Sexual Assault and the Common Law: A New Perspective

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I. INTRODUCTION

The resurgence of the women's movement in the 1960s led to the fundamental re-thinking of most of our ideas about sexual assault. The new and powerful ideas which have had so much influence since then resulted from a simple change in perspective, to that of the victim — usually a woman. As Catharine MacKinnon so neatly puts it, the "methodological secret" of feminism is that it is built on believing women's accounts of sexual use and abuse by men.[1] This focus on women's experience was an absolutely new way to approach law-making and began a process of reshaping the law of sexual assault which continues to this day.[2]

The theoretical insights of feminist thinkers reinforced and informed the political impetus which came from women's anger about sexual abuse. The result was the overhaul of our criminal law on sexual abuse,[3] and the elaboration of remedies outside the *Criminal Code* to deal with sexual harassment.[4] Psychologists turned their attention in the same period to documenting the effects of sexual assault and sexual abuse, with the fruits of their research not only assisting in law reform efforts but also providing insights in the application of the new laws.

In retrospect, the changes wrought in the criminal law, and in the law of sexual harassment, in the last twenty years have been quite remarkable, although one's assessment of the pace and the effectiveness of the change surely must depend on one's perspective. The architectural work on the changes to the *Criminal Code* and sexual harassment law is still underway, with the Supreme Court of Canada reaffirming or refining the concepts introduced in the early eighties,[5] and feminist commentators noting with concern that attitudes of many

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1. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987) at 5.

2. For a good summary of the perceived shortcomings of the 1983 amendments to the *Criminal Code*, and recommendations about future directions, see Christine L.M. Boyle *et al.*, *A Feminist Review of the Criminal Law* (Ottawa: Supply and Services Canada, 1985) at 57-66.

3. *Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person and to Amend Certain Other Acts in Relation Thereto or in Consequence Thereof*, S.C. 1980-81-82-83, c. 125 [hereinafter *Bill C-127*].

4. That sex harassment can constitute sex discrimination was first recognized by Owen Shime in *Re Bell and Korczak* (1980), 27 L.A.C. (2d) 227, and followed in a number of subsequent decisions. The refusal of the Manitoba Court of Appeal to follow the reasoning and result in these cases led to an appeal to the Supreme Court of Canada, and that Court's affirmation that sex harassment is a form of sex discrimination: *Janzen* v. *Platy Enterprises et al.*, [1989] 1 S.C.R. 1252. The theoretical basis for this development was largely the work of Catharine MacKinnon, in *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979); a Canadian study by Constance Bachhouse and Leah Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (1978) has also proved influential. MacKinnon's approach was accepted by the U.S. Supreme Court in *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399 (1986). Statutory amendments in Canada have also made it clear that sex harassment is a form of sex discrimination: see, e.g., *Ontario Human Rights Code*, S.O. 1981, c. 53.

5. See, for example, *R.* v. *Chase*, [1987] 2 S.C.R. 293.

judges show little sign that any change at all has taken place.[6] On the other hand, however, fierce attacks have been made on new provisions of the Criminal Code, in particular, by those whose interests still are best served by the traditional understanding of sexual assault, and who see the changes as dangerous to their wellbeing.[7]

The effect of the new feminist understanding of sexual assault has, until recently, been felt most keenly in the areas of criminal law and other legislative sanctions, like the human rights codes. However, in the past several years, courts in Canada have begun to see actions for civil damages by victims of sexual assault,[8] and policy makers have heard calls for more extensive civil rights of action for sexual assault survivors and those who have been harmed by pornography.[9] In this paper, I shall examine the courts' response to civil actions for damage for sexual assault, and consider the old and new issues they present for the common law judges. First, however, let me provide a brief overview of the new underpinning for any consideration of the wrong of sexual assault.

II. NEW IDEAS, OLD WRONGS

The "old ideas" about rape and other forms of sexual abuse are not so old at that: many people in this audience grew up with them. These ideas grew out of other ideas, about sexual propriety in women, and about something called men's "natural instincts". A good starting point for the description of both sets of ideas is the familiar phrase, "nice girls don't": nice girls don't have sex before, or outside, marriage, and nice girls don't get raped, or receive other kinds of what were euphemistically called "unwanted attentions". If a girl broke the rules about sexual propriety, she ran the risk of suffering the consequences. Conversely, if she were raped, or abused, it was assumed that she must have broken the rules: how else to explain what had happened to her?

The symmetry of this world did, however, permit one variation: a "nice girl" was sometimes violated, in a totally irrational way, by a "mad rapist", in a violent encounter for which she bore no responsibility. His behaviour was attributed to madness, to the exaggeration into insanity of the "normal sexual appetites" of the average man. Just as the

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6. Patricia Marshall, "Sexual Assault, The Charter and Sentencing Reform" 63 C.R. (3d) 216, and Boyle *et al., supra* note 2.

7. See, for example, the challenge to the "rape shield" laws in *Re Seaboyer and the Queen; Re Gayme and the Queen* (1987), 62 O.R. (2d) 290 (C.A.), now on its way to the Supreme Court of Canada.

8. Actions by adult women for sexual assault: *Q.* v. *Minto Management Ltd.* (1985), 15 D.L.R. (4th) 581 (Ont. H.C.J.); *W. (C.)* v. *Haroldson,* [1989] S.J. No. 182 (Q.B., No. 3517 of 1985) and *Jane Doe* v. *Board of Commissioners of Police for Metropolitan Toronto* (1990), 72 D.L.R. (4th) 580 (Ont. Div. Ct.). Actions by adult women and children for child sexual abuse: *J.L.N.* v. *A.M.L.*, [1989] 1 W.W.R. 438 (Man. Q.B.); *Harder* v. *Brown* (28 July 1989), Vancouver A850805 (B.C.S.C.); *Madalena* v. *Kuun*, [1987] B.C.J. No. 52; 35 D.L.R. (4th) 222 (B.C.S. Ct.); *Marciano* v. *Marciano* (22 October 1988) (Ont. S. C.).

9. An excellent reference book on the anti-pornography ordinance is provided by its originators in Andrea Dworkin & Catharine MacKinnon, *Pornography & Civil Rights: A New Day for Women's Equality* (Published by the authors, 1988).

victim of the assault was a paragon, so too in another way was the perpetrator: he was so unusual that what he did could not be identified with normal men.

"Normal men" simply did not commit rape, and when they were accused of it, the circumstances giving rise to the accusation could be explained away by various means. Some of these means were what Brownmiller has described as "the deadly male myths of rape":[10] all women want to be raped, no woman can be raped against her will, and she was asking for it. Sometimes, charges against the normal male were attributed to "Monday morning regret", or malice, and characterized as false. Where the victim was a child, childhood sexual fantasies could be relied upon to explain otherwise inexplicable charges.[11] When actual abuse of the child did take place, it was explained by her tempting behaviour — or the failure of her mother to protect her, usually by having a satisfactory sexual relationship with the abuser.[12]

Clark and Lewis sort the kinds of rape recognized in the traditional view into "real rape" and "everyday rape".[13] The crime to which the law would respond was "real rape": the "brutal defloration of an innocent maiden"[14] or, as Marshall describes it, "the 'blameless' victim is a 15-year-old virgin or a frail 85-year-old; the accused is an unemployed stranger in a Balaclava".[15] And as Marshall points out, the extent to which victim or accused deviate from this paradigm seems to determine the level of trivialization or excusing of the crime.[16]

Sorting real from everyday rape was the central activity of the criminal law before the reforms wrought by Bill C127. Cross-examination of the victim on previous sexual conduct had the effect of identifying "real" victims: the pure, the virginal, the unsullied. An emphasis on violence and trickery in the ingredients of the offence helped to ensure that only a "real" rapist would be convicted, as did the doctrines that emerged around the concept of consent. These were based on the idea that the most conclusive way of showing an absence of consent is to show that serious physical violence occurred: bruises, lacerations, and broken teeth reveal a spirited defense of the treasure of maidenhood, whereas simply saying "no" can be culturally manipulated into meaning "yes", in keeping with the myths described above. And, of course, marriage being taken to imply a once-and-for-all consent to sexual relations, a criminal law informed by the traditional myths makes no provision for spousal rape.

"Real rape" does occur. Strangers do follow women from bus stops, or climb over their balconies on hot summer nights, to engage in violently assaultive acts. Children are abducted from schoolyards, abused, and killed. But the insights of the past twenty years have led directly to an understanding that "everyday rape" is, in fact, what women and children (of

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10. Susan Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Bantam, 1981) at 346.

11. Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (Eaglewood Cliff, N.J.: Prentice Hall, 1980).

12. *Ibid.* at 140.

13. Lorenne M.G. Clark & Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977) at 133-134.

14. *Ibid.* at 134.

15. Marshall, *supra* note 221.

16. *Ibid.*

both sexes) are more likely to confront: incest in the family, sexual abuse from a teacher, social worker, lawyer or priest, "date rape", sexual harassment in the workplace or at school. The National Population Survey done in conjunction with the work of the Committee on Sexual Offences Against Children and Youth (the Badgley Committee) revealed, for example, that one in two females and one in three males have, at sometime during their lives, been victims of unwanted sexual acts.[17] About four in five of these incidents first happened to these persons when they were children or youths,[18] and well over half of the assaults against children occurred in the homes of the victims or the suspects.[19]

We can "see" these facts now, whereas we did not see them before, because the ideological framework within which we view sexual assault and abuse has changed; the change means that we look for these facts, and that we see them, now, in ways that we were not prepared to do before.

A major element in the shift in perceptions around sexual assault is to stop seeing it as sexual impulse run amok, and to start seeing it as an act of violence. Sexual assault is not passion, it is aggression. It does not occur because of an excess of affection for women, but because of unchecked misogyny. It is not about love, even warped and bent love, but about power.

In her influential study, Susan Brownmiller states this basic proposition that "rape is not a crime of irrational, impulsive, uncontrollable lust, but is a deliberate, hostile, violent act of degradation and possession on the part of a would-be conqueror, designed to intimidate and inspire fear..."[20] She identifies the critical function of rape from prehistoric times to the present: "nothing more nor less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear."[21]

Catharine MacKinnon and Andrea Dworkin, pioneers in the development of civil remedies for the harm of pornography, broaden this description to include not only rape, but other forms of sexual abuse:

> *Systematic violations of women's rights to safety, dignity, and civil equality take the form of rape, battery, incest, prostitution, sexualized torture and sexualized murder, all of which are endemic in this society now. These are acts of sex-based hate directed against a population presumed to be inferior in human worth. These are means of keeping women subjugated as a group with a low civil status and a degraded quality of life.*[22]

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17. Committee on Sexual Offences Against Children and Youths, *Report: Sexual Offences Against Children* (Ottawa: Supply and Services Canada, 1984) at 175 [hereinafter Badgley].

18. *Ibid.*

19. *Ibid.* at 201.

20. Brownmiller, *supra* note 10 at 349.

21. *Ibid.* at 5.

22. Dworkin & MacKinnon, *supra* note 9 at 15.

The pattern of dominance by the male and submission in the female is reinforced by sexual abuse which, says MacKinnon, "works as a form of terror". She describes it as "at once absolutely systematic and absolutely random", systematic because one group, women, is its target and lives knowing it, random because there is no way of knowing which particular woman is "next on the list".[23]

The patterning enforced and reinforced through sexual assault begins in childhood. In her landmark work on child sexual abuse, *The Best Kept Secret*, Florence Rush shows that sexual abuse of children is commonplace, condoned, even promoted by society, and rooted deep in our history, traditions and law. The majority of victims of child sexual abuse are little girls and the sexual "double standard" is pervasive.

In this emerging theory of the role and nature of sexual abuse, sexual assault is clearly seen as an offence against the woman herself, a violation of her person, her physical integrity, and her self-determination. Turning the focus to the victim of assault was a significant realignment: before the feminist insights of the 'seventies and 'eighties, the law was more suitable for redressing wrongs to the male "owner" of a violated woman: Clark and Lewis make this explicit when they say that "Rape is simply theft of sexual property under the ownership of someone other than the rapist".[24] Hence the preference of the law for the unsullied victim, and the reluctance to punish unless she has defended her purity with enough spirit so as to incur physical injury.

The "modern perception of sexual assault that views the crime strictly as an injury to the victim's bodily integrity, and not as an injury to the purity or chastity of man's estate"[25] brought about significant changes in sexual assault law. Provisions were enacted in the Bill C-127[26] to replace the previous offences of rape, attempted rape, sexual intercourse with the feeble-minded and indecent assault on a female or male. The present section 271 of the *Code*, enacted in the reform legislation, makes "sexual assault" an offence. Companion sections enacted at the same time criminalize sexual assault with a weapon, threats to a third party, or causing bodily harm; and aggravated sexual assault.[27] These sexual assault provisions parallel provisions relating to non-sexual assault,[28] and to a large extent rely for their meaning on the definition of assault in the *Code*. This definition, in turn, is similar, if not identical, to the concept of assault at common law.

The *Code* does not define "sexual assault". In *R. v. Chase*, [1987] 2 S.C.R. 293, the Supreme Court of Canada makes clear the relationship of this new concept to the *Code's* provisions on assault, which at that time were found in section 244(1). McIntyre, J. for the Court states, at 302:

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23. MacKinnon, *supra* note 1 at 7.

24. Clark & Lewis, *supra* note 13 at 116.

25. Brownmiller, *supra* note 10 at 425.

26. See *supra* note 3.

27. *Criminal Code*, ss. 272, 273.

28. *Ibid.* ss. 265, 267, 268.

> *Sexual assault is an assault within any one of the definitions of that concept in s.244(1) of the* Criminal Code *which is committed in circumstances of a sexual nature,* such that the sexual integrity of the victim is violated. *The test to be applied in determining whether the impugned conduct has the requisite sexual nature in an objective one....* (emphasis supplied)

Consistent with this emphasis on the victim's perspective, the amendments also limited the accused's right to cross-examine a victim on previous sexual conduct, and provided for non-publication of the victim's name, at the request of victim or Crown. The rules relating to "recent complaint" were abrogated, and the requirement of corroboration abolished.[29] The law as presently framed contemplates that a spouse may commit sexual assault.

These changes to the *Code* were similar in some respects to those called for by feminist critics of the existing rape laws.[30] However, several aspects of the provisions cause continuing concern, and it is too early to say that these provisions are "a success". What they clearly have done, however, is bring the sexual assault crimes more clearly into focus as assault. This parallelism between the criminal and common law concepts should make civil remedies for sexual assault more accessible to its victims.

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29. *Ibid.* ss. 273, 274, as enacted by 1980-81-82-83, c.125, ss.19 and R.S.C. 1985 (3rd Supp.), c. 19, s.11.

30. Clark & Lewis, *supra* note 13 at 159-170; Brownmiller, *supra* note 13 at 421-454.

III. EFFECT OF SEXUAL ASSAULT

These reforms in the *Criminal Code* proceeded, in large part, from acceptance of the woman's perspective on sexual assault. Shifting the focus, in this way, from seeing the crime as a violation of male interests in "their women" to one where the woman's physical integrity and autonomy are imperilled, released a lot of energy, which is making its impact felt not only in law reform but in other areas as well.

One of these is the investigation of the nature of the harm that is done to those who are sexually assaulted, whether they be adults or children. The first-hand anecdotal or experiential awareness of workers in crisis houses and women's shelters is now taking theoretical shape as researchers in psychology, psychiatry, medicine, and social work engage in controlled studies.

In 1980, the American Psychiatric Association established the diagnostic category of Post-Traumatic Stress Disorder (PTSD) in the Diagnostic and Statistical Manual of Mental Disorders which is the mainstay of psychiatric diagnosis.[31] PTSD encompasses the immediate and long-term consequences of psychic trauma from diverse stressors (war, political persecution, natural disasters), including violence. More particularly, the psychological response to sexual assault has been described as the Rape Trauma Syndrome;[32] reference is also made to the Post-Sexual-Abuse Syndrome to describe the effects of childhood sexual abuse on later psychological functioning.[33] The Rape Trauma Syndrome has been described as "a stress response not to passion, or sexuality, but to the aggression, humiliation, violation and violence of sexual assault."[34]

The insights of research into these trauma disorders are particularly instructive for the justice system, on several different levels. The design of the criminal law should, arguably, be affected by the suggestion in one study that the subjective experience of distress during the assault is an important predictor of subsequent fear and anxiety, and there is no direct relationship between the actual violence and the subjective distress.[35] This study seems powerfully to support the arguments of those who claim that "extra" violence should not be necessary to enhance a victim's credibility or convince us that there was no consent. And crucial to our understanding of victims' behaviour in court is the finding that victims of sexual assault present in one of two styles, the controlled and the expressed. The expressed style is characterized by hysteria, crying, sobbing, anger and disorganized behaviour. The controlled is cool, calm, rational and matter of fact, as feelings of terror are masked behind organized

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31. Rebeka Moscarello, "Sexual Assault: Psychic Trauma" (Prepared for C.B.A., Ontario) (Toronto: Institute of Continuing Legal Education, 1988) at 2.

32. *Ibid.* at 7.

33. J. Brieve, "The Effects of Child Sexual Abuse on Later Psychological Functioning: Defining a Post Sexual Abuse Syndrome" (Paper presented at the Third National Conference on Sexual Victimization of Children) (Washington, D.C.: Children's Hospital National Medical Centre, 1984).

34. Moscarello, *supra* note 31 at 3.

35. *Ibid.* at 7.

behaviour.[36] Victims who exhibit the controlled response are simply less likely to be believed in court.

From the point of view of actions for damages for sexual assault, however, the most useful insights are those concerning the long-term effects of sexual assault.[37] The Rape Trauma Syndrome has an acute phase and long-term process. The acute phase, beginning with the assault, and lasting for several weeks or months, is characterized by several types of reaction. The impact reaction, central to the act itself, may feature shock, disbelief, denial, intense fear, and terror of being killed. In combination, the result is a devastating effect on one's sense of self-worth and self-esteem. Dissociation (the feeling of being outside the body, looking on) occurs frequently, to save the ego from being overwhelmed. The somatic reaction details the body's response to trauma and acute stress: general aches and pains, gastrointestinal symptoms like pain, loss of appetite and nausea, as well as any specific physical damage caused by the assault. Emotional reactions include shock, disbelief, denials, helplessness, powerlessness, guilt and shame, as well as self-blame. Behavioral and cognitive reactions may include a fear of being alone or going to sleep, startle reactions, hypervigilance, flashbacks and nightmares, difficulty in sleeping and in concentration.

The long-term process of reorganization may last from two to three years to a lifetime. The victim deals with pervasive fear: fear of being unable to trust one's world. Flashbacks, nightmares and interrupted sleep result in a constant state of anxiety, and depression stems from a loss of self-esteem and self-worth, the loss of trust in society, and the loss of freedom to move about. Scanning of one's environment, and hypervigilance, continue, with some sexual-assault-related changes to behaviour lasting a lifetime — i.e. not going out alone after dark. Sexual dysfunction is difficult to resolve; alcohol abuse occurs frequently. Seventy-five to eighty per cent of victims of sexual assault will experience long-term complications.

The short and long-term effects of sexual assault come together in one persisting experience: shame, guilt and self-blame are "virtually universal" and may persist for years. In the long-term, this diminished sense of self-respect may result in the victim becoming a "loser" in society, unable to compete successfully.[38]

Child victims of sexual abuse also exhibit a complex of symptoms, many very similar to the ones described above. Incest or sexual abuse of a child will often mean that a child's sexuality is shaped in a developmentally inappropriate way; the child will also suffer stigmatization, that is feelings of badness, shame, or guilt, which become embedded in the self-image. They feel a sense of betrayal, when they discover that someone on whom they are totally dependent can cause them harm.[39] Victims of child sexual abuse are at a high risk of

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36. *Ibid.* at 3.

37. *Ibid.* at 10-15.

38. *Ibid.* at 11-12, 15.

39. David Finkelhor & Angela Browne, "The Traumatic Effect of Child Sexual Abuse" (1985) 55 Amer. J. Orthopsychiatry 530 at 531-533.

becoming prostitutes;[40] stigmatized, they graduate to various stigmatized levels of society, engaging not only in prostitution but also in drug or alcohol abuse, or other forms of criminal activity.[41] Adult survivors of child sexual abuse are reported as having feelings of isolation, depression, guilt, low self-esteem, and difficulty in forming rewarding personal relationships.[42] They are said to be at a higher risk of being sexually assaulted later in life; it is also reported that a high percentage of abusive mothers have an incestuous history.[43]

A review of these kinds of harm suggests that the real damage of sexual assault is actually no less than a ruined life. It can be predicted that the law's mechanism for determining causation, and for evaluating damages, will be seriously inadequate in the face of such devastation. The social problem is more severe again, for it can be suggested that those who are most seriously damaged by, say, child sexual abuse may not have the personality organization and social wherewithal even to seek redress in a private action. Suicidal, drug-dependent, or prostituting young people more often see the courts as foes than as a potential source of aid.

There is another characteristic particular to sexual abuse which will restrict access to the civil action as a form of redress. It is a seriously underreported crime.[44] Adult women are reluctant to report abuse, in large part because of their fear of a second traumatic experience in the courts. Underreporting of child sexual abuse is perhaps even more severe: it has been estimated that for every reported case, three go unreported.[45] The Badgley Committee reported that most people suffering sexual abuse for the first time did not report because they felt these matters were too personal to divulge to others, or because they felt too ashamed of what had happened.[46] Females did not report because they feared the person who committed the act.[47] Alter-Reid adds that even where a child disclosed to family or outside agencies that abuse had occurred, intervention resulting in an end to the abuse very rarely occurred.[48]

Thus, it will often be much later in life that an adult survivor of child sexual abuse will disclose in a supportive environment that she was assaulted as a child; often such disclosure comes for the first time in psychotherapy as an adult.[49] So, while she has been

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40. *Ibid.* at 534.

41. *Ibid.* at 534; Karen Alter-Reid *et al.*, "Sexual Abuse of Children: A Review of the Empirical Findings" (1986) 6 Clinical Psychology Rev. 249 at 249-261.

42. Alter-Reid *et al.*, *ibid.* at 260-261.

43. *Ibid.* at 261.

44. In *R.* v. *Canadian Newspaper Co.*, [1988] 2 S.C.R. 122, Mr. Justice Lamer said for the Court that "of the most serious crimes, sexual assault is one of the most unreported."

45. Alter-Reid *et al.*, *supra* note 41 at 262.

46. Badgley, *supra* note 17 at 187.

47. *Ibid.* at 189.

48. Alter-Reid *et al.*, *supra* note 41 at 263.

49. *Ibid.*

aware of the unsatisfactory course of her life, she may have lacked the instruction to see that such damage could be attributed to child sexual abuse.

She may even be unaware until adulthood that child sexual abuse occurred. Sylvia Fraser's moving personal account, *My Father's House,*[50] describes how around the age of seven she created a "twin" for herself, which shared her body but not her memories, and endured for her the sexual abuse of her father. Her long and painful rediscovery of her other self occurred after her father's death and in her own middle age, and resulted in this description of her little alter ego:

> *Thus, somewhere around the age of seven, I acquired another self with memories and experiences separate from mine, whose existence was unknown to me. My loss of memory was retroactive. I do not remember my daddy ever having touched me sexually. I do not remember ever seeing my daddy naked. I do not remember my daddy ever seeing me naked. In future, whenever my daddy approached me sexually, I turned into my other self, and afterwards I did not remember anything that had happened.*
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> *Even now, I don't know the full truth of that other little girl I created to do the things I was too frightened, too ashamed, too repelled to do, the things my father made me do....*[51]

If the survivor of abuse is aware that it has occurred, and is aware of the harm and distress it is causing her, she may still be unable to see such harm and distress as the responsibility of the perpetrator, because of the low self-esteem and assumption of guilt we find in victims of sexual abuse. Charlotte Vale Allen describes in *Daddy's Girl*[52] her years of abuse from her father, starting when she was a child. In return for her sexual intimacy, which he assured her was "what all little girls and their daddies would do", he would give her the small change from his pockets, which she would use to buy the "brand new notebooks and fountain pens, bottles of Quink Ink in several different colours, bags of Saratoga Potato Chips and grape-flavored suckers" which she yearned for.[53] By the time she was ten, she was getting ten dollars a time for forced oral sex.[54] She says of this time,

> *I thought of myself as a small-sized prostitute, like one of the women who were forever going upstairs to the rooms of the north star with some man. A prostitute. That's what he'd turned me into: a small child who sold body for money. To her* own father.[55]

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50. Sylvia Fraser, *My Father's House: A Memoir of Incest and Healing* (Toronto: Doubleday, 1987) at 15.

51. *Ibid.*

52. Charlotte Vale Allen, *Daddy's Girl* (Toronto: McClelland & Stewart, 1980).

53. *Ibid.* at 54.

54. *Ibid.* at 93.

55. *Ibid.* at 95.

Yet for all she recognizes his agency in her transformation, she takes the blame onto herself:

> *I blamed myself for all this. Greed for money, for things, had led me into this, so I had to be just as bad as daddy. Except that he didn't feel guilty, didn't — when I confronted him — seem to think he was doing anything the slightest bit wrong. ... I was the one who felt guilty. I felt sick with it, eaten alive by it....*[56]

It is not difficult to see how a child who has internalized the blame for her abuse like this would not think of claiming damages for it in a law suit, at least until she had been helped by counselling to shed her crushing burden of guilt.

IV. THE CASE LAW

I have been able to find comparatively few decided cases in Canada dealing with damages for sexual assault, although the numbers seem to be increasing. The earliest decision is *Q. v. Minto Management Ltd.* (1985), 15 D.L.R. (4th) 581, a decision of the Ontario High Court on a claim for damages arising from rape upon a woman in her apartment by an employee of the landlord. The reasoning in this early case has been referred to not only in later Canadian decisions[57] but in what seems to be the first U.K. decision to consider the issue.[58] It is still too early to draw from conclusions about the response of Canadian judges to the legal and social issues raised by these actions, but a number of initial observations can be made.

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56. *Ibid.* at 95-96. Roland Summit identifies as a typical response of abused children the "child sexual abuse accommodation syndrome". According to Summit, the healthy and emotionally resilient child will learn to accommodate to the reality of continuing sexual abuse, and one of those coping mechanisms is the child's belief that she is the guilty party. "The child cannot safely conceptualise that a parent might be ruthless and self-serving; such a conclusion is tantamount to abandonment and isolation. The only acceptable alternative for the child is to believe that she has provoked the painful encounters and to hope that by learning to be good, she can earn love and acceptance." R. C. Summit, "The Child Abuse Accommodation Syndrome" (1983) 7 Child Abuse & Neg. 177 at 184.

57. See e.g. *J.L.N.* v. *A.M.L., supra*, note 8 at 443-44 and *Harder* v. *Brown, supra*, note 8 at 21; and *W.(C.)* v. *Haroldson, supra* note 8.

58. *W.* v. *Meah*; *D.* v. *Meah and another,* [1986] 1 All E.R. 935 (Q.B.D.).

A. Sociological Observations

My first observations are those of a totally amateur sociologist. In the decided cases, there is an almost even split between actions by women for sexual assault as adults, and actions by adult women or by children for child sexual assault. Two of the actions involving assaults on adults involve claims by the victims against third parties for negligence on their part which contributed to the harm: in *Q.* the action was against both the assailant and the landlord of the victim's apartment building, while in *Jane Doe*, action is taken against local police authorities complaining of their failure to warn women in the affected neighborhood of known facts about the *modus operandi* of a serial rapist operating in the area. Only *Haroldson* seems to involve action against the assailant himself.

In the *Q.* case, the adult victim knew her assailant as a neighbor; in *Jane Doe* the assailant was the archetypal "stranger", climbing in over the apartment balconies of women in the Wellesley-Church area of Toronto. In *Haroldson,* the defendant was an acquaintance and neighbor of the plaintiff's friend.

In all three cases involving offences against adults, the perpetrator was convicted and sentenced for his offences.

Two of the actions for child sexual abuse involve adult plaintiffs: *Harder* and *Marciano*. *J.L.N.* was still an infant at the time of the action. The plaintiff in *Madalena* brought her action just as soon as she had attained her majority.

All the actions for child sexual abuse were against the perpetrator directly. All of these perpetrators were persons in a position of trust and familiarity: in *Marciano,* the defendant is the plaintiff's father, in *J.L.N.,* the defendant was the common law spouse of the plaintiff's mother and father of her half-brother; in *Harder,* a trusted family friend, and in *Madalena,* a foster parent. In *Madalena,* the plaintiff also sued the Ministry of Social Services of the province for its poor record of inspecting her foster home placement.

No criminal proceedings were taken against the perpetrator in *Marciano* or *Harder,* although in *Harder* the case report reveals that the offender was initially in contact with, but later "diverted" from, the criminal justice system. In *J.L.N.,* and *Madalena* the actions were brought in or right after the infancy of the plaintiff, the perpetrator had been tried and sentenced.

B. Use of the Evidence

Resort by plaintiffs to the use of psychiatric evidence was common in these cases, and the courts had no resistance to its admission. Treating psychiatrists gave evidence in *Q., J.L.N., Harder,* and *Marciano.* The evidence described the rape (or sexual assault) trauma syndrome in general, illuminated the acute and long-term symptoms of the plaintiff in light of the theory, and expressed a prognosis for the future. The psychiatric evidence supplemented the evidence of the plaintiff herself, and, in *J.L.N.,* that of a teacher who

described the plaintiff's difficulty with school and rather poor educational outlook resulting from the abuse. The courts seemed to find this expert testimony helpful, setting it out in some detail in their judgments, and emphasizing certain elements in their assessments of damages. However, as will be outlined below, the generally positive and receptive judicial attitudes toward the expert evidence were not matched by a corresponding willingness really to take it into account in the damage awards.

In two of the cases, circumstances dictated the resort to expert testimony beyond the assessment of damages. One of these was *Harder.* At issue in that case was a pattern of exploitation that began when the plaintiff was ten, or barely eleven, and the defendant was sixty-two. The child was from a seriously disturbed home, moved frequently by her mother, required to stay away from school in order to look after younger half-siblings and an aged grandparent, and subjected to sexual abuse by her stepfather. The defendant was a friend of her grandfather, who provided the only kindness she received in her unhappy life, and pocket money for running errands — as well as requiring of her sexual services that began with fondling, nude posing, and being photographed, and soon led to intercourse. For these, she received money. She never lived with the defendant, but would come to him when he telephoned her. When the abuse was finally discovered by the girl's foster mother, she was in her late teens.

The plaintiff brought psychiatric evidence to establish that her apparent acquiescence did not amount to consent. This evidence satisfied Mr. Justice Wood that

> *...the pattern of abuse in this case, and as well the pattern of the plaintiff's response to that abuse, was typical. The confusion, the unwillingness to tell anyone, and the passive acquiescence in its continuation, are all common features of cases of sexual abuse involving young children, whose need for affection, or attention, drives them back again to the source of that abuse.*[59]

He concludes that it would be "unfair and unreasonable" to hold that her apparent acquiescence in later years amounts to consent.

In *Marciano,* the plaintiff faced a serious problem with section 45 of the *Limitations Act.*[60] She had been sexually abused by her father two to three times a week from the age of eight to the age of sixteen. She quit school at sixteen, married at seventeen, and had three children, holding down as well a series of poorly paid menial jobs. She separated from her husband when sex became intolerable for her. Although her children initially were in her custody, she began having serious problems with them when they reached the age when she had begun to be abused. The children moved in with their father. She began treatment for chronic depression in 1983, then joined an incest survivors' group, and finally entered private therapy. She realized for the first time, as a result of this help, the toll which the abuse had taken on her, and also, importantly, that the abuse had not been her fault. Her father had fostered in her the belief that she was the instigator of the abuse; for example, he told her to

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59. *Harder* v. *Brown*, *supra* note 8 at 16-17.

60. The *Limitations Act,* R.S.O. 1980, c.240, s.45 provides in paragraph 45(i)(j) that an action for assault, battery, wounding or imprisonment shall be commenced within four years after the cause of action arose.

turn on her light to ask for sex, "paid" her in money, treats and special privileges, and enforced a rule of secrecy around the activity.

At the age of twenty-eight, she filed a civil action for damages. In her action, she testified, as did her private therapist, that not until she underwent therapy and had more extensive recall of the events surrounding the incest did she realize the connection between the abuse and her injuries. The jury was prepared to award her damages for her injuries, but the action was dismissed by the judge — regretfully — because of the provisions of the *Limitations Act.* Like several plaintiffs in similar actions in the United States, she did not succeed on the argument that the true nature of the harm did not become apparent until she finally made all the necessary connections — between the various symptoms she suffered (some occurring later in life, as different developmental stages are reached), the sexual abuse, and the culpability of the perpetrator (not herself).[61] This decision has been appealed.

C. Damage Awards: The Law

The $50,000 damage award by the *Marciano* jury is in the middle of the narrow range of awards in sexual assault damage cases. Before exploring the appropriateness of these sums, let me examine the legal issues which have arisen concerning the award of damages.

Typically, the plaintiff will claim not only general damages but also aggravated or punitive damages or both. The courts have not experienced difficulty in accepting that aggravated damages would be appropriate, in those cases where they have been claimed. As to punitive damages, there is apparent consensus that punitive damages cannot be awarded against a defendant who has been incarcerated for the offence.

Whether the common law allows an award of punitive damages apart from this, however, did cause the Manitoba Court of Queen's Bench some difficulty in *J.L.N.* Mr. Justice Lockwood held that *Rookes v. Barnard,* [1964] A.C. 1129 (H. of L.) limits the award of punitive damages to two categories of cases: the first, oppressive, arbitrary, or unconstitutional action by the servants of government, and the second, where the defendant's conduct had been calculated to make personal profit, which might well exceed the compensation payable to the plaintiff.[62]

On the other hand, Mr. Justice Gray in *Re Q.* had no difficulty with the idea that punitive damages are theoretically available, but found that the actions of the landlord did not show reckless disregard for the position of the tenants, or callous indifference, and so refused to make an award.[63]

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61. This result is consistent with decisions in several U.S. cases: *Tyson* v. *Tyson*, 727 P. 2d 266 (Wash. 1986); *De Rose* v. *Carswell*, 242 Cal. Rep. 368 (Cal. App. 6 Dist. 1987); *Raymond* v. *Ingram*, 737 P. 2d 314 (Wash. App. 1987); *E.W.* v. *C.D.C.*, 754 P. 2d 817 (Mont. 1988). To the opposite effect is *Hammer* v. *Hammer,* 418 N.W. 2d 23 (Wis. App. 1987).

62. [1989] 1 W.W.R. 438 at 442.

63. (1985), 15 D.L.R. (4th) 581 at 596.

Similarly, Mr. Justice Wood in *Harder* makes an award of punitive damages, relying upon the decision of the Supreme Court of Canada in *Vorvis v. I.C.B.C.,* [1989] 4 W.W.R. 218, at 236, where Mr. Justice McIntyre says for the Court that such damages are available in respect of conduct that is "harsh, vindictive, reprehensible and malicious" or "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment".

Mr. Justice Wood also clarifies, again relying on *Vorvis,* that aggravated and punitive damages are not mutually exclusive.

D. Damage Awards: Quantum

A disappointing aspect of the decisions on sexual assault is the relatively low quantum of damages awarded. What is particularly disturbing is that these modest awards are accompanied by the most alarmed descriptions of the nature of the assaults, and the most welcoming reception of evidence showing acute and long-term harm. One is forcibly reminded of those criminal sentencing cases (and cartoons depicting them) where the judge solemnly remarks that "this is the grossest most devastating example of violent abuse I have seen in twenty years on the bench" and then imposes a sentence of two years less a day. The sad conclusion is that even when judges believe that great harm has been done, their sentences — and in civil cases, their damage awards — show that they have been acculturated to think that the interest that has been harmed is not very valuable. In view of the expert evidence that sexual abuse, particularly in childhood, can literally ruin a woman's whole life, we must hope that this modest beginning will be altered by everyone's second thought, as indeed seems to be beginning in the case of the traditionally very low awards for sexual harassment in the human rights context.[64]

The damage award in *Q.* was $40,000, against the defendant assailant and the defendant landlord. The woman's son received an award of $1,000 for his claim under the *Family Law Reform Act* for the loss of companionship of his mother occasioned by the assault. Mr. Justice Gray described the circumstances of the assault: the perpetrator gained access to the victim's apartment at night, in the dark; he taped her wrists, tied a covering over her eyes, threatened her with a metal object like a gun, and then "after involving her in circumstances I do not choose to relate, had intercourse with her against her will for a period of three-quarters of an hour."[65] Her young son was asleep in an adjacent bedroom.

The woman's treating psychiatrist testified that the woman had had both acute and chronic reactions to the rape. He described the acute phase as including "a host of symptoms, which included considerable fear, inability to sleep, worry and anxiety about being raped again, and concerns about court appearance". This acute phase proved to be beset with greater phobias and anxiety than the psychiatrist had originally predicted, and he saw her as having

64. *Airport Taxicab (Malton) Association* v. *Piazza* [1989] O.J. 994 (action No. 671/87) (Ont. C.A.).

65. *Re Q.*, *supra* note 63 at 585.

a more prolonged and chronic phase than usually observed.[66] The plaintiff testified about considerable weight loss due to her inability to eat, fatigue, and considerable changes in her pattern of life to deal with her anxiety. She found the criminal trial an ordeal and complained of "feeling dirty".[67] The trial judge remarked, however, that she is "considerably above average and superior in some respects," but it is difficult to see what this observation refers to; it may relate to her recovery, or simply to her employment, because he also observes that her employer is satisfied with her and her relationship with her son, once deteriorated because of her trauma, had improved.

There was no award of aggravated or punitive damages in this case. In *Haroldson*, on the other hand, the trial judge made an award of $10,000 general damages and $40,000 punitive damages against a male who had raped an adult woman.

In *Haroldson,* there was no expert evidence concerning the plaintiff's damages, and the Court found few "specific objective signs" of the assault. Yet the judge's revulsion at the conduct of the defendant is evident, and the judge seems to be informed at least in part by a more sophisticated understanding of the political and social dimensions of the wrongdoing. The accused, it was found, had pursued a systematic course of conduct over an evening to achieve his goal of sex with the plaintiff against her will, including getting her drunk, verbal abuse, and following her and confining her about the rooms of his house. The plaintiff herself gave evidence about the psychological and social harm she had suffered, and the judge found her a sympathetic and convincing witness. He finds her to have suffered a growing mistrust of others, particularly males; a basic insecurity in social situations, a feeling of loss of control over her destiny coupled with loss of self-worth, embarrassment and humiliation, nightmares, a loss of desire for sexual intimacy with her spouse, and at times a bitter disposition that interferes with her relationship with spouse and son.

In coming to his award of punitive damages, the judge cites "the utter disrespect the defendant...had for women in general and this lady in particular" and the following:

> (a) it is punishable conduct insomuch as it is a sexual assault upon the plaintiff, involving excessive force and carnal relations;
>
> (b) it is conduct needing deterrence as the predominance of sexual assaults primarily by adult males upon females in our society is real, and unabating. This Court is aware of the many studies and reports as will evidence the number of sexual assaults upon women in Canada, many of which go unreported, and others reported but where requisite evidence is lacking, allowing the offender to escape without penalty of law;
>
> (c) the defendant has done more than offend the ordinary standards of morality and decency. He has done so in a cold and calculating way, uncaring as to the consequences;

66. *Ibid.* at 595.

67. *Ibid.* at 596.

(d) the defendant, in carrying out the sexual attack, has acted arrogantly and callously. He simply did not care as to what harm or consequences would flow from his act; and

(e) specifically, the Court must consider that in the assault, her life was threatened and the defendant brutally raped her. Furthermore, a child was born nine months later, and that, whether or not he is the child of the assailant, the plaintiff, the plaintiff's husband, and the child shall have suffered in the knowledge of this act.

In *J.L.N.,* Mr. Justice Lockwood found that "the infant was subjected to repetitive, terrifying assaults and thereby suffered severe trauma over a six-year period. She has suffered to a lesser extent down to the present day and faces the prospect of significant problems in the future".[68] The assaults started when she was six years old, and involved the defendant feeling her breasts and vagina, sexual intercourse, anal intercourse, attempted fellatio, and placing his finger in her vagina; they occurred at least twice per week for six years, until the arrest of the defendant when she was twelve.

The damage in the short term included sleeplessness, withdrawn behaviour, fear of the defendant, unhappiness to the point where her mother was afraid she would run away, and, during the period of the arrest and court appearance, nervous, hysterical and "uptight" behaviour. She failed a year of school and her teacher stated that her experiences have seriously affected her education. Her treating psychiatrist predicts long-term problems in two areas: the plaintiff continued to feel uncomfortable and unsafe in the presence of adult men, and was not at the same level of development as her age peers in terms of interest in sexual involvement. The doctor concluded that she was vulnerable to future sexual dysfunction and at risk in her attempts to develop trust in relationship with men.[69]

The court awarded $65,000 in damages, citing several aggravating factors: the fact that the abuse began when she was so young, and lasted for a long time, and the fact that the relationship of the abuser to the child was such a close one.[70]

Perhaps the most surprising award is that of Mr. Justice Wood, whose affirmation of the appropriateness of punitive damages, along with aggravated damages, was the firmest of all the judges. He found for the plaintiff in the amount of $40,000 in general damages and $10,000 in punitive damages. This is lower than the award in *J.L.N.,* which Mr. Justice Wood described as quite similar in facts and in the type of damage.[71] It is exactly the same as the jury award in *Marciano* and the award in *Haroldson,* and just slightly higher than the award in *Q*.

68. *Supra* note 8 at 442.

69. *Ibid.* at 440.

70. *Ibid.* at 441.

71. *Harder, supra* note 8 at 22.

Yet, like Karen Marciano, Diana Harder suffered enormous personal devastation, extending into her adult life, from the lengthy series of assaults and the fundamental breach of trust.

Mr. Justice Wood identifies approximately the same aggravating factors as had been found in *J.L.N.*: the fact that the defendant was a person whom the plaintiff knew and trusted, rather than a stranger; the fact that there was a multitude of assaults over a long period of time; and the fact that the assaults began at an early age and continued throughout most of the plaintiff's adolescent years.[72] In arriving at a general damage figure, he professes also to take into account the fact that prolonged, costly, therapy would be needed.[73] Arguably, this last factor might actually be regarded as an item of special damages, particulary as the actual rates of the plaintiff's therapist appear in the judgment.

In addition to including the arguably "special" element of therapist fees in the general damages, Mr. Justice Wood also seems to have undervalued the damages that were established by the plaintiff. Her evidence was that the assaults began with fondling, and proceeded to nude display, picture taking and intercourse. The initial fondling occurred in a small storeroom from which the defendant blocked escape with his wheelchair; he also enforced silence and compliance by threatening to tell the plaintiff's mother, who was a cruel and vindictive parent.

The psychiatric evidence was to the effect that the worst consequences of the assaults were her loss of self-respect, a feeling deep rooted and impervious to change that has affected her outlook towards others, her choice of friends and jobs and her confidence in her ability to overcome life's problems. She was described as having lost her capacity to trust people, particularly men, and as having trouble forming lasting relationships. Although she had a relationship of affection with the father of her two children, she found it impossible to live with him; she was, as well, an overly protective mother. She also has flashbacks and recurrent nightmares.[74] The prognosis was that successful treatment of these problems would take a long while and be difficult to achieve.

The *Harder* case illustrates very well the fact that the damage of sexual assault occurs in different developmental stages. There appears to be almost no evidence on the record concerning the reactions of the plaintiff during the acute phase, in contrast to the evidence put forward in the *J.L.N.* case. The recitation of facts in the judgment portrays a desperately troubled childhood, during which the plaintiff was victimized both by her mother and by the defendant (in different ways); the judgment does not make any attempt to identify the plaintiff's physical or psychological reactions during this time, or allocate them to the acts of the defendant. In the result, the evidence, and the judgment, focusses primarily on the damage still being felt by the plaintiff in her early adulthood. Whether because of the way the plaintiff herself adduced her evidence, or because of the judge's own attitudes, the judgment seems to have taken almost no account of the suffering caused to her as a child.

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72. *Ibid.* at 24.

73. *Ibid.* at 24.

74. *Ibid.* at 17.

These observations point to several essentials for future damage actions. That the plaintiff should adduce both lay and expert evidence of the harm she has suffered seems almost self-evident: mothers, teachers, the victim herself, and her therapist will all have useful testimony. It seems less self-evident, and thus worth confirming, that plaintiffs should make every effort to cover separately each phase of the sexual assault trauma syndrome, acute and chronic or long-term. A plaintiff should also cover separately each of her own developmental phases, so that the court does not see only the last phase (and conclude therefore it is merely "residual" harm).

Beyond these points about the craft of litigation, we find that more intangible (and thus more difficult to influence) factors may have to be dealt with to achieve higher damage awards. The social worth attached to a woman's wellbeing — to the value of her life, in fact — is low, whether the standard is applied by a jury or a judge. Changing those social assessments is a long-term task. In any particular case, the plaintiff can be sure to ask for sufficient damages, so as not to condition the size of the award by her own low expectations, but beyond that, practical short-term solutions are scarce.

The difficulty of achieving long-term change may be exacerbated, in my view, by another factor which hovers beneath the surface of these judgments. This is the factor of social class: it is evident that the victim herself in *Q.* and the mothers of the victims in *J.L.N.* and *Harder* were single parents. The socio-economic status of the family in *Harder* was clearly very low; reference is made to the plaintiff using money from the defendant to buy food for herself and siblings; her mother worked at a canning factory.

One cannot escape the impression that a wide social gulf exists between the judges in these cases and the plaintiffs. This may have made it difficult for the judges to empathize with the plaintiffs, or to reason by analogy to familiar circumstances: what their own female relatives would suffer if subjected to similar abuse. The effects of social class are difficult to measure, and to control; one hesitates to predict how plaintiffs of a different racial background — as well as a different socio-economic one — would fare, although the prognosis would not be hopeful.

E. Consent

The *Madalena* case raises in the civil context that most thorny of issues: consent. The forcible nature of the wrongs in most of the other cases meant that consent was not at issue; in *Harder,* it was dealt with by the trial judge in an understanding fashion.

In *Madalena,* the plaintiff sued her foster father for damages arising from his sexual acts with her while she was a young teenager, during a period when he was separated from his wife. When the acts began, the plaintiff was 15, the defendant 41. Intercourse continued from 1981 to late in 1983.

The defendant's acts resulted in conviction under section 153(1) of the *Criminal Code* for having illicit sexual intercourse with the plaintiff, and was sentenced to nine months

imprisonment and two years probation for that offence. Consent is not a defense to that charge and thus was not at issue in those proceedings.

While agreeing with the plaintiff that "the conduct of the defendant amounts to sexual abuse, is a crime, and a breach of trust as a foster parent", the Court rules that "vile and criminal" though the defendant's conduct was, liability in tort did not arise because the plaintiff consented.

The plaintiff argued that she was coerced into acting as she did, because there was an imbalance of power in her relationship with the defendant. The defendant admitted that he did not discourage or stop the acts which took place between them.

Yet the court finds that she consented, based on a combination of absence of physical coercion and an arguably dubious construction of certain acts of the plaintiff. The judge found that the plaintiff initiated the first act of sex by asking the defendant to massage a sports injury she incurred. He found that both parties were aware of the act and of its sexual significance. He also sets out a conversation in which the two of them allegedly balanced the pros and cons of sexual intercourse, and it is clear from the judge's language that he believes her to have been "the temptress". The temptation analogy is made even more clear by the judge's construction of the context: when his wife left him, the defendant became very disturbed. "The plaintiff offered him comfort and solace in his grief. This soon led to sexual intimacies and, ultimately, to intercourse." It would have been surprising if she had not offered him some sort of comfort at that time; the case also reports that she had been a happy member of the Kuun family for some years.

Mr. Justice MacKinnon perhaps best expresses the attitude which informs his judgment in this passage:

> *Should a consenting female under the age of eighteen have a cause of action if she has full understanding of the nature of her act? It is one thing to say that society will protect itself by punishing those who consort with females under the age of consent; it is another to hold that, knowing the nature of her act, such female shall be rewarded for her indiscretion. Surely public policy — to serve which the statute was adopted — will not be vindicated by recompensing her for willing participation in that against which the law sought to protect her. The very object of the statute will be frustrated if by a material return for her fall "we should unwarily put it in the power of the female sex to come seducers in their turn". Smith v. Richards, 29 Conn. 232. Instead of incapacity to consent being a shield to save, it might be a sword to desecrate.*

V. CONCLUSIONS

This survey has touched all too lightly on some of the fundamental issues raised by the case law. Yet some serious problems have been identified. One is the issue of quantum of damages, which reveals the underlying social under valuation of women's lives, as well as the potential for further difficulty caused by socio-economic and race factors. The persistent low assessment of women's worth pervades many areas of the law, not just this one, yet at

least here there is some positive element. The action for damages for sexual assault seems only recently to be coming into use. It arrives on the scene when a fairly well developed body of expertise concerning harm already exists. The challenge of the future is to let that expertise, and our new perspective on sexual assault generally, guide assessments of damages, rather than relying on the uninstructed discretion of juries and judges.

A second major issue which has already made its appearance is that of the bar to recovery posed by limitations acts. Our accumulated knowledge of damage from sexual assault already shows us that the damage may well unfold, in stages, over the course of a lifetime. More pointedly, it alerts us to the fact that the defense mechanisms of a child dealing with sexual assault may include blocking out, or assumption of guilt — either of which could create circumstances in which a limitations statute can preclude recovery once the true dimensions of the wrong have finally surfaced.

A well founded understanding of sexual assault pushes us in the direction of reasoning that limitations acts should not bar recovery in these circumstances. To allow them to do so is, arguably, to violate the victims' right under the *Charter* to the equal protection and equal benefit of the law, in this instance the law allowing recovery of damages for sexual assault.

The Wisconsin Court of Appeal in *Hammer* takes a firm stand against protecting defendants from past liabilities in sexual abuse cases. To protect the parent at the expenses of the child works, in the words of the Court, "an intolerable perversion of justice".[75] This argument is particularly persuasive in those cases where the defendant's power and authority over the child, and his active and self-interested miseducation of her, disable her from correctly assigning responsibility for the harm.

Our courts recognize, even in the limitations context, the principle that a person cannot benefit from his own wrong. In *Hudson v. Rumola* (1985), 1 C.P.C. (2d) 29, the victim was given the wrong party's name by one of the persons involved in an accident. By the time she had realized that her action was against the wrong party, the limitation period had expired. In denying the defendant's motion not to be added as a party, the court said, at p. 34, that a defendant is not entitled to the benefit of a limitation period where he has, by fraud or deceit, prevented the plaintiff from discovering the cause of action. Nor does it seem inconsistent with the developing principles on reasonable discoverability to deny a defendant the benefit of a limitations period where the plaintiff's psychological injuries have themselves prevented her from seeing them, or their proper causation.[76]

Actions for damages for sexual assault are in a relatively early stage in their development in Canada. They are growing up in the context of a criminal law that tries to see sexual assault from the victim's point of view, and of an ever increasing knowledge of the effects of sexual abuse. In these circumstances, they should become a strong new remedy for

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75. *Hammer* v. *Hammer,* 418 N.W. 2d 23 at 27 (Wis. App. 1987).

76. *Kamloops* v. *Nielsen* (1984), 10 D.L.R. (4th) 161, Wilson J.; *Central Trust Co.* v. *Rafuse* (1986), 37 C.C.L.T. 117 (S.C.C.), LeDain J. at 180; *Consumers Glass Co.* v. *Foundation Co. of Canada* (1985), 33 C.C.L.T. 104, Dubin J.A. at 122.

the oppression of sex assault, and not be diminished at the outset by the importation of older ideas about the value of women's lives and the nature of sex assault.

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