STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

DAVID MEEHAN

v.

STATE OF NEW HAMPSHIRE,
DIVISION OF HEALTH AND HUMAN SERVICES

217-2020-CV-00026
(This Order Applies Only To The Individual Meehan Case)

ORDER

I. Preface

This order addresses the jury's finding that its verdict of $18 million in compensatory damages, and $20 million in enhanced compensatory damages, was grounded on one "incident." Pursuant to RSA 541-B:14, I, a plaintiff cannot recover more than $475,000 from the State or its agencies for injuries arising from a "single incident." Therefore, if the statutory damages cap were applied to the jury's verdict, the judgment would be for $475,000, or just 1/80th, or 1.25%, of the total verdict.

Yet, plaintiff David Meehan's (uncontradicted) testimony was that he was violently sexually assaulted on many different days, by different individuals, in different locations, under different circumstances, over the course of many months, with intervening events such as multi-day furloughs and AWOLs from YDC. He also testified, that he was beaten to the point of

hospitalization on one occasion, beaten and bruised on other occasions, raped at gunpoint in a staff member's home, otherwise subjected to outrageous emotional abuse, and at times denied access to toilet facilities. The cognitive dissonance between a $38 million verdict and the finding of a "single incident" of actionable abuse cannot stand.

Regardless of what anybody may say about the finding of a "single incident," it is important to also say that the jurors are heroes. In an age of limited attention spans, each juror paid close attention to the evidence for a month. From what the court could observe from the bench, the jurors recognized the heavy weight of their jobs as judicial officers. They approached each day with observable diligence, without complaint, and as good sports. Each juror gave up his or her regular life for a month. The court assumes that many jurors lost significant income, or gave up vacation days or PTO time. The jurors put up with court delays. The evidence they heard must have had an emotional impact on them. This judge will forever hold these jurors in the highest esteem. Period.

II. The Issue And The Ruling

The matters before the court are the State Defendants'[1] **Motion To Apply The Damages Cap** and plaintiff David Meehan's **Emergency Motion For A Hearing**. Both parties' motions relate to the jury's finding that plaintiff proved only a single "incident." Notwithstanding Superior Court Rules 10(g) and 13, the court treats each party's motion as doing double duty as an objection to the other parties' motion.[2]

An emergency hearing is not required. But a hearing following full briefing is required to aid the court in choosing among what the court has referred to below as Options 3, 4 and 5. The clerk has already scheduled an hour long hearing for June 24, 2024. Pending this hearing, the court will forbear from granting judgment on the verdict. Nothing in this order

[1] The caption of the Master Complaint lists a number of state agencies and subsidiary units as defendants. In its rulings this court has consistently referred to these defendants as the State Defendants. By the time this individual case reached the jury, the only remaining defendant was DHHS (which had assumed the liabilities of its predecessor, DYDS, and all of the subsidiary units of both DHHS and DYDS, including DCYF and YDC). Nonetheless, for the sake of consistency, the court will continue to follow the convention in these consolidated cases of referring to "the State Defendants."

[2] Since those motions were filed, the plaintiff moved to recall the jury. The court denied that motion via a brief margin order and cited to the fact that this order would be forthcoming. The State moved for JNOV. The court denied that motion by margin order. The plaintiff filed a motion for partial JNOV, to which the State Defendants have not yet responded.

prevents either party from filing any other timely post-verdict motions.

Memoranda of law on the issues discussed below are invited, either before or after the hearing.

III. The Five Options

Things may have changed, but when this judge took the bar exam, the multistate section included many questions that asked, in essence, which of five incorrect answers was the least incorrect. The present situation presents precisely such a question.

The five incorrect options are:

1. Asking the jury to clarify its verdict (e.g. to require further deliberations and a second verdict from the same jury);

2. Taking testimony from individual jurors as to the course of deliberations and their subjective intents, when no suggestion of juror misconduct or exposure to outside influences has been made;

3. Granting the State Defendants' motion to enter judgment in the amount of the $475,000 statutory damages cap for injuries arising from a "single incident." RSA 541-B: 14,I;

4. Granting a motion to set aside the verdict (or for a new trial) and ordering a *de novo* jury trial on all issues; and

5. Granting a motion for something akin to additur with respect to the number of "incidents" subject to both parties'

right to reject the "additur" and demand instead a *de novo* jury trial on all issues.

IV. Option 1 (Recalling The Jury)

An emergency hearing, as requested by the plaintiff, would be useful only if the court were to consider the two most incorrect options at this juncture. The rock bottom worst option would be to recall the jury for the purpose of clarifying its verdict. A jury should not be asked to clarify its verdict, or to deliberate further, after (a) it has been discharged, (b) the jurors have gone home for a weekend or more, (c) the jurors have been exposed to outside influences (such as the statewide saturation news coverage of their verdict and discussions with friends and family), (c) the jurors have discussed the case with others, and (d) the jurors have had time to redeliberate and rethink their verdict in light of the commentary they heard regarding its effect.

The time frame within which a discharged jury may be properly recalled is typically measured in minutes, sometimes measured in hours and rarely, if ever, measured in days. As the U.S. Supreme Court cautioned in Dietz v. Bouldin, 579 U.S. 40, 42 (2016), "the potential for tainting jurors and the jury process after discharge is extraordinarily high," and therefore a trial judge's ability to recall a discharged jury is "limited

in duration and scope and must be exercised carefully to avoid any potential prejudice."

In Dietz, the jury found liability but awarded a personal injury plaintiff "$0" even though the parties had stipulated to $10,136 in medical expenses. The judge discharged the jurors, but then recalled them almost immediately. Only one juror had time to leave the building. None of the jurors had discussed the case with anybody. The U.S. Supreme Court held that under those circumstances the District Court acted within its discretion when it recalled the jury. See also Emamian v. Rockefeller University, 971 F.3d 380, 392 (2nd Cir. 2020) (It was proper for the judge to ask the jury to continue their deliberations, even though he had verbally discharged the jurors, because (a) they had not yet even stood up to leave the jury box and (b) the verdict form included both damages and a finding of "no liability," which needed to be clarified.)

In Dietz, the Supreme Court stressed the hazards of recalling a jury after more than a few minutes has elapsed, especially in a case that has garnered media attention, and especially in a case in which emotions ran high. Jurors may speak with spouses, family, and friends. Freed from the court's instructions, they may consume news coverage of the case. They may consult social media. Through no fault of their own, they may no longer remain as impartial as the lot of humanity will

admit. N.H. Constitution, Part 1, Article 35. See, e.g., State v. Green, 995 S.W.2d 591, 606-07 (Tenn. Ct. Crim. App. 1998) (A jury that acquitted a defendant of first degree murder, but was mistakenly not asked for their verdict on the lesser included offense of second degree murder, could not be recalled after the jurors left the courtroom and were exposed to the public.); Montanez v. People, 966 P.2d 1035, 1037 (Colo. 1998) (Trial court erred by recalling the jury shortly after discharge when two jurors had an opportunity to mingle and discuss the case with outsiders).[3]

In this case, following traditional New Hampshire practice, the verdict form was read to the parties and counsel outside of the jurors' presence. The jurors remained in the deliberation room and were not discharged until after all counsel were provided with copies of the verdict form. While the jurors were still in the deliberation room, and still under the court's instructions, this judge stated to counsel that the verdict form

[3]Although the court cited to two criminal cases, the court is well aware that there may be a difference with respect to the scope of a trial judge's discretion to recall a criminal jury, as opposed to a civil jury, after uttering the not-so-magic words, "You are discharged." See Dietz, 579 U.S. at 51 (noting the additional concerns in criminal cases, such as attachment of the double jeopardy bar). However, the risks to the integrity of the verdict that are created by recalling a jury, after the jurors have left the protective bubble of the deliberation room and have been freed from the court's instructions, are precisely the same in civil and criminal cases.

raised questions. None of the seven attorneys in the room asked for the jury to continue their deliberations.

Had counsel asked for the jury to continue deliberating, or to do so after further instructions, that request would have been given thoughtful consideration. By standing mute, counsel ensured that the jury would be discharged. Thus, counsel waived (or at least forfeited)[4] the opportunity to make a timely request for further deliberations based on the verdict form.

Following the reading of the verdict, the jury in this case was discharged. The jurors disbanded and went back to their lives. At least one--but presumably all--were exposed to the media coverage of their verdict. One juror, who was concerned at what he learned was the legal effect of the jury's findings regarding the number of incidents, approached plaintiff's counsel. The court assumes that the other jurors spoke at least briefly about the case with their significant others. Who would not after a month of forced silence?

The court recognizes that there is no bright line rule in New Hampshire that forbids recalling a jury to correct a

[4]For the difference between waiver and forfeiture, see United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.').

mistake. State v. Adams, 169 N.H. 293, 296 (2016) (citing Dearborn v. Newhall, 63 N.H. 301, 302-303 (1885)). To do so in this case, however, would be a poor and likely unsustainable use of discretion.

V. Option 2 (Juror Testimony To Impeach The Verdict)

An emergency hearing would also be useful if the court were to consider the second worst option, e.g., to have the jurors testify (either in person or by affidavit) about the course of deliberations and their subjective understandings of the court's instructions. In general, a verdict cannot be impeached by a juror's testimony. Bunnell v. Lucas, 126 N.H. 663, 667-668 (1985):

> The law of this jurisdiction recognizes the soundness of the policy against testimonial disclosure of the conduct of jury deliberations. The most notable expression of this policy is the rule governing the treatment of juror testimony offered to support or to impeach a verdict. Under this rule, the affidavit or testimony of a single juror is admissible in exculpation of himself, to sustain a verdict, but is inadmissible where it is offered as a basis for setting the verdict aside.

(internal quotation marks, bracketing and citation omitted)); see also Kravitz v. Beech Hill Hospital, L.L.C., 148 N.H. 383, 386 (2002) ("It is well established that the testimony or affidavits of jurors are not admissible to impeach the verdict."); Drop Anchor Realty Trust v. Hartford Fire Insurance Company, 126 N.H. 674, 682 (1985) ("The affidavit of a juror is

inadmissible in evidence to impeach a verdict."); Caldwell v. Yeatman, 91 N.H. 150 (1940) (tracing the history of the rule from the earliest reported New Hampshire cases to the mid-twentieth century).[5]

This is particularly true with respect to whether the jury, or individual juror(s), misunderstood the court's instructions. In Bunnell, the court reaffirmed the vitality of an early eighteenth century case, Tyler v. Stevens, 4 N.H. 116 (1827), in which the court expressly held that juror testimony cannot be admitted to show misapprehension of the court's instructions. 126 N.H. at 668. As stated in Tyler, and restated in Bunnell:

> If it were once settled that the affidavits of jurors could be received to prove that they had misunderstood the instruction given them by the court, and that such misunderstanding was a legal ground for granting a new trial, the consequences would be most mischievious. For a very little tampering with individual jurors after the trial would enable any party to procure such affidavits and no verdict could be permitted to stand.

Id.

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[5]For those interested, the rule prohibiting juror testimony to impeach a verdict was first fully articulated in a 1785 English decision by Lord Mansfield, Vaise v Delaval, 99 Eng. Rep. 944 (K.B. 1785). The holding in that case was adopted and referred to on both sides of the Atlantic as the "Mansfield Rule." Under the Mansfield Rule, juror testimony was not admissible even to prove misconduct. The Mansfield Rule was later modified to varying degrees in all American jurisdictions. See, Pena-Rodriguez v. Colorado, 580 U.S. 206, 215-218 and Appendix (2017)
As explained below, modern New Hampshire precedents grant the court considerable discretion to inquire into juror misconduct, improprieties during deliberation, and/or exposure to outside influences.

The reasons for prohibiting juror testimony regarding the course of deliberations go beyond those articulated in Tyler. Tyler noted the risk of tampering by the parties to procure grounds for a new trial. In this case, at least, that is not a risk at all, because both parties are represented by respected and ethical attorneys, who would never do anything to influence what a juror might say.

But if jurors could impeach their verdicts by their after-the-fact understandings of the terms and phrases in the jury instructions (e.g., if they could be heard to say that they had a less than perfect understanding of the law at the time of the verdict), then no verdict would have finality. Jurors could upend verdicts, or at least require evidentiary hearings, based on little more than articulable 'buyer's remorse.'

We do our best to instruct the jury in terms that they will understand. This judge's practice is to provide multiple written copies of the instructions, as was done in this case. This judge's practice is also to read the instructions with short breaks in the narrative, and with brief *ad lib* statements (that do not add to the substance), designed to keep the jury's attention. This judge runs a draft of the instructions by counsel, not only to invite

objections and suggestions regarding substance, but also to invite comments on clarity and form. Finally, the jury is told that it can ask questions about the law during deliberations. Beyond this, while counsel does not instruct the jury, counsel's job is to focus the juries' attention on the salient facts and legal principles.

Just the same, jury instructions deal with abstract and nuanced concepts (compare, e.g., criminal recklessness versus criminal negligence, RSA 626:2; or, as in this case, define the dividing line between "pain and suffering" and "hedonic damages," or between permissible "enhanced compensatory damages" and impermissible "punitive damages."). It must be fairly common for jurors, who have varied degrees of education, with varied verbal comprehension and reasoning abilities, and with varied prior exposure to legal concepts, to misapprehend some of the nuances.

When a misconstrued instruction results in a verdict that is objectively and conclusively against the weight of the evidence, the remedy is to set the verdict aside or order additur or remittitur. See Babb v. Clark, 150 N.H. 98, 100 (2003); Quinn Brothers. v. Whitehouse, 144 N.H. 186, 190 (1999); George v. Al Hoyt & Sons, Inc., 162 N.H. 124, 131 (2011); N.H. Superior Court Rule 43; RSA 526:1. The

remedy is not to hear from the jurors themselves about their personal and subjective understandings. But when the verdict is supported by the weight of the evidence, the importance of finality trumps the quest for perfection.

Another reason for prohibiting testimony by jurors regarding the course of deliberation is that, if we had a tradition of freely recalling jurors, it would chill free and open discussions in the privacy of the deliberation room. See Bunnell, 126 N.H. at 667.

Further, while individual jurors are free to voluntarily disclose what they experienced during the trial and in the deliberation room, to cross-examine them about these matters would be harassment and invasive of personal privacy.

All of this said, the court has considerable discretion to consider juror testimony when there is a suggestion of possible misconduct, impropriety, or exposure to outside influence. See Drop Anchor Realty, 126 N.H. at 682 ("Although a juror's affidavit that impeaches a verdict is inadmissible in evidence, it may be considered by the trial court to determine whether the jury should be reconvened for questioning on the propriety of the conduct of their deliberations."); Bunnell, 126 at 669 (The trial

court acted within its discretion when it considered juror testimony that the jury averaged comparative fault).

However, in this case there is no claim of misconduct or impropriety. There is no suggestion that the jury intentionally disregarded any of the court's instructions. All that has been alleged is a good faith misunderstanding as to the meaning of a term in the instructions (i.e., the word "incident.").

In this case, the jurors were not informed about the statutory damages cap. They were asked to indicate the number of "incidents" for which they found liability. They found just one "incident." While that finding cannot stand, it is not misconduct. But this is to be decided by an objective standard that looks only to the verdict, the evidence, and the law. The subjective opinions of the individual jurors, and their recollection of the deliberations, is neither relevant nor admissible.

VI. Option 3 (A "Single Incident" Judgment Of $475,000)

(A) Introduction

A third way the court could err would be by granting the State's motion to apply the damages cap to the "single incident" found by the jury. This would result in a $475,000 judgment in favor of the plaintiff, rather than the $38 million intended by the jury. In the court's view, this be an obvious miscarriage of justice because the finding of a "single incident" was

conclusively against the weight of the evidence. See, e.g., George, 162 N.H. at 131 ("We will set aside a jury verdict if it is conclusively against the weight of the evidence[.] . . . 'Conclusively against the weight of the evidence should be interpreted to mean that the verdict was one no reasonable jury could return.'"); see also Babb, 150 N.H. at, 100; Quinn, 144 N.H. at 190 (1999).

(B) The State Defendants' Statutory Argument

Overview: The court previously rejected the State Defendants' argument that, as a matter of law, all of plaintiff's claims and injuries arose from a "single incident" within the meaning of RSA 541-B:14, I. If the State were correct then the jury's finding of a "single incident" would be superfluous. While the court addressed this issue orally on the record on several occasions, including during the charging conference, a more fulsome explanation of the court's reasoning is in order.

The question is one of statutory construction. The applicable statutory provision, RSA 541-B:,14,I provides that, with respect to state law tort claims against the State and its agencies:

> All claims arising out of any single incident against any agency for damages in tort actions shall be limited to an award not to exceed $475,000 per claimant and $3,750,000 per any single incident, or the proceeds from any insurance policy procured

> pursuant to RSA 9:27, whichever amount is greater; except that no claim for punitive damages may be awarded under this chapter. The limits applicable to any action shall be the limits in effect at the time of the judgment or settlement.

(emphasis added).

Thus, the statute establishes two damages caps for every "incident" for which tort liability has been established. The first cap applies to individual claimants who are injured in a "single incident." Individual claimants can recover no more than $475,000. The second cap applies to all claimants who are injured in the same "single incident." The total amount payable to all claimants is $3,750,000. This type of per incident cap on damages assessed against the State is constitutional on its face. Opinion of the Justices, 126 N.H. 554, 567 (1985) ("The authority of the legislature to set reasonable limits on damages recoverable against government entities well established."); see also Laramie v. Stone, 160 N.H. 419, 437-438 (2010) (applying the $475,000 cap).

Neither RSA 541-B:14, nor any other relevant statute, defines the term "single incident." The New Hampshire Supreme Court has not yet had occasion to construe the term. Therefore, this court must do its best to interpret the statute.

Statutory Construction In General: The New Hampshire Supreme Court has said, with respect to RSA 541-B:14,I in particular, what it has repeatedly said for all statutes:

> The interpretation of a statute is a question of law[.] . . . We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meaning to the words used. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include. If a statute is ambiguous, however, we consider legislative history to aid our analysis. Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.

Laramie, 160 N.H. at 436.

In construing the meaning of statutory terms, the court cannot consider the words and phrases in isolation, but must read them in the context of the statute as a whole. White v. Auger, 171 N.H. 660, 666-67 (2019). Further, the court must bear in mind that that "[t]he legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." Id.

The State Defendants' Argument: The State Defendants' argument can be restated as follows:

> (a) The statutory term "incident" refers to an "incident" of tortious conduct by the defendant. Thus, in the State Defendants' view, the statute provides a damages cap for each "incident" of tortious behavior; and

(b) In this case, the Complaint (e.g. the Master Complaint and the First Amended Short Form Complaint) alleged, and the jury found, that the tortious conduct was the State Defendants' failure to adequately train, supervise, and discipline YDC staff members. More particularly, the State Defendants were found liable for failing to exercise reasonable and fiduciary care in the implementation of their published personnel policies relating to (a) the prevention and reporting of sexual, physical and emotional abuse of residents by staff, (b) the establishment of the ombudsman system to allow residents to report abuse without fear of retaliation, and/or (c) the use and conditions of room confinement as a penalty for serious disciplinary offenses; and

(c) The State Defendants' breach of their duties of care, was alleged to be a continuing tort. According to the Compliant, the tortious conduct began before plaintiff arrived at YDC in 1995 and continued, uninterrupted and unabated, until after plaintiff left YDC in 1999. Indeed, plaintiff argued, and proved, liability for continuing omissions, e.g., for fiddling while Rome burned (or to use a different metaphor, for

aggressively sitting on one's hands, and continuing to do so for years, when action was called for); and

(d) Although plaintiff was assaulted on many different dates, in several different locations, and by several different staff members, the Complaint did not allege any new or different tortious conduct by the State Defendants after the first assault. (Thus, for example, the State Defendants did not engage in any specific, new actionable conduct between the date the plaintiff was first sexually assaulted by Jeffrey B., and the next day when the plaintiff was first sexually assaulted by Steve M. (with assistance from James W.)); and

(e) Because there was only a single, continuous tort, there was only once "incident."

The State Defendants Misread The Statute: The primary problem with the State Defendants' argument is that it improperly conflates the statutory term "single incident" with tortious conduct. The State Defendants have not cited any authority for this position. They have not parsed the statute. They have not pointed to persuasive decisions from other jurisdictions. They cite none of the cannons of the statutory construction. They simply say it is so.

The court starts with the statute itself. RSA 541-B is a comprehensive statutory scheme governing tort claims against the State and its agencies. The statute uses two terms of interest: "claim" and "single incident."

The term "claim" is defined to include "any request for monetary relief for either: (a) bodily injury, personal injury, death or property damages caused by the failure . . .to follow the appropriate standard of care when that duty was owed to the person making the claim." RSA 541-B:1,II-a. Thus, a "claim" is essentially a cause of action. In other words, a "claim" is an allegation of tortious conduct.

While the term "single incident" is not defined, it is clearly something very different from a "claim" (e.g. an allegation of a tortious conduct). This must be so, because the statute defining the damages cap, RSA 541-B:14,I, applies to "All **claims** arising out of any **single incident**[.]" Why would the Legislature have wasted words, and introduced the concept of a "single incident" when it could have simply said, " "**All claims**?"

The only sensible way to read the phrase, "All claims arising out of any single incident," is to recognize that:

(A) Multiple "claims" by individual claimants (such as, for example, negligence and breach of fiduciary duty) may arise from

a single incident, in which case all such claims would be subject to the $475,000 damages cap;

(B) Multiple "claims" by different claimants may arise from a "single incident" (such as the archetypical example of multiple claimants who were injured in the same automobile collision (and all of those individuals' claims would be subject to the overall per incident damages cap of $3,750,000);

(C) A single "claim" by an individual claimant may arise from multiple, discrete incidents (when, for example, as in this case, a plaintiff alleges that as a result of a state agency's breach of a duty of care he was violently raped by different state actors, on different dates, separated by intervening events, and in different locations); and

(D) "Claims" by multiple claimants may arise from multiple incidents (as in these consolidated cases in which over 1,200 plaintiffs allege that they were harmed at different times and places, by different staff members and under different circumstances).

Other states have similar language in their statutes which waive sovereign immunity for tort claims. To this judge's knowledge, no other court has construed the term "incident" or "occurrence" to refer solely to a government defendant's tortious conduct.

The case of Barnett v. Florida Department Of Financial Services, 303 So. 3d 508 (Fla. 2020) is particularly instructive and worthy of extended discussion. The relevant Florida statute conditioned that the state's waiver of sovereign immunity on a $200,000 damages cap on all "claims" "arising out of the same incident or occurrence." Fla. St. Ann. §768.28(5). In this respect the Florida statute is similar to New Hampshire's statute.

The Barnett case arose from a quintuple murder, aggravated assault, and suicide. A gunman entered the home of his estranged spouse, killed her, killed four of her children, severely injured a fifth child by shooting him in the neck, and then killed himself. A few months earlier, the Florida Department of Children and Families ("DCF") had received a report on its domestic abuse hotline that the same man had threatened the same estranged spouse with a knife, said that he would kill her, and slashed all of her tires. DCF conducted an investigation, but then closed its file after opining that the children were not at risk of harm. The DCF investigation noted that both the parents and the older children had agreed to a safety plan which consisted of calling 911 in case of emergency.

The Barnett case was brought by the fathers of the killed and injured children. They sued DCF in their representative capacities, alleging that DCF had breached its duty of care. DCF

raised various defenses, including the $200,000 per incident cap on damages. The Florida Department of Financial Services, which would be responsible for paying any judgment, filed a petition for declaratory relief seeking a determination as to whether the $200,000 damages cap applied.

In Barnett, the state agencies argued precisely what the State Defendants argue in this case, e.g., "the statutory phrase 'incident or occurrence' refers to the negligent or wrongful acts or omissions of . . . the 'state actors[.]" Barnett, 303 So.3d at 514. Thus, in their view, the "occurrence or incident" was the tortious conduct by DCF. The plaintiffs disagreed and argued that the term "incident or occurrence" referred to the crimes that directly harmed the plaintiffs.

The Florida Supreme Court persuasively rejected the state agencies' position:

(A) The Florida Supreme Court first explained--as this court did above with respect to the New Hampshire statute--that the state agencies were conflating two separate statutory terms:

> First, to equate "negligent or wrongful act or omission" with "incident or occurrence" would negate the Legislature's decision to use different phrases in different parts of [the statute]. . . . If the Legislature wanted to link the limit of liability to a state actor's breach of duty, it knew how to describe the breach, having done so repeatedly with the "act or omission" language. Use of the words "incident or occurrence" . . . signals that the language means something different.

Barnett, 303 So.2d at 514.

(B) The Barnett court then noted that the that the term "incident" (and the term "occurrence" which is in the Florida statute, but not the New Hampshire statute) "more naturally and reasonably include the point at which damages are inflicted, not just the (potentially remote) point at which the state defendant's negligent or wrongful act occurs." Id. at 514-15. The Florida Supreme Court then string cited definitions from Dictionary.com, Meriam-Webster Dictionary, Webster's Third New International Dictionary, and Black's Law Dictionary. The Florida Court noted that, "What these definitions all share in common is action, a happening, and event." Id. at 515. This is also true for the definition given in the New Hampshire Supreme Court's current dictionary of choice, the Oxford English Dictionary, which defines the term "incident" to mean, among other things, "an occurrence or event viewed as a separate circumstance."

In Barnett, the Florida Supreme Court held that the plain meaning of the term "incident", as reflected in the dictionaries, described the gunman's "immediate harm-causing actions" but did not describe "DCF's alleged omissions and failures to act." Id. The Court went on to note, "That this is typical of derivative liability cases, which usually involve omissions, or failures to act, and allegations that if the

correct actions had been taken, those actions would have prevented the harm caused by the action of the second tortfeasor (the immediate harm-causing event)." Id.

(C) The Florida Supreme Court also looked closely at the Florida Legislature's use of the phrase "arising out of." Like the New Hampshire statute, the Florida statute applies to any **"claim or judgment . . . arising out of the same incident or occurrence,"** (emphasis added). In Barnett, the court held that the words "arising out of" imply that an "incident or occurrence" refers to the immediate injury-causing event, not just the negligent omissions that allegedly gave rise to the event" Id. As the court explained:

> The object of "arising out of" in the statute is the plaintiff's "claim or judgment." No claim exists, and no judgment can occur, until the cause of action accrues by completion of the last element—damages as a result of an injury. "Arise" is defined as "to begin to occur or to exist; to come into being. Because the claim does not "come into being" or "begin to exist" until the last element accrues, the text is most reasonably read as including the "incident or occurrence" that caused the last element and the cause of action to accrue—the injury-causing event, that is, the event at which damages are actually inflicted.

Id. (internal citations, quotation marks and bracketing omitted).

Other jurisdictions have reached similar conclusions. See, e.g., C.J. v. State, Department of Corrections, 151 P.3d 373, 383-84 (Alaska 2006) (A plaintiff who alleged she was sexually

assaulted by a parolee due to the negligence of the state parole authorities, could recover for three "incidents" of sexual assault, based on three different sexual acts.); Rodriguez v. Cambridge Housing Authority, 795 N.E.2d 1, 10 (Mass. Ct. App. 2003), aff'd, 823 N.E.2d 1249, 1255-1256, fn. 9 and 10 (Mass. 2005) (A plaintiff who was violently attacked during two different home invasions, that occurred on different dates, and who sued a public housing authority for failing to change her lock, could recover for two "incidents."); Folz v. State, 797 P.2d 246, 252, fn 5 (N.M. 1990) (Noting that a per incident damages cap does not cap the total amount of damages which could be awarded for a state defendant's negligence in connection with a highway construction project: "Here, a separate occurrence would have existed had the events in this case been repeated by a second runaway truck that same day, regardless of whether a subsequent negligent act was committed by the Department."); Cf: Essex Insurance Company v. Doe ex rel. Doe, 511 F.3d 198 (D.C. Cir. 2008) (Kavanaugh, J) (A plaintiff who sued a children's home for negligence resulting in four separate sexual assaults by peers could recover for four "occurrences" under the applicable insurance policy.); Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Company, 991 N.E.2d 666 (N.Y. 2013) (Finding a separate "occurrence" within the meaning of an occurrence-based liability insurance policy, for

each occasion on which the same priest sexually molested the plaintiff, when there were multiple sexual assaults that occurred over the span of four years);[6] Renguette v. Board of School Trustees ex rel. Brownsburg Community School Corporation, No. 1:05-cv-1548-SEB-JMS, 2007 WL 1536841, at *8 (S.D. Ind. May 23, 2007) (Holding that Indiana's parental liability statute, which makes a parent vicariously liable, up to a cap of $5,000, for their child's knowing, intentional, and reckless torts, applied separately to each of 58 incidents of sexual assault committed by the defendant's child.).

Conclusion: The court rejects the State Defendants' argument that the Complaint alleges, and the defendant proved, only a "single incident" within the meaning of RSA 541-B:,I.

(C) The Plaintiff's Statutory Argument

During the course of trial the court also rejected the plaintiff's proposed construction of the statutory term "single incident." As it did above with respect to the State's

[6]The court looked to insurance law cases construing occurrence-based policies, because (a) there are not that many on-point decisions under state tort claims statute, (b) there is a plethora, or at least a myriad, of insurance law cases, and (c) insurance policy limits are capped on a per "occurrence" basis, which makes them analogous to tort claims act cases. Unfortunately, not only does the policy language defining an "occurrence" vary significantly, but more importantly, modern insurance policies expressly state that multiple instances of sexual assault will be deemed a single occurrence. Thus, the carriers reacted to decisions such as those set forth above, and amended their policies accordingly.

argument, the court takes a moment here to better explain its reasoning.

If the State's construction of the term "single incident" is strained, plaintiff's construction is even more so. Plaintiff advocates for what might be called a 'time, place and **type-of-intentional-abuse**' standard:

(A) All of the acts must be part of the same "occurrence of any action or situation that is a separate **unit of experience**" Plaintiff's Proposed Jury Instruction No. 38 (emphasis added); and

(B) To be part of the same **unit of experience**, all of the acts of abuse must be of the same type of abuse (e.g, physical abuse, sexual abuse, false imprisonment or emotional abuse). Disparate types of abuse committed at the same time count as different "units of experience" and therefore different "incidents" within the meaning of RSA 541-B:14, I. Id. (An "incident" can be "a single rape, a single physical assault, or a single instance of being locked in confinement," each of which "should be considered independently of the other "incidents.")

Thus, for example, plaintiff would count two incidents, each subject to the $475,000 damages cap, for the late October 1997 episode in which Steve M. and James W.:

(a) committed a violent physical assault by forcing plaintiff to the ground, strangling him, punching him, and

leaving him bloodied (e.g., a number of physical assaults, each of which could be charged as a separate purposeful crime, but all of which together constitute a "unit of experience."), and

(b) simultaneously committed a sexual assault by forcing plaintiff to engage in fellatio with Steve M. (which, in plaintiff's opinion is an entirely separate "unit of experience")

All of these acts occurred during the same compressed time period, without any intervening events, and in the same location. All of the acts were part of a single, uninterrupted attack and were, therefore, closely related to each other. But the physical abuse was a different type of abuse than the sexual abuse and, therefore, in the plaintiff's eyes, there were two "incidents" within the meaning of RSA 541-B:14,I.

Indeed, if the court were inclined towards scholastic reasoning, the number of angels on the head of this particular pin could be greater because the physical and sexual assaults were preceded by emotional abuse. Recall that Steve M. taunted plaintiff by saying "I hear you are a good little cocksucker," which was a reference to the previous day's assault by Jeffrey B.

Plaintiff's position is a compromise under which separate acts can be part of the same "incident," but only if they are chargeable under the same chapter of the Criminal Code (or, less

argumentatively, only if they can be grouped together by type). Thus, two pokes in the eye equals one "incident," but a poke in the eye while fondling the buttocks equals two "incidents," and three different acts of sexual penetration within a few minutes equals one "incident." Considering that the physical and sexual abuse often occurred simultaneously with alleged unlawful room confinement and verbal abuse, plaintiff's definition supports an enormous number of incidents.

Plaintiff stops short of entirely equating "incident" with "act" (or, with "intentional act," or "crime").[7] Plaintiff still sees some use for the traditional notion of an "incident" as an episode or event limned by time, location, the nexus among acts, and the presence or absence of intervening circumstances. But plaintiff envisions an exception to this plain and ordinary understanding of the term "incident" that would double or treble the damages cap for many of the episodes of abuse in this case.

Plaintiff's argument is grounded on little more than moral outrage at the prospect that the damages cap for a sexual assault could be reduced because the plaintiff was also physically assaulted at the same time. Plaintiff's lead counsel

[7]The Alaska Supreme Court took the position that each separate criminal act is a separate "incident" within the meaning of Alaska's per incident damages cap. In C.J., 151 P.3d at 383–84, the court held that three discrete sexual acts, committed in a compressed period of time, equated with three incidents. As explained below, the court rejects this view.

explained that his reasoning was captured by the mantra "no free rapes." During closing argument he argued to the jury that there should not be a "bogo" (buy one, get one) for raping children. The same is presumably true for beat downs and choke outs (which were inflicted on the witness Michael G.), and other physical assaults against children.

"No free rapes" and "no bogos" are great slogans, but they ignore the truth that a damages cap is designed to limit the amount of recoverable damages for all injuries sustained during the same episode. Put more bluntly, so long as it is high enough to pass Constitutional muster, a damages cap is indeed a discount on the amount state agencies must pay for the injuries they inflict. To use plaintiff's marketing argle-bargle, while the cap is not exactly a "bogo", it is an all inclusive price for incidents that cause more than $475,000 in damages to a claimant.

This court rejects the plaintiff's argument because (a) it ignores the plain and ordinary meaning of the term "incident," see above and below, and (b) nothing in the entire statutory scheme evinces a Legislative intent to double or treble the damages cap if different types of abuse are committed at the same approximate time, in the same location, without intervening events and when there is a tight nexus among all of the acts of abuse.

(D) The Court's Construction of The Statutory Language

This court believes that the statutory term "single incident" in RSA 541-B:14,I equates with the OED definition of "incident," e.g., "an occurrence or event viewed as a separate circumstance." This is the same meaning that the court was trying to get at when it instructed the jury that an incident is an "episode."

Of course, this definition begs the question of what criteria should be used to determine when one "single incident" ends and a new one begins. While a "single incident" can take place in a fraction of a second (i.e., as in motor vehicle collisions, slip and falls, and surgical mishaps), it can also take days, weeks or even years to conclude (i.e., as in wrongful imprisonment, or seepage of toxic wastes into an abutter's water supply).

The New York Court of Appeals decision in the Diocese of Brooklyn case, cited above, provides a working description of the factors at play in a case of this nature:[8]

-First, there must be "a close temporal and spatial relationship" among all of the individual actions that comprise

[8]As noted above, Diocese of Brooklyn involved the interpretation of the word "occurrence" in an insurance policy. It did not attempt to define the term "incident," and it did not involve a statute that conditioned the waiver of sovereign immunity on a damages cap. However, the court's analysis and language are persuasive.

the incident. Diocese of Brooklyn, 991 N.E. at 672. The New York court found that each instance of sexual abuse was a separate "occurrence" because they took place on different dates, over a six year time period, and in multiple locations.

-Second, all of the actions must be "part of the same causal continuum, without intervening agents or factors." Id. In Diocese of Brooklyn, the New York court found that the causal continuum factor was best illustrated by a three car collision in which one vehicle hit an oncoming car, ricocheted off and struck a second car more than 100 feet away. Id. at 673. In that example, "the continuum between the two impacts was unbroken, with no intervening agent or operative factor." Id. In contrast, the New York court found that instances of sexual abuse, even though they involved the same perpetrator, were not precipitated by a single causal continuum and, therefore could not be grouped into a single occurrence.

Thus, in determining what acts constitute a "single incident," this court will look to the following factors:

(a) closeness of **time**,

(b) closeness of **location**, (

(c) the causal continuum (i.e. **nexus**) among the acts, and

(d) the presence or absence lack of **intervening events**.

Applying these factors, the court concludes that all related acts of abuse--sexual, physical, or emotional--that

occur in a compressed time frame, in a single location, without any salient intervening events constitute a "single act" within the meaning of RSA 541-B:14, I.

(E) The Debate Over Jury Instructions

The Plaintiff's Position Going Into The Trial: Going into the trial, plaintiff's position was that were "hundreds" of incidents. See Plaintiff's Final Pretrial Statement, p. 7. Plaintiff proposed that the verdict form ask the jury, if it found liability, to state the total number of "incidents" for which it found liability. Plaintiffs did not originally ask that the jury be provided with a list of alleged "incidents' or that it create a verbal list of proven "incidents."

The problem with the plaintiff's proposal was that the damages cap applies separately to each "incident." RSA 541-B:14,I. (To make this clear: Imagine a case in which the jury awards $350,000 for one incident and $450,000 for a second incident. The State would be liable for the entire $800,000 because the damages for neither incident exceeded $475,000. Now change the hypothetical so that the jury awards $750,000 for the first incident and $50,000 for the second incident. The State would now be liable for $525,000, e.g., the cap of $475,000 for the first incident and $50,000 for the second incident.). Without knowing how the jury allocated damages among

"incidents," the court would have no way of knowing whether damages for some "incidents(s)" exceeded the cap.

The plaintiff argued that the damages cap for the entire case should be $475,000 multiplied by the number of "incidents" reported by the jury. While this had the advantage of simplicity, it did not comport with the "per incident" nature of the damages cap.

The State Defendants' Position Going Into The Trial: The State Defendants took the position that no instruction regarding the number of "incidents" was necessary because, as a matter of law there was only one "incident." See above.

The Court's Initial Proposal And The Parties' Reactions To It: The court circulated draft jury instructions to counsel. Those instructions included a proposed jury verdict form. The verdict form included a list of alleged incidents which the court took from the plaintiff's testimony. For each alleged incident, the jury was asked to decide:

> (a) Whether the plaintiff discovered or should have discovered both his injury and the State Defendants' causative role in bringing the injury about;
>
> (b) Whether the plaintiff proved that he was injured as a result of the State Defendants' breach of either the common law or the fiduciary standard of care;
>
> (c) Whether (for DeBenedetto purposes) the plaintiff's injuries resulted from the State Defendants' knowing and active participation in a common plan or design that harmed the plaintiff (RSA 507:7-e,I(C));

(d) Whether any of the named DeBenedetto parties were partially at fault for the "incident" and, if so, what was their proportionate share of fault (RSA 507:7-e,I(b)); and

(e) What percentage of the total compensatory and, if applicable, total enhanced compensatory damages was attributed to that incident.

Plaintiff had no objection to the court's approach. The State Defendants, however, objected on two grounds. Their primary objection, which remains preserved, was that there was only "incident" as a matter of law. In the alternative, and without waiving their primary objection, the State Defendants objected to the court providing the jury with a list of alleged incidents. The State Defendants argued, with great vigor, bordering on ire, that this would be reversible commentary on the evidence.

The court responded to the State Defendants, during the charging conference, that it knew of no other way to poll the jury with respect to each incident. In the court's view, while the parties contested many facts, there was no dispute as to what plaintiff alleged. The First Amended Short Form Complaint did not include an acceptable list of specific incidents. The parties did not submit a list of incidents. *What else could the court do to ensure unanimous verdicts on liability and damages with respect to each incident?*

In any event, in the last few minutes of the court day, with closings and jury instructions scheduled for the following

day, the State Defendants indicated that they might agree to the plaintiff's initial proposal, e.g., asking the jury for a total number of incidents and agreeing that the damages cap would equal $475,000 multiplied by the number of incidents. Counsel for the State Defendants indicated that they needed to confer and obtain authority for such a stipulation.

The following morning, subject to and in the alternative to their primary argument that there was just one "incident," the State defendant agreed to:

(A) As the jury to provide the total number of incidents for which they found the State Defendants liable;

(B) For this case only, stipulate that the State Defendants would be liable for damages not to exceed $475,000 multiplied by the number of incidents.

The plaintiffs also agreed to this and the court issued a brief order commemorating their stipulation. This order was written in open court and the wording was approved by counsel for both sides.

Thus, the jury was instructed to (a) determine the damages for the case as a whole and (b) report the number of "incidents" for which liability was found.

(F) The Jury Instruction And The Verdict

The jury was instructed that an "incident" was a "single episode during which plaintiff was injured," for which injuries the jury found liability, on claims the jury found to be timely.

This instruction was included on the verdict form. It was not included in the body of the instructions. However, the court went over the instruction in detail.

Because the court believed that determining the number of incidents would be laborious, the court jokingly told the jury that he expected to hear a groan after he gave the instruction.

(G) The Juries $38,000,000 Verdict Cannot Be Reconciled With The Finding Of A Single Incident

An overly clever logician might say that the jury could have found that plaintiff proved one instance of abuse, disbelieved his testimony regarding all of the other instances, and awarded $38,000,000 for the single instance.

But this would be sophistry rather than true logic. No reasonable jury would award $38 million for a single instance of abuse. No reasonable jury would have believed plaintiff's testimony as it related to a single hour and disbelieved his testimony as related to all of the other hours, days, weeks, and months. Indeed, the State Defendants did not even challenge the plaintiff's testimony with respect to the several instances of sexual abuse for which the intentional tortfeasors were indicted. For that matter, the plaintiff's testimony was not

specifically contradicted with respect to any of the instances of sexual assault or physical assault (although the State Defendants did suggest that the injuries for which the plaintiff was hospitalized could have resulted from playing football). In general, the plaintiff's testimony was corroborated with respect to the torfeasors' opportunities to commit the abuse.

The State Defendants did not ask even a single question, or present any evidence, with respect to the first instance of sexual assault, i.e. the anal rape committed by Frank D. Frank D. was indicted by the State for this conduct, and the State Defendants said nothing about it during closing argument. If a reasonable jury found that this incident occurred, could it also conclude that nothing untoward at all happened with Jeff B., or Steve M., or James W.?

The finding of a one "incident"--as that statutory term was defined on the verdict form, and as it has been construed by the court--is conclusively against the weight of the evidence.

The court does not blame the jury for this error. The court's instructions might have been too vague. The court chose not to tell the jury about the damages cap. The court made this decision because the number of incidents is not dependent on either the existence or the amount of the damages cap. The court opined that telling the jury about the damages cap might introduce an irrelevant wildcard into the deliberations.

In retrospect, however, the court realizes that the jury was never informed as to why it needed to count the number of incidents for which it unanimously found liability. Without that ballast, the question may have seemed superfluous.

Further, the court should have provided a more detailed instruction on the definition of "incident." The court was loathe to do so, because the New Hampshire Supreme Court had not defined the term, and any definition might be erroneous. However, on reflection, the court now sees that it would have been preferable to instruct the jury as detailed above.

In any event, there was plainly more than one incident. Entering a verdict of $475,000, when the only proper verdict is many multiples of that number would be a gross and unconscionable miscarriage of justice.

VII. Option 4: A New Trial De Novo

The fourth incorrect option is a *de novo* jury trial, e.g. a do-over.

As explained above, the court may set aside a verdict and order a new trial under Superior Court Rule 43, and may grant a motion for a new trial pursuant to RSA 526:1, if the verdict is conclusively against the weight of the evidence. George, 162 N.H. at 131; Babb, 150 N.H. at, 100; Quinn, 144 N.H. at 190 (1999).

For all of the reasons detailed above, a *de novo* jury trial would be a legally correct result. However, it would be extremely burdensome to the parties, potentially harmful to the plaintiff, and dilatory with respect to reaching a final resolution of both this individual case and all of the consolidated cases.

An order granting a new trial would be an interlocutory order. See Supreme Court Rule 3 (defining an "interlocutory appeal" as an appeal of "rulings adverse to a party, before a final decision on the merits in a trial court."); Appeal of Mullen, 165 N.H. 344, 345 (2013) (suggesting that an order granting a new trial is interlocutory)[9]; Hodgdon v. Beatrice D. Weeks Memorial Hosp., 128 N.H. 366, 367 (1986) (describing an appeal from an order granting a new trial as interlocutory); Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33, 34 (1980)("An order granting a new trial is interlocutory in nature and therefore not immediately appealable").

What this means is that if the court orders a *de novo* jury trial, there will be another month long jury trial with the same

[9]In Mullen, the court dismissed an appeal from an administrative adjudication on the grounds that it had not yet become final because the agency reopened the record and the proceedings were ongoing. In reaching this result, the Supreme Court cited Okongwu v. Stephens, 488 N.E.2d 765, 768 & n.6 (1986), for the proposition that an order granting a post-trial motion for new trial is interlocutory and not immediately appealable;

evidentiary rulings. While this judge continues to believe that he struck the right balance between probity and the risk of unfair prejudice, there were admittedly some big ticket choices to make and, once there is a final judgment, the Supreme Court may find error. That would result in a *third* month long jury trial.

Further, if the appeal in this case is delayed then the parties in the consolidated 1,200 (+/-) cases will be prejudiced by the continued lack of certainty as to the legal issues that were raised in this case.

Conversely, if this court approved, and the Supreme Court accepted an interlocutory appeal, that might substantially delay the conclusion of Mr. Meehan's individual case. The case is already four and a half years old. If the decision to grant a new trial is affirmed on interlocutory appeal, it will likely be six years old at the time of the second trial, and then there will be another appeal. If the decision to grant a new trial is reversed on interlocutory appeal, then there may be further trial court proceedings, plus an appeal from the final judgment.

Finally, the court is particularly mindful of the effect of the court proceedings on the plaintiff. Two psychiatrists and a psychologist testified as to his delicate state of mind, resulting from his diagnosis of complex PTSD. A *de novo* trial

about how he was repeatedly raped as a young teenager may literally be deleterious to his health.

An order granting a new trial is by no means the most incorrect option, but it is still not an ideal option.

VIII. Option 5: "Additur Of Incidents"

The least incorrect option might be something akin to additur. "Where there has been a finding as to liability and the damages are grossly inadequate, the appropriate remedy is to order additur, or, in the event the defendant does not consent to the additur, a new trial on damages." Kravitz v. Beech Hill Hosp., L.L.C., 148 N.H. 383, 390 (2002); see also, Belanger by Belanger v. Teague, 126 N.H. 110, 111(1985) ("Additur is customarily sought as alternative relief on a motion for new trial on the ground of inadequate damages. . . . The option of accepting an additur rests with the defendant.").

In this case, perhaps, the court can order something similar to additur with respect to the number of "single incidents" found by the jury. To be sure, the State Defendants would have to accept such an "additur of incidents" in the alternative to a full blown *de novo* jury trial. (The State Defendants would not, however, have to waive their underlying objection to granting the plaintiff any form relief from the one "incident" verdict. Thus, the State Defendants could accept something akin to additur, in the alternative, without waiving

their primary argument that the judgment should be for one "incident" and $475,000).

The court's authority to order traditional additur is derivative of its jurisdiction to order a new trial. The same logic should enable the additur-like order that the court is considering as an alternative to a new trial.

The biggest problem with ordering "additur of incidents" (aside from the fact that there may not be such a thing) is that the court has no way of knowing precisely which "incidents" supported the jury's verdict. Did the jury find that the plaintiff had proven some, all, or none of his claims related to room confinement? How many instances of sexual assault did the jury believe occurred? Did the jury find that the plaintiff was hospitalized due to a beating in the course of a forcible rape, or due to a football injury? With respect to the emotional abuse claims, what conduct did the jury find tortious and what did it find merely offensive?

Thus, the court needs to tread carefully and modestly. In general, the court would consider "additur of incidents" with the following ground rules:

1. **With one exception, the court would not find <u>any</u> "incidents" for room confinement.** The room confinement claims were the most factually contested claims. During some of the time that plaintiff testified he was subject to "solitary

confinement," he was actually allowed to go to school for six hours on each school day. The conditions of room confinement, per the plaintiff, varied from flatly unconstitutional (e.g. no toilet facilities) to lawful but unpleasant. The outer boundaries of the agency's discretionary policy regarding those conditions was not completely described at trial. What they knew or should have known twenty-five years ago about the effect of room confinement on teenage development was largely unanswered.

Furthermore, for the most part, the room confinement sanctions were for actual disciplinary offenses such as going AWOL, assault, stealing, etc. Even if plaintiff would have an arguable competing harms defense to some of these charges in criminal court, he pretty much admitted the serious disciplinary violations. He also received short one day sanctions for yelling (e.g. "loud voice"), talking out of turn, and similar minor violations.

To be sure, Plaintiff alleged that he was kept in his room for almost two months, commencing in late April 1998, to cover up his injuries from the physical abuse he suffered. But there was actual contradictory evidence regarding the reason for this room confinement, its duration, and the conditions of confinement. This room confinement was allegedly imposed for an escape attempt that involved a screwdriver. Plaintiff was

apparently allowed to go to school during part of the room confinement sanction. The conditions of the room confinement varied over the course of the sanction. The length of the room confinement was disputed. Plaintiff did not testify that he was denied toilet facilities.

Overall, while a reasonable jury certainly could find one or more room confinement "incidents," there is no way to know how this jury viewed the evidence. The modest and prudent thing to do, in considering "additur of incidents," as an alternative to a trial *de novo,* is to find no "incidents" for room confinement, except for the one immediately below.

2. Plaintiff testified that there was one occasion, commencing on September 17, 1997, when he was subjected to room confinement without toilet facilities for up to ten days. The lack of toilet facilities would be an Eighth or Fourteenth Amendment violation in an adult jail or prison. See, e.g., Flakes v. Percy, 511 F. Supp. 1325, 1332 (W.D. Wis. 1981) ("[D]eprivation of basic elements of hygiene is beyond the constitutional power of the state. . . . [W]hen the Eighth Amendment is operative, its ban is violated by locking a person, for any significant period of time, in a cell lacking a flush toilet and a washbowl."); Masonoff v. DuBois, 899 F. Supp. 782, 788 (D. Mass. 1995)("Having a sanitary place to dispose of one's bodily waste is one of the minimal civilized measures of life's

necessities." (internal quotation marks and citations omitted)); Strachan v. Ashe, 548 F. Supp. 1193, 1205 (D. Mass. 1982) ("An inmate's constitutional right to adequate and hygienic means to dispose of his bodily wastes [is] clearly established."); Whitnack v. Douglas County, 16 F.3d 954, 958 (8th Cir.1994) ("[R]easonably adequate sanitation and the ability to eliminate and dispose of one's bodily wastes without unreasonably risking contamination are basic identifiable human needs of a prisoner protected by the Eighth Amendment"). The court thinks it reasonable that the jury in this case would have found the experience to be actionable.

With respect to the likelihood that the jury accepted plaintiff's testimony on this point, the court notes that another resident who testified, Michael G., confirmed that refusing access to bathroom facilities was a custom and practice that was often observed. The likelihood that these two former residents, who did not otherwise know each other, would have made up this allegation--at the time they made their first statements--is remote.

The court views the entire 10 days of room confinement as a one "single incident" within the meaning of RSA 485-B:14, I. There were no intervening circumstances between the first moment and the last moment of room confinement.

3. With only one exception the court would not find any "incidents" for purely emotional abuse that was not accompanied, in the same incident, by either physical or sexual abuse. This is so because there was a wide continuum of emotional abuse and it is impossible to determine where the jury likely drew the line.

The court would find one "incident" for the event in November 1997 when Jeff B. forced plaintiff to witness Jeff B. sexually assault plaintiff's female friend. Forcing a person to witness what might be called the rape of a friend is clearly actionable.

Of note, erring on the side of caution in the State Defendants' favor, the court did not count any incidents for:

(a) any portion of the Teddy Bear incident, aside from the sexual assault on the day it began,

(b) the emotional abuse by Jeff B. circa Halloween 1997, when he first told plaintiff that he would make him break up with his girlfriend and perform oral sex on Jeff B. on the same day, and that he would not go home for Thanksgiving unless he broke up with his girlfriend, or

(c) The instances in which plaintiff was forced to watch other residents engaged in forced assaults of each other.

While the court finds these instances to be abhorrent, the court cannot speculate on whether the jury found liability for any incident of pure emotional abuse, without accompanying physical contact, with the exception of the incident where plaintiff was forced to observe the sexual assault of his friend.

There were other instances of emotional abuse that would have qualified as free-standing "incidents" if they were not committed as part of an "incident" involving sexual abuse.

4. With respect to the many instances of sexual abuse, the court notes that the State Defendants never attempted to disprove any of the acts alleged in the pending indictments against the tortfeasors. Thus, much of what plaintiff had to say was (a) never specifically contradicted by testimony or other evidence, and (b) while not quite conceded, not quite disputed either. The State Defendants did attempt to cast doubt on the exact number of incidents, and they challenged some of the facts relating to some of the incidents. But the State Defendants did not argue that the tortfeasors were innocent men unjustly accused of horrific acts.

Overall, and considering the amount of the verdict, the court concludes that the jury necessarily accepted most of the plaintiff's testimony regarding the sexual assaults. Although the determination of witness credibility is not the court's to

make, in the court's eyes, the plaintiff was a most credible witness. His testimony was broadly corroborated by the resident Michael G. who credibly testified to similar conduct by an overlapping cadre of cottage staff. Thus, the jury could have found that YDC management should have been aware of a custom or practice relating to the sexual assault of residents by staff members.

The court would find one "incident" for each day that a sexual assault by Jeff B. occurred (regardless of whether the sexual assault was accompanied by a physical assault or emotional abuse). There were intervening events between one day's assault and the next day's assault. Jeff B. presumably left the YDC campus and went to his own home. A new shift of staff members came and went in the cottage, which, in theory should have served as an opportunity for plaintiff to make a report. Most of the time, plaintiff went to school where he was surrounded by staff members who were not associated with the cottage.

For the same reasons, the court would find a separate "incident" for each day that a sexual assault by Steve M. occurred (with or without assistance from other staff members).

As the court understands the evidence, Jeff B. and Steve M. never committed sexual assaults together, but rather did so at different times. Therefore, the court would treat each Jeff B.

"incident" as separate from each Steve M. "incident." Thus, there could be a Jeff B. "incident" and a Steve M. "incident" within the same 24 hour day.

The court gave the State Defendants the benefit of the doubt when it came to counting the number of "incidents:"

> (A) Plaintiff testified that there was a four week period (October 29/30 to November 27, 1997) during which he was sexually assaulted by Jeff B. two to three times per week.[10] Each sexual assault occurred on a different date. A reasonable jury could find as many as twelve sexual assaults (e.g., 3 x 4).
>
> The court assumed only two incidents per week (due to the preponderance standard) which reduces the number of incidents to eight. The court then reduced this number by one to account for the fact that, depending on the date of the first and last incidents, there may not have been four full weeks. This reduction also served the purpose of what might be called a "gestalt reduction," e.g., a discount in the

[10]The court's trial notes reflect that after a break in his testimony, counsel asked plaintiff a leading question that assumed there were two to four incidents (rather than two to three incidents) of sexual assault by Jeff B. each week between October 29/30 and November 27, 1997. The discrepancy does not matter because, applying the preponderance standard, the court used the lowest number of estimated incidents.

State Defendants' favor on the number of incidents to account for how the jury might have viewed the evidence. This leave seven incidents. They are accounted for on four different rows as Nos. 3, 6, 8 and 11-14.

(B) Plaintiff testified that there was a 16-week period (January 3, 1998 to April 23, 1998) when he was sexually abused four to five times per week by Jeff B. A reasonable jury could find as many as 80 incidents. The court found just 50 incidents. That is a full one-third reduction from the maximum number of incidents the jury could find. To arrive at this number:

-The court used the lower estimate of four times per week (which the court thought was necessary due to the preponderance standard of proof);

-The court then reduced the resulting number (e.g., 64 incidents) by one because the time frame was two days short of a full 16 weeks.

-The court then further reduced the number of incidents by 20% to 50.4 incidents. This "gestalt reduction" in the

State Defendants' favor accounts for fact that the jury may have been concerned about the specificity of plaintiff's memory. Finally the court truncated the number to 50 incidents.

(B) The court engaged in a somewhat similar process with respect to reducing the number of incidents attributable to Steve M. during the same 16 week time frame. Plaintiff testified that Steve M. sexually assaulted him twice each week. That worked out to 32 incidents. The court reduced this figure by 20% to 25.6 incidents. The court then truncated this down to 25 incidents.

(C) The court used the same approach for the seven-week time period of April 23, 1998 to June 13, 1998. Plaintiff testified he was sexually abused by Jeff B. four to five times per week during this time frame. The jury could have found as many as 35 incidents. The court assumed no more than four incidents of abuse each week, resulting in 28 incidents. The court applied a 20% "gestalt reduction" and truncated the result to calculate 22 incidents.

(E) The court used the same approach for the 13-week period between June 13, 1998 and September 12, 1998. The court's math is set forth in the chart.

All told, while the court recognized a large number of incidents of sexual abuse, this was the lowest reasonable number of incidents consistent with believing the gist of the plaintiff's testimony.

The lowest reasonable number of incidents, which include only, (a) one incident for room confinement without toilet facilities for up to ten days, (b) one incident of being forced to watch a female friend be sexually assaulted, and (c) incidents of sexual assault, some of which were accompanied by violence, is 155.

To this number the court applies one more global "gestalt reduction" of 25% in the State Defendants' favor. In the court's view this is essentially a large, deliberate error, discounting the number of incidents from 155 to 116 for the purpose of "additur of incidents." Simply put: no reasonable jury could have accepted the gist of plaintiff's testimony, awarded $38 million in damages, and found less than 116 incidents.

Pursuant to the parties' court approved agreement, under which there would be no allocation of damages among "incidents," the maximum amount of damages payable by the State would be

greater than the jury's actual award of compensatory and enhanced compensatory damages.

Thus, as explained in the chart below, the court would propose an "additur of incidents" to allow a judgment for 103 "incidents":

1	January 1997: Alleged sexual assault (anal rape) by Frank D.
2	September 17-26, 1997: Room confinement without toilet facilities for 10 days (without interruption); had to go to the bathroom on the floor, and had to wear the shirt he used for cleaning urine.
3	October 29 or 30, 1997: First sexual assault by Jeff B. (forced fellatio), and emotional abuse (forcing Meehan to call his girlfriend to break up)
4	Late October or early November, 1997: First Physical assault (forced to ground, choked, strangled, held down, bloodied) and sexual assault (forced oral sex) by Steve M. and James W. (in plaintiff's room)
5	Early November 1997 (a week after No. 5): Physical assault (punched with closed fist in the abdomen, kidneys, and ribs) and sexual assault (forced oral sex) by Steve M. in the checkroom.
6	Early November 1997 (a day after No. 6): Physical assault (very hard punch with closed fist), sexual assault (anal rape) and emotional abuse by Jeff B.
7	Circa Halloween 1997 (Likely November): Emotional abuse, forced to watch Jeff B. engage in non-consensual oral sex with a female resident.
8	November 11 or 18, 1997: Sexual assault, at gunpoint, by Jeff B. in Jeff B.'s apartment.
9-10	Two additional sexual assaults (forced oral sex) by Steve M. Plaintiff testified that there were a total of four sexual assaults by Steve M. between October 29/30, 1997 and November 27, 1997. Two of the sexual assaults are listed above (e.g. Nos. 4 and 5). The other sexual assaults, which occurred on different dates, are listed on this row.
11-14	October 29/30 to November 27, 1997: Four additional sexual assaults by Jeff B. (Plaintiff testified that he was sexually assaulted by Jeff B. 2 to 3 times

	every week from October 29/30, 1997 to November 27, 1997. The court assumes that this includes the 3 sexual assaults listed above (e.g., Nos. 3, 6 and 8). Each time Jeff B. committed on of these sexual assaults, plaintiff was either anally raped or forced to perform oral sex or both. All of the sexual assaults occurred on different dates. There were approximately four weeks in the time frame. The maximum number of "incidents" a jury could find would be 12 (e.g., 3 x 4). The court instead assumes only 2 times for 8 incidents. The court reduces this number by 1 because the fourth week may have been two days shy of a full week, depending on the dates of the first and last sexual assaults. The court then reduces the resulting number of 7 incidents to account for the 3 incidents of sexual assault listed above. Thus: the maximum number of incidents of sexual assault by Jeff B. in the time period is 12, but the court counts only 7 (four on this row and 3 above).
15-64	1/3/98 to 4/23/98: Fifty incidents of sexual assault by Jeff. B. Plaintiff testify that Jeff B. sexual abused him "every day" that Jeff B. worked at YDC during this 16-week period. Plaintiff testified that Jeff B. worked four to five days per week. The court uses the lower number (e.g., four days per week) to calculate 64 separate incidents over the 16 week period. The court reduces the number of incidents by 1 to account for the fact that the time period was two days shy of a full sixteen weeks. This court reduces the resulting number, 63, by 20% to err on the side of caution, in the State Defendants' favor, and to account for how the jury may have viewed the evidence. This leaves 50.4 incidents. The court truncates down to 50. The highest number of incidents the jury could find based on plaintiff's testimony would be 5x16, or 80. The court lists only 50 on this row. The court does not separately count the sexual assault by Jeff B. that occurred in a car in the Spring of 1998 because it might possibly fall within this timeframe. The court does not separately count the Teddy Bear incident for the same reason, even though involved different types of conduct, including emotional abuse.
65-89	1/3/98 to 4/23/98: 25 incidents of sexual assault by Stephen M. Plaintiff testified that Steve M. sexually abused him "about twice a week" during this 16 week period. Thus, plaintiffs testimony would support a finding of 32 incidents.

	The court reduces this by 20% and truncates the resulting number to a whole number. The court counts only 25 incidents.
90-111	4/23/1998 to 6/13/1998: 22 incidents of sexual assault by Jeff B. Plaintiff testified that he was sexually assaulted by Jeff B. four or five times per week during this 7 week period. The maximum number of sexual assaults a jury could find is 35 (4 x 7). The court assumes only four sexual assaults per week, reducing this number to 28 incidents of sexual assault. The court then reduces the number by 20%, to err on the side of caution in the State's favor, resulting in 22.4 incidents, which the court truncates to 22.
111-114	4/23/1998 to 5/10/1998: Four sexual assaults by Stephen M. Plaintiff testified that Stephen M. sexually assaulted him two times each week for these two and half weeks. The court errs on the side of caution by treating the frame as if it were just two weeks.
115-155	June 13, 1998 to September 12, 1998: Plaintiff testified that he was sexually assaulted by Jeff B. four to five times per week for this 13-week period. The maximum number of incidents a jury could find is 65. The court assumes no more than four sexual assaults per week, resulting in 52 incidents. The court then applies a gestalt reduction of 20% to calculate 41.6 incidents. The court truncates this number to 41. (This includes the sexual assault on September 12, 1998 that plaintiff claims were accompanied by extreme violence, resulting in injury and hospitalization).
	GLOBAL "GESTALT REDUCATION" OF 25%, ON TOP OF THE EARLIER GESTALT REDUCTIONS = 116 INCIDENTS FOR "ADDITUR OF INCIDENTS"

IX. Conclusion

There is no clear correct option. The court has identified what it believes to be the five available options. These options shall be discussed at the upcoming hearing.

May 22, 2024

Andrew R. Schulman,
Presiding Justice