs' identifications are supported by the descriptions they offered before the lineup. Their identifications are also supported by the similar fact evidence, as between each other and with the 1976 offences. This includes I.J.'s identification of Ivan Henry, who was attacked after the lineup took place.

[730] The plaintiffs' evidence concerning their identification of Mr. Henry is strong. They were subject to thorough and detailed cross-examination. None agreed that their evidence was tainted by the lineup.

[731] As the plaintiffs point out,

> Most significantly, concerns over "tainting" of witness evidence are particularly acute in the criminal context where liberty is at stake and, as a consequence, the standard of proof is beyond a reasonable doubt. If police conduct results in a 5 or 10% chance that critical identification evidence may be incorrect, then an acquittal must follow. But that does not mean that the person identified is not more likely than not the offender.

Is the witness' opinion contradicted?

[732] In this case, the voice identification evidence of the plaintiffs is uncontradicted by any credible evidence. I find it to be reliable. It supports my conclusion that the voice that each plaintiff heard while her rapist was in her apartment, in her bedroom (C.D. lived in a studio apartment) as they were raped, was that of Mr. Henry.

Victim's Reactions

[733] When G.H. saw Mr. Henry in the May 12 lineup, she said she had a gut reaction similar to observing something "really scary and really frightening". A.B. said that she has a visceral reaction to Mr. Henry every time she sees him. I.J. spoke of her visceral, shaking reaction of seeing Mr. Henry's photograph.

[734] As the authorities demonstrate, this evidence is admissible as part of the element of identification.

Serological Evidence

[735] The only plaintiff to which serological evidence pertains is G.H. A vaginal swab was taken when she was in the hospital after the rape. A semen sample was observed and it was tested for the presence of sperm.

[736] I have set out the evidence of Paul Norvell and Gary Harmor. I find that it shows that the Vancouver City Analyst's Lab had no ability to test seminal fluid for blood type before late-1983. Essentially, they would test evidence collected from sexual assaults to confirm the presence of semen (acid phosphatase) or sperm (microscope) but that was the extent of their abilities. Further, from May 1981 to July 1982, the relevant period, the individuals investigating the crime of rape did not have the ability to test seminal stains for blood type. Their scientific abilities were

restricted to the confirmation of semen and sperm. Semen samples were not kept because they were of little evidentiary value.

[737] During defence counsel's submission on what is headed "Blood Typing Evidence", I asked if blood type evidence were to prove anything, was the lab required to have the perpetrator's blood and also the blood type of the complainant. There was no evidence regarding G.H.'s blood type. Defence counsel asked that I infer that the lab had knowledge of G.H.'s blood type.

[738] The plaintiffs assert that I cannot make such an inference. Even so, having the blood type of G.H. would do nothing to assist the analysis because the lab needs to have the blood type of the man who raped her. There is no evidence that the lab had that information.

[739] Mr. Norvell said that he took one swab and did an acid phosphatase test which looks for the presence of seminal fluid; the test proved that seminal fluid was present. Mr. Norvell explained that all he was doing was the basic acid phosphatase test to confirm the presence of seminal fluid, as well as looking to confirm the presence of sperm.

[740] In October 1983, Paul Norvell undertook the semen identification course and began analyzing semen samples to attempt to determine the blood type of the assailant shortly after, but he was not doing so in March 1982.

[741] There is no evidence that the analysts at the Vancouver City Analyst's Lab were aware of G.H.'s blood type, or that they would be interested in it. After they began undertaking semen identification analysis for blood type they would need a sample of the victim's blood type. Because of the mixture of fluids, when analyzing a sample in a sexual assault case, it is necessary to know the blood type of the victim in order to potentially determine the blood type of the assailant. But when only analyzing the sample for the presence of sperm or semen, as was done here, there would be no need to determine the blood type of the victim.

[742] I have no basis to infer that the Vancouver City Analyst's Lab knew G.H.'s blood type or that of Mr. Henry.

[743] Even if there was blood type evidence in this case, the lab must know whether Mr. Henry is a secretor. As Mr. Harmor said, about 20% of the population are "non-secretors," meaning that their blood type cannot be detected in non-blood bodily fluids. There is no evidence about whether Mr. Henry is a secretor.

[744] For the reasons that I have given in respect of the analysis of the semen sample taken from G.H., after she was raped, Mr. Henry is not excluded as a potential rapist of G.H. or any other of the plaintiffs.

Smallman

[745] I have noted that while the defendant took issue with the statements of the complainant in the Winnipeg offences being admissible for the truth, he invites me to go through 23 files regarding sexual offences committed between April 1983 and July 1988, based on statements of the complainants contained in each file as being admissible for the truth.

[746] I have admitted the complainants' statements in the Winnipeg offences for the truth of their contents. Whether I would do the same with the 23 files presented by the defence is not necessary for me to consider. I am not persuaded that the defence has established the relevance of the Smallman investigation to this case.

[747] I have described the process of the Smallman investigation: Donald McRae, a.k.a. "Smallman" was a suspect in the 1980s in the cases where the DNA matched, as well as others. Detective Griffiths testified that she believed that Mr. McRae received the nickname Smallman based on his stature and that he was recorded to be 5'5" or 5'6" in his booking sheets through the years.

[748] The investigators took note of the similarities among the files that they reviewed, and there were many. It is clear that there were other rapists at large in the early 80s in the Mount Pleasant and Marpole areas (and other areas) of

Vancouver. Sexual assaults continued to happen in Vancouver after Mr. Henry was incarcerated.

[749] The investigators did not investigate any of Mr. Henry's files regarding the rapes of the five plaintiffs, except for a cursory review of G.H.'s file, until they learned that Mr. Henry had been convicted of rape in her case.

[750] The plaintiffs' evidence demonstrates that Donald McRae was not the man who raped them. Their attacker was taller, in the range of 5'9". Each plaintiff was played a video recording of a news report where Mr. McRae spoke to the reporter. None recognized his voice. His voice was in a higher range then Mr. Henry's. It was not low or gruff. It was not the voice of the man who raped each of them.

Inferences

[751] The plaintiffs seek to have me consider drawing an adverse inference against Mr. Henry regarding three matters. First, they say that actions taken or not taken by the defendant during the course of the police investigation into the offences and during the lineup, preliminary inquiry and the 1983 criminal trial can be used to infer consciousness of guilt. Second, the defendant's failure to call his ex-wife, Jessie Henry, as a witness in his 1983 criminal trial gives rise to an inference that he did not do so because her evidence would not have been helpful to his defence and instead, pointed to his guilt. Third, the defendant fled to 100 Mile House on learning that he was the target of a sexual assault investigation gives rise to an inference of consciousness of guilt.

[752] I decline to draw these adverse inferences.

[753] I have commented on Mr. Henry's choice to resist cooperating in the May 12 lineup. I agree with the defence that he was not obliged to participate in the lineup. Both the Court of Appeal and Hinkson C.J. addressed the lineup and consciousness of guilt extensively in their reasons. While I accept that different considerations apply in this civil case, I am exercising my discretion not to derive an inference that his conduct indicates a consciousness of guilt.

[754] I reach the same conclusion for different reasons regarding Mr. Henry's not calling Jessie Henry as a witness in his 1983 criminal trial, despite referring to her relation in the alibi statement that he provided to the Crown in November 1982. I accept that the defendant said that he did not call his wife as a witness, as he wished to spare her that experience. Additionally Mr. Henry did not have a copy of Ms. Henry's statement to police during his 1983 criminal trial (or most other relevant documents). He was also representing himself. It is reasonable that he chose not to call Ms. Henry as a witness.

[755] In regard to the plaintiffs' assertion that Mr. Henry's "fleeing" to 100 Mile House to avoid being arrested on several counts of rape of these plaintiffs and others, may be an explanation for that conduct, there are potentially other reasonable explanations for him to have done so.

Credibility

[756] The defence objected to my allowing evidence about Mr. Henry's Winnipeg offences being tendered as evidence in this trial. I have referred to this objection under "Similar Fact Evidence". The defendant asserts that the evidence of Mr. Henry's 1977 convictions and the circumstances surrounding them lead to a finding that Mr. Henry is of bad character and therefore the person who sexually assaulted the plaintiffs.

[757] I am not finding that Mr. Henry had the propensity to sexually assault young women, sleeping alone in their apartments, in the middle of the night, to conclude he must be liable to these plaintiffs. The evidence does not tip the scales against Mr. Henry. It is one of the factors to consider in determining Mr. Henry's credibility.

[758] Mr. Henry's criminal record is not conclusive on whether he sexually assaulted these plaintiffs but it bears on his credibility. He has a lengthy criminal record and he has been convicted of crimes that impugn his honesty and integrity. It is one feature in my consideration.

[759] Mr. Henry denies sexually assaulting any of the plaintiffs. I must consider his denial in the context of his evidence generally. I have referred to Mr. Henry's deflection. He showed an inability to answer straight-forward questions with straight-forward answers.

[760] I have also found Mr. Henry's evidence to be untruthful. I will not provide an exhaustive list here, but give some significant examples:

a) Mr. Henry lied about not committing the assault on L.A. in Winnipeg, to which he pleaded guilty.

b) Mr. Henry lied about the photographs taken on May 12, 1982 being fabrications.

c) Mr. Henry lied to police in his interview on the same day when he said, as an alibi to the rape of G.H., that he was in Regina with $7000 in his pocket.

d) Mr. Henry suggests that he was terrified of police brutality on May 12, 1982. I do not accept that suggestion. He already had extensive involvement with law enforcement, from 1960 on. Putting toilet paper in his ears does not describe someone afraid of what was going to happen to him, but of someone openly antagonistic to police. His May 12, 1982 interview shows that Mr. Henry was entirely comfortable with the police. Mr. Henry lied about being fearful of police.

Sexual Assault of A.B.

[761] A.B. was raped by a man who broke into her ground floor apartment, where she lived alone, on May 5, 1981 in the middle of the night. He told her that he "got information somebody living here ripped me off for a lot of money." Although it was approximately a year later, Jessie Henry's statement refers to Mr. Henry using the expression "rip-off" as he loves the term and uses it regularly. In the May 12, 1982 interview with Detectives Campbell and Sims, Mr. Henry said that he thinks the

police were put onto him by “Don” because he “ripped me off for about $600” in a “coke deal.”

[762] A.B.’s opportunity to visually observe her attacker was limited by darkness. She said from the beginning that she did not believe she would be able to identify him based on appearance alone. However, A.B. had the opportunity to hear her attacker’s voice for a reasonable period. At that time, she was a 33-year-old professional who worked as an executive assistant and took pride in being able to recognize client voices when they called.

[763] In the police notes from the day of her assault, A.B.’s assailant’s voice is described as “gruff.” A.B. does not believe that was her word, but she conveyed that description.

[764] The police notes from the initial investigation showed that notes were added to the initial investigation report prepared by the police after the first interview of A.B. It appears A.B.’s height was transposed with her attacker’s. A.B. was adamant that she never described her attacker’s height as 5’5” and the errors in the police report support the conclusion that the police officer erred in recording that. This is also supported by a review of the handwritten version of that report where “165” [cm] is written in the box to describe height of the victim.

[765] While the defence describes this a fatal flaw in A.B.’s initial description of her assailant’s height, I find that A.B. did not make that error. She was 5’5” (165 cm) and consistently described her assailant as taller than she was.

[766] That this was a police error is corroborated by A.B.’s May 12, 1982, ballot. A.B. said that she was careful when she filled it out. She wrote number 12, followed by a question mark, then: “right size and build, also French accent (slight) noticed.” It does not make sense that she would have written Mr. Henry was the right size and build if she believed her assailant to have been 5’5”. Further, her initial reaction upon waking up to her attacker in her bedroom was that she thought it was her boyfriend because the build and size were similar; her boyfriend was 5’9”.

[767] A.B.'s description was otherwise consistent with Ivan Henry. She described him as a male, in his 30s, 160 lbs. He had wavy hair and a husky build that she described as broader in the shoulders, narrower at the waist.

[768] A.B.'s statement that her attacker had a "possible accent" and of hearing a slight French accent from Mr. Henry in the lineup can be reconciled. It is not hard to feign an accent, especially if one does not want to be recognized by his voice. Mr. Henry would know that because J.J. had also identified him by his voice. A.B. did not believe that the accent was real.

[769] A.B. is the only victim who attended another lineup looking for her assailant. Presented with nine possible suspects at an earlier lineup on October 21, 1981, she wrote nothing on her ballot. She was careful in her identification.

[770] When she saw Ivan Henry in the May 12, 1982 lineup, A.B. made a tentative identification of him, based upon his voice. She understood the seriousness of the matter.

[771] At the preliminary inquiry, A.B. acknowledged that she could not visually identify her assailant. She did not have the opportunity to hear him speak. She did not identify him in the courtroom and instead identified him only as the individual she had identified at the lineup. She was clear that her visual identification at the preliminary inquiry was the same as it was in the May 12, 1982 lineup. As that is the case, I cannot find that Mr. Henry's behavior in the lineup caused A.B. to transfer her impression of him from the lineup to her ultimate identification of Mr. Henry as her attacker.

[772] Upon hearing Mr. Henry speak during her cross-examination at the preliminary inquiry A.B. became certain and could swear that Ivan Henry was her attacker. She did so, first in an affidavit, and then at the 1983 criminal trial. Her certainty that Mr. Henry was her attacker was on hearing him speak.

[773] Mr. Henry denied that he was the one who attacked A.B. on May 5, 1981. In his May 12, 1982 interview with police, after initial questioning about A.B.'s attack,

he wanted more details. It was only after being told that there was attempted anal intercourse that he denied the offence, saying at that point: “You can fucking throw that one out because I know I didn’t do it.”

[774] Mr. Henry was cross-examined on this point and gave the following evidence:

> Q: And sir, my suggestion to you is if you hadn’t been sexually assaulting women, there would be no reason to distinguish between anal rapes and vaginal rapes as you do in response to that question.
>
> A: That’s really repundant [sic], very very repundant [sic].
>
> …
>
> Q: Campbell says to you: then there was attempted anal intercourse, and you respond, you can fucking throw that one out because I know I didn’t do it. The distinction is between anal rape, and vaginal rape, I suggest to you.
>
> A: I don’t know how you get to reach that, you think about that, now how would you get that out of that.
>
> Q: Well sir, I suggest to you that if you hadn’t been sexually assaulting anyone, you wouldn’t wait to hear that it was attempted anal intercourse before saying you can fucking throw that one out because I know I didn’t do it.
>
> A: Well, you could, I can’t even answer that, that’s absolutely crazy. Huh.
>
> Q: The questioning starts, at the top of that page, with Detective Campbell, saying one of these incidents occurred on May 5, 1981, a B&E and assault of a woman in the 200 block, West 18th in Vancouver. And you respond by saying I was living on Canada Way, that’s a fucking long time ago. But then you seek out more details. You say she was assaulted, she was sleeping? The detective says yes, then you say that’s my old fucking MO right, can you give me the details, and you wait to hear some more details, and it’s only after hearing there was attempted anal intercourse, that you say you can fucking throw that one out because I know I didn’t do it. Because it wasn’t in your habit to anally assault victims?
>
> A: My verbal, no it wasn’t in my verbal. Plus I understand there was two statements written. Do you have the other one, I understand there was two of these.
>
> Q: Two versions of the May 12, 1982 interview?
>
> A: That’s what I understand.
>
> Q: And are you saying you recall a different version of this with something substantively different?
>
> A: Well not the recalling it, I’m remembering they were talking about it, and the 2nd version was taken and put aside some place…
>
> …

Q: Sir, I'm going to suggest to you that when you sexually assaulted A.B. on May 5, 1981, you hadn't intended to anally penetrate her, but you were sexually assaulting her in dark conditions. The anal penetration was brief, inadvertent and painful, and at that point, you returned to forcing her to perform oral sex on you?

A: So I came all the way from wherever I was to go to her house, and to anal assault her when I could have stayed over at the Woodbine, or I could have did over there, I came all the way down to 16th, across the street from where I was going to live a year later, you're telling me that?

Q: Sir, that is what I'm suggesting to you.

A: That's unbelievable that you can actually even envision that. Let alone talk it.

Q: Sir, is it that much different than what you did on the night of June 2nd, 1976?

A: Yeah, it's somebody's ass. Huh. That's the difference.

Q: That is the difference.

A: Yeah, that's the difference. It's a little repundant to me, and god himself would be very repugnant to me if I was to do that.

Q: The anal part is, more so than the rape itself.

A: Well both are bad, but one is worse than the other one. If you want to put them on a scale, one is really bad, the other is bad but not the same scale, right.

[775] A.B. described the attempted anal rape as brief and painful. I agree with plaintiffs' counsel that was likely inadvertent on the part of the assailant. It was, after all, dark in A.B.'s apartment. Mr. Henry's denial, on questioning by police about a May 5, 1981, sexual assault, came after he was told that detail of the offence.

[776] A.B.'s identification of Ivan Henry as her assailant is primarily based on his voice, with other physical features corroborating that identification. She was careful in her description. She had a prolonged opportunity to hear his distinctive voice. She described his voice from the outset, if not with the word "gruff" then with words that caused "gruff" to be recorded.

[777] A.B.'s identification is sufficient to meet her burden on a balance of probabilities. Taken together with the other evidence including the expression "rip-off" and other descriptors used by A.B., I am convinced that it is probable that Mr. Henry was her attacker on May 5, 1981.

Sexual Assault of C.D.

[778] On February 26, 1982, four days after C.D. was sexually assaulted, she met with a police sketch artist and provided this description to accompany the composite sketch.

[779] C.D. believed the resulting sketch to be about 30% accurate.

[780] According to Jessie Henry's statement, he always called her "honey." Asked whether he was using "honey" a lot back then, he said maybe to his wife, but that he did not think he would call somebody on the street "honey." C.D. told the sketch artist that her attacker called her "honey".

[781] C.D. believed that her attacker "sounded American". Again, Mr. Henry may have been feigning an accent for the reasons that I have set out.

[782] In cross-examination, Mr. Henry was asked about the composite sketch details that C.D. had described to the sketch artist:

> Q: I'm going to ask you to go to Tab 5, sir.
>
> A: Okay.
>
> Q: Have you seen this composite drawing before?
>
> A: Yeah, I have a -- I have an affidavit to that picture.
>
> Q: And so the date on this appears to be February 26th, 1982, so four days after the events at issue. And the suspect is described as a white male, 30 to 35 years. And, sir, what age were you at that time?
>
> A: In 1982 I was, what, 35? Yeah. Yeah.
>
> Q: You would have been -- yes, 35 on that date. About five eight; is that fair? You were about five eight?
>
> A: No. I told you five nine point five.
>
> Q: Okay. You were big, heavy chested?
>
> A: Not really. 170 pounds.
>
> Q: So you had a substantial build; is that fair to say?
>
> A: Well, depends if I'm wearing a coat. You couldn't really tell if it's the wintertime; right?
>
> Q: Sir, you did have a substantial build. You were a strong man that kept in good shape; is that true?
>
> A: Absolutely.

Q: And your upper body in particular was –

A: I worked hard for it, yeah.

Q: Okay. And it says "big hands." Sir, did you have big hands back then?

A: I've got big hands, yeah.

Q: You've got big hands now, and you had big hands then?

A: Yeah. Big hands, yeah.

Q: It says "broad and squat nose." She says "hair very thick and bushy." Sir, we know that on the night of February 22nd, 1982, it was raining because C.D. went out onto her patio to bring in some suede boots that had been left out there, and that's when these events unfolded. I'm going to suggest to you, sir, that hair of the type that you had back in 1982, when it would get wet, it would hang down further. Is that fair to say?

A: I don't know. I didn't look in the mirror when my hair was wet, so I have no idea.

Q: What do you mean, sir? That you never saw your hair wet in the mirror?

A: Well, I did when I showered but not -- not that I -- I'm outside, you know, in the -- you know what I mean? It's a different -- it's a different proposition.

Q: Well, it might be a different proposition, but I'd suggest to you that you knew what happened to your sort of curly-ish hair when it got wet.

A: I guess so.

Q: And what would happen to it is it would hang down further than when it was dry?

A: Well, didn't have long hair to hang down.

Q: Well, how long was your hair at this time, sir?

A: About a little longer than this, maybe.

Q: You're talking about the hair that you've got on your head right now?

A: Yeah. A little longer than that, yeah.

Q: Your hair –

A: Because it was more fuller. I sort of lost it after all these years; right?

Q: Understandable, sir. But just for the record, your hair now is very short.

A: Yeah.

Q: And –

A: Can I interject?

Q: You can, sir.

A: What happened to the original -- what happened to the original? This is not the original. This is -- this is a photocopy of whatever, but the -- the names in the bottom are disappeared. Everything disappeared on there.

> Q: Sir, I don't know what happened to the original document from 42 years ago.
>
> A: Because Harkema took this after -- after the lineup.
>
> Q: Sir, the -- sir, on May 12, 1982, your hair was -- I'm going to suggest to you, as we see in Exhibit 10 –

[783] When Mr. Henry was asked to review the photographs of the May 12 lineup, Mr. Henry returned to his position that the photographs were a fabrication:

> CNSL K. GOURLAY: If the witness could please have Exhibit 10.
>
> Q: Sir, I'm going to suggest to you that that depicts the length of your hair on May 12, 1982.
>
> A: That looks really funny. That looks -- that looks like a goofy guy. That's not me. I said that to you before. That's a fabrication.
>
> Q: So not only do you not accept that –
>
> A: Not only do I not accept that picture, that's an absolute fabrication. And I don't know what to say about fabricating evidence in a civil, but I know you can't do it in criminal, and you couldn't -- if you had a jury right now, you couldn't put this evidence because it's fabricated. And I'll keep saying that. They're fabricated.

[784] I find this to be a deflection: while Mr. Henry agreed to most of the details of the description that C.D. provided to the sketch artist, he then resorted to denying that he was in the photographs of the May 12 lineup at all. This evidence cannot be reconciled with the defendant's submission that the plaintiffs' evidence was tainted by their observations of Mr. Henry in the May 12 lineup, as shown in the photographs, because Mr. Henry says that the photographs are a fabrication and he was not in them. The plaintiffs all gave evidence that the photographs were an accurate depiction of what they observed.

[785] C.D. provided a detailed description of Mr. Henry before she had any opportunity for her evidence to be tainted. She did not identify him on her ballot after the May 12 lineup, because she could not see his face full-on and she was overwhelmed.

[786] I accept C.D's subsequent in-court identification of Mr. Henry. The context was calm and orderly and she was able to identify a number of features of the attacker that were consistent with Mr. Henry, including his movement pattern, the

sound of his distinctive voice, along with drawly quality of some of the elongations of vowels. She could see Mr. Henry's hands, they were the big hands of her attacker.

[787] C.D. said that she could also identify him by his sudden changes in demeanour were observable in the witness stand.

[788] C.D.'s identification of Mr. Henry as her attacker is established on a balance of probabilities.

Sexual Assault of E.F.

[789] E.F. was sexually assaulted 17 days after the rape of C.D. They both described that their attacker was claiming to be looking for "Valerie." On that basis, it is likely that the same person attacked both of them.

[790] E.F. provided a description consistent both with Ivan Henry and with C.D.'s description of him to police, that I repeat here:

> White male, late 20s, 178cm (5'10"), 72.6 kg (160 lbs), broad shoulders, regular build, dark hair, curly/wavey, very thick (approx. 2" think, s/l, face "surprisingly wide", no facial hair noted but Victim not sure, strong body odor (victim states smell from dirt not other sources) accent described as similar to Chinese who speaks poor English but she feels it was being put on by Suspect."

[791] E.F. marked down the number of a foil (number 18) at the lineup. She described being paralyzed in the chaos of the lineup and feeling overwhelmed, confused, and frightened. The defendant argues that this is to be taken as evidence that she did not think Mr. Henry was her attacker, as he was number 12. With no other corroborating evidence, the in-court identification after identifying a foil at the lineup may give rise to reasonable doubt. But, again, Mr. Henry says that the photographs that she was shown in this trial as the May 12 lineup, were not of him and are a fabrication. Further, the lineup was a farce. In any event, E.F's identification of number 18 as her attacker must be considered with all the other evidence.

[792] E.F. subsequently explained to Detective Harkema in her August 17, 1982 statement, that she believed Ivan Henry to be her attacker after hearing what she described as his growling slur of words at the lineup. She struggled to make out his face because it was so distorted but considering the voice and what she could observe, she would give her identification a 9 out of 10.

[793] She described her attacker's penis as circumcised in her initial report to police. She later said in her August 17, 1982, statement that his penis looked uncircumcised. She acknowledged that change in her evidence.

[794] E.F. was cautious in identifying Mr. Henry but became certain when hearing him speak at the preliminary inquiry. She described finally having a face that she definitely knew was the face. When she heard him speak, it came together. This was the man.

[795] In E.F.'s earliest report of her assault, she described her assailant as speaking to her "in a gruff voice," telling her several times to be quiet or he would cut her up. He told her to put a pillow over her face. She reiterates, five lines later in her own handwriting, that he "spoke with a gruff voice." The day of her assault, she describes her attacker the same way as other victims in this case, and with the same adjective used by J.J. when hearing Ivan Henry's voice at the bar where she worked, enabling her correct identification of him as her attacker.

[796] As with C.D., some of the comments made to E.F. by her assailant are the same: The attacker told each of them that he had to have sex with her because "the police will persecute you—that's the way the law is now and it will be better someday."

[797] E.F.'s further and better opportunity to observe Mr. Henry at the 1983 criminal trial made her more certain.

[798] Ivan Henry was identified as a suspect because Jessie Henry had concerns that, in the very period of time during which E.F. was sexually assaulted in March 1982, she told police that Ivan Henry was going out around midnight and coming

home around 4:00 a.m. at least once a week. On March 10, 1982, E.F. was sexually assaulted at approximately 3:00 a.m., in her apartment that was within an easy walking distance from where Ivan Henry was when he was with his family.

[799] Having found that Jessie Henry's statement meets the test of ultimate reliably, I accept that she was telling the truth. Ivan Henry had been out at night, causing concern for her that he was behaving as he had prior to his arrest in 1976. Jessie Henry saw him going out in the middle of the night because he was. When E.F. and several other women were given a fair opportunity to identify him, they did.

[800] I do not accept the evidence or the inference made by Mr. Henry, or by Tanya Olivares, that Jessie Henry, unprompted, contacted the police with ill-intent and misinformation and Mr. Henry was not going out late at night and returning early in the morning in March 1982. It cannot be mere coincidence that after his wife falsely reports him to police, the women who had been sexually assaulted also identify him as their assailant.

[801] I accept E.F.'s evidence that she was wrong in identifying number 18 in the May 12 lineup as her attacker. Combined with the other cases, and with the strength of E.F.'s other identification evidence and Jessie Henry's statement, it is consistent with the preponderance of the evidence that Mr. Henry was E.F.'s attacker.

Sexual Assault of G.H.

[802] G.H.'s rape occurred nine days later on March 19, 1982. She was assaulted during the same period when Jessie Henry expressed specific concern about Ivan Henry's activities between midnight and 4:00 a.m. G.H. was raped at approximately 2:30 a.m.

[803] G.H.'s rape followed a similar but abbreviated pattern. Her attacker showed her a knife and asked if she knew what it was. She brushed her hand against it and cut her finger. He told her to put a pillow over her head. He asked about her boyfriend, and she made one up, saying he gets off at 3:00 a.m. and would be there

right after. He told her not to tell her boyfriend because it would not “look good for” her. She was told: “next time lock the door,” and “count to 50.”

[804] C.D.’s opportunity to observe her attacker was limited because of light in the room and a pillow was placed over her head within the first 10 seconds of the attack. Her attacker was speaking to her throughout. She was able to hear every word he said.

[805] G.H.’s description of her attacker was consistent with Ivan Henry: “Male, sounded about late twenties, Caucasian – Husky build – about 173 cm [~5’8”] – c/l curly hair like a perm which was growing out.”

[806] In her March 29th statement, G.H. described her attacker as having a “wide face”. E.F. gave the same description of her assailant on March 10, 1982. Two weeks before that, on February 26, C.D. had described him as having “prominent cheekbones.”

[807] G.H. knew she could not identify her attacker visually but when she attended the May 12 lineup, but she heard his voice and knew it was her attacker. She wrote on her ballot: “12 by his voice only.”

[808] G.H. told Detective Harkema in her August 13, 1982 statement, that taking all the factors together, including his voice, she would rate her identification of Ivan Henry at 10 out of 10.

[809] G.H. was strengthened in her certainty that Mr. Henry was her attacker after having a further opportunity to hear him speak at the 1983 criminal trial.

[810] G.H.’s sexual assault occurred in the Marpole neighbourhood, and it was within a block or two of the mailbox that Mr. Henry maintained throughout his time in Vancouver. Mr. Henry said that he was familiar with that neighbourhood.

[811] When Mr. Henry was interviewed about G.H.’s assault on May 12, 1982, he lied to the detectives and said he was in Regina with $7,000 in his pocket. Mr. Henry responded to being told that G.H. had a pillow put over her head by saying: “That’s

my thing again." He repeats on the 7th page of that statement: "All you had to do was run my M.O. through and you would see I was a pillow man." His explanation in this trial was that he was referring to his stepfather making him cough into a pillow as a child. This makes no sense. He was talking to the detectives about his M.O. in the context of sexual assaults, not about coughing into a pillow as a child.

[812] On a balance of probabilities, I find that Mr. Henry was G.H.'s attacker in her ground floor apartment where she lived alone, in an area that he was familiar with, Marpole.

Sexual Assault of I.J.

[813] Jessie Henry made a statement to the police because her partner, Ivan Henry was behaving erratically and in a similar manner to his behaviour in 1976 when he attacked multiple women and attempted to rape one in Winnipeg. He was saying things to her that caused her concern. In the statement she gave, she told the police that Ivan Henry "loves the term 'rip-off'" and uses it regularly.

[814] On May 12, 1982, Ivan Henry was being questioned by police. He offered that he thought the police had been put on to him by Don. When asked why Don would do something like that, Mr. Henry responded: "Because he ripped me off for about $600.00…In a coke deal."

[815] I.J. was raped on June 8, 1982. One of the first things her rapist said to her was that he was looking for Debbie and that Debbie had ripped him off and stolen drugs from him. He repeated similar phrases, asking her how he could know that she wasn't Debbie, and that she did not rip him off.

[816] As in the other four assaults, the attacker had something in his hand. He told her repeatedly that he could cut her with it.

[817] I.J. had a good opportunity to observe her assailant. She was sitting up with the light on for a minimum of 30 seconds before he told her to lie down. Then she

was lying down with the light on while they continued interacting before her attacker seemed to realize she was looking at him. He turned the light off.

[818] Her attacker told her, “I’m not going to hurt you unless you make me hurt you,” referring to the knife; that “I can hurt you with this thing;” and, “God knows I never meant to hurt you.” After he had raped her, he told her to count to 50 or 100. He told her not to go to the police because he would know, and then he would have to hurt her. He told her she should get a chain on her door because the lock was not enough.

[819] The investigation report records I.J. describing her rapist later that day, as speaking in a voice that “was threatening and quite low and gruff,” words almost identical to those used by J.J. as a “low gruff voice”, to describe the voice that allowed her to be certain Ivan Henry was her rapist.

[820] I have referred to the evidence of Detective Barnard about his attempt to hypnotize I.J. on July 26, 1982, as he asked her questions. I accept I.J.’s evidence that she was not in any sort of hypnotic or trance state. Detective Barnard was trying to get her to close her eyes and pretend to be on a beach. She tried to cooperate but was nervous and fraught. Detective Barnard acknowledged that I.J. was a poor hypnosis subject and if she was in a trance state, it was very light.

[821] I.J. described her rapist to Detective Barnard on July 26, 1982. She said he was about 5’9” – 5’10”, approximately, even not that tall. He was fair skinned and had a wild look in the eyes “so you can’t really tell what colour they are”. He was not fat but muscular, or medium to muscular. His face was broad, similar to descriptions by E.F. and G.H. He had hair that was the kind of brown that probably would have been blond as a kid but turned dark as an adult. It was curly and over the ears.

[822] When I.J. was sexually assaulted on June 8, 1982, Mr. Henry was clean-shaven. Mr. Henry was also adamant that he was clean-shaven on May 12, 1982: “no beard, no moustache.” That is not true. I accept that the photographs of the May 12 line up and subsequent photograph of Mr. Henry are true deceptions. Mr. Henry

did shave his face clean, but he is mistaken about the date: it was not immediately before the May 12 lineup but instead, it was before his June 8, 1982 assault of I.J.

[823] Small details support I.J.'s identification of Ivan Henry. She explained to Detective Barnard that she "couldn't see his teeth when he talked." Jessie Henry had told police on May 2 that "[w]hen he talks to people, he tries not to move his lips so that he covers his teeth."

[824] When I.J. saw Ivan Henry in the photo array on July 27, 1982, she picked him out as her assailant. She asked to see more photos of him if they were available but she was certain he was her assailant and so she signed the photo lineup. She did so because she was a "hundred percent sure" that the person she pointed out in the photo lineup was the man who attacked her.

[825] I.J. came back from her home in the northeastern United States to give evidence at the preliminary inquiry because she knew it was important and because she did not want anyone else to experience what she had gone through. I.J. confidently identified Mr. Henry in the courtroom, knowing the seriousness of doing so, because she had no doubt that he was the person who raped her.

[826] In April 1983, I.J. received a letter from Ivan Henry addressed to her at home in northeastern USA. He wrote to her of his "supposedly being accused of hurting you when in fact you know positively well I did not hurt you." He questioned why she would "venture to hurt someone you know never hurt you."

[827] I agree with I.J.'s conclusion that the letter was probably from her attacker, Ivan Henry. The letter reflected the same language used by her attacker including his reference to God and Jesus Christ. It was a letter from the man who thought he had a deal with her that he would not "hurt" her with his knife, that he would not cut her up, if she did as she was told and did not go to the police. She was the one who had hurt him by going to the police. Ivan Henry wrote the April 18, 1983, letter to I.J. where he echoed the words that he had said to her on June 8, 1982, to threaten and to intimidate her.

[828] The man that I.J. described to Detective Barnard, picked out of a photo array, and identified at the preliminary inquiry was also the man whose own partner had alerted police over concerns about his late-night behaviour.

[829] Mr. Henry's alibi was that he was at home caring for his daughters while Jessie Henry was in hospital on June 7-8, 1982. Beyond Ms. Olivares' incredible assertion about where she her family was, there is no evidence that Ms. Henry was hospitalized that night, while Mr. Henry purported to be the caring father of his two young daughters. I have no hesitation in concluding that even if he was caring for his daughters, it does not exclude him from raping I.J. at her basement suite close by, at some point during that night.

[830] I.J. has positively identified Ivan Henry as her rapist on June 8, 1982. I find that Ivan Henry sexually assaulted I.J. on June 8, 1982, on a balance of probabilities.

Mr. Henry's Liability for Sexually Assaulting the Five Plaintiffs

[831] Each of the five plaintiffs identified Mr. Henry as the individual who sexually assaulted them in the period from May 1981 to June 1982.

[832] C.D. and I.J. had good opportunities to visually identify Mr. Henry as their attacker and did so. C.D. provided an accurate description of Mr. Henry to the sketch artist, although she says that the actual sketch was 30% accurate. I.J. also provided an accurate description and picked Mr. Henry out of a photo array.

[833] A.B., E.F. and G.H. had less opportunity to visually identify their attacker, however, their visual identifications were supported by their voice identifications, and the voice identifications were verified by the distinctiveness of Mr. Henry's voice and manner of speaking.

[834] The woman Mr. Henry admits to the attempted rape of (J.J.) in Winnipeg in 1976, made certain of the fact that he was her rapist only after hearing him speak in his "low gruff voice."

[835] E.F. described her attacker's voice as being "gruff," I.J. described her attacker's voice as being "very gruff." The police officer's initial notes have A.B. describing her assailant as having a "gruff voice." G.H. described her attacker's voice as being a "gruff, harsh whisper."

[836] A.B.'s assailant said that someone who lived there had "ripped [him] off", while I.J.'s assailant said he wanted some drugs that had been "ripped off" from him. The assailant of C.D. and E.F. engaged in a similar ruse. Jessie Henry said that he used the term "rip-off" often.

[837] Jessie Henry also told the police in the spring of 1982 that she had "become concerned about Mr. Henry's activities over the past few months," that he was "following the same pattern that he did in Winnipeg before his arrest there," and that he had been "going out around midnight or later and coming home around 4 a.m." She said that if she did not want sex, he would say "that is the reason he is going out and that [she] will 'lead him back to jail again'." She expressed concern about him because of the way he was acting and said she did not want to see anyone get hurt.

[838] The similar fact evidence relating to the Winnipeg offences, particularly the attempted rape of J.J. on June 2, 1976, is significant corroborative evidence that the plaintiffs were not mistaken in their identification of Mr. Henry as their assailant.

Conclusion on Liability

[839] Individually, each plaintiff has met her burden: to establish that Mr. Henry is the man who attacked her, on the balance of probabilities. They each have proven that it is more likely than not that Mr. Henry committed these sexual assaults.

[840] I have reviewed the identification evidence of each of the plaintiffs, as well as the surrounding evidence: Jessie Henry's statement, similar fact evidence, Ivan Henry's M.O., and the similarities among these five offences. The evidence that I must weigh against the evidence of Mr. Henry is his denial. I have found that Mr. Henry is not a credible witness. I do not accept his denials over the plaintiffs' evidence.

Damages

[841] Each of the plaintiffs seek damages against Mr. Henry for sexual assault. The heads of damages sought are general damages including aggravated damages and punitive damages.

[842] Dr. O'Shaughnessy provided details of his expertise:

> I am a duly qualified and licensed medical practitioner with a specialty in psychiatry. Since 1980 I have been in the practice of forensic psychiatry, the subspecialty area of psychiatry addressing interface issues between psychiatry and law and applying psychiatric knowledge to legal problems and concerns. I routinely attend and present at academic conferences in my specialty area and maintain ongoing knowledge of developments within my field. I am currently a Clinical Professor in the Department of Psychiatry at UBC and I was the Head of the Forensic Program at UBC from 1986 until resigning in 2012. I continue to serve as the Site Director, Civil Forensic Psychiatry. I have had extensive experience evaluating individuals traumatized in a variety of circumstances including motor vehicle accidents over the last 35 years of practice.

[843] As an expert forensic psychiatrist, Dr. O'Shaughnessy was qualified to give expert evidence in respect of four of the five plaintiffs (except I.J.), evaluating the effect of the trauma the sexual assault had upon each of them.

The Plaintiffs' Evidence

A.B.

[844] A.B. said that the sexual assault by Mr. Henry took about 15 minutes, yet it has impacted her life since May 1981. Before it happened, A.B. took great joy in her work, she had a loving and committed relationship with her partner and had a generally positive outlook on life. The assault caused her to have physical injuries, particularly from the anal penetration, and significant emotional injuries. A.B. experienced tremendous strain because she had to keep memories of the assault fresh in order to testify. Her nerves were on edge. She described being close to a breakdown in the dangerous offender hearing regarding Mr. Henry.

[845] A.B. described her continuing to work. It was stressful. She only talked to one person at work about what had happened to her because rape was not something that people talked about.

[846] The rape had a significant effect on A.B.'s relationship with her partner. She had problems sexually. Before the assault, she and her boyfriend were in a happy and committed relationship. Their intimate relations were fulfilling. After she was raped, A.B. internalized the notion that sex was something men wanted just for their own satisfaction. It was no longer a shared loving experience and she projected that onto her partner. She knew that it was unfair and she felt that she was punishing him. She has not been able to enjoy sex the same way she once did: she regained some enjoyment in it, but it was never quite the same.

[847] In 1990, A.B. gave up her work at the investment company and she and her boyfriend moved to the interior of British Columbia and then to Australia, in search of other ventures. They retuned to the B.C. interior in 2006 and have remained there.

[848] Each time Mr. Henry was in the news, A.B. would experience overwhelming fear. She learned from the CBC news around 2008, that people were talking about someone having their conviction investigated. A.B. then saw Mr. Henry's picture. She described it as her worst nightmare. A few days later, she received a call from a victim service worker for the VPD, who said she was tasked with contacting Mr. Henry's victims. They kept in phone contact regularly. In February 2008, A.B. was contacted about any remaining evidence that she might have from the assault. She still had the pillowcase that she spat semen on to, but it had been used and washed. Someone from Kelowna RCMP came and collected the pillowcase, and A.B. never heard anything about it again.

[849] A.B. found the re-emergence of the case to be horrific. She started looking online and saw various newspaper articles over the years, and researching Mr. Henry to keep up with the case, so she could learn what was happening.

[850] A.B. could not recall specifically when she first learned of Smallman, or where or how, but it was likely in the later 2000s. She searched online and came across newspaper articles connecting him with Mr. Henry. The Smallman news was highly distressing to A.B. She went through a long process of trying to get the police to tell her whether both Smallman and Mr. Henry lived close to her on East 17th Avenue. They would not provide her with any information. She was caught in an information vacuum. Any self-doubt or second thoughts eventually vanished as she learned more details about Smallman.

[851] A.B. was in despair upon learning that Mr. Henry's convictions had been overturned in 2010. She was equally distressed when she learned of the Hinkson C.J. decision. She was offended that she was not afforded any opportunity to meaningfully participate in that process.

Medical Evidence

[852] Dr. O'Shaughnessy prepared a report regarding A.B. dated January 17, 2024. He opined that "she continues to experience residual symptoms of PTSD that in my opinion are directly the cause of the sexual assault and would not have occurred otherwise". These symptoms include being irritable, anxious, hypervigilant, and experiencing panic attacks and problems with sexual intimacy and pleasure.

[853] Dr. O'Shaughnessy also observed that A.B. has been able to maintain functionality, at work and personally, by using denial and avoidance techniques. He continued:

> Unfortunately, these same defence mechanisms make it challenging for her to fully address and resolve the emotional reaction to the assault. She has coped by in fact narrowing her life such that she has few interests and very few relationships other than being with her husband. Although she was always somewhat of a homebody it is clear from my discussions with her that she has been really quite reclusive for many years and has virtually no friends outside of her husband and his interests. If that relationship is disrupted, there will be a significant loss for [A.B.] that she will struggle to manage.
>
> In effect, she has altered her lifestyle to accommodate the fears generated by this assault. She has not been able to easily address the impact of the assault as she feels overwhelmed emotionally when thinking of or discussing

> the events coupled with an inappropriate sense of guilt and responsibility for being a victim of an assault. Effectively this has changed her sense of herself and identity and in particular impacted her general sense of security and safety in which she now views the world as a much more dangerous place requiring her to limit risk and avoid situations that she likely otherwise would not have avoided had this assault not occurred.

C.D.

[854] C.D. said that in the immediate aftermath of the sexual assault, she could not sleep and had nightmares when she did sleep. She said that she was in a constant state of hypervigilance. It was difficult for her to be around people. Settings such as the classroom or the bus were nearly impossible. C.D. was given a prescription for sleeping pills. She said that one night, she came close to committing suicide.

[855] C.D lived with her friend for a few days after the assault and then moved home to live with her parents. She tried to continue her studies at UBC, but it was difficult, and she dropped out of most of her classes. She still managed to pass one course in April 1982. However, she was determined to persevere, and she obtained her anthropology degree, even though she had to take summer courses and an extra semester to catch up.

[856] C.D. said that because of the assault and the ongoing trauma that resulted from it, her worldview changed completely. She had to navigate a new path in her life. She did not pursue further education right away, as she otherwise would have, and she gave up on her plans for a Master's degree or a law degree. In 1987, C.D. completed a teaching degree and went on to teach.

[857] C.D. got married in 1990. They had two children together before she and her husband separated in 2006.

[858] In December 2006, C.D. learned that Mr. Henry had launched an appeal of his conviction. From that time, C.D. was contacted by the police periodically, but was not involved personally until 2012. In November 2012, C.D. attended the hearing (along with G.H.) before Mr. Justice Goepel, seeking anonymity for herself and the other women connected with Mr. Henry's proceedings.

[859] In the spring of 2011 due to the re-emergence of her PTSD symptoms, C.D. went on leave from her employment. She went back to work for a period but ended up taking a further leave from 2012 to 2014. This leave was attributed again to her PTSD symptoms, as well as some family issues. In the mid-2010s, C.D. was working on her Master's Degree which she completed in 2018. She is now employed full-time as a counsellor.

[860] C.D. sought treatment periodically throughout the years and continues to do so, mainly in the form of counselling. Since the assault, she has done a lot of healing work to try and rebuild trust in the world in which she lives.

[861] Since the end of her marriage, C.D. has not had any romantic relationships. She said that she has always carried with her what Mr. Henry said: "Don't tell your boyfriend about this, he will hate you for it" and she has heard the same thing many times; she feels he was right. It has been very hard for her to open up to someone and trust, so she has not.

[862] C.D. said that she feels that she is finally in a place where she would have been, but for the assault, in 1982-1983. She is working full-time in a job she loves, she is living in the city she loves, she is spending a lot of time in nature. She said that it took her 42 years to get here.

Medical Evidence

[863] Dr. O'Shaughnessy provided his expert report regarding C.D. on January 15, 2023. He diagnosed her as suffering from PTSD in partial remission and generalized anxiety disorder. He formed this view on the basis of his conclusion that:

> It is evident that [C.D.] did indeed have rather classic symptoms of Post-Traumatic Stress Disorder caused by the sexual assault in March 1982. As above, these included the nightmares, intrusive memories, and flashbacks of the assault, the ongoing emotional disruption with panic attacks, increased startle response, hypervigilance, and fears and accompanying avoidance of situations that she perceived as being unsafe. She also had avoidance of relationships, especially with males, sexual dysfunction, and avoidance of any situation outside her: "safe bubble" that in turn limited her lifestyle and plans. She perceived the world as a very dangerous place and continues to do so and remains highly preoccupied with general issues of her own safety

> and that of her family. It was evident from my discussions with her that these symptoms were very prominent in the first one to two years following the assaults and gradually improved. Unfortunately, she never achieved full remission of her symptoms and she always had some degree of residual effects from the Post-Traumatic Stress Disorder, including her heightened fears for safety, the sexual dysfunction, and the preoccupation with the events as well as intermittent symptoms of intrusive memories. Further, she felt others would judge her poorly for not having somehow fought back and/or she feared rejection if others knew that she had been assaulted.
>
> [C.D.]'s symptoms seemed to have worsened substantially in 2006 onward when the issues related to Mr. Henry's legal matters came to attention with increased publicity. Thereafter she had a resurgence in many of the symptoms of PTSD but also developed more classic symptoms of the Generalized Anxiety Disorder characterized by constant worry, a sense of tension, preoccupation with fears for herself and her family, increased startle response, hypervigilance, and avoidance of any situation that she perceives to be unsafe.
>
> It is also evident from my discussions that [C.D.] has become preoccupied with Mr. Henry and the potential risk he presents. It is evident that his behaviour has intersected with her anxiety to the point that she perceives herself to be in constant risk of harm from Mr. Henry to the point where she does not want any of her own personal or medical information revealed for fear it may be used in some way to harm her future. I see this as a product of her anxiety intersecting with Mr. Henry's behaviour.

[864] Dr. O'Shaughnessy opined that C.D.'s PTSD was caused by her being sexually assaulted by Mr. Henry in March 1982. The symptoms of PTSD have waxed and waned over the years but:

> [H]ave clearly also been impacted by subsequent events since 2006 related to Mr. Henry's legal issues and publicity surrounding same. Again this is not uncommon and in fact frequent insofar as individuals who have developed PTSD following a specific trauma generally will experience increased symptoms whenever there is an increased focus on the trauma or they are exposed to situations reminding them of same.

[865] In respect of her generalized anxiety disorder, Dr. O'Shaughnessy continues:

> In addition, she also has now developed symptoms of a Generalized Anxiety Disorder. Again this is not an uncommon comorbid condition with PTSD. It is challenging to determine when she actually first started experiencing symptoms of Generalized Anxiety Disorder and in fact she may have been experiencing these since the assault to the present. Certainly they have become much clearer in the last number of years. There is a substantial overlap in symptoms between PTSD and Generalized Anxiety Disorder. At this point, her Generalized Anxiety Disorder symptoms appear to be of greater impact than the residual PTSD type symptoms insofar as she continues to be fearful on a constant basis with daily anxiety, excess worry,

> hypervigilance, startle response difficulties, sleep disturbances, and preoccupation with safety issues. This in turn has limited her lifestyle substantially such that she protects herself and her family from any perceived threat or risk that in turn limits the scope of her life, e.g. travel, relationships, activities, etc.

E.F.

[866] E.F. said that after the assault, she was unable to sleep for more than two hours a night. She stayed with friends and when she was able to sleep, she kept a knife under her pillow.

[867] E.F. had worked at ICBC since 1979. After she was sexually assaulted in March 1982, she could not concentrate, there was a lot going on, and her work attendance began to be spotty. She would cry and have panic attacks at inappropriate times. The work that she loved and enjoyed doing no longer made sense.

[868] In 1983, for the first time, E.F.'s superiors had some discussions with her about needing to improve her work performance. She said she was struggling with an inability to function or focus on her work.

[869] Before she was assaulted by Mr. Henry, E.F. was about three-quarters of the way through a program she was taking through the Insurance Bureau of Canada, but was unable to continue due to the psychological symptoms she was trying to manage.

[870] On November 21, 1983, E.F. attended Mr. Henry's dangerous offender hearing and provided an impact statement. She spoke about having to leave work because she would start to cry and because she was having trouble concentrating. This was an ongoing issue.

[871] E.F. continued to have severe sleeplessness. She felt a change in her personality. She said that she used to be a very optimistic person, very sure of life, but since the assault, she described herself as very moody, without a lot of hope in

life improving. She has a defeatist attitude and does not know if it will go away. She misses what she once was.

[872] E.F. described sitting in the gallery as the sentence was pronounced upon Mr. Henry in 1983. E.F. heard Mr. Henry make a statement to the effect of having friends on the outside and that they would find the victims. She found the statement and the event shocking and disturbing, and immediately had a panic and freezing response.

[873] After the assault, E.F. said that she became extremely dependent on friends. She was afraid to be alone. She went from being a woman who loved being independent to needing to be around people, otherwise she would panic.

[874] E.F. pressured her then-boyfriend to let her move in with him, because she could not be alone. She realized that she needed to be with someone to feel safe.

[875] In the spring of 1984, E.F. was told by her supervisor at ICBC that she would be fired due to poor performance if she did not resign. She chose to resign to avoid having been fired on her work record. This was heartbreaking to E.F. as her lifelong desire and plan had been to continue with her education at the Insurance Bureau of Canada and pursue a career path as an insurance adjuster at ICBC.

[876] After her resignation from ICBC, E.F. started a business renting out computers in 1984, which initially did quite well. She also had a baby that year.

[877] In January 1986, E.F. left her husband and moved out with her son, first to a transition house and then into other social housing as she learned how to navigate various social assistance programs and food banks. She had limited family with whom she had very little contact. She had no friends. It was a dark and difficult time in her life. She said:

> All my feelings, specifically in 1986, really spiralled down. I became extremely depressed. I'm holding this little toddler, this little bundle of energy. I've just received a month's supply of sleeping medication. I was contemplating committing suicide for several months…I realized that I had to be there for my son, no matter how bad I felt, I had to be there for my son.

[878] E.F. tried to work and held a variety of part-time jobs that were mainly government subsidized, but she had a lot of trouble concentrating. She did find a job but had to leave it because she required surgery to her hip.

[879] When she recovered from surgery, E.F. returned to school but barely passed, which was upsetting and frustrating for her, as she used to be an honours student.

[880] By 1991, E.F. was designated as a Person with a Disability and living in subsidized housing in Vancouver, with her son. Since then, she has worked in retail, inventory and other odd jobs. She has never earned enough income to support herself and she has remained dependent on social assistance for survival.

[881] In and around 2009, E.F. saw in the papers that Mr. Henry was applying to be released. Her first reaction was “Oh my god, did I pick the wrong man?” that reaction was short-lived because she knew that she was not wrong. At this time, she was living in North Vancouver. When Mr. Henry was released, he was also living in North Vancouver with his daughter. E.F. began to have panic attacks and nightmares as she recalled Mr. Henry promising to get even. She eventually moved.

[882] Sometime during 2015, E.F. was contacted by the Province and was asked to testify in Mr. Henry’s civil proceedings for compensation. E.F. had been diagnosed with cancer and was unable to participate in any way.

[883] Currently, E.F. lives a quiet life. Her apartment has three separate locks to enter the suite from inside the building and two locks on her sliding patio door as well as an alarm system. E.F. also wears a personal alarm at all times. She is terrified of another break-in.

[884] E.F. still suffers from panic attacks and anxiety and still thinks of dying. She has a hard time trusting people and getting close to them. She is isolated. She still thinks of the assault often and it still has an impact on her emotions, activities, and abilities.

Medical evidence

[885] Dr. O'Shaughnessy provided an opinion regarding E.F. dated January 14, 2023. In his report, he outlined the severity of the impact of the assault on E.F.:

> Sexual assaults of this magnitude can in fact be life-changing events in the majority of individuals who experience them and I think they were in [E.F.'s] case. In large measure, this is directly related to the extent of the symptoms of PTSD that have been quite profound coupled with the development of a depressive illness throughout the 1990s. I think there has been significant impact on her abilities to maintain employment and her abilities to initiate and maintain relationships that is directly related to the assault and probably would not have occurred had this assault not happened. There have also been perpetuating factors insofar as the litigation around Mr. Henry has forced her to relive the assault and the trauma. The literature is very clear that situations that force individuals to relive their traumas or situations that remind them of the traumas are likely to increase symptoms for variable periods of time as they have in [E.F.'s] case. Overall, she has done quite well in the last few years, having learned how to master some of the anxiety-reduction through suppression and compartmentalization and she seems to be coping much better now than she describes in earlier years.

Economic Evidence

[886] E.F. submits that but for the assault, she would have continued working at ICBC until she became disabled due to her congenital hip issues or other health problems. However, due to the assault, she stopped working for ICBC on April 1, 1984. E.F. says that had she not been sexually assaulted and not experienced the trauma that she did, she would have continued working until the end of 1986, when she went off work on disability. In the absence of the assault, because she still would have been an ICBC employee, she would have been entitled to collect disability benefits, in accordance and with the provisions of the collective agreement

[887] PETA Consultants provided a report dated November 6, 2023. The report calculates that E.F.'s loss of earnings is $457,205, based on those assumptions. E.F. is claiming this amount as her past income loss/economic loss on the terms of the collective agreement between ICBC and her union, COPE Local 378, for the period between July 1, 2019 and July 1, 2022.

G.H.

[888] Mr. Henry's assault on G.H. had a profound traumatic effect on her and her family. Her father felt responsible that the sliding doors in her apartment were not secure. Although G.H. said that she tried to assure her father that he was not responsible for what had happened to her, her father was so upset that he left her mother. This caused her mother to move in with G.H. Her parents reconciled over the next year.

[889] G.H described that after the rape occurred, she could not stay in her apartment and went to live at her parents' house. She could not sleep at night and mostly slept for about three to four hours during the day. If she did sleep, she slept fully clothed on a couch or a chair. She ruminated about being assaulted and was hypervigilant.

[890] G.H. struggled to find the ability to focus and study. She did not go to school, other than reaching out and going to see one professor who helped her with completing a course. She failed the rest of her courses and was required to withdraw.

[891] G.H. was not able to go to work for a number of weeks and started to have financial struggles as well, not being able to pay rent on time.

[892] G.H. spoke during the dangerous offender hearing:

> I have always been very, very independent, and immediately after this happened I felt a need to be protected. I wanted somebody to take care of me, and I ended up accepting a proposal of marriage about eight weeks after this happened from somebody I had just recently met. I am no longer engaged. It was the wrong thing to do.

[893] For the next three years, G.H. tried to finish her degree while working full-time. She was paying all her expenses including her student loans. She finally gave up her studies in 1986 and took a full-time position as a cosmetician. She was the top salesperson for the company for two years, and was subsequently promoted to a sales representative position.

[894] During this time, G.H. continued to struggle with her eating disorder and went from relatively low weight to overweight. I was easy to hide her weight while she was a counter manager in cosmetics, but after becoming a sales representative, there was pressure to be thin. G.H. was required to travel for her job and stayed many nights in hotels, which meant she was unable to sleep at all. In 1989, she resigned from this position as she was not able to do her job.

[895] In about 1987, G.H. re-enrolled at university while continuing to work. She had to start again at the third-year level. She loved her studies and found them fascinating, but she ultimately could not manage both school and work.

[896] G.H. was employed as a federal law enforcement officer in late 1989 to about 2007.

[897] Before meeting her husband in 1994, G.H. found dating difficult. She was 34 years old when she met her husband. They married fairly quickly, after about ten months of dating. G.H.'s husband had two children from a previous relationship, both of whom had special needs. G.H gave birth to a daughter in 1997, and took a full year of maternity leave before returning to work.

[898] Since the assault, G.H has struggled to have close intimate relationships. It is hard for her to let her guard down. The only time that she and her husband could have satisfying intimate relations was after several glasses of champagne.

[899] G.H. is fearful of other people constraining her or being in constrained places. She said that she "lives in [her] head a lot". She continues to have problems with claustrophobia and not having an escape route or feeling confined. She cannot sit in the back seat of a car and, if riding on a bus, she has to be close to the exit. This has been the case since the assault.

[900] In 2006, when G.H. was notified that there was going to be an inquiry where she could expect to be called to give evidence and that Mr. Henry may be facing a retrial or appeal of his conviction. She started to experience a lot of the same symptoms as after the assault – sleeping in the daytime, inability to sleep at night,

calling in sick to work, binge eating. Things got worse. She was getting sicker and she got very heavy. She felt she was going to die early as a result of what she was doing to herself with food. Bulimia is known to cause heart attacks and other problems and she has choked on her food on more than one occasion. She decided to retire at that point. She continued to be very ill.

[901] In February 2008, G.H. went to a treatment center. She left the treatment facility after 30 days and started attending 12-step meetings regularly. Those meetings were AA type of meetings for people with eating disorders such as bulimia and anorexia. G.H. achieved significant physical and emotional recovery. She continues to attend these programs, particularly over-eaters anonymous. She supplements that with meditation and yoga.

[902] The impact of the Doust inquiry and the re-opening of the case had a significant impact on G.H. Any time there was a news story or a news article, it brought the matter back to the forefront of her mind. Because G.H. had a young teenage daughter in her home, and she was terrified, she would sleep in a chair in her living room. She was contacted about the case periodically and kept in the loop by victim services. However, G.H.'s preferred approach was to block it out and try not to hear anything about it. She tried to focus on other things and to travel more.

[903] G.H. was contacted by victim services about a court hearing in Mr. Henry's civil suit about the provision of documents to him. She and the other women, were told by victim services that the women still had an interest in these proceedings but that the Attorney General could not represent them because they were a party to the lawsuit. C.D. understood it to be about information and documents which could contain more recent information about her, plus the information of 49 other women. Since they had no legal representation, G.H. prepared her own legal brief about why the women's privacy rights should be protected. She went to court in 2012 to represent her own interests and those of the other women, along with C.D. They asked for protection of their privacy.

[904] At that hearing, G.H. saw Mr. Henry in the courtroom. When everyone was coming back after the lunch break, G.H. heard his voice behind her. Mr. Henry's voice bought back all of the fear of the assault and the criminal hearings.

[905] In response to being asked why she came to testify and why she was a part of this case, G.H. said she felt that at every point of the last 42 years since the attack, her voice and the voice of other women had not been heard and she wanted to tell her story. She recognized that there were reasons for the findings that Mr. Henry was wronged and released; the reasoning made sense to her. But she knew that Ivan Henry had attacked her.

Medical Evidence

[906] Dr. O'Shaughnessy authored a report regarding G.H. dated January 13, 2024. He diagnosed her as having Post-Traumatic Stress Disorder as a result of the assault and a Binge Eating Disorder that pre-existed the assault but was aggravated by it and subsequent proceedings.

[907] In terms of the effects that the assault had on G.H., Dr. O'Shaughnessy opined that "it was clear that the anxiety, sleep disturbances, and feeling of vulnerability and hypervigilance following the assault impacted her university education" as well as "had significant impact on relationships" , including "significant difficulties with intimacy and relationships" and "significant sexual dysfunction that persists to the present".

[908] Although G.H. is currently doing somewhat better, she continues to experience symptoms of anxiety, hypervigilance, sleep disturbance and struggles with her binge eating disorder. Dr. O'Shaughnessy opined:

> She remains at risk for developing further difficulties, especially if there are any untoward events with Mr. Henry or she experiences similar type assaults. She remains more vulnerable to development of psychiatric illnesses given the history that she has had and any further trauma would more likely than not result in increase in symptomatology.

I.J.

[909] I.J. returned to live in the U.S. after she was sexually assaulted by Mr. Henry. I.J.'s father died shortly before the 1983 criminal trial, so she did not come back to Vancouver to testify. She was in shock and much of that time was a blur for her. She went into a deeper depression as she realized her life was not going to be the same as before the assault and she was unable to do things she used to. She experienced constant panic attacks and anxiety. She was unable to tell other people, because, at that time, it was the kind of thing that people just did not talk about.

[910] I.J. described carrying shame along with her fear. It felt that even though the perpetrator does the crime, the woman carries the shame. There was not a lot of help at that time for that. I.J. felt she was close to a nervous breakdown because of the assault and the death of her father, she could not deal with both. Her mother was very fragile and I.J. wanted her mom to think that she was ok even though she was not.

[911] I.J. received a letter from Mr. Henry dated April 18, 1983. She did not know how he got her address. It had a enormous impact upon her. She was afraid. She recognized the language in the letter as the language that Mr. Henry used during the time he sexually assaulted her. She perceived the letter as being Mr. Henry letting her know that she had broken the deal they had made during the rape – that he would not hurt her unless she went to the police.

[912] I.J is a poet and a writer and has studied language extensively. She testified that Mr. Henry has an unusual cadence and way of speaking, as well as the way he uses words. She recognized his cadence in the letter. The mention of God and Jesus Christ gave her the biggest chill because he had mentioned that at the end of her rape and it was the end of his apology. This letter so closely resembled Mr. Henry's words during the rape that I.J. was very concerned about whether she was safe.

[913] For the rest of the 1980s, I.J. worked in the entertainment industry in various capacities. After an economic collapse, she learned how to counsel people who

were in career transitions. She loved that job as she was helping people change their lives and this developed into her primary career.

[914] I.J. loved music and began to turn her attention towards music again. While she was working, she put herself through a two-year conservatory program for writers and actors for theatre. This was in the late 1980s. She also began to take her writing seriously and formed a band/recording group that became very successful. I.J. had the talent to perform, but she was afraid and made a decision to remain backstage.

[915] I.J. married and had a child.

[916] For several years following the assault, I.J. attended counselling with several different people because, although she was successful and happy, she still experienced symptoms of fear, anxiety, nightmares and panic attacks.

[917] I.J. received another letter in 2000, this one from a Palm Beach based private investigator. The letter was sent to her current residence which was not listed in her name as she had tried to keep her name, phone number and any personal information private after Mr. Henry's 1983 letter. She was shocked and fearful, it brought a tremendous amount of fear back into her life. I.J did not respond to this letter in any way. She was suspicious about its origin and thought that Mr. Henry had solicited a detective to penetrate her privacy.

[918] When the case re-emerged in the late 2000s, I.J. found out about it through a voice message left by either the police or victim services informing her that Mr. Henry would be released and it was going to be announced. Her young child heard the message. I.J. did not know what it would be about and was shocked to find out Mr. Henry was being released. I.J. did not have any awareness of the Ivan Henry proceedings up to that point as it was not in the U.S. media. She was never contacted by the special prosecutor.

[919] I.J. became aware of the 2015 trial from victim services and other victims. I.J. attended a meeting for victims where she was told this proceeding was not about his

factual guilt or innocence, but it was about wrongful procedure. I.J. testified that it was, of course, important that people have rights, and that one of the most important rights was the right to due process. But she knew it was Mr. Henry who sexually assaulted her. That left her with a lot of fear because it seemed that if he were actually free, he would come to harm her.

[920] I.J. was informed by a friend that a letter she had written to Detective Harkema had become a front-page article in the Vancouver newspapers. It was a letter she had written in June 1983, as a young rape victim still recovering from her assault and the death of her father. She had written that letter to thank him for helping her obtain some funding for counselling and for taking her seriously when she was in distress after receiving Mr. Henry's April 1983 letter. I.J. said that Bill Harkema was stalwart in a lot of ways and that he treated all the victims with a lot of respect and care.

[921] I.J. could not even imagine why her letter was published. She felt that someone was weaponizing a very vulnerable moment from a 22-year-old woman. It was horrifying to her. She could not imagine that somebody would want to attack a victim of Mr. Henry.

[922] In the end, I.J. did not give evidence at the 2015 trial despite expecting to have that opportunity. She was asked to and was willing to testify as she felt that Mr. Henry's factual guilt was an important part of the process.

[923] About this issue, I.J. said:

> If I was to go back to my 22 year old self, I would say Henry was right – don't go to police and go through this. I was willing to testify to his guilt. I didn't have anything but compassion for Henry, he was a very damaged person but he did it. It became less safe for other women and girls, if a predator could become a hero in the media and collect money for it without having to demonstrate that he wasn't that person. We were told by many people that this was technicalities of how the process went. I felt it was important to believe and participate in the due process and say that victims need to participate and be heard in this process too.

[924] I.J. continues to be a producer. I.J.'s friend persuaded her to sing again. Just as they were gearing up to do some other projects, Mr. Henry's case began to re-emerge and it became quite dominant for I.J. In response, she felt the need to be behind the scenes again and she stopped singing.

[925] I.J. continues to be a counsellor and to help people. This is the source of her primary income given the challenges of earning a living in music.

[926] Reflecting back on her adult life, I.J. says she cherishes her life. The hardest thing for her has been to remain loving. She was taught that she has to care for people who were not as fortunate her. The hardest moments for her were those when she felt hatred, which she never wanted to feel. She wants to create safety. She says there is no shame in being a victim of crime or being a woman/girl.

[927] I.J. was not examined by Dr. O'Shaughnessy.

Summary of Medical Evidence

[928] Dr. O'Shaughnessy described this in his evidence, referring to the experience of the victims he assessed as "obviously at the extreme end of sexual assaults in terms of severity," "on the severe end of the spectrum of sexual assaults and included a number of factors that have been empirically shown to predict for increased risk of psychiatric sequelae," "a very severe assault on the spectrum of sexual assaults," and "on the severe end of the spectrum and certainly the type of sexual assault that would produce significant psychiatric sequelae in the vast majority of individuals who experienced it."

Legal Issues

Sexual Assault

[929] Madam Justice L'Heureux-Dubé wrote in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 68, that sexual assault is one form of violence against women. It is an "assault upon human dignity and constitutes a denial of any concept of equality for women." It is a violation of rights protected by s. 7 and s. 15 of the *Charter* (at para. 69).

[930] In *R. v. McCraw*, [1991] 3 S.C.R. 72 at para. 29, the Court said that to argue that a woman, forced to have sexual intercourse against her will, has not necessarily suffered grave and serious violence is to ignore the perspective of women.

[931] In *R. v. Arcand*, 2010 ABCA 363 at para. 171, the Alberta Court of Appeal defined "major sexual assault" as a sexual assault of a nature or character such that a reasonable person could foresee it as likely to cause psychological or emotional harm, whether or not physical injury occurs. Major sexual assaults cause very grave harm. This includes "fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide" (at para. 177).

General and Aggravated Damages

[932] General damages are awarded to plaintiffs, who suffer pain, suffering and loss of enjoyment of life from the wrongful, or tortious, acts of another person (the defendant) to substitute for what has been lost. It is compensation for the loss in financial terms. In 1978, the Supreme Court of Canada set an upper limit on damages for pain and suffering, of $100,000. This was, in the Court's words in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at para. 88 to address:

> The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

[933] Adjusted for inflation, in 2024, the upper limit is approximately $490,000.

[934] In cases where the tort is intentional involving criminal behavior, the upper limit does not apply: *Y (S.) v. C. (F.G.)* (1996), 26 B.C.L.R. (3d) 155.

[935] *Y (S.)* is a leading authority for aggravated damages in sexual assault cases and enumerates several factors to consider. Macfarlane J.A. discussed the role of

aggravated damages in sexual assault cases, holding that aggravated damages are not a separate head of damage:

> 35 I begin by noting that general damages in most cases are assessed taking into account any aggravating features of the case. Those aggravating features may increase the amount awarded. Aggravated damages must be distinguished from punitive damages: *Norberg v. Wynrib* (1992), 68 B.C.L.R. (2d) 29 at 54 (S.C.C.).
>
> 36 In my opinion aggravated damages are not a separate head of damages. They are a part of general damages. Juries ought not to be instructed as if they are a separate category of damages, particularly in cases of sexual abuse where it is difficult to separate the physical harm, which is often of much less significance than the fright, misery and humiliation connected with it, and the continuing mental suffering from it.

[936] In *Y. (S.)* there were significant aggravating circumstances. It involved a stepfather's breach of trust with his stepdaughter, assault of a minor, as well as lack of remorse.

[937] In *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120, the Court set out a framework for determining damages in civil sexual assault cases at paras. 134-135:

> - the circumstances of the victim at the time of the events, including factors such as age and vulnerability;
> - the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were;
> - the circumstances of the defendant, including age and whether he or she was in a position of trust; and
> - the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.
>
> 135 Consideration of these factors, in my view, will assist in determining an appropriate amount of non-pecuniary damages to serve the functions of providing solace for the pain, suffering and loss of enjoyment of life flowing from the assaults, of demonstrating vindication of the victim's rights of personal dignity and individual autonomy and, with regard to aggravated damages, of appropriately recognizing the humiliating and undignified nature of the defendant's conduct.

[938] In *H.N. v. School District No. 61 (Greater Victoria)*, 2024 BCSC 128, Justice Coval addressed damages to be awarded to a 35-year-old man who was sexually abused by a volunteer at his elementary school in 1999-2000. The abuse consisted

of touching, groping, sexualized comments and the defendant repeatedly exposing himself. The plaintiff was awarded $225,000 in general damages.

[939] Justice Coval referred to aggravated damages at para. 152: “Aggravated damages augment non-pecuniary damages when the unlawful acts involved humiliating or undignified circumstances” referring to *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.):

> ... [T]hey are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant ... that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life ... It is, of course, not the damages that are aggravated but the injury.

[940] The plaintiffs rely on the series of cases to which Coval J. referred:

> (i) *Anderson v. Molon*, 2020 BCSC 1247 - $275,000 (which included a 10-15% reduction for a prior condition). The plaintiff was 70 years old at the time of trial. While in her late 20s, she was employed as an elementary teacher in a Catholic school. She had a sexual relationship for a few months with the assistant pastor, which was found to be degrading, exploitative and an abuse of power. Justice Crossin said the assaults caused "serious psychological harm" that "had a profound effect upon the plaintiff's psychological well-being" and caused her "pain, anguish, grief, and humiliation. It deeply affected her self-confidence. She has carried these wounds throughout her life."
>
> (ii) *MacLeod v. Marshall*, 2019 ONCA 842 - $425,000 jury award, with $350,000 for general damages and a separate award of $75,000 for aggravated damages). In high school, the plaintiff had been abused more than 50 times by a priest.
>
> (iii) *Waters v. Bains*, 2008 BCSC 823, the plaintiff was awarded $325,000 ($445,000 adjusted for inflation). Aged 50 at trial, from ages eight to 18 she was sexually assaulted by her uncle in horrific and prolonged ways.
>
> (iv) *S.Y. v. F.G.C.* (1996), 26 B.C.L.R. (3d) 155 (C.A.), at para. 59, the Court of Appeal reduced a jury award from $350,000 down to $250,000 (or $490,000 in current dollars). The plaintiff had been repeatedly sexually, physically, and verbally abused by her stepfather from ages seven to eighteen. She was 36 years old at the time of trial, and the effects on her continued to be devastating and profound.
>
> (v) *C.M.A. v. Blais*, 2022 BCSC 214 - Chief Justice Hinkson awarded the plaintiff $250,000 for sexual assaults that commenced when she was 10 or 11 and continued into her teenage years. The defendant was a close friend of the plaintiff’s father, and was 20 years older than her. The assaults involved

> frequent touching, including massages, kissing, at least one incident of digital penetration, and other invasive sexual conduct. He gave her alcohol, drugs, and money as a form of grooming her to submit to his sexual advances.
>
> (vi) *C.L.H. v. K.A.G.*, 2022 BCSC 994 - Justice Veenstra awarded $200,000. The assaults occurred when the plaintiff was between six and 12 years old. They were perpetrated by her brother, who was four years older. They involved sexual touching, including digital penetration, the brother masturbating in front of her, and one incident of partial penile penetration. At trial, the plaintiff was in her mid-50s. Due to the abuse, she suffered anxiety, depression, nightmares, flashbacks, and insomnia.

[941] The defence summarizes these cases:

> A review of the case law relied on by the plaintiffs thus reveals a range of $200,000–$490,000 in damages for serial sexual assaults perpetrated against vulnerable children by persons in positions of trust and authority. The highest end of the range is reserved for repeated sexual assaults that include penetrative assaults perpetrated against children.

[942] The defence refers to cases where there was one incident of sexual assault, as in the case of each of these plaintiffs:

> (i) In in *Seymour v. Nole*, 2022 BCSC 867, Justice Shergill awarded plaintiff who was 26 years old at the time of the events $100,000 for a single instance of sexual assault that included penetration and occurred when she was particularly vulnerable as she was intoxicated and asleep. The defendant's liability for this aspect of the claim was upheld on appeal: 2023 BCCA 329.
>
> (ii) In *R.Y.H. v. Y. LTD and L.E.Y.*, 2021 SKQB 48, the plaintiff bought a bus ticket for a trip to northern Saskatchewan. The last portion of the trip took place in the defendant's truck as the bus company subcontracted to him for this leg of the journey. During this part of the journey the defendant violently sexually assaulted the plaintiff. When she attempted to resist he overpowered her. The sexual assault included violence, fondling, digital penetration and groping. She was awarded $100,000 in general and aggravated damages.
>
> (iii) In *Zando v. Ali*, 2018 ONCA 680, the Ontario Court of Appeal considered an appeal of the assessment of damages for sexual assault following a judge alone trial. The assault at issue was a single incident of violent sexual assault that was perpetrated by a physician against his friend and colleague in her home during which he tripped the victim, thrust his penis into her face, pulled down her pants and penetrated her vagina. As she left, she observed him masturbating. After setting out the appropriate framework for assessing damages in civil sexual assault cases, the Court endorsed the trial judge's range of $144,000 to $290,000 for damages for sexual assault (the equivalent of $173,000 to $348,000 in 2024 dollars) and upheld the lower court's award of $175,000.

Punitive Damages

[943] An award of punitive damages is made in addition to awards under the other heads of damage. They are exceptional awards that act to deter other similar acts. The leading case is *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. The purpose of punitive damages is not to compensate, but to punish (at para. 111).

[944] *Whiten* set out some of the factors in assisting the blameworthiness of a defendants conduct at para. 113:

> (1) whether the misconduct was planned and deliberate;
>
> (2) the intent and motive of the defendant;
>
> (3) whether the defendant persisted in the outrageous conduct over a lengthy period of time;
>
> (4) whether the defendant concealed or attempted to cover up its misconduct;
>
> (5) the defendant's awareness that what he or she was doing was wrong;
>
> (6) whether the defendant profited from its misconduct;
>
> (7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.
>
> [citations omitted]

[945] Additionally, an award of punitive damages must be:

a) proportionate to the degree of vulnerability of the plaintiff;

b) proportionate to the harm or potential harm directed specifically at the plaintiff;

c) proportionate to the need for deterrence;

d) proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct;

e) proportionate to the advantage wrongfully gained by a defendant from the misconduct: *Whiten* at paras. 114-126.

[946] The Court recognized that the criminal law is the primary vehicle for punishment in Canada and while a criminal conviction did not absolutely bar an award of punitive damages, it was a “factor of potentially great importance” in determining whether such an award was warranted. Thus, as a general rule that the Court will not award punitive damages where there has been a criminal sanction for the same activity (at para. 69).

Damages for Pecuniary Loss

[947] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64.

[948] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27.

Analysis

General and Aggravated Damages

[949] Each of these five plaintiffs was a young woman. Two of them, A.B. and E.F. had already embarked upon fulfilling careers that promised advancement. The other three, C.D., G.H. and I.J., were just beginning their trajectory in life, pursuing education and experience to propel them in their lives.

[950] All of the plaintiffs were proud of their independence, which was demonstrated by their decisions to live on their own in their own apartments. They were self-sufficient, eager to contribute to the world and excited about the future. Their homes were a refuge: a safe retreat from the outside world where they felt secure and comfortable.

[951] It is reasonable to conclude that their hopes and dreams were shattered when a stranger entered their apartments in the middle of the night, while they were sleeping, and under the threat of a knife (or some object that could hurt them),

attacked them sexually, requiring them to perform all forms of sexual acts at the command of this stranger. He told them to cover their faces so they could not see him. He told them to remove their clothing. To some of the women, he insisted that they swallow his semen. Mr. Henry suggested that he had to rape them to keep them from going to the police. He told them that if they went to the police, he would come back for them. Then, he had the audacity to criticize each victim for the faulty locking mechanisms of their patio sliding doors.

[952] Comparing sexual assault cases to assess damages is, as the plaintiffs' point out, rather unseemly. The cases provide the legal principles for damages assessment, and some guidance regarding the quantum of such an assessment, however, these cases address sexual assaults in the context of familial relationships, residential schools or tutor/coach settings.

[953] General damages are to be assessed, not calculated. Whether the sexual attack occurred once or was repeated, whether the victim was a child or an adult, and what form of sexual assault took place, are factors in determining sentences for sexual offenders. The focus in this case is on providing compensation to the plaintiffs for the wrongful acts of Mr. Henry that has affected them for decades and continues to do so.

[954] The plaintiffs are also entitled to aggravated damages. Aggravated damages augment non-pecuniary damages when the unlawful acts involved humiliating or undignified circumstances. Those circumstances apply to the sexual assault of each plaintiff.

[955] Having considered the relevant cases, I have accepted that the general and aggravated damages awarded in *Zando* are the appropriate comparison. In that case, the plaintiff and defendant were doctors at the same hospital and they were friends. The defendant, using a pretext of an urgent matter went to the plaintiff's home and sexually assaulted her.

[956] In this case, Mr. Henry broke into the homes of the plaintiffs' in the middle of the night, while they were sleeping, threatened them, and attacked them sexually. I find that general damages should reflect the aggravating circumstances here.

[957] I award $375,000 to each plaintiff for general and aggravated damages.

Punitive Damages

[958] The plaintiffs assert that all of the adjectives used to describe when an award of punitive damages is warranted are simply unobjectionably applicable to the facts here: exceptional circumstances; harsh; vindictive; reprehensible; malicious; extreme in its nature and by any reasonable standard deserving of full condemnation and punishment.

[959] Each plaintiff seeks punitive damages of $1,000,000 per plaintiff. The rationale is that Mr. Henry received an award of $8,086,691.80 in connection with these offences that the plaintiffs have proven that he committed. The plaintiffs assert that:

> The compensation that Mr. Henry received is directly relevant to the appropriate punitive damages award in this action given that such an award must be proportionate not just to the degree of vulnerability of the plaintiffs, proportionate to the harm they suffered, and proportionate to the need for deterrence against rape, they must also be proportionate even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted by the defendant, and proportionate to the advantage wrongfully gained by the defendant.

[960] The defendant points out that:

> Mr. Henry was wrongfully convicted because a prosecutor intentionally withheld disclosure . But for the actions of the Crown, he would not have been convicted in 1983 and would not have spent 27 years in custody or been declared a dangerous offender. While the impact of federal incarceration in such circumstances does not require a detailed description to be understood, his particular experience was described at length in the judgment of Chief Justice Hinkson.

[961] Although I have found Mr. Henry to be liable for his sexual assaults of the plaintiffs, he was acquitted of the criminal charges after he served 27 years in federal custody. He has not gone unpunished.

[962] In the cases that have been cited, only *Anderson* makes an award for punitive damages. The offending defendant, Father Molon, was apparently not charged with criminal offence and thus not convicted. He served no sentence. The Court found that punitive damages were warranted against him and against the Roman Catholic Bishop of the Diocese of Kamloops, which was aware of Father Molon's conduct and did not address it.

[963] In the other cases cited, the Courts have declined to award punitive damages, finding that doing so, after the defendants had served a sentence for the crime of sexual assault, was not appropriate.

[964] Should these plaintiffs be awarded punitive damages? The facts and circumstances of each rape meet the factors listed in *Whiten* for awarding punitive damages. Mr. Henry was convicted of rape of each of these plaintiffs (and other complainants) and spent 27 years in jail before the Court of Appeal determined that he was wrongfully convicted. This is, as *Whiten* derives, a "factor of potentially great importance" in determining whether such an award was warranted.

[965] The plaintiffs' argument in respect of punitive damages, relies upon my finding that "Mr. Henry's indeterminate prison sentence was cut short and, more importantly, he received an award of $8,086,691.80 in connection with these offences which he did, in fact, commit." As noted, the plaintiffs argue that the damages award granted to Mr. Henry by Hinkson C.J. were "wrongfully gained".

[966] My finding that Mr. Henry is liable to each plaintiff for damages for sexual assault means that it is more likely than not that he was their attacker and performed the sexual assaults upon them that they have each described, on a balance of probabilities. It does not mean that he committed the sexual offences that he was found to have committed in 1983 beyond a reasonable doubt.

[967] As I pointed out, I do not disagree with the findings of the Court of Appeal in 2010, nor am I finding them to be in error. I do not find that Mr. Henry's sentence

was “cut short”. He should not have been convicted and should not have spent any time in jail.

[968] Similarly, I do not find that Mr. Henry “wrongfully gained” the damages that he was awarded by Hinkson C.J. He was entitled to the damages that he received.

[969] I find that an award of punitive damages against Mr. Henry is not appropriate in this case.

E.F.’s Claim for Pecuniary Damages

[970] I find that E.F. has not proven that she is entitled to pecuniary damages for her past loss of income.

[971] The evidence is that E.F. resigned her position at ICBC because she wanted to avoid being fired. Whether she could have avoided being fired and placed on long-term disability (LTD), relies on my finding that ICBC had a responsibility to accommodate her disability in in 1984, by not giving her more than two options: resign or be fired. It also requires that I find she qualified for LTD based upon the provisions of the collective agreement in effect for the period between July 1, 2019 and July 1, 2022. I cannot assume that the collective agreement in force in 1982-1984 contains the same provisions regarding qualifying and receiving LTD benefits.

[972] I accept that E.F. suffered a loss of income that was caused by the defendant sexually assaulting her in 1982, leading to her inability to perform her work, but I find that the monetary claim is too speculative upon which to base an award of damages.

Conclusion

[973] I find that Mr. Henry is liable for sexually assaulting each of the plaintiffs. They are each awarded general and aggravated damages of $375,000.

[974] The plaintiffs are entitled to their costs. If the parties wish to speak to costs, a case management conference should be scheduled to discuss the process for the determination of costs.

"Gropper J."

Appendix "A"

Chronology

May 5, 1981: A.B. is sexually assaulted in her ground-floor apartment at #106 – 223 East 16th Avenue, in the Mount Pleasant neighbourhood of Vancouver

February 22, 1982: C.D. is sexually assaulted in her ground-floor apartment at #3 – 2267 West 7th Avenue, in the Kitsilano neighbourhood of Vancouver

March 10, 1982: E.F. is sexually assaulted in her ground-floor apartment at #103 – 2142 Carolina Street in the Mount Pleasant neighbourhood of Vancouver

March 19, 1982: G.H., is sexually assaulted in her ground-floor apartment at #104 - 8750 Osler Street, in the Marpole neighbourhood of Vancouver

May 12, 1982: police lineup (May 12 lineup)

May 12, 1982: Mr. Henry is interviewed by Detectives Harkema and Sims (May 12 interview)

June 8, 1982: I.J. is sexually assaulted in her basement suite at 433 West 17th Avenue in the Mount Pleasant neighborhood of Vancouver

July 31, 1982: Mr. Henry is arrested in 100 Mile House.

October 27-November 15, 1982: Preliminary Inquiry

November 20, 1982: Mr. Henry provides his alibi statement to Crown Counsel

February 28-March 15, 1983: Criminal Jury Trial in BC Supreme Court before Justice Bouck. Mr. Henry is convicted of 10 counts, including rape, attempted rape and indecent assault of 8 complainants

November 1983: Dangerous Offender Hearing, where Mr. Henry is sentenced to an indeterminate sentence as dangerous offender

October 27, 2010: BC Court of Appeal decision (2010 BCCA 462) finding that Mr. Henry was wrongfully convicted and acquitting him of all charges

August to December 2015 – *Charter* Damages Trial

June 8, 2016: BC Supreme Court (Hinkson C.J.) awards damages to Mr. Henry for breach of his *Charter* rights (2016 BCSC 1038)