

DATE: 20240730

SUPERIOR COURT OF JUSTICE

HEARD: December 11, 12, 13, 14, 15, 18, 19, 20 and 21, 2023

- [1] The main plaintiff in this action, Kelly Lynn Wicke (who will be referred to as the plaintiff or Ms. Wicke) brought this action seeking damages for an alleged sexual assault committed upon her by the defendant on May 1, 2002. The other named plaintiffs are Kelly's children who claim damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3 as am. ("*FLA*"). At the beginning of the trial the claim made by Kayden Wicke was withdrawn.
- [2] The Statement of Claim was issued on April 12, 2016, and a Statement of Defence was filed on May 16, 2016.
- [3] The plaintiff reported the sexual assault to the Stratford Police Service on May 4, 2002, but no charges were laid at that time. Mr. Hilderley was charged with sexual assault in 2019 but was acquitted following a trial in the Ontario Court of Justice. He denies the allegations.

THE EVIDENCE OF THE PLAINTIFFS

- [4] Kelly Wicke is currently 63 years of age. She has three children; Kody, 36 years old, Kassi, 31 years old and Kayden who is 30 years old. She was married to Kevin Wicke on May 31, 1986. They separated in September 1998 and divorced in 2000.
- [5] She attended South Perth Centennial School for her elementary school education where the defendant was a teacher and vice principal. In 1969, her sister Pam was hit by a truck and killed, a few years later her brother Karl was in a serious car accident as well. She was a child when these events occurred, and she received no counselling to help her deal with them.
- [6] She continued to high school but struggled with her studies and left before graduating. After she left school, the plaintiff went to Woodstock where she worked as a waitress.
- [7] She is an insulin dependant diabetic and has been diagnosed with an underactive thyroid for which she takes medication. She worked at FRAM on an automated machine until she suffered a shoulder injury due to the repetitive nature of the work that affected her range of motion to the point where she could not perform the job functions anymore. She was treated with physiotherapy and cortisone shots and performed modified duties.
- [8] Prior to her separation from her husband, Ms. Wicke and her family spent time at the racetrack where her former husband participated in drag races. They enjoyed a good social life, attended church and often had friends over to their home. Their son Kody played hockey, so they often attended his games.
- [9] After separation, Ms. Wicke testified that she and her former husband shared custody of the children. When the children were with their father on the weekend she often went out with friends.
- [10] By 2001, Kelly was divorced and had lost her job at FRAM. As a result, she was in receipt of Workers' Compensation Benefits. Through that programme, she was able to pay for her tuition at Fanshawe College to retrain for a different career. She first needed to complete her GED before going on to college. She was interested in obtaining a diploma as a law clerk.
- [11] In the spring or fall of 2001, (the evidence is conflicting on that point), Kelly ran into Mr. Hilderley quite by chance at a local grocery store. Ms. Wicke recalls that he recognized her despite the many years that had passed since they last saw each other. Kelly was now 41 years of age.
- [12] They had a pleasant conversation and Mr. Hilderley offered to tutor Ms. Wicke if she required assistance with her schoolwork. She had great respect for him at that time, as she did when she was a student. They spoke about her divorce. He provided her with his phone number and email address.

- [13] Over the course of the next few months, they communicated with each other by telephone and email. They next saw each other, again by chance, when the plaintiff attended at the Stratford General Hospital to visit a friend who was in palliative care in November 2001.
- [14] She was in the lobby of the hospital and the defendant, who volunteered there, saw her and came over to speak to her. After Ms. Wicke visited her friend, the defendant was still in the lobby, and he invited her for coffee. Ms. Wicke indicated that her children would be getting home soon so she needed to go home, and Mr. Hilderley invited himself to her home for a coffee. He did attend at her home, and they had coffee and casual conversation about school and her children and life in general. Eventually the conversation turned to the topic of Ms. Wicke's breast reduction surgery. According to her testimony, Mr. Hilderley asked if he could see her breasts and she said no. He left her home after asking if he could have a hug.
- [15] After Ms. Wicke began her studies in the Law Clerk Program at Fanshawe College in January 2002, she received quite a few calls from the defendant. She testified that he seemed genuinely concerned with her studies. He invited her out for coffee, but she had no time to meet him while juggling her studies and caring for her children.
- [16] On May 1, 2002, Mr. Hilderley called her and invited Ms. Wicke over for a coffee. She testified that she had not consumed any drugs that day except her thyroid medication, cholesterol medication and insulin. She arrived at his home between 1:30 to 1:45pm, but did not take particular notice of the time.
- [17] Ms. Wicke indicated that she was surprised that Mr. Hilderley's wife was not at home since she was retired as well. She planned to be home by 3:30pm when her children were due home from school.
- [18] After arriving at the defendant's home, Ms. Wicke was shown into the kitchen and offered coffee. She noted that there were two mugs on the counter. She wanted sweetener for her coffee because she did not use sugar. Mr. Hilderley did not have any, so Ms. Wicke went out to her van to see if she had some. When she returned, her coffee was already poured, and she put the milk and sweetener in it.
- [19] They moved into the living room, and she had a few sips of coffee, then he offered to take her on a tour of the house. They attended upstairs where the bedrooms were located. They then returned downstairs and had a conversation while sitting in the living room drinking coffee. They spoke about Mrs. Hilderley's cross-stitch work which was displayed in the home. The defendant wanted to show the plaintiff more of his wife's work in the family room downstairs. When she got up, Ms. Wicke felt "off" and unsteady. While downstairs, Mr. Hilderley offered her some wine, but Ms. Wicke indicated that she didn't like wine. They then returned to the living room.
- [20] Once she sat down in the living room, the plaintiff felt unwell. She recalls that the defendant asked her if she watched pornography. At that point, Ms. Wicke felt dizzy and as if she did not have control of her body, she thought she was going to pass out.

- [21] The defendant offered to warm up her coffee and she finished it. When she stood up to leave, she felt like she was going to fall. Ms. Wicke has no memory of walking to the front door or putting on her shoes. At that point, Mr. Hilderley asked her for a hug. He then began to kiss her aggressively.
- [22] According to the evidence of the plaintiff, she was wearing overalls, and the defendant reached under the bib portion and grabbed her right breast. After this, Ms. Wicke described in her evidence that she has only "flashes of memory". When she closed her eyes, she saw blackness. The next thing she remembers is that she was standing at the front door completely naked. Ms. Wicke remembers being told to go upstairs, although she doesn't remember going upstairs. She recalls standing in the doorway of his bedroom with Mr. Hilderley standing on the other side of the bed, pulling back a green comforter.
- [23] The plaintiff testified that her next memory was laying on the bed with the defendant on top of her and his penis inside her, having intercourse with her and she could not move. She remembers that he said, "you're so tight after having three kids".
- [24] Ms. Wicke has a vague memory of Mr. Hilderley telling her to get on her hands and knees and helping her. She was feeling pain. He then told her to get to the edge of the bed. Her next memory was of Mr. Hilderley telling her that her ass was tight. She cannot recall if he sexually assaulted her vaginally again, but she remembers him saying that he was "coming".
- [25] Ms. Wicke recalls the defendant telling her to get dressed and leave before his wife got home. She has no memory of going downstairs and picking up her clothes which were on the floor.
- [26] Ms. Wicke has no memory of driving home. She remembers telling her children that she needed to get groceries and she went to Food Basics and spoke to the manager and told him she had a severe headache. She does not remember, but was told that she took her children to Erie Footlong to get dinner.
- [27] The next thing she remembers was being at Kathy Bell's residence while she was getting ready for work the following day. She told Kathy that she went to someone's house for coffee and now only has flashes of memory. She did not tell Kathy everything that had happened, but remembers telling Kathy she was on his bed.
- [28] Ms. Wicke had driven her friend Ms. Bell on May 1, 2002, to get her car repaired and was supposed to pick her up from work and take her back to the repair shop, but she did not show up. Ms. Bell asked her why she had not picked her up. Ms. Bell advised her to get a urine test to see if she had been drugged.
- [29] On May 2, 2002, Ms. Wicke attended at St. Mary's Hospital in St. Mary's Ontario, where a urine screen was conducted which showed that she had benzodiazepines in her urine sample. The doctor who gave her this result suggested that she attend at Stratford Hospital to have a "rape kit" done. Ms. Wicke subsequently learned that the Stratford Hospital did not perform this type of examination and she was required to attend a hospital in Kitchener.

- [30] On May 3, 2002, the plaintiff attended at the Sexual Assault Treatment Centre (SATC) at St. Mary's Hospital in Kitchener Ontario where she was examined, samples of her blood and urine were collected and she was given medication to prevent an STD. She reported that at that time she was feeling depressed and angry. She felt humiliated.
- [31] According to Ms. Wicke, the defendant called her on May 2nd and 3rd, 2002 but she did not answer the phone. Eventually she spoke to him on May 3, 2002, after receiving the results of the initial urine screen which showed drugs in her urine. She asked him why he put drugs in her coffee and told him never to call her again and hung up the phone.
- [32] Subsequently, Ms. Wicke sought follow up treatment with her family doctor, but she did not receive any counselling or any other treatment recommendations. She confided in various family members and her ex-husband about what had happened, and he was very supportive.
- [33] She had left some pamphlets that were provided to her at the SATC on her kitchen table and her son Kody saw them and asked her about them. She told him some of what happened, and he left the house on his bike. She phoned the police because she suspected he was going to the defendant's house and was afraid of what he might do.
- [34] On May 4, 2002 she reported the incident to the Stratford Police and gave them a statement. She was advised that an investigation would be conducted.
- [35] Ms. Wicke testified that about a week after the incident, she contacted Mr. Hilderley's wife to tell her what he had done. In the spring of 2003, she was advised that the police would not lay charges.
- [36] The plaintiff testified that the next time that she saw the defendant was at a Swiss Chalet restaurant and at a grocery store and it scared her. On one occasion when she was working at the Arden Park Hotel front desk, Mr. Hilderley came in. He asked her how she was. She went to her manager's office because she was terrified.
- [37] Ms. Wicke testified that when she saw the defendant, it brought back the memories as if it just happened.
- [38] Since May 1, 2002, she has had trouble trusting men and she suffers from nightmares. She testified that the sexual assault impacted her schooling. Although she completed the Law Clerk Program and obtained her diploma, she did not enjoy the social aspect of school anymore. She tried to avoid people, and no longer enjoyed chatting and having coffee with her classmates.
- [39] As for her social life, she testified that she socializes with her adult children, but is wary of other people, particularly men.
- [40] When Ms. Wicke saw Mr. Hilderley at the Arden Park Hotel a second time, she applied for a Peace Bond pursuant to s. 810 of the *Criminal Code*, RSC 1985, c C-46 because she feared for her safety.

- [41] She did attend for counselling including group and individual counselling sessions.
- [42] After graduating from Fanshawe College in April 2003, Ms. Wicke worked as law clerk for Legate and Associates for about a year. She left her position because she lost her passion for the law. After Mr. Hilderley was not charged with any offence, she felt like the law let her down.
- [43] In approximately 2004 she began working for Combined Insurance Group where she worked until 2010. She has worked at various jobs since that time including at Arden Park Hotel and for The Brick.
- [44] Since the time of the assault, Ms. Wicke has had one romantic relationship which lasted about three months. She did not enjoy the intimacy of the relationship despite the fact that her partner was understanding. She continues to have trouble forming relationships with men out of fear.
- [45] In cross-examination, Ms. Wicke acknowledged that in her testimony at Mr. Hilderley's criminal trial on October 10, 2020, she said that she first ran into the defendant at Sobey's grocery store in September 2001, but she told the police when she first reported the sexual assault that the meeting was in May 2001.
- [46] An inconsistency in the evidence given by the plaintiff at trial and during her examination for discovery was put to her, namely that, when she testified about the defendant attending at her home for coffee after running into him at the hospital in November 2001 she did not mention, in her discovery evidence, that they had a discussion about her breast reduction surgery and the defendant asked to see her breasts. The plaintiff insisted that she was trying to testify truthfully and had forgotten to mention that discussion.
- [47] The plaintiff acknowledged that she has been hospitalized on three occasions for ketoacidosis. She also acknowledged that she has sought medical treatment in the past for dizziness.
- [48] During cross-examination, the complainant denied being the victim of childhood sexual abuse but acknowledged that her mood had been low for some time before the events of May 1, 2001.
- [49] The plaintiff was asked about inconsistencies in her evidence in relation to the time when she arrived at the defendant's home on May 1, 2020. At trial, she testified that it was at about 1:30p.m. to 1:45p.m. and at the examination for discovery she testified that she arrived at the defendant's home at around 2:00p.m.
- [50] In addition to the evidence given by Agreed Statement of Fact, Terri Martin was qualified to testify as an expert in Forensic Toxicology, which is the study of the absorption, distribution and elimination of drugs in the human body.
- [51] Ms. Martin analyzed the samples of blood and urine collected from Ms. Wicke during her examination at the Sexual Assault Treatment Centre at St. Mary's Hospital in Kitchener on

May 3, 2002. She testified that the urine sample detected temazepam and oxazepam in Ms. Wicke's urine. In her blood sample, there were trace amounts of temazepam and no oxazepam. Oxazepam is a metabolite of temazepam, but is also a drug prescribed on its own. Restoril is the brand name for temazepam.

- [52] Ms. Martin testified that temazepam is a benzodiazepine used for the treatment of insomnia. In her opinion the elimination of the drug from the system is dependant on various factors including individual metabolism and the dose consumed. She described drowsiness as an effect of taking temazepam, which is a central nervous system depressant. It causes sedation, reduced reaction time and a reduction in the ability to process information quickly.
- [53] Ms. Martin testified that the drug is absorbed quickly and within 30 minutes the effects can be felt, but peak effect occurs within two to three hours after ingestion. In her experience, a person can drive after taking this drug. As for adverse effects, Ms. Martin indicated that confusion is one, headache, dizziness, nausea, as well as ataxia or loss of balance, and clumsiness are also adverse effects.
- [54] Sergeant Paul Reece, a retired police officer with the Stratford Police Service was called as a witness for the plaintiff. He was the officer who investigated the criminal complaint made by Ms. Wicke. He became involved in the investigation on May 6, 2002.
- [55] He reviewed the statement provided by Ms. Wicke to Constable Jackson on May 4, 2002, and obtained the sexual assault kit that was conducted by the SATC. Sgt. Reece testified that he was provided with information during the course of the investigation that benzodiazepines had been found in the urine sample provided by the plaintiff.
- [56] Sgt. Reece was made aware of a report taken by Constable Jordan relating to an incident in October 2001 when Ms. Wicke's son attended at Mr. Hilderley's home.
- [57] The investigation was ongoing when Sgt. Reece contacted Mr. Hilderley on January 8, 2003, to arrange an interview. Although the original audio recording of the interview conducted has been lost, Sgt. Reece had notes about it and a report, and he also had a recollection of the investigation. On January 9, 2003, the defendant attended at the Stratford Police Service. He was told that the police were investigating an allegation of sexual assault, he was cautioned, advised of his rights to counsel and the availability of Legal Aid. Mr. Hilderley was told that he was not under arrest, and he declined to contact counsel.
- [58] An interview was conducted which lasted about three hours. Mr. Hilderley told the officer he first met Ms. Wicke when she was one of his students and they had run into each other recently and he offered to assist her with her schoolwork. He felt that the plaintiff had a crush on him. The defendant told the officer that the plaintiff contacted him on May 1st, 2002, and was quite proud of her marks in school and invited him over to her home for coffee. He said that he seldom drank coffee, and that he was suffering from the flu and frozen shoulder, and he invited her to his home.

- [59] The defendant gave the officer details of the events that occurred that day, including that Ms. Wicke showed interest in his home so he gave her a tour, which included his wine collection because she said that she liked wine. Before leaving, Ms. Wicke asked if she could use the bathroom and so she went upstairs, and he went downstairs to get himself another ginger ale. When he returned, he observed Ms. Wicke standing on the upstairs landing dressed only in underwear and socks. The defendant indicated he was in an utter state of shock and disbelief.
- [60] He testified that the defendant described Ms. Wicke performing a strip tease for him. During that interview, the defendant denied sexually assaulting Ms. Wicke and denied administering any noxious substance to her. He did, however, acknowledge engaging in sexual activity with her. He indicated that she performed fellatio on him in the front entranceway of the residence. He told Sgt. Reece that Ms. Wicke was naked, and he was clothed except that his pants and underwear were pulled down to his ankles. The defendant told the officer that he ejaculated, and Ms. Wicke rubbed the ejaculate on her breasts and genitals.
- [61] Mr. Hilderley denied using force on Ms. Wicke and insisted that she was the aggressor and initiated the sexual encounter. Mr. Hilderley told Sgt. Reece that it was the first time he had oral sex and he should not have agreed to it.
- [62] Sgt. Reece told Mr. Hilderley that Ms. Wicke believed that he had drugged her because of the way she felt, and Mr. Hilderley was adamant that she had consumed nothing at his home.
- [63] Sgt. Reece indicated that the version of events given by Mr. Hilderley was so vastly different from the version given by Ms. Wicke that it is something he has never forgotten. After the interview was concluded, Sgt. Reece received a call from Mr. Hilderley who advised him that years earlier he had been prescribed Restoril/temazepam for a transatlantic flight. About a week later, Mr. Hilderley contacted him again and wanted to be re-interviewed.
- [64] Sgt. Reece testified that Mr. Hilderley did not tell him that he was impotent. Sgt. Reece confirmed that no charges were laid at that time. He also confirmed in cross-examination that the sexual assault kit that was collected was negative for DNA evidence.
- [65] Kassi Wicke, the daughter of Kelly Wicke testified. She described her mother as a very loving person who always did things for her. She described the relationship between her parents as better after their divorce.
- [66] Kassi Wicke described how her mother's paranoia around her increased over time, and she expressed a fear of Kassi being sexually assaulted. She described how the assault on her mother has affected her mood and her social life. She does not go out. Her mother just socializes with her children.

- [67] Kassi Wicke testified that her mother lacks confidence and struggles with self-worth. Kassi has a Masters of Social Work and spoke to her mother about getting counselling and has tried engaging with her about the assault but her mother has difficulty talking about it.
- [68] Kody Wicke who is Kelly Wicke's oldest child testified as well. He testified that when he was involved in sports as a child his mother would often watch him play. He described her as happy. He became aware of the sexual assault on his mother a few days after it happened. He testified that he came across some documents on a table that were troubling, and he confronted his mother. She told him that she had been raped and who was responsible.
- [69] Kody confirmed that he attended at the defendant's home and threatened to hurt him if he ever went near his mother again. He was then picked up by the police who took him home.
- [70] As to any changes in her personality, Kody described his mother as a shell of the person she used to be.
- [71] Katherine Bell-Young a friend of Ms. Wicke's testified as well. She first met Ms. Wicke when she was looking for housing during her divorce and they became friends.
- [72] Ms. Bell-Young testified that she made arrangements for Kelly to pick her up from work on May 1, 2020, and take her to pick up her car from the mechanic. Ms. Wicke did not show up at 4:00p.m. as arranged. Ms. Bell-Young did see Ms. Wicke driving that afternoon and yelled at her but received no response. She tried to call the plaintiff when she got home but was told by one of the children that she was asleep.
- [73] Ms. Wicke attended at Ms. Bell-Young's residence the following day and did not look well. The plaintiff told her that she had trouble remembering the events of the day before and did not remember how she got home. She remembered having coffee, then being woken up and told to get dressed.
- [74] Ms. Bell-Young asked Ms. Wicke if she thought she had intercourse. She said yes but she did not remember it, so Ms. Bell-Young advised her to go to the hospital and get checked out.
- [75] Ms. Bell-Young described the plaintiff as feeling ashamed, abused, and hurt.
- [76] Jessy Hawley, an accountant testified as an expert qualified to give opinion evidence in relation to past and future economic loss.
- [77] The calculations conducted by Ms. Hawley were based on the assumption that Ms. Wicke had just begun the Law Clerk Program when these events occurred, but she intended to pursue a career as a paralegal which would have required further education.
- [78] Ms. Hawley calculated the plaintiff's past lost income based on potential gross income as a paralegal versus Ms. Wicke's actual gross income to be \$594,745, as of March 2022. Her future economic losses were calculated at \$145,000.

- [79] During cross-examination, Ms. Hawley was asked about an alternative calculation prepared by the defence which started with the actual income she earned at the time of these events and resulted in a calculation of a loss of income of \$33,390 and a future loss of income of \$14,298.
- [80] Ms. Hawley's calculations relied on data from Statics Canada about the average income for a person working as a paralegal in Canada. This figure included wages from large cities and other provinces. There was no evidence provided as to the average wage for a law clerk or paralegal in Stratford, Ontario during that time.
- [81] Dr. Charles Gatfield, Ms. Wicke's primary care physician testified. He has been her physician since about 2001. He confirmed that Ms. Wicke was prescribed Lorezapam in 1995 and 1996 and was also prescribed Ciprolex on two occasions as an antidepressant and to treat anxiety.
- [82] Dr. Monique Costa El-Hage testified as a Psychologist and was qualified to give opinion evidence on psychological diagnoses, the functional impact of psychological conditions, prognoses and treatment recommendations. She conducted an assessment of Ms. Wicke.
- [83] In forming her opinion, she reviewed Ms. Wicke's clinical notes and medical records and spoke to her on two occasions, once in person and once by videoconference.
- [84] Dr. Costa El-Hage testified that in her opinion Ms. Wicke suffered two significant traumas in her life involving the death of her sister and her father for which she did not receive any treatment. Following the sexual assault of May 1, 2002, Ms. Wicke has suffered severe levels of depression and anxiety as well as trauma symptomology.
- [85] Dr. Costa El-Hage was of the opinion that despite those earlier traumas and the emotional and psychological abuse she suffered at the hands of her former husband, that Ms. Wicke presented with a level of resiliency and functionality and was not impaired by those unresolved traumas.
- [86] In her opinion, the sexual assault has resulted in Ms. Wicke developing Post-Traumatic Stress Disorder as well as an exacerbation of symptoms of Major Depressive Disorder. Ms. Wicke suffers from cognitive difficulties, short-term memory impairment, unhappiness, low self-worth, and a sense of detachment. This could result in difficulties in establishing and maintaining relationships with others.
- [87] Dr. Costa El-Hage testified that the prognosis is guarded, early intervention is critical which did not occur in this case. There is very limited treatment which would require a prolonged course of intervention.

THE EVIDENCE OF THE DEFENDANT

- [88] Mr. Hilderley has a very different version of the events that occurred on May 1, 2002.

- [89] Mr. Hilderley is 78 years old. He was a teacher and vice principal at South Perth Centennial School until his retirement from teaching in 1998. He testified that he does not specifically recall Ms. Wicke as his student, but he is aware that she attended South Perth Centennial School. His wife was also a teacher. She passed away in 2021.
- [90] According to his evidence, after she graduated from elementary school, the next time he saw the plaintiff was when she was 16 years old and attended at his home one day, uninvited and without any notice, to advise him that she had gotten her driver's licence. She attended at his home on another occasion as well.
- [91] The defendant testified that he volunteered at Stratford General Hospital in 2001 and the next time he saw Ms. Wicke was at the hospital when he was volunteering, and she was there to visit a friend. According to his evidence, Ms. Wicke "appeared before [him]" and told him her name and that she was attending Conestoga College. He denied attending at the plaintiff's residence for coffee and denied that they exchanged phone numbers.
- [92] Mr. Hilderley testified that Ms. Wicke called him on May 1, 2002, and wanted to show him some of her assignments and talk to him about how well she was doing in school. She invited him to her home for coffee. He indicated that he was not feeling well since he was suffering from "frozen shoulder" a condition which made it difficult for him to move his left shoulder and caused him a great deal of pain. The defendant testified that he was getting physiotherapy for his shoulder because he could not use his left arm at all.
- [93] Excerpts from the defendant's medical records which were filed as exhibits reflect that on February 11, 2002, he attended at his doctor's office complaining of discomfort in his left shoulder. A report from the Stratford Physiotherapy Centre dated March 21, 2002, reflects that he was suffering from left shoulder capsulitis with secondary supra, infraspinatus subscapular tendon impingement with occasional median nerve impingement. This condition appeared to have resolved by June 6, 2002, when he was discharged from physiotherapy.
- [94] According to the defendant, during the conversation with Kelly which took place on May 1, 2002, at approximately 1:45p.m. to 2:00p.m. she suggested that she attend at his home. She arrived at his home a short time later, at about 2:15p.m. or 2:20p.m. He was home alone as his wife was supply teaching that day. When Ms. Wicke arrived, the defendant showed her into the kitchen and offered her a drink. The plaintiff asked for coffee, and he told her she would have to make her own instant coffee since he never drank coffee and did not know how to make it.
- [95] According to the defendant, he told Ms. Wicke that he could not even open a can of ginger ale due to his injury and she opened one for him.
- [96] Initially, they sat in the living room. He then took her on a tour of his home and showed her an area in the basement where he had a small wine collection. He offered her some wine which she accepted. They drank that in the living room while they "chatted". According to the defendant, the plaintiff began to talk about her husband and their sex life.

She also told him about a man she met when she took her children to the east coast for a vacation.

- [97] Mr. Hilderley testified that he did not care for the conversation they were having and told her it was time for her to go. Kelly finished her coffee and took her mug to the kitchen and asked if she could use the washroom. He testified that when Ms. Wicke asked to use the restroom, he went downstairs to put the empty ginger ale can into the recycling bin. When he returned to the main floor, as he came up the stairs, he did not observe Ms. Wicke by the front door where he expected her to be. He looked around and saw Ms. Wicke at the top of the stairs naked except for a pair of socks.
- [98] The defendant stated that he was shocked by this. He said that she made a comment about the socks she was wearing because they were diabetic socks. Mr. Hilderley indicated that he told her to get dressed and get out. He said that she then "displayed herself" to him and bent over and swatted her own "behind" while saying "see how tight that is".
- [99] According to Mr. Hilderley, Ms. Wicke sat on one of the steps and opened her legs and made a comment about being "tight" even after having kids. The defendant wanted her to leave so he was going to go get her clothes and throw them out the door. He was afraid his wife would come home at any moment.
- [100] The defendant testified that he took a step towards Ms. Wicke and as he did so he hit his left arm on the banister and experienced excruciating pain. He said that he must have looked up and the next thing he knew she was kneeling in front of him and she pulled down his pants and underwear and put his penis into her mouth.
- [101] She was unsuccessful in causing him to have an erection, so she spit on his penis at least twice. Mr. Hilderley said that he could not move because his pants and underwear were still down at his ankles. According to the defendant, she continued her efforts for two to three minutes, but finally gave up because he could not achieve an erection. Ms. Wicke then went upstairs, and he pulled up his briefs and his pants.
- [102] According to the defendant, Ms. Wicke came out of the master bedroom wearing a matching bra and underwear and said something about always wearing matching bra and underwear sets before disappearing and coming back out fully clothed. He then told her to get out and that he did not want to see her again.
- [103] According to Mr. Hilderley he found a puddle of saliva on the linoleum floor after the plaintiff left his home. He then obtained a fresh pair of briefs and put those on which he was able to do despite his frozen shoulder, threw away the briefs he had been wearing and cleaned up the saliva.
- [104] According to Mr. Hilderley, he did not ejaculate during this encounter. He described himself as an asexual person who is not able to have sex and has never had sex. He denied sexually assaulting Ms. Wicke. He denied penetrating her vaginally or anally with his penis and said that they did not kiss. He also denied administering any substance to Ms. Wicke that caused her to be dizzy.

- [105] Mr. Hilderley did not tell his wife what had happened when she arrived home at about 3:30p.m. According to his evidence, he had no contact with the plaintiff after that day.
- [106] In mid-October 2002 someone knocked on the front door of his home. His wife answered the door. There were two young men at his door. He later found out that one of the young men was Ms. Wicke's son. He denied that the young man accused him of raping his mother. According to the defendant, the young man was upset, and threatened him. He called the police.
- [107] During his testimony, when he was asked if he was ever contacted by the police, the defendant testified that he had a "chat" with Sergeant Reece in January 2003. He testified that he was advised by the officer that an allegation was made against him, and he was asked to attend at the Stratford Police Service. He described the meeting with Sgt. Reece as "just two guys discussing something". He testified that he described what happened when Kelly attended at his home but denied that he told the officer that he ejaculated. He stated that he did not tell Sgt. Reece that he was asexual or impotent.
- [108] According to Mr. Hilderley's evidence, Ms. Wicke sexually assaulted him, and he described her as a sexual predator.
- [109] The defendant testified that he attended at River Gardens Retirement Residence about five or six years ago to see what it was like, because he was thinking of moving to a retirement home, and not because he wanted to see Ms. Wicke. When he entered the building, he saw a woman at the front desk who could have been Ms. Wicke so he asked her what her name was. He denied that he knew she worked there. He did not remember seeing her at a restaurant or grocery store later.
- [110] In cross-examination, Mr. Hilderley denied that he told Sgt. Reece during the interview that he ejaculated. He acknowledged that there are no medical records to support his position that he is asexual as he never talked to his doctor about his condition. He said he never spoke to anyone about his condition and only felt comfortable speaking about it for the first time during his examination in chief.
- [111] He was confronted with the evidence he gave under oath at his examination for discovery on July 17, 2018, when he testified that he has had a lifelong problem with impotence and that his medical records would support this. In response, he insisted that asexuality and impotence are interchangeable terms and testified that he had talked to a doctor in the 60's about his condition.
- [112] The evidence given by the defendant at his criminal trial for sexually assaulting Ms. Wicke differed from the evidence given during this trial. Before Justice McKerlie in the Ontario Court of Justice on October 30, 2020, he testified that he spoke to his doctor about taking Viagra to treat his erectile dysfunction. When asked in cross-examination about the inconsistency in his testimony, the defendant said that maybe he misunderstood the question.

- [113] According to Mr. Hilderley, he did not tell his wife about what happened with Ms. Wicke because it would reveal his failure to protect the home by letting her into their house. He agreed that he was aware that Ms. Wicke had called his wife about a week after this event occurred, but he did not tell his wife what happened.
- [114] During his cross-examination, the defendant acknowledged that he had been prescribed Restoril (temazepam) by his doctor when he travelled to Europe. He could not remember whether it was in his medicine cabinet in 2002 or whether he had left the prescription in Europe.
- [115] When asked during cross-examination about being interviewed by Sgt. Reece, Mr. Hilderley insisted that he was not "interviewed" by the police, they only had a "chat". He was critical of the police investigation and said Sgt. Reece "should have settled this".
- [116] He denied sexually assaulting Ms. Wicke, giving her temazepam or destroying evidence afterwards.
- [117] The defence also called Dr. Joel Mayer, a Forensic Toxicologist who testified as an expert in pharmacology and toxicology, the behavioural effects of alcohol, drugs and toxins and their methods of analysis. He testified that temazepam, is a benzodiazepine which is used to treat insomnia. Oxazepam is used to treat anxiety.
- [118] According to Dr. Mayer within one to two hours of taking temazepam it would get absorbed to produce the maximum blood concentration. If the drug is dissolved in liquid the rate of absorption would be faster and the onset of its effects would be faster.
- [119] Dr. Mayer opined that if Ms. Wicke had been given temazepam she would experience psycho-motor impairment which would persist for some time. The strong effects of the drug would persist for one to three hours. According to Dr. Mayer, the adverse effects of temazepam include dizziness and difficulty with balance, ataxia, which is an inability to control movements in a controlled fashion and serious impairment of motor movements.
- [120] In the opinion of Dr. Mayer, based on a finding of trace amounts of temazepam in Ms. Wicke's blood and urine collected on May 3, 2002 (as per the Agreed Statement of Facts) she would likely have ingested the drug between April 30, 2002, at 22:40 hours and May 3, 2002 at 00:40 hours, and accordingly the interaction with Mr. Hilderley falls within that time frame.
- [121] Dr. Mayer agreed that if someone ingests temazepam, but sleep is not desired then they are likely to experience the effects and side effects of the drug including drowsiness, headaches and dizziness. The drug manufacturer warns against the use of temazepam when a full night's sleep is not possible.

AGREED STATEMENT OF FACTS

- [122] During the course of the trial, the parties agreed to certain facts. The parties agreed that the documents contained in the Medical Briefs filed as exhibits # 4a and #4b are authentic

copies of the originals and are admitted for the truth of their contents except for statements that might be recorded in those records as part of a case history.

- [123] The parties agreed that the documents in the Education and Employment Brief filed as exhibit # 2 contains authentic copies of the originals and are admitted for the truth of their contents.
- [124] An Agreed Statement of Facts was filed as exhibit #11 relating to the evidence of Terri Martin who was employed by the Centre of Forensic Sciences ("CFS") in 2002. She testified at Mr. Hilderley's criminal trial on October 22, 2020.
- [125] Ms. Martin analyzed the blood and urine samples collected by St. Mary's Hospital on May 3, 2002, at 3:40p.m. and determined that the analysis of the blood sample detected traces of temazepam, and the analysis of the urine sample detected temazepam and oxazepam.
- [126] The term "traces" signifies an amount below the limit for quantification of the drug but above the limit of detection of it.
- [127] Temazepam is a drug typically prescribed as a sleep aid for insomnia and oxazepam is typically prescribed as an anti-anxiety medication, but it also a metabolite of temazepam. Both substances are benzodiazepines. Both drugs can cause a loss of balance and reduced co-ordination. Adverse effects include dizziness and nausea.
- [128] Ms. Martin could not determine whether the presence of oxazepam in the urine sample was the result of metabolism of temazepam or the ingestion of oxazepam.
- [129] The onset of the effects of temazepam is generally within 30 minutes to an hour of ingestion. The half life for temazepam is generally between 3 to 13 hours. Based on her calculations, Ms. Martin calculated that the temazepam had been ingested no earlier than 65 hours before the sample was collected.

THE POSITIONS OF THE PARTIES

- [130] The plaintiff submits that they have proven their case on a balance of probabilities on the basis of all the evidence called. They ask the court to reject the version of events testified to by the defence as a fabrication.
- [131] The plaintiff argues that Ms. Wicke's version of events was not challenged on cross-examination and is supported by other significant evidence and accordingly the liability of the defendant has been established.
- [132] The plaintiff asks the court to accept that Ms. Wicke was drugged by the defendant with temazepam which resulted in her experiencing confusion and dizziness and in that condition, she was sexually assaulted by the defendant.

- [133] As for the issue of damages, the plaintiff submits that sexual assault is an inherently damaging and degrading act and seeks non-pecuniary damages in the range of \$200,000 to \$250,000.
- [134] As for punitive damages, the plaintiff maintains that the wrongful act in this case is significantly aggravated because the defendant used his position of trust with the plaintiff to commit a significant act of violence against her.
- [135] Further, the plaintiff submits that the defendant lied under oath on multiple occasions, and he should be penalized with punitive damages of \$50,000.
- [136] In relation to economic losses, the plaintiff recognizes that the evidence of Ms. Hawley utilizes figures that are somewhat inflated in arriving at a calculation and accordingly, she has revised her position and is now seeking \$300,000 for past economic losses and \$75,000 for future economic loss.
- [137] The plaintiff also seeks approximately \$9,000 to compensate for the anticipated cost of counselling required by her in accordance with the evidence of Dr. Costa El-Hage and between \$8,000 to \$15,000 for the damage claim under the *FLA* for each of the children.
- [138] The defendant submits that that the court should find the evidence of the plaintiff is implausible and unbelievable. The defendant argues that it would have been impossible for him, given his injury and given the short window of time available to administer temazepam to the plaintiff and commit a sexual assault upon her.
- [139] The defendant further submits that the physical effects described by Ms. Wicke including amnesia and loss of coordination are highly unusual adverse effects of ingestion of temazepam according to the expert evidence and it would have been impossible for the plaintiff to have been so significantly impaired and then shortly after leaving Mr. Hilderley's house conduct herself in an ordinary way by driving home and grocery shopping.
- [140] The defendant denies liability.
- [141] If the court finds otherwise, the defendant argues that the plaintiff has failed to mitigate her damages and has an obligation to do so. She has not engaged in significant counselling despite a recommendation that she do so by her family doctor immediately after the alleged assault.
- [142] Had she sought out treatment and counselling at an earlier opportunity, the defence suggests that the effects of the sexual assault might have been mitigated.
- [143] The defendant submits that if the court finds him liable for non-pecuniary damages, the appropriate amount for an award would be in the range of \$175,000 and punitive damages in the amount of \$25,000.

- [144] The defendant further argues that any additional damages for infliction of emotional distress should be in the amount of \$5,000 to \$10,000.
- [145] As it relates to the *FLA* claims, the defendant argues that there is no evidence before the court of loss of care, guidance or companionship, and in any event, those claims should be limited to \$7,500 each.

APPLICABLE LAW AND ANALYSIS

A. LIABILITY

- [146] The first issue to be determined is liability. I must determine on a balance of probabilities whether the defendant committed a sexual assault on the plaintiff.
- [147] In making this determination, I have considered all of the evidence. The plaintiff, Kelly Wicke gave her evidence in a clear, logical and straightforward manner. Her evidence was compelling. She testified to having been the victim of a serious sexual assault perpetrated by a person who was formerly in a position of trust towards her and who she held in high esteem.
- [148] Ms. Wicke testified to the events that occurred on May 1, 2002, and despite some minor inconsistencies in her evidence, it was clear, and it was uncontested. Importantly, Mr. Hilderley's version of events was not put to her in cross-examination.
- [149] I accept her evidence. I find that the evidence establishes on a balance of probabilities that on May 1, 2002, Ms. Wicke attended at the residence of the defendant for coffee, and she was administered temazepam without her knowledge and was sexually assaulted by the defendant.
- [150] There was also evidence that confirmed the testimony of Ms. Wicke. Most importantly, the drug temazepam was found in Ms. Wicke's urine when it was analyzed on May 2, 2002, and in her blood and urine on May 3, 2002, when a further sample was taken at the SATC. This is a prescription drug that was never prescribed to the plaintiff, but by his own admission, had been prescribed to the defendant.
- [151] The effects of that drug, including dizziness, headache, lack of coordinated movement and some memory loss are consistent with the evidence of the plaintiff about how she felt when she was at the defendant's residence and afterwards.
- [152] Ms. Bell-Young confirms some of the evidence given by the plaintiff about how she appeared the following day and in fact she urged her to seek out medical treatment.
- [153] In contrast to the evidence of the plaintiff, the defendant, Mr. Hilderley was a difficult, arrogant and argumentative witness. He was more interested in insulting and denigrating the plaintiff in hopes of making her seem less credible than in answering the questions posed to him during cross-examination. In fact, Mr. Hilderley repeatedly insisted on discussing Ms. Wicke's sexual history.

- [154] I do not accept the evidence of the defendant. His version of the events is not believable. There were significant inconsistencies in his testimony at trial, during examination for discovery and at his criminal trial which causes the court to question the credibility and reliability of his evidence.
- [155] When initially confronted by Sgt. Reece with the allegation of sexual assault in January 2003, the defendant admitted to sexual activity with the plaintiff, but said that she was the one who initiated the sexual activity by performing fellatio on him. He gave details. He said that he ejaculated, and that Ms. Wicke rubbed the ejaculate on her breasts and genitals.
- [156] At his trial for sexual assault in 2020, Mr. Hilderley said that he was impotent and could not achieve an erection and denied that he ejaculated. At this trial, he testified that he was asexual and at the time of this incident he was essentially disabled by his frozen shoulder. He claimed that he had been sexually assaulted by Ms. Wicke.
- [157] In assessing his evidence, I also take into account what is referred to as the rule in *Browne v. Dunne* 1983 CanLII 65 (FOREP) If, during the course of a trial a party intends to impeach an opposing witness, then that different version of the events should be put to the witness in cross-examination to give them an opportunity to comment upon it. In this case, Mr. Hilderley's version of the events was not put to Ms. Wicke in cross-examination. Ms. Wicke's version of the events was uncontested in cross-examination.
- [158] Despite his failure to lay criminal charges at the time of the incident, and the very slow pace of the criminal investigation, Sgt. Reece, who had a duty to record events in his police reports made detailed notes of his interview with the defendant. Where the evidence of the defendant conflicts with the evidence of Sgt. Reece, I accept the evidence of Sgt. Reece.
- [159] The defendant's evidence about what occurred on May 1, 2002, has evolved over time in an effort to conform with the other evidence. I do not accept that he was asexual, or unable physically to achieve an erection (which is not supported by any medical evidence) or that his "frozen shoulder" left him so physically disabled that he would not have been able to carry out a sexual assault upon the plaintiff.
- [160] On the basis of the totality of the evidence, I find that on May 1, 2002, the defendant invited the plaintiff to his residence while his wife was at work and administered temazepam to her to make her compliant and thereafter sexually assaulted her by forcing vaginal intercourse with her.
- [161] Accordingly, liability has been established. Mr. Hilderley committed the tort of sexual assault.

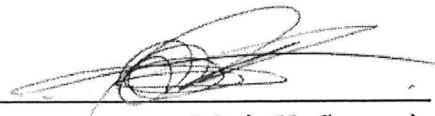
B. DAMAGES

- [162] The plaintiff Kelly Wicke seeks non-pecuniary damages for pain and suffering, past and future pecuniary damages, special damages, damages for intentional infliction of mental suffering, aggravated damages, and punitive and exemplary damages. The other plaintiffs each seek damages pursuant to the *FLA*.

- [163] Non-pecuniary damages in civil sexual battery or assault cases are meant to “provide solace for the victim’s pain and suffering and loss of enjoyment of life, to vindicate the victim’s dignity and personal autonomy and to recognize the humiliating and degrading nature of the wrongful acts” see *Zando v. Ali* 2018 ONCA 680 at para. 12.
- [164] In *Zando v. Ali* at para. 13 the Court of Appeal set out the following factors for assessing non-pecuniary damages including:
- (i) the circumstances of the victim at the time of the events, including the victim’s age and vulnerability; (ii) the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were; (iii) the circumstances of the defendant, including age and whether he or she was in a position of trust; and (iv) the consequences for the victim of the wrongful behaviour including ongoing psychological injuries (*B.M.G.*, at para. 134, citing *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, at para. 89).
- [165] In *Zando v. Ali* at para. 24, the Court of Appeal upheld the trial judge’s decision to impose punitive damages in the circumstances of that case considering that the defendant’s conduct was morally reprehensible, and should be punished and denounced, and because he had not been punished criminally.
- [166] In *McCabe v. Roman Catholic Episcopal Corporation* 2019 ONCA 213 at para. 39, the Court of Appeal states that “punitive damages are meant to punish wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.”
- [167] The court heard evidence about the negative effects that this sexual assault has had on the plaintiff. She had gone back to school as an adult and was excited to start her career as a law clerk and intended to continue and earn a degree as a paralegal. According to Ms. Wicke, after the sexual assault, she became frustrated with the pace of the police investigation and when they failed to lay charges, she became disillusioned with the justice system, and after successfully obtaining her Law Clerk diploma, with very high marks and securing employment, she quit after one year.
- [168] Ms. Wicke continues to suffer the effects of this act which impacts upon her personal dignity and self-worth. She has withdrawn socially. Her children describe her as a different person now. She has been diagnosed with PTSD and an exacerbation of Major Depressive Disorder.
- [169] The plaintiff testified that she is not interested in intimacy with other people and is fearful of being hurt. Her past traumas made her more vulnerable. The consequences of the sexual assault appear to be long lasting.
- [170] In fixing the amount of damages for non-pecuniary loss the court will consider the factors outlined in *Zando v. Ali*. In that case, the Court upheld an award of damages of \$175,000 for a single incident of sexual assault.

- [171] In this case, when I consider the circumstances of the plaintiff at the time of these events, I find that she was particularly vulnerable. She had just gone through a divorce and was attempting to improve her situation in life by retraining for a new career. The defendant offered to assist her with that and betrayed her trust.
- [172] I have considered that this was a single act of sexual assault, however, it was particularly violent, degrading and invasive and involved the administration of a drug to the plaintiff to ensure she would be unable to resist.
- [173] The defendant is an older adult, who was previously in a position of trust with the plaintiff and a person for whom she had a high regard. The nature of this relationship continued and in fact, Ms. Wicke was proud of her marks in school and wanted to share that with the defendant.
- [174] When I consider the consequence of the conduct, it is clear that Ms. Wicke continues to suffer the adverse effects of the sexual assault. She continues to suffer from insecurities and fears.
- [175] In *C.O. v. Williamson* 2020 ONSC 3874 at para. 170, Salmers J. relied on *Zando v. Ali* and found that the appropriate range of general and aggravated damages for a single incident of sexual assault is in the range of \$144,000 to \$290,000.
- [176] In this case, based on the nature of the sexual assault, in my view an appropriate award for non-pecuniary and aggravated damages is \$200,000.
- [177] As for punitive damages, I agree that the conduct of the defendant was morally reprehensible and should be denounced. He was not punished criminally which is an appropriate factor for this court to consider. Further, I take into account the manner in which the defendant denigrated the plaintiff at every opportunity in an attempt to further victimize her to be a factor to be taken into account in determining that punitive damages are appropriate.
- [178] An appropriate award of punitive damages is in the amount of \$50,000.
- [179] As for damages for economic losses both past and future, I do have some difficulty with the calculations presented by Ms. Hawley. Although the plaintiff stopped working as a law clerk because she became disillusioned with the legal system, she has been gainfully employed since then. It is difficult to determine whether she would have continued her education and become a licenced paralegal. I take judicial notice of the fact that paralegals were not licenced by the Law Society of Ontario until 2008.
- [180] I prefer the alternative calculation of loss of past and future income provided by the defence in this regard. Accordingly, there will be an award for loss of income in the amount of \$33,390 for past losses and \$14,298 for future loss of income.

- [181] As for the alleged failure of the plaintiff to mitigate her loss, the burden is on the defendant to establish that the plaintiff could have reduced her damages by mitigating. It is alleged that she failed to mitigate by not pursuing counselling.
- [182] While counselling can assist with dealing with the consequences of abuse, it is not necessarily that simple a matter. The plaintiff did seek out counselling, but she felt ashamed and had difficulty expressing what happened since it brought up negative feelings. People react differently to trauma. It is uncontested that Ms. Wicke suffers from PTSD. I am not satisfied that it has been proven that the plaintiff failed to mitigate her damages.
- [183] As for the *FLA* claims, it is clear from the evidence of Kassi and Kody Wicke that following the assault there was a change in their mother. She was no longer the active and social person she had been. She was withdrawn and prefers to stay home. In my view, it is appropriate to award to each the amount of \$5,000.
- [184] The parties agree that pre-judgment interest is due and accordingly, I will award pre-judgment interest at a rate of 5% on the award for non-pecuniary loss in accordance with r. 53.10 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194. Post-judgment interest is awarded in accordance with s. 129 of the *Courts of Justice Act*, R.S.O. c. C.43 as am.
- [185] In relation to the issue of costs, although the plaintiff is seeking costs, no submissions were made as to costs at trial. Accordingly, the parties may make submissions on costs in writing. The plaintiff shall file written submissions not exceeding five pages in length exclusive of a bill of costs within 21 days of the date of this order. The defendant shall file his submissions within 21 days of being served with the plaintiff's submissions and his submissions likewise shall not exceed five pages in length exclusive of a bill of costs.



Maria V. Carroccia
Justice

CITATION: Wicke et al. v. Hilderley, 2024 ONSC 4265
COURT FILE NO.: Stratford File No. 16-2727
DATE: 20240730

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KELLY LYNN WICKE, KODY ANDREW WICKE,
KASSI RAE WICKE and KAYDEN JACOB WICKE

Plaintiffs

– and –

ROGER HILDERLEY

Defendant

REASONS FOR JUDGMENT

CARROCCIA J,

Released: July 30, 2024