# CIVIL SEXUAL ASSAULT: REPRESENTING THE PLAINTIFF

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This paper will serve to highlight the nuances of sexual assault litigation for the plaintiff's lawyer. From the initial meeting with the plaintiff to determining who may ultimately be held responsible for the assault, acting for the plaintiff in a civil sexual assault case requires special considerations during every step of the litigation process. The objective of the paper is to alert the reader to important legal issues that should be addressed at the various stages of the process and to offer guidance regarding common difficulties that arise.

The framework for discussion will concentrate on the following: the initial client meeting; determining the limitation period; drafting the pleadings; common defences; production and discovery; evidence at trial; and settlement.

## 1. INITIAL MEETING WITH THE PLAINTIFF

When meeting with the plaintiff and devising a strategy for the litigation, it is important for counsel to bear in mind the trauma which the plaintiff has experienced, and the probable sense of victimization and self-doubt that (s)he will feel. Rather than being overly formal and commencing with an actual standard "legal" interview, counsel would be well advised to gain the client's confidence gradually, if possible. It is more important to make the client feel comfortable and secure with counsel than may be necessary in other types of litigation. Explaining solicitor/client privilege at the outset may help to put the client at ease.

Counsel should then proceed to obtain as much information and detail as possible about the actual assault(s) as well as the plaintiff's pre and post abuse history including information regarding their family, education, employment, therapy, any drug and alcohol dependency, criminal record etc. It is also critical to acquire an understanding of the plaintiff's litigation goals. More often than not, goals such as "being acknowledged", "being heard", "coming forward", "validation", "healing", and "closure" are as important to the abuse survivor, if not more important, than monetary compensation. Together, the plaintiff and counsel can work out an appropriate strategy, based upon the facts of the particular case and the relevant legal principles. Plaintiff's counsel must be aware that abuse survivors often distrust authority figures, and the role of counsel and the client should be discussed frankly.

## 2. LIMITATION PERIODS

The reforms to Ontario's *Limitations Act* [1](the *"Act"*) that came into force on January 1, 2004 are encouraging to would-be sexual assault plaintiffs. The new *Act* recognizes the unique challenges faced by survivors of abuse in coming forward in a timely manner to commence litigation against their abusers. While the new black letter law of limitation periods provides *primae facie* support of claimants of assault and sexual assault, this assistance is qualified, leaving room for defence to argue the expiry of the limitation period.

[1] S.O. 2002, c. 24.

a. Basic 2-year Limitation Period

The *Act* introduced to civil litigation a basic limitation period of the second anniversary of the day on which the claim was discovered (s.4). The test for discoverability in cases of sexual abuse is set forth by the Supreme Court of Canada in *M.(K.) v. M. (H.).*[2] In *M.(K.)* the Court determined that the limitation period did not begin to run until the plaintiff was reasonably capable of discovering the wrongful nature of the perpetrator's acts and her injuries. As such, under the 2002 *Act* the claim must be brought within two years of the plaintiff coming to this understanding.

However, there is an important exception to the basic limitation period, where a claim relates to a sexual assault committed by a defendant who had charge of the sexually assaulted party; was in a position of trust or authority in relation to him or her; or was someone on whom he or she was dependent (financially or otherwise); in such circumstances subsection 16(1)(h) of the *Act* prescribes that there is no limitation period.

Given the controversy that may arise when a plaintiff attempts to characterize the abuse as having occurred in a fiduciary, trust or dependency relationship (to which no limitation period attaches), it is imperative that plaintiff's counsel nevertheless presume and preserve a basic 2-year limitation period when confronted by a claimant of sexual abuse, even where it seems obvious that the allegations occurred in a fiduciary, trust or dependency relationship. Where applicable, subsection 16(1)(h) may then be relied upon in response to any limitation period defence that is later raised by the defendant.

In *Morgan v. Kent*[3] the plaintiff served the statement of claim in March 2004, for an assault that took place in 1988, a gap of 16 years. The Court stated that if the defendant was found to be a person of authority, trust or a fiduciary, then section 16(1) would apply. As a starting point the Court looked at three general characteristics of a fiduciary set forth in *Frame v. Smith*[4]: the fiduciary has scope for the exercise of some discretion or power; the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. Ultimately, the Ontario Superior Court determined that the plaintiff had failed to establish that his assaulter was in a position of authority, trust or fiduciary relationship and as such section 16(1)(h) of the *Act* did not apply.

b. The Commencement of the Limitation Period

The *Act* offers assistance to help determine when the 2-year limitation period begins to run in cases of assault and sexual assault. By enacting these provisions, the legislature has recognized the reality of those who are assaulted and has expressly acknowledged that survivors of sexual abuse, as well as those who are physically assaulted by persons with

[2] [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289 [*M.(K.)*].
[3] (2008), 165 A.C.W.S. (3d) 739, [2008] O.J. No. 972 [*Morgan*].
[4] [1987] 2 S.C.R. 99 [*Frame*].

whom they share intimate or dependant relationships, will more likely than not experience mental or psychological impediments to commencing litigation with respect to their abuse.

Specifically, the legislation establishes that where a claim is based on an assault or sexual assault, the limitation period does not run at any time in which the person with the claim is incapable of commencing the proceeding on the basis of his or her physical, mental or psychological condition (s.10(1)). This leniency towards abuse claimants who delay in commencing litigation becomes even more clear with the legislative presumption that a person with a claim based on a sexual assault is incapable of commencing the proceeding earlier than it was commenced, unless the contrary is proven (s.10(3)). Similarly, the legislation provides a presumption that a person is incapable of commencing litigation earlier than it was commenced where his or her claim is based on an assault by a person with whom the claimant was dependent at the time of the assault ("intimacy/dependency assault")(s.10(2)).

Therefore, *so long as a claim is based on a sexual assault or an intimacy/dependency assault*, there is a presumption that the claimant has been incapable of commencing litigation, and thus *the limitation period does not start to run* prior to the time when the proceeding is actually commenced. Given the special treatment afforded these claimants, it may seem as though there is now effectively no limitation period in sexual assault or intimacy/dependency assault cases.

The plaintiff's lawyer should not, however, blindly rely on the presumption of incapacity in these cases, particularly since the presumption is qualified. A defendant may lead evidence to rebut the presumption that a plaintiff was incapable of commencing litigation earlier. In *Morgan*[5], the Ontario Superior Court determined that the plaintiff was capable of bringing the action earlier than he did. They noted that he was able to talk about the sexual assaults with his immediate family in 1997; he spoke about the sexual encounters with three of his friends about the time that they occurred; and he had testified about the abuse at the preliminary hearing in 1998 and to the Criminal Injuries Compensation Board in 2000. The Court also noted that they will permit a long period of time before the clock starts to run in sexual assault cases, particularly when it takes the individual years of therapy to come forward. However, in this case, there was no evidence of any counseling or therapy. Consequently, the action fell outside of the limitation period of two years.

When the impugned conduct does not relate to a sexual or an intimacy/dependency assault, the *Act* provides that the 2-year limitation period commences on the day the "claim is discovered", with the *Act* codifying the common law discoverability principle (s.5). There is furthermore, a presumption that the claimant "discovered" his or her claim on the day the act or omission took place, unless the contrary is proven. Accordingly, the plaintiffs whose claims relate to abuse that is characterized by physical assault (that does not arise within an intimacy/dependency relationship), neglect or other psychological abuse, will be subject to a 2-year limitation period that begins to run in accordance with the codified discoverability principles (s. 5(1), 5(2)).

[5] *Supra* note 1 at 61-66.

Of course, regardless of the nature of the claim, no limitation period shall run against a plaintiff who is both a minor and is not represented by a litigation guardian in relation to the claim (s.6).

### c. Understanding the Transition Rules in the *Limitations Act*

It is important to understand the transition rules in the *Limitations Act*. Pursuant to subsection 24(7), claims of assault or sexual assault incite the new *Act* which, as described above, invoke either the 2-year limitation period and the section 10 rules addressing the commencement of the limitation period, or no limitation period where no such period applies. The new *Act* applies to these cases of assault or sexual assault even if a former limitation period expired before January 1, 2004.

However, unlike other sections of the *Act* that address assault and sexual assault, the transition rule of subsection 24(7) qualifies the type of claims to which it applies. Specifically, subsection 24(7) applies only to "claims based on assault or sexual assault *that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit*" (emphasis added). Accordingly, the direct sexual offender who commits an assault or sexual assault will be caught by the wording of subsection 24(7), thus triggering the new *Act*.

For example in the recent case of *P.M. v. Vallabh*[6], the Ontario Superior Court determined that the limitation period on a sexual assault that occurred in 1995 had not expired under the new *Act*, despite more than eleven years passing since the assault. In this case, the plaintiff was sexually assaulted while alone in an office at work by a complete stranger. Justice Pattillo found that although the limitation period for the claim would have expired under the old *Limitations Act*, section 24(7) of the 2002 *Act* now applied. He stated "If the defendant had committed the sexual assault after the Effective Date, section 10 of the 2002 Act would have applied. Accordingly, section 24(7) provides that section 10 of the 2002 Act applies to the plaintiff's claim". With regard to section 10(1) of the new *Act*, the plaintiff had been incapable of commencing the claim because of her emotional and psychological condition prior to October 27, 2006 when the claim was commenced. Furthermore, Justice Patillo referred to section 10(3) of the new *Act*, stating that in any event the plaintiff was presumed to be incapable of commencing the proceeding earlier than it was commenced, and that there was no evidence to the contrary before him.

In the case of a secondary defendant, such as an employer or institution, it is important to remember that the secondary defendant must possess knowledge of the assault or sexual assault in order for subsection 24(7) to invoke the new *Act*. Thus, a claim against a secondary defendant that is founded only on vicarious liability for the acts of the individual perpetrator, and that does not involve allegations that the secondary defendant knew of the impugned events, will not necessarily invoke the new *Act*.

[6] [2008] O.J. No. 1641 [Ont. S.C.J.] [*Vallabh*].

An assault or sexual assault (which took place prior to January 1, 2004) that is not caught under the wording of subsection 24(7) will be subject to transition rules that do not specifically relate to claim of assault or sexual assault.

d. Client Communication

After the initial meeting with the client, the abuse survivor often wants to take time to think about all that is involved in bringing an action. It is therefore critical for plaintiff's counsel to advise the client of the time limits for bringing an action and to send the client a follow-up letter after the initial meeting outlining the time limits for bringing an action. Further, counsel should diarize the limitation period to ensure the client is contacted prior to the expiry of any limitation period to ensure the client, and the lawyer, are adequately protected.

## 3. PLEADINGS

a. General

Rule 25 of the *Rules of Civil Procedure* [7] defines the scope of the pleadings in all civil matters, and contains both procedural and substantive requirements. Generally speaking, a claim for sexual assault should be very broadly drafted, so as to ensure wider latitude at discovery, and to avoid missing potential causes of action. Novel causes of action should be considered, and counsel should ensure that all realistic potential causes of action are pleaded in the claim. For example, assault, battery, breach of fiduciary duty, breach of non-delegable duty, breach of trust or confidence, intentional and/or negligent infliction of mental distress, and various other types of negligence may potentially be pleaded.

It is difficult for the defendant to successfully strike out the plaintiff's claim on the basis of alleged ambiguity, or for other reasons. The courts seem to consider civil sexual assault as a new and expanding area of law, in which a great deal of leeway is often permitted. There is recognition that new duties and causes of action may evolve, and it is anticipated that the judicial approach will be to allow increasing latitude to the civil sexual assault of the plaintiff in most instances. Counsel may wish to review Statements of Claim in personal injury as precedents, but care must be taken to tailor pleadings to the specific facts of each case.

Before an action is commenced, counsel must discuss potential defendants to the action with the plaintiff. In some cases, a good strategy is to include as many defendants as possible. However, it is important to remember that adding defendants may complicate and lengthen the proceedings. This potential cost must be weighed against the possible benefit of having more parties available to contribute to the ultimate settlement judgment.

Other potential parties include non-offending parties who owed some type of duty to the plaintiff, and who knew or ought to have known that the plaintiff was being abused by the

[7] *Courts of Justice Act*, R.R.O 1990, Reg. 194.

defendant. These parties may be held jointly and severally liable for their failure to act with respect to the prevention of the abuse. Examples of such defendants include: the non-offending parent in incest cases or cases in which the defendant is standing in parentis loci; teachers, day care supervisors, or medical personnel in such institutions as hospitals, schools and crisis centers, or others who owe a duty of care to the plaintiff. However an abuse survivor may simply not want to sue some parties such as a negligent non-offending parent. In such circumstances, written instructions should be obtained.

Lastly, counsel should always have the client carefully review the claim before it is issued. As these cases often turn on assessing the plaintiff's credibility, it is critical to ensure the claim is free of errors. This will help avoid any negative impressions of the plaintiff's credibility that can easily arise when there is inconsistency between the claim and the evidence proffered at examination or trial.

b. Vicarious Liability

In 1999 the Supreme Court of Canada decided two cases involving employer's liability for sexual assaults committed by employees.

In *Bazley v. Curry*[8] a non-profit association operating residential care facilities for children was held vicariously liable in an action brought by a former resident for sexual assault by a child care counselor. The Court unanimously rejected the argument that non-profit bodies should be protected from tort liability in the public interest, a position reaffirmed in the case *Blackwater v. Plint*[9] discussed in Appendix A to this paper. The relationship between the employer and employee was sufficiently close, while the wrongful act was a manifestation of risks inherent in the employer's enterprise. Liability was found against the foundation on the basis that the assaults took place in circumstances that flowed from its mandate, and the abuse of the authority given to the employee.

In *Jacobi v. Griffiths*[10] the majority of the Court found a non-profit Boys' and Girls' Club not vicariously liable for sexual assaults committed by its employee, the program director. Some of the assaults took place in the employee's home, and some of them in the course of excursions relating to the children's sports activities. In applying the test set out in *Bazley*, the majority found that the required strong connection between the risks inherent in the employer's enterprise and the wrong had not been established. The employer organized recreational activities and the employee's job did not give him the degree of control or intimacy with respect to the children that would attract liability.

The test with respect to vicarious liability per McLachlin J. (as she then was) in *Bazley* and affirmed in *Jacobi* is two-step. First, precedents should be examined – are there decisions in cases dealing with similar fact situations which unambiguously determine whether the case should attract vicarious liability? Second, if prior cases doe not suggest a solution, determine whether vicarious liability should be imposed in light of the broader public

[8] [1999] 2. S.C.R. 570 [*Bazley*].
[9] [2005] 3 S.C.R. 3 [*Blackwater*].
[10] [1999] 2 S.C.R. 570 [*Jacobi*].

policy rationales behind the concept of strict liability. *Bazley* sets out a principled framework to apply this policy rationale to a particular set of facts.[11] The factors to consider, as summarized in *Doe v. Avalon East School Board*[12], include: (a) the risk of wrongdoing must be sufficiently connected to the employer's enterprise, and the power and authority which flows therein; (b) there must be a sufficiently close relationship between the wrongdoer and the defendant; and (c) the impugned action must be sufficiently connected to the exercise of the authority and power provided by the defendant[13].

Since 1999 an abundance of case law on vicarious liability has been developed in Canada. See Appendix A for a summary of some of the judicial determinations regarding vicarious liability specific to the sexual assault context.

c. Use of Pseudonym

There are also special considerations regarding naming the plaintiff in pleadings. Victims of abuse often have feelings of guilt and shame associated with the abuse they have suffered from and consequently confidentiality may be of paramount importance to them. Counsel may want to obtain an order allowing the plaintiff to be identified by initials or a pseudonym. As a practical matter, such a motion should be brought prior to commencing the action or immediately thereafter.

In order to grant such an order, the court must find that there is a significant public interest that justifies overriding the requirements of Rule 14.06, which provides that parties must be identified in the title of proceedings. Case law has established that one such interest is encouraging victims of sexual abuse to come forward with their allegations by assuring them that they will not be exposed to public embarrassment and humiliation. Further, Rule 37.17 will allow a party to make a motion before commencing an action in urgent circumstances upon the moving party's undertaking to commence the proceeding forthwith.

In *Doe v. Escobar*[14], an application was brought by the plaintiff to use the pseudonym "Jane Doe" instead of her real name, with other relief required to give practical effect to the use of the pseudonym. The judge hearing the motion allowed the application but qualified it to the extent that the plaintiff's name could be disclosed by either parties' counsel in order to conduct the litigation in "good faith and with reasonable diligence."

In qualifying the plaintiff's request, the motions judge considered a number of principles. First, it is important for courts to recognize privacy rights of plaintiffs in matters involving sexual assaults. Second, the qualification that the defendant's counsel can disclose the plaintiff's name allows the defence to obtain evidence of the plaintiff's character or past sexual conduct, in so far as such evidence is relevant and admissible. Third, the plaintiff's application would have been stronger if there was expert medical evidence regarding her

[11] *Supra* note 7 at 41-43.
[12] (2004), 135 A.C.W.S. (3d) 1176, 28 C.C.L.T. (3d) 88 [*Avalon*].
[13] *Ibid.* at 31.
[14] (2003), 125 A.C.W.S. (3d) 606, 37 C.P.C. (5th) 329 [*Escobar*].

emotional or physical condition. Last, a court order should have been obtained allowing the use of the pseudonym before the Statement of Claim was issued and served.

The Ontario Superior Court of Justice dismissed the defendant's motion for leave to appeal. The Court found the motions judge applied the correct principles. He recognized that the right of the public to an open court system needs to be balanced against the public policy goal of encouraging victims of sexual assault to come forward by offering them protection from negative public exposure, while protecting each party's right to a fair trial.

In *J. Doe v. TBH*[15], the case involved a joint motion by the parties to use pseudonyms for both the plaintiff and the defendant. In the main action the plaintiff alleged that at the age of fourteen he was sexually assaulted by a counselor when was a resident of an institution operated by the defendant. Both the plaintiff and defendant argued that the use of pseudonyms was necessary to prevent embarrassment, personal distress and adverse professional and economic consequences.

The Court cited *Attorney General of Nova Scotia v. MacIntyre*[16], for the principle that public accessibility to the court system should only be restricted where there is a need to protect social values of the utmost importance, such as the protection of the innocent. The Court held that the plaintiff should be allowed to use the pseudonym "J. Doe" because Parliament and the courts have long recognized that victims of sexual assault need to be assured that they will not be traumatized and embarrassed by widespread publication and these victims are clearly "the innocent" referred to by the Supreme Court of Canada. However, the Court had more difficulty approving the defendant institution's motion to use a pseudonym. The Court stated that it is important to hold public agencies accountable and to satisfy the public that such agencies and the courts are fulfilling their obligations. The Court determined that the defendant should be permitted to use a pseudonym throughout the pre-trial stage of the action, but to continue doing so during trial it would have to apply to the trial judge for such relief.

In *M.(S.) v. C. (J.R.)*[17] the plaintiff brought a motion pursuant to Rule 37.17 of the *Rules of Civil Procedure* for an order allowing her to commence proceedings with the use of pseudonyms in the title of proceedings. The plaintiff argued that the use of her initials was necessary because of the embarrassing nature of the assaults, she did not want her parents to find out about the assaults, and on the grounds that publication of the assaults would adversely affect her ability to continue in her program of adult education.

The Court attempted to balance the privacy rights of the plaintiff and the public policy goal of encouraging victims to come forward against the right of the general public to an open court system. The Court ultimately concluded that the plaintiff's privacy rights could be adequately protected by a publication ban or similar order and it dismissed the motion for use of pseudonyms.

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[15] (1996), 61 A.C.W.S. (3d) 665, 45 C.P.C. (3d) 1 [*TBH*].
[16] [1982] 1 S.C.R. 175 [*MacIntyre*].
[17] [1993] 13 O.R. (3d) 148, 40 A.C.W.S. (3d) 41 [*M.(S.)*].

The trend seems to be in favour of granting pseudonym motions. Arguably where the is still a minor at the time of the litigation, the public interest in protecting the plaintiff's identity is ever more compelling than where the plaintiff is an adult.

d. Particulars

If the Statement of Claim contains broad allegations, the defendant may demand particulars. However, a decision of the Master Cork seems to suggest that this demand may be successfully resisted. In *O.A. v. A.G.*[18] the defendant demanded the times, dates, and locations of the alleged assaults on the Plaintiff. The pleading in this case read as follows:

> "Beginning in or about 1978, when X was 5 and Y was 16 years of age and continuing until in or about 1986, until X was 14, and Y was 25 years old, Y repeatedly sexually assaulted and battered X. The sexual assault and batteries included Y making X watch pornographic movies with him, having sexual intercourse with another female in front of her, touching X's breasts and genitals, requesting that X perform fellatio on him, performing cunnilingus on X and having sexual intercourse with X."

Master Cork's decision was reached notwithstanding the fact that the defendant had pled no knowledge of the allegations, and had therefore argued that he unable to respond. Master Cork stated that: "the defendant has the ability to plead the claims, even if such be a general denial of the allegations therein contained". He was persuaded that if the particulars of the allegations were ordered, then those very particulars (facts) could possibly serve to limit the scope discovery, and the ultimate liability of the defendant. This is because the boundary of relevance in the action could be limited to the particulars. Master Cork also stated that the ability of the plaintiff to provide the specific particulars in this case was hampered because of the age of the plaintiff when the assaults occurred. Ultimately, Master Cork held that while some uncertainty existed on the defendant's part absent particulars, there was sufficient certainty for the defendant to plead to the allegations of the plaintiff, on the other hand, if a defendant can demonstrate that certain defences, such the civil equivalent of "alibi", are unavailable without sufficient particulars, Master Cork's decision may be distinguishable. The plaintiff may therefore be forced to provide particulars. Unfortunately, if a demand for particulars is granted, this may significantly limit the scope of discoveries and the ultimate liability of the defendant.

4. DEFENCES

The traditional defences to sexual assault in criminal cases are: consent; honest but mistaken belief; mistake of fact; and honest belief in consent. In civil sexual assault cases, aside from a complete denial that the alleged events occurred, the most commonly asserted liability defence is that of consent. While consent has been accepted by some courts as a defence to sexual assault, it will not succeed when the consent is determined to be other than genuine. For example, consent is not genuine when it is obtained due to the fact that

[18] [1993] O.J. No. 382 [*O.A.*].

the plaintiff holds the defendant in high esteem, and desires "acceptance" by the defendant for a specific reason. If, however, the plaintiff has a true opportunity to prevent the assault and fails to do so, consent may be inferred. Therefore, it is essential for counsel to gather as much information as possible from the plaintiff, in order to gain the best possible grasp of all of the issues and potential defences to the plaintiff's allegations prior to commencing an action (or entering into settlement negotiations).

## 5. PRODUCTION AND DISCOVERY

### a. Documents

Rule 30.02 of the Rules of Civil Procedure sets out that:

> Discovery must be made of every document relating to any matter in issue in an action or has been in the possession, control, or power of a party, whether or not privilege is claimed in respect of the document.

"Document" is broadly defined under the Rules, and the plaintiff will therefore generally have to produce all relevant medical documentation, including clinical notes and records of treating physicians (whether or not the plaintiff intends to rely on them at trial). All other documents which may be relevant to the plaintiff's claim, or to potential defences, may also be subject disclosure, such as school records, employment records, criminal records, and tax returns. These may be used to demonstrate a decline in the plaintiff's school work or aptitude prior to the assault. The defendant likewise has a similar obligation.

### b. Examination for Discovery Generally

In civil sexual assault cases, one of the most common areas of dispute on discovery relates to issues concerning privilege. The competing policy considerations between the right to discover and the law of privilege are clear: the right of the litigant to fully pursue discovery on any legitimate defence is set squarely against the plaintiff's rights of privacy.

In *A. M. v. Ryan*[19], the production of clinical notes and records of the treating psychiatrist was sought by the defendant. The plaintiff alleged that communications between herself and her psychiatrist were privileged. The Doctor raised the issue of the confidentiality of her notes. The Court held that to qualify as privileged communication the following four criteria must be met;

1) the communication must originate in a confidence that they will not be disclosed;
2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3) the relation must be one which in the opinion of the community ought to be sedulously fostered; or

[19] [1997] 1 S.C.R. 157 [*Ryan*].

4) the injury that would inure to the relation by the disclosure of the communication must be greater that the benefit thereby gained for the correct disposal of litigation.

Justice Vickers of the B.C.S.C. stated that:

> "the law does not recognize a blanket or class privilege in these circumstances. The rule is to take such situations as they arise, on a case by case basis. Case by case privilege may arise in circumstances where sufficient reason exists outside a recognized common law or "class" setting to warrant treating the communications as privileged."

In this particular case, the public interest in the proper administration of justice outweighed the public interest that might be protected by upholding the claim for privilege where the plaintiff had placed in issue matters that probably are referred to in the treating physician's notes. Again, due to the need to establish the plaintiff's recognition of the causal connection between the harm and the consequences thereof, the claim of privilege may fail in many cases.

The rights of the members of support groups to protect the confidentiality of their communications, and to prevent disclosure of the fact that they are members of such groups, was considered in *Sarah Jane Doe v. Hirt*[20]. The Court held that in order for the defence to obtain sweeping and intrusive inquiries into the sexual history of a litigant through non-parties, the relevance of the inquiry and the probative value of whatever information may be subsequently obtained ought to be established to a relatively high standard. The factors that must be balanced are whether or not the injury that would result from compelling the plaintiff to disclose the identity of her group is greater than the benefit gained for the correct disposal of the litigation, that is, whether or not the public interest in the proper administration of justice outweighs the importance of any public interests that might be protected by upholding the claim for privilege.

Pursuant to Rule 31.06(3) of the *Rules of Civil Procedure*, all findings, opinions and conclusions, as well as the names, of any experts must be disclosed unless they are made in contemplation of litigation and the particular expert will NOT be called as a witness at the trial. This rule is equally applicable to both the defendant and the plaintiff.

The "golden rule" with respect to discovery is that if the question and/or information is relevant to the issues in the case, then it can be obtained on discovery. Since the pleadings in actions such as civil sexual assault are usually very broad in nature, it is relatively easy to show how a document could be relevant. Therefore, it is important to advise the plaintiff from the outset that even information and documentation that may touch upon very sensitive and personal issues may be subject to disclosure and that in many ways their life will be put under the microscope.

[20] (1993), 16 C.P.C. (3d) 88, 39 A.C.W.S. (3d) 941 [*Hirt*].

The defence to causation of damages and the assessment of damages often requires scrutinizing all facets of the plaintiff's life. The defendant is only responsible to pay for damages the defendant actually caused and therefore the defence often argues that the alleged abuse did not cause all of the plaintiff's loss. Rather, the defence will suggest that other factors in the plaintiff's life are the reason for the plaintiff's unfortunate circumstances. For example the defendant will argue that the plaintiff's alcohol dependency was not caused by the trauma of the abuse but that the plaintiff was actually genetically predisposed to alcoholism in light of the occurrences of alcoholism common to the plaintiff's family. Likewise the life circumstances of the plaintiff's relatives will be brought forward to suggest the plaintiff would have suffered poor self esteem, poor educational performance, periods of unemployment, and involvement in criminal activity despite the abuse. Thus the argument that the abuse did not cause all of the plaintiff's loss allows for a wide sweeping analysis of the plaintiff's life.

In criminal cases, where the plaintiff is the complainant and not a party, the Court makes an effort to protect the plaintiff's privacy concerns. However, in civil proceedings where the plaintiff seeks monetary compensation, the Court is less sympathetic to the plaintiff's privacy concerns. As such it is imperative to warn the plaintiff of this likely intrusion into their life, past and present, especially where the claim includes damages for long-term psychological effects of the abuse. Counsel should therefore take the effort to ensure the client understands that their whole life is fair game for scrutiny. The plaintiff may be able protect their privacy to some extent by narrowing the pleadings. Specific instructions in this regard should be sought from the plaintiff.

c. Examination for Discovery of a Minor

There are specific Rules governing the examination for discovery of a minor. In order to be examined for discovery, the minor must be competent to give evidence. Also, the courts will use their discretion to limit or prevent such an examination where it would be "oppressive, vexatious, or unnecessary" or where there is a real potential for psychological harm. Further, in order to actually read into or use the evidence given at examination for discovery of a minor at the trial, the Rules require leave of the trial judge.

Although the Rules allow a litigation guardian to be examined in lieu of the party under disability, practically speaking this rule should be applied only to family members, or other litigation guardians who are familiar with the party. If the Children's Lawyer or the Public Guardian and Trustee has been appointed as litigation guardian only, they may have no independent knowledge of the case and therefore an examination of them may have no practical benefit.

The Court held in *Nemeth v. Harvey*[21] that an in order for a child of tender years to be examined for discovery, the child "must have an awareness of the purpose of the examination, its general meeting, a general understanding of its significance and the sum insight into the importance of what might be said by him on such an examination." Ultimately, the Court determined that although the five year old plaintiff possessed average

[21] (1975), 7 O.R. (2d) 719 AT 13 [*Nemeth*].

intelligence and they had no reason to believe that he would not be truthful, the minor plaintiff did not display the level of intelligence required under the test set out above.

The infant plaintiff in *Bennett v. Hartemink*[22] had no recollection of the circumstances at issue. The Court refused to require the examination for discovery of the infant as it would be "an exercise in futility", stating that a parties' right to examination of an infant is not absolute, and the courts can and should exercise discretion so as to protect the interests of the child. This is so even where an infant is competent to give evidence.

In *H. v. H* [23] the defendant brought a motion in an action for sexual assault for an Order that the minor plaintiff be examined for discovery by defence counsel, unless she proved not to be competent. The minor plaintiff was four years old at the time of the assaults and would be eight years old after the close of the pleadings. The Court cited *Bennett* for the proposition that the right to discovery of a minor is a matter of discretion. The court found that, at and around the time of the incident, the evidence disclosed that the minor plaintiff would not discuss the incident with anyone. At the time of the trial, the minor plaintiff was still unable to speak about the incident, even with her mother. Another significant consideration by the court was that the taking of evidence could be harmful to the child "in light of the type of incident itself"[24]. The defendants only intended to examine the minor plaintiff on damages, but not on the issue of liability. The court held that school records, doctors' clinical notes and other documentary evidence would be sufficient to provide the defendants with the evidence necessary to know the case that it had to meet at trial. Accordingly, the court denied the request by the defendants to examine the minor plaintiff.

d. Presence of Defendant at Discovery

Under the *Rules of Civil Procedure* generally a party has a right to be present at the discovery for the opposing party. For some sexual abuse survivors, it is intimidating to be orally examined at discovery with the perpetrator of the sexual abuse present. To best protect the plaintiff, counsel should consider the test to exclude a defendant from discovery of the plaintiff in civil sexual assault litigation.

In *Piper v. Piper*[25] an application was brought by the husband for an order permitting him to be present in the examination room when his counsel examined his wife for discovery. The fundamental objection raised was that wife's counsel did not feel it advisable to introduce the wife to the discovery in the presence of the husband since the very presence of that husband represented an intimidation of the wife, which had been existent in her life for many years preceding the separation. Master Cork noted that although there were no cases on point, he did in fact have discretion to preclude the husband from attending his wife's discovery. He stated,

[22] (1983), 42 C.P.C. 33 [*Bennett*].
[23] (2003), 42 C.P.C. 33, 125 A.C.W.S. (3d) 607.
[24] *Ibid.* at 13.
[25] (1988), 65 O.R. (2d) 196, 27 C.P.C. (2d) 170 [*Piper*].

> "I believe, therefore, as conceded between counsel, that I have discretion to preclude the husband from attending his wife's discovery. If I exercise my discretion against him, then such must be for some practical reason, given that neither spouse through counsel are arguing that the husband in any way has disrupted the proceedings by his presence. As the wife's counsel has put it, even if the husband never opens his mouth, his very presence will be considered by his wife as intimidation."

Master Cork explained that the issues before him were quite different to the context of business litigation. He stated,

> "I am perfectly satisfied that in this peculiar area of the law, the mere presence of a long-standing marriage partner in an examination room could quite easily amount to a threat or intimidation on the other spouse, when the experiences of both spouses has been that the now attending spouse has been dominant in the relationship over the other subservient spouse then being examined."

Ultimately the Court refused to permit the husband to be present during his wife's examination for discovery as his presence created the real possibility of intimidation.

Master Cork was again asked to determine whether a party could be excluded from the oral examination of the plaintiff on discovery in *K.(G.) v. K.(D.)*[26]. The plaintiff had brought a motion to exclude the defendant from her oral examination. The defendant was her father whom she had accused of sexually assaulting her when she was younger. The plaintiff was of the belief that she would feel intimidated by his presence and he would be disruptive to the examination.

In this case, Master Cork refusted to grant the order. The master noted that there was a well-defined right in any litigant to be present during both the court proceedings and discovery of any other litigant in the action, opposed to the interest of the litigant conducting the examination. He cited the case of *I.C.C. International Computer v. I.C.C. Internationale Computer*[27], as standing for the proposition that there is an inherent right to be present during the examination of any other party for discovery, and therefore there remained only a discretion in the court to exclude such a party, where such exclusion is necessary to secure the ends of justice. As such he required the plaintiff to show cause for exclusion of the defendant, and that cause would be a matter decided on the facts in each individual case, by the court reviewing the request for such exclusion.

After reviewing the facts of the case, Master Cork determined that the parties themselves, although both under tremendous pressure, were able to withstand that pressure, and control themselves during the discovery process. As such the defendant was permitted to be present on the plaintiff's examination for discovery.

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[26] (1994), 36 C.P.C. (3d) 41, [1994] O.J. 1680 [*K.(G.)*].
[27] (1988), 66 O.R. (2d) 187, 31 C.P.C. (2d) 178 [*ICC International*].

In *Redekop v. Redekop*[28] the Court questioned Master Cork's analysis of showing cause in *Piper* holding that that the principle that a party has a right to be present at the examination of the other party and will not be excluded on the basis of subjective intimidation, applies to both civil and matrimonial litigation equally.

Justice Quinn disagreed with any suggestion that the inherent right of a party to be present during the out-of-court examination of an opposite party is not strictly applicable in matrimonial litigation, stating,

> "No special rights should attach to such litigation; and I certainly do not see anything to be gained by attempting to set up subcategories, such as "quasi-matrimonial" proceedings. Regardless of the species of law suit, the inherent right remains the same and it is lost only when cause, in the form of exceptional circumstances, is found to exist. If, for example, intimidation is the cause being alleged, it must be proved, as I have already stated, on a balance of probabilities. In that situation, if the parties in question are spouses, that fact, by itself, would not be determinative of the issue. What would be important to know is whether the historical nature of their relationship makes it probable that intimidation will result if one spouse sits in on the discovery of the other. Undoubtedly there are instances where, throughout the marriage, the conduct of a husband towards his wife was such that his mere presence during her examination would create the probability of intimidation. But, even then, that must be proved and not assumed."

With respect to sexual assault litigation this test requires the plaintiff's lawyer to prove on a balance of probabilities that a cause to exclude the defendant from the oral examination exists. For example, if intimidation is the reason, intimidation must be proven on a balance of probabilities. The Court must consider whether the historical nature of the relationship makes it probable that intimidation would result if the defendant were to sit in on the discovery of the plaintiff.

e. Defence Medicals

Rule 33 of the Rules of Civil Procedure provides that on a motion by an adverse party under section 105 of the *Courts of Justice Act*, the court may make an Order for the physical or mental examination of a party whose physical or mental condition is at issue in the proceeding. The plaintiff's mental and physical condition is usually relevant to both liability and to the quantum of damages that will ultimately be awarded.

It is recommended that counsel meet with the client prior to the client's defence medical examination to prepare him/her. Counsel should discuss the reasons for the examination, and the purposes for which its results will be used, that is, to assess the client's medical condition and to allow the examining doctor to provide a report to the defendant's lawyer in this regard. The doctor may be called as a witness against the plaintiff at trial, the report may be used to cross-examine the plaintiff or the plaintiff's medical witnesses, or the report may be filed as an Exhibit at trial. Some specific issues that the client should be advised to

[28] (1998), 28 C.P.C. (4th) 109, 41 O.R. (3d) 301, [1998] O.J. No. 2435 (Gen.Div.) [*Redekop*].

consider during the course of his/her medical examination include: any and all discussions which the client is involved in with anyone at the doctor's office; whether or not the doctor wrote down and detailed the client's answers to questions; whether or not any other parties were present during the examination; any pain which the client experienced during the examination; any specific questions and answers or discussions which occurred between the client and the doctor. The client is also well advised to take detailed notes immediately after the exam. Such notes may provide information which is useful at cross-examination of the defendant expert.

Counsel should advise the client to be co-operative and honest, without exaggerating or minimizing the assault. The client should be informed that many psychological tests have validity indicators to reveal if the plaintiff is not being honest or is exaggerating. Additionally, the client should be advised to discuss ALL aspects of the assault, so that the doctor will include these details in his/her report. If the client fails to do so, (s)he should be advised that this could adversely affect his/her case.

## 6. EVIDENCE AT TRIAL

### a. Prior Testimony

One of the most interesting evidentiary issues concerns the use of prior testimony from a criminal proceeding at the trial of the civil action.

In determining the admissibility of testimony from a criminal proceeding in the civil proceeding, Sopinka and Lederman stated, in The Canadian Law of Evidence in Civil Cases (1974), that:

> "..the previous testimony of a witness in a criminal case is generally not admissible in a subsequent civil action even though it involved the same fact situation. Parties and issues in criminal and civil cases are different, and, consequently, a cross-examination for the purposes of a civil action could be totally different from the cross-examination conducted in the criminal proceeding which would focus upon different issues."

Generally, the rules regarding the admissibility of prior testimony were established by the Supreme Court of Canada in 1894. In *Town of Walkerton v. Erdman*[29] it was determined that three elements were necessary in order to justify such admissibility. These elements are that: there must be a chance to cross-examine; the questions in issue must be substantially the same; and the parties and/or their representatives must be the same.

In the 1990 Ontario decision of *Insco Sarnia Ltd. v. Polysar Ltd.*[30], the defendant moved to file as evidence the transcript of the evidence given by the plaintiff at a prior criminal trial. The criminal trial had led to the conviction of the President and operating mind of the civil plaintiff company. The evidence sought to be admitted was from an officer-employee of

[29] (1893), 22 O.R. 693 [*Erdman*].
[30] (1990), 49 B.L.R. 122, 22 A.C.W.S. (3d) 1093 [*Polysar*].

the company who had died a few months before the trial. In holding that the transcripts were inadmissible, Justice Killeen relied on Phipson on Evidence, 11th ed., and Sopinka and Lederman, The Canadian Law of Evidence in Civil Cases, (1974). Justice Killeen concluded that in those situations in which the trial Judge had expressed reservation about the credibility of the witness and did not rely on that witness' testimony, it would be profoundly unfair to the plaintiff to allow the evidence from the criminal trial to be admitted into the civil trial.

b. Fact of a Criminal Conviction

A prior criminal conviction will be *prima facie* evidence, admissible in a subsequent civil action by the plaintiff if the issues and parties to the action are substantially the same (see *Erdman*, supra). However, this evidence can be rebutted on its merits by the defendant, and the plaintiff will still be required to prove that the alleged injury and damages flow from the assault. The fact of a prior conviction cannot be used to completely tie the defendant's hands in the civil action.

In *Demeter v. British Pacific Life Insurance*[31], the Court held that proof of the plaintiff's conviction for the murder of his wife was admissible (on behalf of the defendant) in his civil action to collect on her life insurance policy after her death. Justice Osler held that the conviction should be regarded as *prima facie* proof of the defendant's guilt, subject to rebuttal by the defendant on the merits.

In *Q. and Q v. Minto Management Ltd*[32], the plaintiff had been sexually assaulted by an employee of the defendant corporation. The Judge held that the prior conviction was admissible in the subsequent civil proceeding. However, neither the convicted party himself nor the corporate co-defendant was prevented from introducing the defence that the rape had not been committed. In reaching this decision, the Judge held that a criminal court ruling cannot constitute a conclusive presumption that cannot be rebutted in a civil court. The conviction is only considered *prima facie* evidence that each of the defendants may try to successfully rebut. Furthermore, although the other corporate defendant had not been involved in the criminal trial, the conviction was still held to be admissible as against it. It was considered to be illogical to allow the conviction into evidence against one defendant, but to refuse to admit the same conviction as against the other defendants. The plaintiff was still required to prove the extent of the injuries and damages which (s)he suffered as a result.

In *Holt v. MacMaster*[33], the defendant sought summary judgment with respect to a determination of liability for an assault that had occurred during the course of an amateur hockey match. The defendants filed affidavits detailing the alleged assault by the plaintiff, Holt. Holt filed an Affidavit stating that the assault had occurred in circumstances of self-defence. Holt was cross-examined on his Affidavit, and admitted that he had been criminally convicted of assault arising from the circumstances, and that his Affidavit

[31] (1983), 43 O.R. (2d) 331, 50 D.L.R. (3d) 249 [*Demeter*].
[32] (1984), 46 O.R. (2d) 756, 44 C.P.C. 6 [*Minto Management*].
[33] (1993),11 Alta. L.R. (3d) 226, 140 A.R. 235 [*Holt*].

contained essentially the same facts as the evidence he had given at his criminal trial. However, Holt argued that with the exception of defamation actions, proof of a criminal conviction is not "conclusive proof" that the offence was committed. Instead, it is merely one piece of evidence that is to be weighed with all of the other evidence. Justice Hunt denied the appeal, but stated that a conviction or finding of guilt shall not be treated as "conclusive proof", because there may be cases in which the issue to be decided in the civil case are not identical to those issues that were decided in the criminal case. The Court also held that in cases in which the facts and issues are identical, and the defendant's evidence is, by his own admission, essentially the same as it was in the prior criminal trial, very heavy weight should be attached to any conviction which resulted from that prior trial.

Similarly, in *Franco v. White*[34], the plaintiff sought summary judgment with respect to the issue of liability after the defendant was convicted by a jury of sexually assaulting the plaintiff. Although the Court noted that summary judgment does not follow automatically upon a criminal conviction if the defendant can show that despite the conviction there is an issue to be tried, in this particular case, the issue in the civil case was in fact identical to that tried in the criminal case.

The Court considered the following factors: the appellant was found guilty of the offence on the criminal standard of proof after a fully contested jury trial; he had every incentive and every opportunity to defend himself to the full extent permitted by law; and that he offered nothing new at this stage. The Court stated, “In his defence to the civil action, he relies solely on the evidence he gave at the criminal trial. The civil trial would be a re-run of the criminal trial. The plaintiff would only have to satisfy the civil balance of probabilities standard”.

Although the case was one of credibility, the Court found that one cannot ignore the prior determination. Considering the appellant's evidence was rejected by both the jury and the trial judge in preference for the evidence of the respondent, there was no genuine issue of credibility that required a trial. The Court found that the case fell within the principle that "credibility precludes the granting of summary judgment . . . only when what is said to be an issue of credibility is a genuine issue of credibility."[35]

In *Polgrain Estate v. Toronto East General Hospital*[36] an appeal was brought by the estate of Polgrain from the dismissal of its action for damages against the Hospital for an alleged sexual assault of Polgrain while she was a patient of the hospital by a member of the hospital nursing staff. The staff member had been acquitted of criminal charges of sexual assault and the motions judge dismissed the civil action as an abuse of process. The motion judge made this order because he interpreted the reasons of the judge in the criminal case as expressing a finding that the sexual assault did not occur, rather than merely expressing a reasonable doubt. The Ontario Court of Appeal allowed the appeal and set aside the order dismissing the action finding that the doctrine of abuse of process did not extend to prevent the action.

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[34] (2001), 53 O.R. (3d) 391, O.J. No. 847 [*Franco*].
[35] *Ibid.* at 51.
[36] (2008), 90 O.R. (3d) 630, 293 D.L.R. (4th) 266 [*Polgrain*].

The case turned upon the application of the abuse of process doctrine to prevent relitigation. The respondent submitted that relitigation would undermine the integrity of the judicial process because of the judicial findings made in the criminal case. However, the Court found that the reasons of the trial judge in acquitting the respondent were not judicial findings that attract the same relitigation concerns as does the formal verdict. The Court declared that the dismissal of the suit as an abuse of process would attribute to the reasons of the trial judge a declaration of innocence, a verdict that was not in fact legally open in the criminal proceedings.

Additionally, the Court found that there were important policy reasons for not recognizing a verdict of factual innocence. One such concern was the impact on the integrity of the judicial process. The Court stated that where the accused is acquitted, the only essential finding is simply that the case was not proved beyond a reasonable doubt and the trial judge may arrive at that conclusion for any number of reasons.

> "For example, in a sexual assault trial there may be a reasonable doubt that the complainant consented, that the act occurred, that the accused was the perpetrator or that the touching was of a sexual nature. It is not essential that the trial judge find as a fact that there was consent, that the act did not occur, that the accused was not the perpetrator or that the touching was not of a sexual nature. It is enough that the trial judge had a reasonable doubt on one or more of those features of the case. The judge is not required and it is not essential that the judge make a positive finding in the accused's favour on any of those issues".[37]

Accordingly the Court in *Polgrain* decided that to give full legal significance for abuse of process purposes to matters that were not essential to the decision would confuse the roles of the criminal and civil courts. As such the appeal was allowed and the order dismissing the action was set aside.

In summary, prior testimony will not generally be admissible in a subsequent civil action, whereas proof of a prior conviction will be permitted. Notwithstanding the admissibility of the fact of the prior conviction, the defendant can still plead any of the available defences. In all cases, the onus remains on the plaintiff to prove the injury and the damages.

c. Hearsay

Hearsay has always been problematic in both the civil and criminal contexts. This is particularly true with respect to sexual assault cases, since it is often impossible for the plaintiff to provide independent first-hand evidence, although (s)he may have told friends, family, or care providers about the incident.

The rules regarding the admissibility and scope of hearsay have been relaxed over the course of the past few years. This trend towards flexibility truly began with the decision in

[37] *Ibid*. at 36.

*R. v. Khan*[38]. A mother was permitted to give hearsay evidence that had been told to her by her three-year-old daughter, even though the daughter's statements were made outside of the general scope of exceptions to the hearsay rule. The daughter told her mother about sexually abusive activity by her pediatrician 15 minutes after the incident had occurred (the general exception is that the statement must be immediate). The Supreme Court of Canada held that the child's evidence, as provided by the mother, was admissible. The Court reasoned that the child's statement was "necessary and reliable" in the circumstances. The Court held that "necessity for these purposes must be interpreted as reasonably necessary". The "necessary and reliable" test is now accepted as the appropriate test to apply in order to determine whether or not the hearsay statement will be admissible, and will be applied differently depending upon the particular circumstances of each case.

The Court will consider whether or not the party who made the hearsay statement had a reason to fabricate it, whether or not there were any other means by which to acquire the evidence, and whether or not the evidence is corroborated in some way by some other type of (physical) evidence. Therefore, it may be the duty of the plaintiff's counsel to seek out corroborative evidence, to prove that there are no other means by which to admit the evidence, and to prove that the plaintiff had no ulterior motive in making the hearsay statement. In effect, the Court must find that it is necessary to admit the hearsay evidence due to the fact that there is no other equivalent evidence from other sources.

In 1992, the Supreme Court of Canada again considered the "necessary and reliable" test in *R. v. Smith*[39]. Statements implicating the accused in the offence were made by the murder victim to her mother in the course of various telephone calls. The Supreme Court of Canada applied the Khan, supra principles, and determined that certain calls were admissible. Lamer, C.J.C. stated that:

> it is now open to the Courts to create exceptions to the hearsay rule on the basis of principle and the principle is based on the necessity of the evidence to prove the fact in issue and the reliability of this evidence.

Although these exceptions were developed in the criminal context, it is likely that they are equally applicable to civil cases. It is recommended that counsel for the plaintiff carefully examine the advantages, disadvantages and potential implications of tendering hearsay evidence. The weight that should be given to such statements should also be addressed. Counsel must be well-versed as to the rationale of admissibility with respect to all potential hearsay evidence. It may even be recommended to call in expert evidence to assist counsel with respect to the development of a foundation for such evidence.

d. Character Evidence

Generally speaking, the character of either party cannot be addressed at trial because of its potential to prejudice a fair trial. Character refers to "a description of a person's disposition, that is, a character trait or a group or sum of traits, or of a disposition in respect

[38] [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 [*Kahn*].
[39] [1992] 2 S.C.R. 915, 94 D.L.R. (4th) 590 [*Smith*].

of a general trait, such as honesty, temperance or peacefulness".[40] Evidence of "propensity" or "disposition" is only admissible in exceptional circumstances.

In sexual assault cases, character is often specifically at issue where the defence is a complete denial of all of the plaintiff's allegations. In such circumstances, the defence often introduces character evidence through advancing the argument that the defendant is "not the type" of person to perform the acts which (s)he is alleged to have performed. The plaintiff may also seek to introduce character evidence of the defendant in the form of similar fact evidence.

In the companion cases of *R. v. Shearing*[41] and *R. v. Handy*[42], the Supreme Court established that similar fact evidence is admissible where the probative value of the evidence is sufficiently strong to outweigh its prejudicial effect. The rationale for admission is that it would be an affront to common sense to exclude the evidence in light of the improbability of coincidence. In *Handy* the Court articulated the similar fact rule as follows[43],

> "Similar fact evidence is … presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception."

*Handy* set forth the following factors to consider in an effort to determine whether on a balance of probabilities the probative value of the evidence in relation to a particular issue outweighs it potential prejudice. With respect to probative value the Court should first: (1) identify the issue that the similar fact is said to be relevant to; (2) assess the strength of the similar fact evidence; (3) consider the possibility of collusion; and (4) assess whether the similar fact evidence is appropriately connected to the acts complained of. With respect to the last issue, the Court listed helpful factors to determine whether the necessary nexus exists between the similar acts and the disputed issue: (1) proximity in time and place; (2) extent of the similarity of the details; (3) number of occurrences; (4) circumstances surrounding or relating to the similar acts; (5) any distinctive features unifying the incidents; (6) intervening events; and (7) any additional factors tending to support or rebut the underlying unity of similar acts.

Sexual abuse cases do not require lesser or greater degree of similarity than other cases. The drivers of cogency will differ depending upon the issue in question and the other facts of the case[44]. However, evidence of collusion between the witnesses will undermine the basis of admissibility. Collusion may also occur from unintentional infection from media publicity, police questioning or a common lawyer. The Supreme Court has stated that there

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[40] S.Lederman et al., *The Law of Evidence in Canada*, 2nd ed. Supplement. (Markham: Lexis Nexis Butterworths, 2004).
[41] [2002] 3 S.C.R. 33, 214 D.L.R. (4th) 215 [*Shearing*].
[42] [2002] 2 S.C.R. 908, 213 D.L.R. (4th) 385 [*Handy*].
[43] *Ibid*. at 55.
[44] *Ibid*. at 78.

must be something more than a mere allegation or opportunity for concoction or collaboration; there must be some evidence of actual collusion or at least an air of reality to the allegations. For example in *Handy* the Court found that the similar fact evidence at issue was not admissible given the conversation that took place between the complainant and the accused's former spouse a few months prior to the alleged sexual assault regarding, the accused's criminal record; allegations of abuse against the accused by the former spouse; and the availability of monetary compensation for victims of assault perpetrated by the accused from the Criminal Injuries Compensation Board.

Lastly, the court must weigh probative value against the prejudicial effects, that is, the prejudice the party will suffer if the similar fact evidence is admitted at trial. In this regard the Court must assess the presence of: (1) moral prejudice (i.e. the extent to which the defendant will look like a bad person); and (2) reasoning prejudice (i.e. to extent to which the jury may be confused and distracted by the admission of the evidence). In *J.R.I.G. v. Tyhurst* the British Columbia Court of Appeal stated that in civil cases generally, the prejudice will be less than in criminal cases, but more in civil cases alleging morally blameworthy conduct[45].

e. Admissibility of Polygraph

There is extensive controversy surrounding the use, reliability and admissibility of polygraph tests and of their results. They are not considered to be "exact" in terms of their reliability as a scientific evidentiary aid. In *R. v. Beland*[46], the Supreme Court of Canada rejected the use of polygraph evidence, citing the reasons that the tests are too subjective, and are really more of an art than a science. As such, polygraph tests failed to satisfy the requisite objective standard for admissibility.

Polygraph tests also offend other evidentiary rules, such as oath-helping, the use of prior consistent statements, character evidence rules, and rules with respect to the "ultimate trier of fact". Even expert evidence that is available to support the reliability of the polygraph results is usually insufficient to render them wholly admissible, although they may be given some consideration in certain circumstances (the details of which will not be addressed in this paper).

f. Expert on Damages

Proof of damages for future lost income and the cost of care may require expert evidence at the trial including medical, vocational, accounting and actuarial evidence. Specifically, counsel will want to consider whether to obtain a medical opinion from a treating therapist or an independent expert or both. In any event, in my view, the plaintiff should be in therapy during the course of the lawsuit, so as to obtain medical advice and support and also because such therapy can fulfill the plaintiff's legal obligation to mitigate damages.

[45] [2003] BCCA 224, B.C.J. No. 846 [*J.R.I.G.*].
[46] [1987] 2 S.C.R. 398, 43 D.L.R. (4th) 641 [*Beland*].

Depending on the facts of the case at hand, it may be that a treating doctor is better suited to testify regarding damages than an independent medical expert or vice versa. However, there are some general considerations that should be born in mind. A treating professional could potentially provide more persuasive evidence on damages than an independent expert. First, the treating professional would know the plaintiff well, based on significant time and experience with him or her. Also, the treating doctor may appear to be more objective because he or she was not retained for the sole purpose of providing a favourable opinion.

However, there are potential disadvantages to relying on a treating professional. For example, it could be argued that the treating professional is biased, as his or her motivation for serving as a witness is to help the plaintiff. Also, the treating professional could be overly optimistic about recovery, leading to a smaller damage award. Further, since most treating doctors' are unfamiliar with the law and accordingly the considerations that should be contained in a medical/legal report, counsel will need to take the time to provide such an explanation, Similarly, a treating professional may not have sufficient experience as a witness. Most significantly, even if the opinion that you are given is harmful to your case, you are obligated to provide it, as per Rule 31.06(3).

Rule 31.06(3) defines the scope of examination for an expert opinion. It provides that party is entitled, on examination for discovery of an expert, to obtain access to the findings, opinions, conclusions, and name and address of any expert that has been retained by the party being examined. However, the party being examined does not need to disclose the above information where such information was solely made or formed in preparation for litigation and the party being examined undertakes not to call the expert as a witness at the trial.

An independent medical expert might appear to be more objective than a treating doctor because he or she would only have been retained for the purpose of providing a medical/legal opinion. Also, such an expert would be familiar with the law and be better able to address causation and damages issues. He or she would probably have more court experience as well. Most importantly, if this expert provides an unfavourable opinion, counsel is not obliged to provide it, as per the exception set out in Rule 31.06(3).

A drawback to using an independent medical expert as a witness is on damages is that he or she can be challenged on the basis that they not spent a significant amount of time getting to know the plaintiff. To help overcome this disadvantage, it is wise to provide such an expert with as much documentation as possible upon which they can form their conclusion, including notes and records of all treating medical professionals, all school records and any other documentation. In addition, counsel may consider having the expert conduct interviews with family members. As with any case, it would also be wise to have multiple assessments conducted before the trial.

Counsel needs to be cognizant of the fact that it may be upsetting and damaging for an abuse survivor to have to discuss the abuse with a stranger, especially if the plaintiff is a minor. However, there are various options that may be less intrusive and less harmful to the minor than having the independent expert conduct his or her own examination. For

example, the independent expert could review the treating therapist's notes, and conduct a "paper review", or a videotape of a session, or he or she could sit in with the treating doctor during a session. Presumably there would already by a relationship of trust between the plaintiff and treating doctor and the plaintiff would not have to be subject to reciting the facts to a new doctor, with he or she has no relationship.

7. SETTLEMENT

a. General

The conduct of settlement negotiations in civil sexual assault cases can be the most important aspect of the litigation since it involves the anticipated achievement of the plaintiff's ultimate goal without subjecting him/her to the trial process. There is no single correct way to conduct the settlement negotiations; the client's goals, the relationship between the parties, and the nature of the allegations can influence counsel's strategy in conducting settlement discussions. Following are some suggestions of general applicability.

Counsel for the plaintiff should keep in mind that there are advantages to settling at an early stage. The first and foremost of such advantages is that the plaintiff will not be subjected to the litigation process. The defendant's concern about proceeding to trial also provides motivation to settle. It is important, however, for plaintiff's counsel to remember that the client's "fear" of having to go through the whole litigation process should not cause the plaintiff to accept a "lowball" settlement. Over time, and with therapy, a client's willingness to withstand the pressures of a trial may increase as the desire for retribution or compensation grows.

There are also disadvantages to an early settlement. In order to adequately advise the plaintiff, obtain instructions, and conduct negotiations, counsel must have proof of the damages that are being claimed. In most personal injury cases, extreme caution is taken, on the plaintiff's part, in settling the damages issue at an early stage of the lawsuit. It can often takes many months or years to properly assess the value of the claims. Any negotiations and/or offers made should be duly recorded, so that in the event of a trial counsel will be well-prepared to make submissions on the issue of costs and offers to settle. It is also advisable to obtain authority to settle from the client in writing.

b. Mediation

Mediation is often the most appropriate form of resolution to consider in civil sexual assault matters. As mentioned previously, financial compensation is only one of the goals of litigation and the companion goals of litigation may in fact be best achieved through mediation. Mediation permits the plaintiff to be involved in the process; to face the defendant and make a statement; to have an opportunity "to be heard"; to see how both plaintiff and defendant counsel approach the question of liability and damages; and to possibly grasp a better understanding of the ultimate settlement. However, before mediation is embarked upon, counsel must ensure the client understands the mediation process and feels comfortable to ask the lawyer questions about the process and to raise any

concerns with the lawyer. It is also essential that the lawyer take the necessary steps to ensure an appropriate mediator is chosen to conduct the mediation. The unique circumstances that surround civil sexual assault litigation require that a mediator experienced with the nuances of the litigation subject matter be selected. Ideally a past lawyer with experience in such cases is preferred. If a suggested mediator is unknown to the plaintiff's lawyer, the lawyer should ask the mediator for references and should speak with other plaintiff's counsel who have mediated with the particular mediator in a civil sexual assault case. Such steps are necessary to ensure the mediation will be conducted in an appropriate manner unique to the needs of a survivor of abuse.

c. Damages: Types and Quantum

There are several types of damages that are claimed in the typical civil sexual assault case. These include: (1) general damages for pain and suffering; (2) damages for future lost income; (3) damages for the cost of future care; (4) special damages, which include past lost income, out-of-pocket expenses etc. ; (5) aggravated damages, which take into account intangible injuries, and by definition will generally augment damages assessed under the general rules relating to the assessment of general damages; such damages may only be awarded for compensatory purposes; and (6) punitive damages, which are imposed to punish offensive conduct.

Clearly, the quantum of damages awarded will be based on damage awards in similar cases. Factors that the courts take into consideration in assessing general damages are: the nature of the act; the duration of the assault, that is, whether the assault occurred only once or over a period of time; the resulting harm; the age of the victim; and other factors which demonstrate the extent to which the injury has interfered with the plaintiff's enjoyment of life and/or ability to work. Proof of damages for future lost income and the cost of care may require expert evidence at the trial including medical, vocational, accounting and actuarial evidence.

In *Blackwater v. Plint* [47], causation of damages was at issue. The calculation of damages arising from the sexual assault perpetrated on the plaintiff was complicated by other sources of trauma suffered by the plaintiff. The Supreme Court of Canada explained that although untangling the different sources of damage and loss may be nearly impossible, the law requires that it be done, since at law a plaintiff is entitled only to be compensated for *loss caused by the actionable wrong*.[48]

The Court espoused that it was important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. Whereas the rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities, the rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the

[47] *Supra* note 9.
[48] *Ibid.* at 74.

defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway.[49]

With respect to the thin skull rule, the Court stated,

> "The question then becomes: what was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages".[50]

Causation was also at issue in a recent case from British Columbia, *Greenall v. MacDougall* [51], where the critical question was whether the defendant's assaults caused or contributed to the plaintiff's subsequent alcohol dependency. The plaintiff had a serious alcohol abuse problem and a lengthy criminal record that primarily consisted of alcohol-related offences. It was noted that although it was difficult to untangle the different sources of the plaintiff's present psychological problems, it was the function of this Court to do so in order to determine the loss that is caused by the defendant's actionable wrong.[52]

The Court stated that the test for causation, which applies to single and multi-cause injuries, is the "but for" test and that the plaintiff had the burden of proving that "but for" the sexual assaults of the defendant, his psychological injuries would not have occurred. Citing *Blackwater*, the Court noted that a plaintiff does not have to establish that a defendant's negligence was the sole cause of the injury. Where the "but for" test is unworkable, causation may be established where the defendant's negligence "materially contributed" to the occurrence of the injury. A materially contributing factor is one that falls outside the *di minimus* range.[53]

Thus the "material contribution" test is an exception to the "but for" test, and is only to be applied if: (1) it is impossible for a plaintiff to prove that the defendant's negligence caused the injury using the "but for" test, and the impossibility must be due to factors outside the plaintiff's control, and (2) it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff suffered that form of injury.[54]

The Court proceeded to refer to the reformulation of the principles in *Athey v. Leonati*[55] found in the *Blackwater* trial decision. The first two examples apply the "but for" test and the third the "material contribution" test.

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[49] *Ibid.* at 78.
[50] *Ibid* at 79.
[51] [2007] 156 A.C.W.S. (3d) 109, BCJ No. 486 [*Greenall*].
[52] *Ibid*. at 33.
[53] *Ibid.* at 37.
[54] *Ibid*. at 38.
[55] [1996] 3 S.C.R. 458 [*Athey*].

(1) if the psychological injury would have occurred at the same time, without the injuries sustained in the sexual assault, then causation is not proven;

(2) if it was necessary to have *both* the sexual assaults and the other life circumstances for the psychological injury to occur, then causation is proven since the psychological injury would not have occurred but for the sexual assaults;

(3) if the sexual assaults alone could have been a sufficient cause, and the other life circumstances alone could have been a sufficient cause, then it is unclear which was the cause in fact of the psychological injury. The trial judge must determine, on a balance of probabilities, whether the defendant's sexual assault(s) materially contributed to the psychological injury.

Ultimately the Court determined that the plaintiff was entitled to be compensated for the loss caused by the sexual assaults, and was entitled to be restored, as much as possible, to his original position. In order to do this, pre-existing conditions were taken into account. The Court considered the following factors: that the plaintiff was at considerable risk to become alcohol dependent as both of his parents were alcoholics, and it appeared that his brother was as well; the plaintiff was developing an alcohol problem, was diagnosable with alcohol abuse; and was moving in the direction of alcohol dependence prior to the assault; and that the plaintiff did not become alcohol dependent until after the assault.

The Court was of the opinion that an appropriate award for general and aggravated damages was $25,000, taking into consideration the plaintiff's original position (the psychological injuries he suffered as a result of the sexual abuse he experienced as a child and the difficulties he had with his family) and his reaction to the defendant's abuse. Based on the conclusion that the plaintiff would have become alcohol dependent regardless of the defendant's abuse, it was decided that there was no basis to make any award for alcohol treatment. However the Court awarded $1,500 for counseling sessions to be provided outside of the prison system to address all of the plaintiff's experiences of sexual abuse - those that occurred when he was a child, and those that occurred in prison. Further the Court awarded $10,000 as punitive damages against the defendant, primarily because of the defendant's position of authority in the prison system.

Punitive damages are often awarded where the tortfeasor has offended the ordinary standards of morality or decent conduct in the community, or is guilty of moral turpitude. These damages are also awarded where the conduct of the defendant is found to have been arrogant and/or callous. Although punitive damages are generally not awarded if the defendant has been convicted of a criminal offence arising out of the same circumstances in *Surgeoner v. Surgeoner*[56] it was held that this general principle will not be applied in cases of domestic sexual assault, due to the special marriage relationship, which is based upon trust. As stated by General Division Justice Hugh M. O'Connell:

[56] (1993), 44 A.C.W.S. (3d) 248, [1993] O.J. No. 2940 [*Surgeoner*].

> "I think it is necessary in this age of enlightenment in dealing with claims of this nature which are, in essence, abuse claims, that an exception should be made allowing for an award of punitive damages ... because the effect of such will be to deter this anti-social behaviour."

Justice O'Connell noted that the wife had gained nothing from her husband's criminal conviction, and such even though an award of punitive damages may result in "double jeopardy", this was justified in light of the special circumstances. Additionally, in this particular case, the defendant had received a rather modest criminal sentence, which may have influenced the exercise of discretion to award punitive damages.

This proposition has since been followed in *Dhaliwal v. Dhaliwal*[57] where the Court held that it was appropriate for the husband pay to the wife general, aggravated and punitive damages as a result of the physical and verbal abuse she endured. The Court stated, "the fact that the husband was convicted and punished in the criminal court system does not deter the making of this award in any way"[58].

Lastly, counsel for the plaintiff in civil sexual assault should be aware of the *Victims' Bill of Rights*[59] when it comes to issues of costs and damages. The purpose of this *Act* is to ensure victims of crime are treated with compassion and fairness. Accordingly, section 4 of the *Act* sets forth cost and damage parameters for judges to follow when victims of crime seek redress from a person convicted of the crime.

Under section 4, the *Act* prescribes that a judge may not make an order under the rules of court requiring a victim to provide security of costs nor may a judge exercise his or her discretion under the *Courts of Justice Act* to disallow an award of interest to a victim unless it is necessary in the interests of justice and the spirit of the Act. With respect to damages, the judge may not consider the sentence imposed on a convicted person when ordering that person pay damages as a result of the harm suffered by the victim. However, the Act permits the sentence to be taken into consideration with respect to an order for punitive damages.

d. Insurance Coverage

Clearly, there are enormous costs, both monetary and emotional, faced by victims of sexual assault when they turn to the civil courts to seek redress for the damages that they have suffered. It is devastating when plaintiffs receive judgments in their favour, yet those judgments ultimately prove to be unenforceable against impecunious defendants. Therefore it is imperative to scrutinize (and re-scrutinize) the possibility of insurance coverage.

Plaintiffs and defendants alike have historically argued that homeowners' insurance policies require insurance companies to defend and indemnify policy-holders against

[57] [1997] O.J. No. 5964 [*Dhaliwal*].
[58] *Ibid.* at 65.
[59] S.O. 1995, c.6.

claims of sexual assault. Most policies do not explicitly address sexual assault; however, nearly all policies contain exclusionary clauses that preclude claims related to intentional or criminal activity. Typically, such a clause is worded as follows:

> Your are not insured for claims arising from bodily injury or property damage caused by any intentional or criminal act or failure to act by ….any person insured by this document.

Insurance companies have successfully argued that sexual assault fits within this definition and abusers' deliberate assaultive actions are thus typically precluded from coverage. Plaintiffs have aimed to avoid exclusionary clauses by framing their claims in terms of negligence.

The Supreme Court applied exclusionary clauses in claims related to sexual assault in the companion cases of *Sansalone v. Wawanesa Mutual Insurance Co.*[60], and *Non-Marine Underwriters, Lloyd's of London v. Scalera*[61]. A unanimous Court stated that a plaintiff may not use pleadings crafted in terms of negligence to obviate the intentional and criminal nature of sexual assault. Writing for the Court, Iaccobucci stated:

> "A plaintiff cannot change an intentional tort into a negligent one simply by choice of words, or vice versa… a court must look beyond the choice of labels, and examine the substance of the allegations contained in the pleadings."

Thus, in the wake of *Sansalone* and *Scalera* the actions of abusers have generally been shielded from the reach of homeowners' insurance coverage. Plaintiffs have consequently shifted the focus of their pleadings to the action (or inaction) of bystanders to sexual abuse.

A typical claim of negligence would be levied, for example, against a mother who fails to prevent the sexual abuse of her child at the hands of her husband. Such was the case in *W.T. v. W.(K.R.J.)*[62]. The plaintiff brought a claim of negligence against her mother for allegedly failing to prevent her repeated sexual abuse by her step-father. In deciding whether the defendant mother's insurance company had a duty to defend and indemnify her, Reilly J. of the Ontario Court of Justice stipulated that insurance coverage in such cases was contingent upon the wording of the policy. Where the policy excluded coverage for "bodily injury caused intentionally by or at the direction of *an* insured," "an insured" was taken to mean *any* insured, thereby preventing all insureds from claiming coverage. In contrast, other exclusionary clauses referred to "*the* insured", which the Court interpreted as "the insured claiming indemnification from the insurer" (i.e. the negligent, non-offending mother). This permitted coverage of insureds whose conduct was non-intentional and non-criminal.

[60] [2000] 1 S.C.R. 627 [*Sansalone*].
[61] [2000] 1 S.C.R. 551 [*Scalera*].
[62] (1996), 29 O.R. (3d) 277, 63 A.C.W.S. (3d) 1148 [*W.T.*].

Subsequent cases confirmed that exclusionary clauses may not apply to the actions of the non-intentional, negligent bystander insured in sexual assault claims. (See *Godonoaga v. Khatambaksh*[63]) In *Snaak v. Dominion of Canada General Insurance Co.*[64], the Court added that ambiguous language in an exclusion clause must be interpreted in favour of the insured.

Since Ontario courts have held that some homeowner policies cover insureds accused of non-intentional torts in sexual assault claims, it is important to examine the courts' interpretation of who qualifies as an insured. In *R.E. v. Wawanesa Mutual Insurance Co.*[65], the Ontario Superior Court of Justice considered the definition of a "household" because an insured was any person in the "household". The Court determined that membership in a household can be temporary, transitory, or cyclical, and that "[a] temporary resident in a household is eligible for insurance coverage." The Court thus reasoned that a minor was covered by his aunt and uncle's homeowners insurance policy because he resided with them temporarily while the accident in question took place. The Court of Appeal upheld this finding.

Insurance coverage for individuals who live in the insured household on a temporary, transitory, or cyclical basis is important in the context of sexual abuse. Individuals who may not reside in the household permanently or continuously may nonetheless be capable of interceding in situations of sexual abuse. It seems to follow from *R.E.* that those individuals' inaction respect to sexual abuse may subject them to insurance coverage despite their temporary or transient status in the insured household.

Plaintiffs may also have claims framed in terms of non-intentional, non-criminal torts against institutions; often the employer of the perpetrator. However, most standard institutional liability policies give institutions the option of indemnifying themselves against injuries caused by tortious assault or battery by an employee, volunteer, or agent of the institution.

In *Medhurst v. Children's Aid Society of London and Middlesex*[66], the court applied a similar *contra preferentum* principle to the institutional liability context as it applied to the individual liability context in *Snaak*. The institution's municipal liability policy included a guarantee to pay for all damages arising from, *inter alia*, assault and battery perpetrated by any insured during the policy period.

The policy further included two exclusions that contradicted the preceding guarantee. The clauses excluded damages arising from intentional or criminal activity by or at the direction of any insured.

The court held that since the institution specifically bargained for the inclusion of coverage against the risk of assault and battery perpetrated by an employee, agent or volunteer of the

[63] [1999] O.J. No. 3368 [*Godonoaga*].
[64] (2002), 61 O.R. (3d) 230, 115 A.C.W.S. (3d) 875 [*Snaak*].
[65] (2006), 80 O.R. (3d) 114, 146 A.C.W.S. (3d) 717 [*Wawanesa*].
[66] [2001] O.J. 1382 [*Medhurst*].

institution, it was entitled to be defended or indemnified against such claims despite contradictory clauses in its municipal liability policy.

Often in cases involving institutional defendants the plaintiff's main obstacle relates more to fixing the institution with respect to vicarious liability or negligence than it does to finding applicable insurance coverage.

The best approach for counsel for the plaintiff is to frame allegations against non-offenders in terms of negligence and other non-intentional torts. Did you client report his or her abuse to an authority figure at the institution who then turned a blind eye to the revelation? Did the institution properly check the defendant employee's references? Did the institutions adequately supervise the individual defendant? Did the abuser's spouse negligently ignore obvious signs that the abuse was happening to the plaintiff?

Although the actual perpetrator of the abuse may be the 'most responsible', in insurance terms it is the peripheral parties (the naïve parent, the dismissive school principle or the materially empowering employer) that are more likely to be able to provide access to their insureds' funds. To best serve your client, and to improve the chances of your fees being paid, these are the groups and parties to add to a civil sexual assault claim whenever possible.

Lastly, it is important for plaintiff's counsel in civil sexual assault litigation to inform the plaintiff as early in the proceedings as possible if it is an insurer who will be the defending the claim and paying the damages. As mentioned previously, monetary compensation is only one of the many goals of civil sexual assault litigation and a plaintiff whom is angry at the institution and more concerned with the companion goals of "being heard" and "facing their abuser", should not learn that the insurer is in fact the defendant for the first time at mediation.

## 8. CONCLUSION

There are many specific considerations for counsel for the plaintiff in civil sexual assault cases. Counsel must bear in mind the sensitive nature of the case and the importance of protecting the plaintiff's interests wherever and however possible. It is essential to make the plaintiff feel secure in his/her relationship with counsel, so as to ensure the best possible outcome based upon the most extensive disclosure of the facts with respect to the assault. Pleadings must be broadly drafted and evidentiary issues must be seriously considered before proceeding to either settlement negotiations or to trial. Through this process, counsel and the plaintiff must keep in mind the ultimate goal(s) of the litigation in the particular circumstances. Each plaintiff has different goals and expectations and it is important to be aware of them to ensure that counsel provides the best possible representation.

## APPENDIX A

**Recent Developments – Vicarious Liability for Sexual Assaults**

Churches

*John Doe v. Bennett and the Roman Catholic Episcopal Corporation of St. George's*, [2004] S.C.J. No. 17.

- The defendant Father Kevin was a Roman Catholic priest in Newfoundland in the Diocese of St. George's and sexually assaulted the plaintiffs in his parishes.
- **Vicarious liability was imposed on** the Roman Catholic Episcopal Corporation of St. George's.
- The relationship between the bishop and the priest is akin to an employment relationship.

*J.R.S. v. Glendinning*, [2004] O.J. No. 285 (Sup. Ct.)**.**

- Glendinning, who was in a position of trust and assumed a quasi-parental role with respect to the children as their priest, was held liable for sexual assault resulting in serious harm to the children.
- **Secondary victim** - M.S. was abused by her brother J.R.S., but the Court attributed this abuse to Glendinning's abuse of her brother.
- **Vicarious liability was imposed** on the basis that there was sufficient connection between the job-created or job-enhanced risk of harm and the assaults by Glendinning .

*Doe v. O'Dell*, [2003] O.J. No. 3546 (Sup. Ct.).

- Diocese was **held vicariously liable** as it significantly increased the risk of sexual abuse by putting an individual in the position of Father O'Dell and requiring him to perform the duties of a Parish Priest.
- The Court reasoned that the Diocese was in the position of an employer for the purposes of vicarious liability. Further, the job-created authority of a priest, the vulnerability of the plaintiff and the psychological intimacy in the relationship between a priest and individual who seeks spiritual guidance are factors which significantly increased the risk of sexual abuse in a child and in turn the finding of vicarious liability.

Vicarious liability also lies against churches that operated residential schools, as decided by the Supreme Court of Canada in *Blackwater v. Plint*.

*Blackwater v. Plint*, [2005] 3 S.C.R. 3.

- The Government of Canada and the United Church of Canada jointly operated a residential school in British Columbia during the 1940s until the 1960s. The trial judge ruled that Canada and the United Church were vicariously liable for the abuse perpetrated by a dormitory supervisor they both employed. The trial judge apportioned 75 fault to Canada and 25% fault to the Church. On appeal the British Columbia Court of Appeal exempted the Church from vicarious liability based on the doctrine of charitable immunity

- The Supreme Court of Canada **restored the trial judge's finding of vicarious liability against the Church and Canada,** as well as the apportionment of fault between the Church and Canada found at trial. The Supreme Court of Canada rejected class-based exemptions from vicarious liability since such a doctrine would not motivate such organizations to take precautions to screen their employees and protect children from sexual abuse.

*L.E.W. v. United Church of Canada,* [2005] B.C.J. No. 832 (Sup. Ct.).

- **Vicarious liability was not imposed.**

- The defendant was a lay minister and a volunteer rather than and employee or full time minister**.**

- The employee had no office with the Church.

- The employee had no duties with respect to being alone with children and was not directed by the Church to minister to people in their homes or develop relationships with children.

- It was not in his role as a lay minister that the defendant ascertained that the plaintiff was vulnerable following the death of her family members.

Schools

*Doe v. Avalon East School Board,* [2004] N.J. No. 426 (N.L.) (Sup. Ct.).

- **Vicarious liability was imposed.**

- The Court reasoned that through providing education services to youths, the Board's operations carried a risk of harm to the public through giving authority to teachers over students that could potentially be abused. Further, the court affirmed that the employer-employee relationship between it and the teacher was sufficiently close. Moreover, the Court determined that the teacher's actions were so closely connected with the authority assigned to him by the Board, that it would be fair and just that liability for the assault could properly attach to the Board. In particular, it was the school board which gave the teacher, as a trusted professional employee, the authority to set up the circumstances wherein this offence was committed.

- Noteworthy – this more recent case was decided differently than two other school decisions outlined below

*S.G.H. v. Gorsline* 2004 ABCA 186, *aff'g* 2001 ABQB 163.

- **No vicarious liability was imposed.**

- The Court found that while the student teacher relationship provided the opportunity for the defendant to meet the plaintiff, the circumstances of the commission of the offence were not sufficiently connected to that relationship.

- Many of the activities and situations which provided for the context for the assaults were outside the purview of the school board's mandate and in many instances, off the premises. Parents sent their students to track meets and other activities which took place outside school hours, thereby breaking the chain of connection with the board's business. Specifically, the trial judge found that "while the defendant teacher's job gave him an opportunity to abuse his authority, his duties did not require anything approaching intimate contact."

- The opportunity created by the employment, itself, is not sufficient to impose liability.

- The court distinguished Bazley by maintaining that the relationship fostered by the Board, "fell far short of the "parent-like" control or authority discussed in Bazley."

- The court reasoned that (1) Gorsline did not have any unusual authority over the student, and (2) that while his influence might be great, he was only one of several teachers who taught the appellant. ***Note*** that this line of reasoning was clearly not adopted by the Lbr. and Nfld. Supreme Court in its' decision in *Doe v. Avalon*

- The trial judge also recognized that the imposition of vicarious liability on school boards could result in the introduction of rules and policies which would be regressive to the educational system and harmful to the students the system serves. The Court of Appeal supported the trial court's findings and reasoning.

*K.G. v. B.W.*, [2000] O. J. No. 2155 (Sup. Ct.).

- The Ottawa Board of Education was **not vicariously liable** for the assaults.

- The Court reasoned that (1) the duties and responsibilities relating to a teacher in a classroom (a public setting) provided an opportunity for the teacher to meet the child but had not "materially enhanced the risk" on the part of the teacher to abuse the child, (2) there was no evidence in the case to establish that the school board was aware that the defendant was allowing the plaintiff to sleep over at her home.

- Arguably, this case is distinguishable because the student had a relationship with the teacher outside of the school. All of the teacher's involvement with the family was outside of his duties and responsibilities as a teacher. The teacher was a

family friend and that relationship (as opposed to the employment relationship) gave him the power to abuse. There was very little connection between the teacher's assigned duties and the assault.

Residential Schools

Courts have consistently imposed vicarious liability in the residential school context where the perpetrator had duties directly caring for children. See for example *D.W. v. Canada (Attorney General)*, [1999] S.J. No. 742 (Q.B.); *V.P. v Canada (Attorney General)*, [1999] S.J. No. 723 (Q.B.); *H.L. v. Canada*, [2001] S.J. No. 298 (Q.B.), varied on different grounds but finding of vicarious Crown liability upheld at Court of Appeal [2002] SKCA 131 and at Supreme Court of Canada [2005] 1 S.C.R. 401; *T.W.N.A. v. Clarke*, [2001] B.C.J. No. 2747 (Sup. Ct.), appeal to B.C.C.A. allowed and damages remitted back to court below; *Blackwater v. Plint*, [2001] B.C.J. No. 1446 (Sup. Ct.), trial judgment restored by the Supreme Court of Canada 3 S.C.R. 3, 2005; *M.A.* v. *Canada (Attorney General)* [2001] S.J. No. 686 (Q.B.), Crown conceding that it was vicariously liable; *C.M. v. Canada (Attorney General)*, [2004] S.J. No. 290 (Q.B.).

However, in the Supreme Court of Canada decision, *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, (see below) the Court did not impose vicarious liability where the perpetrator's job as a baker did not require him to interact with the students at the school.

*E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, [2005] 3 S.C.R. 45.

- The trial judge held the Oblates **vicariously liable** on the basis that the residential school created and materially enhanced the risk of the assaults.

- The B.C.C.A. set aside the trial judge's decision, holding that he had overemphasized job-created opportunity and failed to have regard to specific employment duties and activities assigned to S and the connection, if any to those duties and responsibilities and the wrongs committed by S against B.

- The Supreme Court of Canada (8/9 judges) in finding that the Oblates were not vicariously liable, reasoned that there was no finding of a "strong connection" between the particulars of the baker's employment and the assault, as is required to find vicarious liability under the test set out in *Bazley*.

Landlord and Tenant

*P.S. v. R.H.M.*, [2006] B.C.J. No. 504 (B.C.C.A)

- Landlord's repairman employee sexual assaulted a tenant.

- Landlord **not vicariously liable**.

Ultrasound Clinic

*T.W. v. Seo*, [2005] O.J. No 2467 (C.A.)

- The defendant employee worked at an X-ray/Ultrasound Clinic. He surreptitiously video taped the plaintiff and performed unauthorized tests on her, including a pelvic examination.

- The Clinic **was vicariously liable** for the assaults by the employee.

- The Clinic's enterprise and empowerment of the employee material increased the risk of sexual assault. The Clinic's protocol called for the technician to be alone in the room with the patient, who necessarily depends on the technician to perform proper tests. The patient has a certain level of vulnerability arising from the stress and anxiety associated with unknown health problems.

- The technician was permitted to touch the plaintiff in intimate body zones because of the authority granted to him by his employer.

- There is an obvious and strong connection between what the employer was asking the employee to do and the wrongful act. The employer significantly increased the risk of harm by putting the employee in this position and requiring him to perform the assigned tasks.

- The wrongful act was so closely related to authorized conduct, it justifies the imposition of vicarious liability.

- The **defendant unions were found vicariously liable**, on the basis that the defendant unions had condoned their members' acts of intimidation and assault, and even if the defendant unions had *not* condoned these acts these acts were modes of carrying out acts that were authorized by the defendant unions.