Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto et al.

[Indexed as: Doe v. Metropolitan Toronto (Municipality) Commissioners of Police]

39 O.R. (3d) 487
[1998] O.J. No. 2681
Court File No. 87-CQ-21670

Ontario Court (General Division),
MacFarland J.
July 3, 1998

Charter of Rights and Freedoms -- Right to life, liberty and security -- Failure by police to warn potential victims of serial rapist -- Police having sexist and stereotypical belief that women would have hysterical response to warning and would scare off rapist who would escape apprehension -- Charter rights violated -- Canadian Charter of Rights and Freedoms, s. 7.

Charter of Rights and Freedoms -- Equality rights -- Failure by police to warn potential victims of serial rapist -- Police having sexist and stereotypical belief that women would have hysterical response to warning and would scare off rapist who would escape apprehension -- Charter rights violated -- Canadian Charter of Rights and Freedoms, s. 15.

Torts -- Negligence -- Duty of care -- Negligent police investigation -- Failure by police to warn potential victims of serial rapist -- Police having sexist and stereotypical belief that women would have hysterical response to warning and would scare off rapist who would escape apprehension.

In the early morning hours of August 24, 1986, the plaintiff,

who lived in a second-floor apartment in the Church and Wellesley area of Toronto, was raped at knifepoint by PDC, who had broken into her apartment from a balcony. At the time, the plaintiff was the fifth victim of similar crimes by PDC, who would become known as the "balcony rapist".

In this action, the plaintiff sued the Metropolitan Toronto Police Force for damages on the grounds that (1) the police force had conducted a negligent investigation and failed to warn women of the risk of an attack by PDC; and (2) the police force had violated her rights under ss. 7 and 15 of the Canadian Charter of Rights and Freedoms.

The evidence at trial established that, before the rape of the plaintiff, PDC had committed similar crimes on December 31, 1985, January 10, 1986, June 25, 1986, and July 25, 1986. All the crimes took place in apartment residences in the Church and Wellesley area of the City of Toronto. By August of 1986, members of the police force had deduced that the crimes were linked and that the assailant lived in the area of the crimes. They knew that there was most likely a serial rapist attacking women who lived alone in second- and third-floor apartments with climbable balconies and that the rapist would most certainly attack again, likely around the 24th or 25th of the month. However, only two officers, Sgts. C and D, were assigned to the investigation, and they were extremely busy with substantial commitments to other cases.

Sergeants C and D decided that their investigation would be low-key in comparison to the approach used by the force in the investigation of another series of rapes, the "Annex Rapist" crimes, in another area of the city, where a task force had been established and where there had been substantial media coverage and publicity of the crimes. With respect to the balcony rapist crimes, Sgts. C and D decided not to issue any warning, and they decided that any increased police presence in the area of the crimes would be made only covertly. Sergeants C and D both testified that they did not want a media blitz alerting the public to the danger because they did not wish the assailant to flee as had the Annex Rapist before his arrest in Vancouver.

Held, there should be judgment for the plaintiff.

The police are statutorily obligated to prevent crime, and, at common law, they owe a duty to protect life and property. The police force failed utterly in their duty to protect the plaintiff and the other victims from a serial rapist known to be in their midst by failing to warn them so that they might have had the opportunity to take steps to protect themselves. A meaningful warning could and should have been given to the women who were at particular risk. This warning would not have compromised the investigation. The professed reason for not providing a warning, that is, that the assailant might flee, was not genuine, and the real reason was that Sgts. C and D believed that women living in the area would become hysterical and scare off the offender and this would jeopardize the investigation. In addition, they were not motivated by any sense of urgency because the balcony rapist crimes were regarded as not as serious as the Annex Rapist crimes which were distinguished by more violence. Sexist stereotypical views informed the investigation and caused the investigation to be conducted incompetently. Had a warning been given, the plaintiff would have taken steps to protect herself and likely those steps would have prevented her from being raped.

The plaintiff's Charter rights were infringed by police conduct. The police investigation was carried out in a way that denied the plaintiff equal protection and equal benefit of law as guaranteed to her by s. 15(1) of the Charter. The conduct of the investigation and, in particular, the failure to warn was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women, and about women who are raped. The plaintiff was discriminated against by reason of her gender. Women were treated differently because some members of the force adhered to sexist notions that, if warned, women would panic and scare off the attacker. Further, the defendants deprived the plaintiff of her right to security of the person under s. 7 of the Charter by subjecting her to the very real risk of attack by a serial rapist. They were aware of the risk but deliberately failed to inform her of it. Because the defendants exercised their discretion in the

investigation in a discriminatory and negligent way, their exercise of discretion was contrary to the principle of fundamental justice. The plaintiff was entitled to an award of damages as a remedy under s. 24 of the Charter.

The damages for the Charter breach were the same as for her action founded in negligence. Her damages should be assessed in the following amounts: (a) general damages, $175,000; (b) special damages to date, $37,301.58; and (c) future costs, $8,062.74. The plaintiff was also entitled to an amount that equalled the present value of the sum required to produce $2,000 annually for 15 years for transportation costs and to a declaration that the defendants violated her rights under the Canadian Charter of Rights and Freedoms.

Cases referred to

Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1990), 74 O.R. (2d) 225, 40 O.A.C. 161, 72 D.L.R. (4th) 580, 1 C.R.R. (2d) 211, 5 C.C.L.T. (2d) 77, 50 C.P.C. (2d) 92 (Div. Ct.), affg (1989), 58 D.L.R. (4th) 396, 48 C.C.L.T. 105 (Ont. H.C.J.); Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, 38 B.C.L.R. (3d) 1, 151 D.L.R. (4th) 577, 218 N.R. 161, [1998] 1 W.W.R. 50, 46 C.R.R. (2d) 189; Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252, 58 Man. R. (2d) 1, 59 D.L.R. (4th) 352, 95 N.R. 81, [1989] 4 W.W.R. 39, 47 C.R.R. 274, 25 C.C.E.L. 1, 89 C.L.L.C. 17,011 sub nom. Janzen v. Pharos Restaurant; Prete v. Ontario (1993), 16 O.R. (3d) 161, 110 D.L.R. (4th) 94, 18 C.R.R. (2d) 291, 18 C.C.L.T. (2d) 54, 86 C.C.C. (3d) 442 (C.A.) [leave to appeal to S.C.C. refused (1994), 17 O.R. (3d) xvi, 20 C.R.R. (2d) 192n, 20 C.C.L.T. (2d) 319n, 175 N.R. 322n]; R. v. Osolin, [1993] 4 S.C.R. 595, 109 D.L.R. (4th) 478, 162 N.R. 1, 19 C.R.R. (2d) 93, 86 C.C.C. (3d) 481, 26 C.R. (4th) 1; Schacht v. R., [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 [affd [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453]; Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, 58 N.R. 1, 14 C.R.R. 13, 12 Admin. L.R. 137

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24
Police Act, R.S.O. 1980, c. 381, s. 57
Public Authorities Protection Act, R.S.O. 1990, c. P.38, s. 7(1)

ACTION for damages for negligence and for violation of ss. 7 and 15 of the Canadian Charter of Rights and Freedoms.

Sean Dewart, Eric Golden and Cynthia A. Petersen, for plaintiff.
Bryan Finlay, Q.C., and J. Gregory Richards, for defendants.

MACFARLAND J.: -- Jane Doe was raped and otherwise sexually assaulted at knifepoint in her own bed in the early morning hours of August 24, 1986 by a stranger subsequently identified as Paul Douglas Callow. Ms. Doe then lived in a second-floor apartment at 88 Wellesley Street East, in the City of Toronto; her apartment had a balcony which was used by the rapist to gain access to her premises. At the time, Ms. Doe was the fifth known victim of Callow who would become known as "the balcony rapist".

Ms. Doe brings a suit against the Metropolitan Toronto Police Force (hereafter referred to as MTPF) on two bases; firstly she suggests that the MTPF conducted a negligent investigation in relation to the balcony rapist and failed to warn women whom they knew to be potential targets of Callow of the fact that they were at risk. She says, as the result of such conduct, Callow was not apprehended as early as he might otherwise have been and she was denied the opportunity, had she known the risk she faced, to take any specific measures to protect herself from attack. Secondly, she said that the MTPF being a public body having the statutory duty to protect the public from criminal activity, must exercise that duty in accordance with the Canadian Charter of Rights and Freedoms and may not act in a way that is discriminatory because of gender. She says the police must act constitutionally, they did not do so in this case and as the result, her rights under ss. 15 and 7 of the

Charter have been breached. She seeks damages against the MTPF under both heads of her claim.

The trial of this action took place over approximately eight weeks; some 30 witnesses were called and voluminous documentary evidence filed. Counsel have filed lengthy written argument and had two days in which to give an oral outline of their written submissions.

OVERVIEW

It is necessary when considering claims under s. 15 of the Charter that they be considered in relation to the larger social, political and legal context. In the words of La Forest J. in Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at p. 668, 151 D.L.R. (4th) 577:

> As Wilson J. held in Turpin, the determination of whether a law is discriminatory is a contextual exercise. It is important, she explained, at p. 1331, "to look not only at the impugned legislation . . . but also to the larger social, political and legal context".

In this respect the plaintiff called Dr. Peter Jaffe, well experienced in the topic of male violence against women, to give evidence in relation to the social and political context in which the plaintiff's discrimination claim is made.

In his evidence Dr. Jaffe cited a number of surveys and studies which have concluded that a very large number of Canadian women have been sexually assaulted by Canadian men. This social phenomenon is not new and has been known for many years.

The evidence establishes beyond peradventure that among adults, the perpetrators of sexual violence are overwhelmingly male and the victims overwhelmingly female. It is not disputed that this fact was known to the MTPF in 1986.

As Dr. Jaffe explained, sexual violence is a form of violence; it is an act of power and control rather than a

sexual act. It has to do with the perpetrator's desire to terrorize, to dominate, to control, to humiliate; it is an act of hostility and aggression. Rape has nothing to do with sex, everything to do with anger and power.

It is accepted that one of the consequences of the pervasiveness of male sexual violence in our society is that most women fear sexual assault and in many ways govern their conduct because of that fear. In this way male sexual violence operates as a method of social control over women. For example, women are likely to avoid activities which they perceive may put them at risk of male sexual violence. They will, for example, avoid going out alone in the evening. As plaintiff's counsel put it in written submissions: "The sexual victimization of women is one of the ways that men create and perpetuate the power imbalance of the male-dominated gender hierarchy that characterizes our society."

It is also proved, on the evidence, that the majority of sexual assaults committed against women are not reported to police, a fact of which the MTPF was also aware in 1986. The evidence establishes, to my satisfaction, that a reason many sexual assault victims do not report to police is because they have concern about the attitudes of the police or courts to this type of incident and this fact has been recognized by the Supreme Court of Canada: see R. v. Osolin, [1993] 4 S.C.R. 595 at p. 628, 109 D.L.R. (4th) 478, where Madam Justice L'Heureux-Dub said in part:

> One of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system; as I discussed in Seaboyer, supra, at p. 650, almost half of unreported incidents may be traced to this perception on the part of sexual assault victims. With good reason, women have come to believe that their reports will not be taken seriously by police and that the trial process itself will be yet another experience of trauma.

For those women who do report the fact that they have been sexually assaulted, the police constitute their first contact

with the criminal justice system. At this preliminary stage, the police can and do act as a filtering system for sexual assault cases. If, for example, an investigating officer determines that a particular complaint is "unfounded", it likely will not proceed further in the justice system. Studies exist which show that, generally, the "unfounded" rate for crimes of assault is lower than for crimes of sexual assault.

One of the reasons suggested for the higher "unfounded" rate in relation to sexual assaults is the widespread adherence among investigating police officers to rape mythology, that is, the belief in certain false assumptions, usually based in sexist stereotyping, about women who report being raped. The fact that these stereotypical beliefs are widely held in society is a factor to be considered in relation to the larger social and political context in which this aspect of the plaintiff's claim must be analyzed.

Dr. Jaffe in his evidence gave a number of examples of common rape myths:

-- that women lie about being raped;

-- that women are not reliable reporters of events;

-- that women are prone to exaggerate;

-- that women falsely report having been raped to get attention.

In general, in matters relating to rape and sexual assault women tend to report things which have no basis in fact. There exists the belief that the report is false, grossly exaggerated or is done for another purpose such as attention seeking, essentially that women either precipitated or falsely reported rapes. The literature documents in far more detail and provides more examples of commonly held rape myths involving the attribution of stereotypical characteristics to survivors of rape and other serious sexual assaults.

The existence of rape myths is not something new; their

existence and widely held belief among members of society in general has been well-known at least since the early 1970s when rape trauma began to be studied in a serious way.

Certainly those persons engaged in the various fields of endeavour that would cause them to come into contact with survivors of sexual assault would have been aware of the Rape Trauma Syndrome and Rape Mythology from as early as the mid-1970s.

All of the investigative police personnel called to give evidence in this proceeding were aware of these matters in 1986 and earlier.

Every police officer who testified in this proceeding repeated the mantra that sexual assault was a very serious crime second only to homicide.

Problems Within the MTPF Concerning the Investigation of Sexual Assaults

It is important to keep in mind that the events giving rise to this lawsuit occurred in 1986 -- now some 12 years ago.

In 1975 four members of the MTPF prepared a detailed report for the then Chief of Police, Harold Adamson; that report was entitled "Report of the Police Committee on Rape" and is dated July 30, 1975. The stated purpose of the report was to:

> look into the rape problem in our jurisdiction with a view to:
>
> (a) preparing a response to the Brief prepared by the Rape Crisis Centre for Alderman Dorothy Thomas; and
>
> (b) assessing the feasibility and/or advisability of forming a Special Squad for the investigation of sexual assaults.

This document is an important one in understanding the state of the police knowledge at the time. The four main categories of

the report were: Statistical Analysis for the years 1970-1974, Victim Survey, Quality of Investigations and Training Programs.

It was learned from the analysis that of the 907 rapes reported in this five-year period only 37.5 per cent of them were found to be "confirmed" rapes. The recommendation is made by the authors of the report:

> That the police explore some means of subtracting false rape reports from statistics before publishing them for the information of the community.

The authors then go on to observe:

> The fact that so many occurrences are shown to be unconfirmed does not relieve the Police of their obligation to thoroughly investigate all reported rapes but a question does arise. On what basis is the decision made to categorize a report as founded or unfounded? From reading many occurrences, it would appear that the decision may be an arbitrary one made by the investigator without benefit of consultation with or confirmation from supervisory personnel or unit commanders. In that case, the personality, attitudes and experience of the investigating officer become a matter of concern not only for the victim but for the reputation of the Police and their stated desire to produce top quality investigation and case preparation. Stated simply -- are all unconfirmed rapes really unconfirmed or should some of them, given proper investigation, be listed as confirmed? The question arises because the figures are so dramatically different e.g. only 37.5% of reported rapes confirmed as such during the years 1970-1974.
>
> Recommendation: That experienced investigators take responsibility for rape investigations and that their decisions be subject to scrutiny and confirmation by senior investigative and supervisory personnel so that all reported rapes are properly investigated and categorized for statistical purposes.

Recommendation: That supervisors take into account the attitudes, personality and experience of an investigator to whom they assign rape investigations.

While discussing the investigator and the quality of investigation, is it possible that the number of rapists charged and convicted might increase if the above recommendations were implemented and the victims scrupulously and sensitively assisted through the investigative and court processes? Charges are not possible in some cases for a number of reasons, but should the Police be satisfied to lay charges in only 38.7% of confirmed rape cases as is indicated during the period 1970-1974?

Concern is expressed here that reported rapes should be categorized properly as confirmed or not.

A sampling of the comments of some of the victims who were interviewed for the report is interesting for the concerns expressed back in 1975 for example:

3. The majority remarked about the number of police officers involved in their cases -- initially, during questioning, and during subsequent investigation.

4. Many commented that they were not kept informed of the status of the case, including final disposition.

5. Most were embarrassed to discuss the intimacies of the act with investigators and some of these felt that the male officers were embarrassed as well.

6. The majority expressed the opinion that they would have preferred relating to a mature, experienced female officer. They said that if a woman was not available, they would prefer to speak to an older, mature male (NOT a young policeman or policewoman).

7. Most expressed a desire to have a relative or friend present during the interview. Many who made such requests were

refused.

8. Many wondered if the same investigators could not be in charge of the whole case, so that they could relate the facts only once.

9. Many women would prefer that police inform them and explain the reasons for looking into their past, particularly if they intended to interview former boy friends, neighbours, family, etc.

10. Most would appreciate more privacy at police stations. They were of the opinion that everyone wanted to see or talk to them. They would remind police officers that they are not victims by choice.

11. The court procedure was not always explained to witnesses.

The authors also noted that:

> In our anxiety to produce results measured in arrests and convictions, the importance of treating complainants with respect, sympathy and understanding has not received the attention it deserves in field and college training programs.

And the recommendation made:

> That Procedure 40, Rules and Regulations, be amended to reflect the importance of providing discreet sympathetic handling of the rape victim in addition to the mechanics of the investigation.

The authors acknowledged that their inquiries demonstrated that while most investigations were "excellent . . . some are shoddy and incomplete and decisions not to prosecute are made for obscure and flimsy reasons". They go on to observe that generally experienced investigators do a better job than those without personal experience themselves and/or without the availability of anyone else with experience to give them guidance and advice. It was recommended that competent, experienced investigators be made available for rape

investigations and that supervisors take into account the attitude, personality and experience of an officer to whom they assign a rape investigator; that suitable controls and supervision be put in place over the progress of investigations and decisions being made by having an "independent" and supervisory reader of the occurrence reports among others.

The report indicated that while existing training programs were adequate it conceded greater emphasis should be placed on the needs of the victim. It is suggested that supervisory personnel be required to seek out those not doing a satisfactory job and ensure that such persons either come up to an acceptable standard of proficiency, or if such persons are unable to do so, that they be placed in positions where they will not "become an embarrassment to the Force". It was agreed greater emphasis should and would be placed on the treatment of victims of sexual assault.

As indicated above these observations are indicative of the awareness of the MTPF of some of the concerns of members of the public and of some of the shortcomings of the force in relation to the investigation of rape in 1975.

The next significant study in which the MTPF were directly involved was the Report of the Task Force on Public Violence against Women and Children. As stated in the introduction of the preliminary report of that group there had been a number of brutal rapes and murders in Toronto during the summer of 1982. In response to the public concern and outrage they generated, the Metropolitan Toronto Chairman at the time, Paul Godfrey, requested the Metropolitan Toronto Board of Commissioners of Police to establish a Task Force to examine the various issues raised and the Task Force on Public Violence against Women and Children was created. The MTPF had representatives on the Task Force and on several of its subcommittees. The preliminary report of the Task Force was published in July 1983. Among the recommendations and observations made by the Task Force in that preliminary document were the following:

-- police officers are human beings, some will be more suitable than others to investigate sexual assault

cases.

-- training at Police College should include and emphasize rape trauma syndrome; training should be ongoing.

-- a specialized sexual assault investigation team should be created.

-- that crime prevention should be made a higher priority of the MTPF.

-- there should be a publicity campaign by MTPF to increase public awareness of crime prevention programs and increase the public's participation in such programs.

-- MTPF should encourage the media to alert the public to crime problems and means of crime prevention.

-- police officers should receive additional training to scrutinize them to the special needs of women . . . victims of violence.

-- courses should be made immediately available at the Police College and in the form of video presentations in each police station.

-- historically, sexual assaults have had a very low rate of reportage.

One of the reasons cited for non-reporting by victims was the victim's fear of not being believed and the Task Force recommended in this respect that police officers investigating these crimes be specially trained to be aware of and sensitive to the needs of these victims.

Linked to the recommendation that a specialized squad be created for the investigation of such crimes was the recognition of the need for co-ordination of sexual assault investigation on a Metro-wide basis.

In September 1983 the MTPF responded to the preliminary

report of the Task Force intending to specifically focus on the recommendations directed at the MTPF. They agreed with each and every one of the observations and recommendations noted above. The MTPF reported that a course outline and proposed syllabus had been developed for "Sexual Assault and Child Abuse Investigative Techniques" to deal with victims of sexual assault and their unique problems. The course would be a week long, would include guest lecturers from various professions dealing with sexual assault victims and would start in October of "this year" -- i.e., October of 1983.

Virtually all of the recommendations and observations contained in the Task Force's Preliminary Report are contained in the final report of that group delivered in March 1984. The only exception relates to the formation of a specialist squad. In the final report the committee preferred specialized training generally for all police officers rather than for a single specialized squad.

Again the Task Force noted that historically sexual assaults have a low rate of reportage and the need for the co-ordination of sexual assault investigations on a Metro-wide basis.

MTPF responded to the final report of the Task Force and there are three responses filed in evidence -- the first bears the front page notation "Operational Planning, June 1984", the second "March 1986" and the third "Family and Youth Services September, 1986". The second and third responses appear to be the same but they differ from the first response to the Final Report. Again the recommendations are accepted and the progress on implementation of those recommendations to date is set out.

It would appear then from the written material emanating from the MTPF to the public that by March 1984, MTPF not only knew and understood the importance and the necessity of the training of all officers in relation to the investigation of sexual assaults, -- that officers be taught and understand the Rape Trauma Syndrome and Rape Mythology.

-- such courses be held both at College and every station across Metro.

-- that victims of sexual assault be treated sensitively and respectfully.

-- that officers who by their personality or otherwise were unsuited for the investigation of sexual assaults would be assigned elsewhere.

-- that officers assigned to the investigation of sexual assaults would be supervised by senior experienced officers who would be required to read and sign off on occurrence reports filed.

-- that the force become more focused on crime prevention and work with the media to inform the community of crime problems and crime prevention techniques.

-- that there was a pressing need for the co-ordinating of all sexual assault investigations across Metro Toronto.

but that they had begun to implement the recommendations in all training programs, some of which would eventually reach all officers.

The office of the Sexual Assault Co-ordinator was created in direct response to the recommendations of the Task Force on Public Violence against Women and Children -- or the Godfrey Task Force as it became known. Its function in a very general sense was to look into the sexual abuse of adults generally, to catalogue and categorize all aspects of these crimes, to act as a liaison with other agencies both internal and external to the force and to train police officers.

The purpose was obviously for the assistance of the officers engaged in investigating these types of crimes. Detective Sgt. Margo Boyd detailed the function and provided a history of the development of this office, She described the difficulties encountered in 1985 in trying to computerize the information.

On the evidence it would appear that one of the major difficulties faced by this office, if not the major difficulty,

was that it appeared to have little credibility with the officers who were investigating these crimes. Detective Sgt. Boyd reported that when Bill Cameron telephoned her in relation to this investigation, she was pleased that "we had some credibility . . . that investigators were calling for help".

In September 1986 Ms. Boyd authored a report which her immediate superior passed up the chain of command. That report clearly set out the problems the MTPF was still having as of that date. Ms. Boyd confirmed in her evidence that these problems were not new as of the date of this report -- September 29, 1986 -- but had been ongoing to her knowledge from early 1985. There was some effort made to address these problems by a training blitz over the summer of 1985 but the problems continued into 1986 and thereafter.

Detective Sgt. Boyd's report which Inspector Dennis of the Family and Youth Services sent on to Supt. Maywood of Investigation Services was a hard-hitting document. The problems were clearly stated and set out. Inspector Dennis remarked in his covering memorandum:

> this police force is not meeting the needs of sexual assault victims.
>
> the MTPF has committed to improving the method to which we respond to sex assault victims. Although the Police Force has agreed, the officers in the field are not meeting that commitment.
>
> the monitoring of these (sexual assault) investigations has revealed that there is less adherence to the procedures, less investigation into the occurrences, less resources being utilized and a lack of understanding and support being given to the victim.

He concludes the covering memorandum with the following:

> The object of this report is not to identify individual mistakes as it should be pointed out that the problems being discussed have been seen in every division in each district.

(Emphasis added)

The author of the report made the following observations which are important I think in the context of this action:

> Victims' response to sexual assault is varied. When the victim becomes overly concerned with the control she now must regain in her life, she could be described as "over reactive" and at times "obstructive". Many trained sexual assault investigators can handle this situation. However, we are finding that certain "trained" officers are unable to deal with the victims' "response". This is reflected usually in a complaint from either the victim or hospital personnel in terms of the "treatment" the victim received from the police officer.
>
> Certain victims' statements and synopsis as shown by the occurrence reports are not accurate and a proper analysis based on the information on the synopsis is not possible. The reasons for the inaccuracies are questionable.
>
> "Trained" sexual assault investigators are ignoring important factors dealing with forensic evidence collection. . . . in many cases the Identification Bureau is not notified to attend.
>
> The "supplementary reports" to an original sexual assault occurrence are not being submitted and we cannot determine if any follow-up at all by the investigating officer has taken place.
>
> Victims of serious sexual assaults are not being "called back" by anyone involved with the investigation. The victim has then initiated a telephone call to the police unit concerned and in essence been "brushed off".
>
> The victim has now become not only a victim of a criminal assault, but the victim of "our" poor investigative follow-up.

Occurrence Reports reflect the investigator's belief or disbelief of the victim's complaint.

In reported incidents, the investigator disbelieves the victim but cannot advise as to what investigation he has done in support or to refute the victim's story. This is reflected by noted discrepancies, cautions of public mischief and polygraph threats.

Occurrences can be cleared based on judgments of character and comments on victim's behaviour and not as established by investigation or lack of forensic evidence.

It is observed that although the Godfrey Task Force recommended the establishment of a Sexual Assault Co-ordinator and the training of specialized sexual assault co-ordinators -- and although the Force responded to both recommendations the incidents, which are the subject of the report, demonstrate that "we have some trained field personnel that have done a poor job of not only investigating a criminal sexual assault but have also done a poor job of dealing with the victim!"

Suggested reasons for the poor investigative qualities were:

(a) individual personality of the officer;

(b) lack of officer's ability to co-ordinate his time and caseload to incorporate follow-up investigation and victim "feed back".

It was observed that "inappropriate" personnel were sent to be trained as sexual assault specialists and rather than the "cream of the crop" being sent -- officers were sent on the basis of who was available. Not all investigating officers responded favourably to the Sexual Assault Co-ordinator.

These shortcomings in relation to sexual assault investigations were not new and the officers in the upper ranks of the MTPF were well aware of them.

In his May 8, 1986 memorandum to the then Chief of Police,

Jack Marks, in relation to the Toronto Sexual Assault Research Project, Inspector Dennis outlined these same difficulties which had been identified.

Detective Sgt. Boyd annexed to her report a "random" selection of occurrence reports to demonstrate the problems which she outlined in her report.

I found it unsettling that in at least one-half of this random selection the "motive" ascribed to the offence is that of "sexual gratification" which to me belies a very basic misunderstanding of this crime on the part of the investigators involved. As Dr. Jaffe stated, there is nothing sexual about rape; it is an act of violence.

Detective Sgt. Boyd details in notes annexed to the actual occurrences some of the problems revealed in the occurrence report attached.

For example:

1. police officer's absolute refusal to even file an occurrence report.

2. a victim reporting the fact she'd been sexually assaulted was yelled at so loudly by the Desk Sgt. that the S/Sgt on duty came to investigate the noise at the front desk; victim was never informed she would be required to go to court and avoided the service of a subpoena fearing her attacker would return and kill her -- subpoena served by plain clothes officers who confined the victim in an elevator and chased her down a hallway for the purpose.

3. first officers on scene advised her to go to Women's College Hospital and C.I.B. personnel told her there was no point in doing so; no photos of injuries and marks left from binding; no call back for three months.

4. victim could neither hear nor speak; C.I.B. officer assigned because of ability to "sign" began by saying

he did not believe the victim and refused to sign saying she (the victim) could lip read well enough; cautioned her with public mischief charge; accused her of having intercourse with a boyfriend and reporting sexual assault.

5. judgments and comments about her demeanour "did not appear to be upset at all"; disbelief of her report.

6. comments about the victim's behaviour i.e. she drinks to the point of oblivion; inconsistencies in report indicating victim not assaulted -- disbelief of victim.

7. opinion of officer -- "it would appear to me from talking to her, this young man is only fulfilling a fantasy of hers".

8. doctor not spoken to and forensic opinions ignored -- all evidence consistent with victim's report, none inconsistent; victim cautioned with public mischief and advised to take polygraph; although hysterical and sobbing every time officer spoke to her, this was an act "put on".

(I have not included here those reports in relation to the seven-year-old male).

The last group of reports selected by Det. Sgt. Boyd for inclusion in the report were prepared by Police Constable Ian Moyer and by now Staff Sgt. Stephen M. Duggan in relation to the sexual assault of B.K. B.K. was the second known victim of the balcony rapist. Ms. Boyd noted:

9. entire occurrence slanted towards the opinion the victim is lying and she is disbelieved; discrepancies questioned and pointed out; public mischief discussed; comments regarding victims lack of emotion; opinions and speculation on victims behaviour and reasons for reporting a fictitious rape; "the story about an intruder having sexual relations with her is not plausible at this time."

In spite of the problems noted in the 1975 MTPF's own report on rape, the recommendations of the Godfrey Task Force and the reports from the Sexual Assault Co-ordinator's office -- the problems in relation to the investigation of sexual assault by the MTPF continued in 1985 and 1986. While public pronouncements were made to the effect that steps had been taken to implement the various recommendations made, the reality was that the status quo remained unchanged. Whatever the changes were that may have been implemented they were clearly ineffective.

As Inspector Jean Boyd would note to Chief Marks in 1987:

> The bottom line is we are going to get roasted very soon if we don't get our act together. Over three years have passed since the recommendations were tabled and we are not very much further ahead except that Margo does a considerable amount of in-house and community speaking. WAVA has identified and it is accepted that more intensive training is required.

(Emphasis added)

With this background I move now to consider the specific investigation in issue.

The Specific Investigation

I am told that much of the MTPF documentation in relation to the investigation of the balcony rapist has been destroyed. All that remains are the occurrence reports and the officers' memo books for the most part. Additional documentation which was kept by officers working on the case while the investigation was active have been destroyed. While most of the officers were still in possession of their individual memo books, Staff Sgt. Duggan, who investigated the B.K. rape, was not; his memo books for this period were destroyed. So that it is perfectly clear, I should say there is no evidence that there was any deliberate destruction of records on the part of the MTPF. I point this out simply to record that by reason thereof the police were somewhat hampered in giving their evidence.

It is necessary in order to fully understand the investigation of the Jane Doe assault to also have reference to the investigations into the four other related assaults beginning with that of P.A. on December 31, 1985; B.K. on January 10, 1986; R.P. on June 25, 1986 and F.D. on July 25, 1986. Each of these women were victims of Paul Douglas Callow.

All of the attacks were within the geographical confines of what was known as 52 Division with the exception of the first attack which occurred within 51 Division of the MTPF. All were within very close proximity to the intersection of Church and Wellesley Streets in Toronto in an area known as the Church/ Wellesley area.

P.A.

P.A., at the time she was attacked, lived in apartment 301 at 437 Jarvis Street, Toronto. In the early morning hours of December 31, 1985 she was raped and otherwise sexually assaulted at knifepoint in her own bed by a stranger who was subsequently identified as Paul Douglas Callow. The knife used during the attack had been taken from her own kitchen drawer. During the attack her head was covered so that she was unable to see her attacker who continued to speak to her conversationally throughout the attack. The locking mechanism on the balcony door of her apartment was broken and the door could not be locked. After the attack when P.A. left her bedroom she noted that the balcony door was open and as she reported to the police, assumed this was how her attacker had gained entrance to her apartment. P.A. told police she had ensured the front door to her apartment was locked before retiring that evening. It was through the front door that her attacker fled following the incident.

Immediately following the attack, and after notifying police, P.A. called her boyfriend "Gerry" who lived in the apartment next door to her in apartment 302. Gerry's apartment balcony was immediately beside P.A.'s apartment balcony.

The investigating officer who arrived at the scene noted in

his occurrence report as follows:

> Note: the only way onto the #301 balcony is by way of #302 (practicably).

And later:

> It is the writer's opinion that the only way to gain entrance was from the balcony of #302. The occupant I.D. as Gerry _____ 09 Oct. 48 who was with her at the time of arrival of police matches the general description given by the victim and will be spoken to at a later time today by 51 investigators.

As is evident from the occurrence reports filed as well as from P.A.'s letters of complaint following the arrest of Callow, from the very outset the investigating officer insisted to P.A. that the assailant was her boyfriend. She denied it and when she pointed out to police that the description of her attacker did not match her boyfriend's, it was suggested she was protecting her boyfriend. She described her attacker, as the officer recorded it, as follows:

> Suspect: The complainant described the attacker as male, white, approximately 6' tall "built like Gerry, maybe thinner" 150 lbs. Dark fine shaggy hair to the collar, unshaven but not as full as a beard. The male was wearing a dark leather jacket with a light-coloured sweater and dress shirt underneath. The male was also wearing dark pants "not jeans but something finer like a dress pant". The complainant also stated the male had a soft spoken voice "kind of sexy and sweet" also a dark belt.

Shockingly, on the very day she had been assaulted, a police officer telephoned her while she was in the shower. She was asked why it had taken so long for her to answer the phone and when she explained that she had been in the shower -- remarked that he should have been there.

She was asked invasive personal questions about the number of men she was seeing at the time. Police seemed preoccupied with

P.A.'s personal sexual habits.

P.A. was not kept informed of the status of the investigation; what she learned was as the result of her own inquiry.

B.K.

B.K. lived in apartment 202 at 60 Gloucester Street, Toronto when she was raped in her bed in the early hours of January 10, 1986. Her attacker, who would later be identified as Paul Douglas Callow, wore a towel about his head with a hole cut into it which allowed him to see; he also held a knife, which had come from B.K.'s kitchen, to her face. Again the attacker apparently gained entrance to B.K.'s apartment by the balcony; there were no signs of forced entry to the front door. During the assault her attacker spoke conversationally to her. Before leaving her apartment, her attacker cut her telephone line.

P.C. Moyer in his occurrence report completed that same day noted that B.K.:

> . . . was calm and relaxed and related the details of the story easily without emotion. These observations made by the investigating officer at the scene and at the hospital do not negate the possibility that a rape occurred but they do tend to shed some doubt on the credibility of the victim's story.

and further:

> Area of occurrence searched by Grummet and Dixon for weapon and towel negative results. Apartment was immaculate and looked undisturbed, with the exception of the blood from the victim's cut there is no evidence that anything happened in the apartment -- no sign of forced entry.

and later:

> Victim was interviewed by Sgts. Duggan and P.C. Giancola at length and it is evident that this occurrence may be cleared with a public mischief charge once forensic examination

complete.

Investigation should be held back until results complete.

All of the foregoing observations were recorded by P.C. Moyer on the day of the attack -- January 10, 1986. There is no apparent follow-up investigation until April 21, 1986 when we have the first supplementary report prepared by Staff Sgt. Duggan.

It is obvious from the subsequent occurrence reports that Staff Sgt. Duggan did not believe B.K.'s version of the events. In his report dated April 25, 1986 he opines as to a possible motive why B.K. would report a fictitious rape. I found the reasons he cited for disbelieving B.K.'s account of the events of January 10, 1986 to be simplistic, superficial, irrelevant and generally uninformed.

He concludes she was seeing a man other than her stated boyfriend at the time; that there were no signs of forced entry to the front door of her apartment; that she was too calm in reporting the incident; that it was impossible, within the given time-frame of the attack, for her attacker to have taken one of her towels and cut a hole in it as B.K. described, and noted that she had a matching set of towels without any missing; that her stated boyfriend at the time stopped seeing her because of her moods and tendency to fantasize; that she had given the boyfriend venereal disease and suggested this must go to show her possible sexual activities; that she was an only child with some contact with her mother, no immediate friends and keeps to herself. In conclusion he says that he does not doubt B.K. had sexual intercourse "during the incident" but is "positive" she knows who her attacker is -- he then goes on to theorize a possible motive for reporting a fictitious rape.

As Det. Sgt. Boyd observed when commenting on these occurrence reports in relation to the B.K. attack they are "slanted toward the opinion the victim is lying" and she is disbelieved for no legitimate or substantiated reason.

Staff Sgt. Duggan had taken the sexual assault investigators' course in March 1986; only a month before he completed the April 1986 occurrence reports; one can only conclude that the course was ineffective in influencing his views in relation to the crime of sexual assault.

R.P.

She was raped and otherwise sexually assaulted at knifepoint in her own bed in the early morning hours of June 25, 1986 by an unknown assailant who covered his face with one of her shirts. At the time she lived alone at apartment 307 -- 60 Gloucester Street in the same building as B.K. on the floor above. She was the third known victim of the balcony rapist who would be identified as Paul Douglas Callow. During the attack he tied her hands behind her back. Like the assailant in B.K.'s attack he initially indicated he wanted money. He spoke to her conversationally as he had to P.A. and B.K. After the attack he left by the front door of her apartment.

The description she provided of her attacker to police is recorded as follows:

> Male white late 20's -- 5'10" 150 lbs light build dark shoulder length greasy straight hair. Days growth dark stubble, thin face around jaw, wearing blue jeans with a dark belt with a silver colour large buckle in the shape of a horseshoe. Solid black sleeveless t-shirt.

Although the officer at the scene noted that the windows leading to the balcony were open and without screens, it was also noted that although R.P. reported locking her front door by engaging all three locks on it before retiring on the evening of her attack, entry could have been gained via the front door without too much difficulty and without leaving signs of forced entry.

It is of interest to note that in a small article which appeared in the Toronto Star newspaper on the day of R.P.'s attack, it was noted:

For the second time in 6 months a tenant in a Gloucester Street apartment building has been raped by a man who climbed the side of the building to get through a balcony window.

Metro police suspect the same man committed the rape last January of a woman who lived on the second floor.

This morning at 3 a.m., a 24-year old tenant of the third floor was awakened by a man in her bedroom brandishing a cheese cutter he had taken from the kitchen.

She suffered a cut hand when she tried to fight him off.

It would appear that by June 25, 1986 MTPF had made at least a tentative link between the B.K. and R.P. rapes.

F.D.

F.D. was also attacked in her own bed, in her apartment #206 at 89 Isabella Street, Toronto. Her assailant was armed with a butcher knife, taken from F.D.'s apartment. He tied her hands behind her back and raped and otherwise sexually assaulted her. Ms. F.D. was the fourth known victim of Paul Douglas Callow. Her attacker had gained access to her apartment through a balcony window and left through the front door. Ms. F.D. was unable to describe her attacker because he covered her head during the attack. She did tell police he had long hair because she had been able to feel it, a gruff voice and was unshaven. Again the rapist spoke to F.D. conversationally during the assault and asked if she had any money or gold.

In his supplementary occurrence report dated July 25, 1986 Sgt. Bill Cameron recorded the following notation:

This occurrence may be related to two similar ones that happened at 60 Gloucester Street in January and June of this year.

F.D. discovered that Callow had taken some of her jewellery and a camera from her apartment and provided Mr. Cameron with a description of those items.

By memorandum in writing dated July 29, 1988 Sgt. Jim Hughes of the 52 C.I.B. office reported to his superior, Staff Sgt. Hein, in relation to the F.D. rape as follows:

> The following steps have been taken with regards to sexual assaults in the Gloucester/Isabella area:
>
> 1. 172's have been obtained from the Crime Analyst.
>
> 2. Provincial Alert with the M.O. of the suspect has been sent out on the chance he has had past police contact.
>
> 3. Officers in Zone 2 have been advised of the occurrences. Since investigators believe the suspect may live in the area they have been encouraged to increase the 172's, especially in the early morning hours.
>
> 4. A key to the victim's apartment at 89 Isabella has been obtained for "occasional use" as an observation post.
>
> 5. Special attention has been given the area by Sgts. Hughes and Petruzzellis during their 7pm to 3am shifts both Monday and Tuesday. Sgt. Cameron is carrying this on throughout this night shift.
>
> Unfortunately the time period between assaults makes constant surveillance of this area a difficult procedure both to man and to justify. The investigators do not wish to scare off the suspect if he in fact lives in the area by overwhelming police presence.
>
> The writer feels that building superintendents should be contacted and that they advise "trusted tenants", especially single women to be aware of the occurrences and advise police of any person who they feel may be suspect.

Sergeant Hughes' suggestion that "trusted tenants" in apartment buildings in the area be made aware of the occurrences was not acted upon.

Sergeant Cameron testified that he did not agree with Sgt. Hughes' suggestion that "trusted tenants" be warned or alerted to the sexual assaults. By this time he says, they (meaning the police) had come to believe that the assailant they sought lived in the area. As he explained, he feared such a course as Hughes had suggested may alert the suspect and cause him to leave the area. Sergeant Cameron suggested they had no idea who their suspect was -- he could have been a superintendent of a building, a "trusted tenant" or a husband or boyfriend of a "trusted tenant".

Sergeant Cameron explained the only certainty was that the suspect would attack again and continue to do so until he was stopped. He reasoned that if their suspect left the "small area" around Church and Wellesley and moved to Greater Metropolitan Toronto he could continue to attack victims for "who knew how long" before he was detected.

Additionally, he explained that he was aware of the substantial media coverage that had been given in the latter part of June in relation to the investigation of the "Annex Rapist" who had been attacking women in the Bloor/Avenue Road area earlier that same summer.

Sergeant Cameron said he had been told by members of the task force assigned to that investigation that Dawson Davidson, identified as the Annex Rapist, had fled the city and gone to Vancouver because of the extensive media coverage in that case.

Sergeant Cameron and the officers who investigated Dawson Davidson that same summer were part of the same office and worked within feet of one another. Shortly after his arrival in Vancouver Dawson Davidson raped another woman and Sergeant Cameron explained he did not want that to happen in this case and for this reason he said he wanted this investigation to be low-key by comparison and without extensive media coverage.

Sergeant Cameron believes, through inquiries he made of the Sexual Assault Co-ordinator, Det. Sgt. Boyd, he learned of the P.A. occurrence and had spoken to her by on or about August 5,

1986.

As of August 3, 1986 Sgt. Cameron was assisted in the investigation by Det. Sgt. Derry who, in his own words, took charge of the paper side of the investigation.

I am persuaded on the evidence that Messrs. Cameron and Derry were aware by August 7, 1986 that P.A., B.K., R.P. and F.D. had most probably all been attacked by the same man. It is conclusively established that they had this knowledge by August 16, 1986 when Sgt. Cameron filed a supplementary occurrence report recording the fact.

The 52 C.I.B. office is an extremely busy one and was particularly so in the summer of 1986. The police officers assigned to that office had extremely heavy caseloads and almost overwhelming responsibilities. Sergeant Cameron and Det. Sgt. Derry were no exceptions.

In August of 1986 they were both necessarily spending a significant amount of their time preparing for the trial of a fraud investigation of which they had been in charge. A review of their memo books at the time details the substantial time commitment required by that case.

Between the "Two Toes" case (as the fraud case was known) their days off and vacation times -- there was little time left, I find, available to be devoted to the detailed, plodding, necessary detective work involved in the investigation of this series of sexual assaults.

They and the MTPF knew in early August 1986 that there was most likely a serial rapist attacking women who lived alone in second- and third-floor apartments with climbable balconies in the Church/Wellesley area who would most certainly attack again.

Yet for all intents and purposes -- prior to August 24, 1986 -- only Sgts. Cameron and Derry were assigned to the investigation. Even when they were otherwise unavailable no one else was specifically assigned to take up this investigation on

their behalf.

The contrast between this investigation and that conducted into the Annex Rapist earlier the same summer is extreme. In that case, a task force was created to conduct the investigation with a number of officers assisting Det. Sgt. Reilly and his partner, Glen Sinclair, who were in charge of that investigation. There was significant media coverage whereby in addition to the information contained in the majors, the MTPF gave interviews to the press detailing those occurrences.

In that case the area of the attacks was searched and the neighbourhoods canvassed. Those doing the canvass were not instructed not to reveal the fact that they were investigating sexual assaults.

As Det. Sgt. Reilly explained, they were desperate; they had nothing to go on and the violence of the attacks was escalating. The police feared the next victim may be killed. He felt a duty to protect the women living in this area who faced a very specific threat of attack by this predator. It would be not only inappropriate but neglectful were he simply to sit back at his desk and wait for a break.

As it turned out in that case, a tenant who moved into the premises vacated by Dawson Davidson (the Annex Rapist), found a wallet which he had apparently left behind. That tenant turned the wallet over to the landlord who contacted the secretary of the wallet's owner who in turn called police. The wallet belonged to one of Dawson Davidson's victims. This was the lucky break police needed and Davidson was arrested shortly later in Vancouver. The fact of Davidson's arrest was also publicized in local papers.

There was discussion among the officers in the 52 CIB office in July 1986 to the effect that the media coverage and the obvious increased police presence in the Annex area had caused Dawson Davidson to leave Toronto. There was also evidence which suggested his departure was caused by neither.

In any event Sgts. Cameron and Derry were, I find, influenced by the discussion they heard among their fellow officers and determined that their investigation would, by comparison, be low-key.

I am satisfied that the only significant difference in the two investigations was the nature of the attacks themselves or as it has been characterized in submissions the "high level of violence" in the case of the Annex Rapist and the comparatively "low level of violence" in the case of the Balcony Rapist. The urgency that appeared to drive the investigation of the Annex Rapist was noticeably absent in the investigation of the Balcony Rapist to at least after August 29, 1986 and after Callow attacked his fifth known victim, the plaintiff, Jane Doe.

Jane Doe

Jane Doe lived at apartment 206, 88 Wellesley Street East when she was attacked in the early hours of August 24, 1986 by Paul Douglas Callow. As he had with other victims, Callow covered Ms. Doe's eyes with a pillow case, threatened her with the knife he had in his possession and spoke conversationally with her during the attack. He raped her and otherwise sexually assaulted her before leaving her apartment via the front door. Entrance to Ms. Doe's apartment had been gained by means of a balcony window which she had left slightly ajar for ventilation. For the duration of the attack Callow disguised his own appearance by covering his face.

Ms. Doe was interviewed at length by a number of police officers immediately following the occurrence at her apartment and at Women's College Hospital where she was taken for examination and completion of the customary rape kit.

Sergeant Cameron's notes for August 24, 1986 indicate, in considerable detail, that he interviewed Ms. Doe on the evening of August 24, 1986 without Det. Sgt. Derry. His notes and those of Det. Sgt. Derry indicated that they both met with Ms. Doe at her apartment on the evening of August 27, 1986.

Ms. Doe's recollection of these events is that she did not meet Sgt. Cameron until the evening of August 27, 1986 when she agreed to meet him at her apartment. She had not met Sgt. Cameron before then and had a friend with her, Mr. Maurice Arcand. She denies that Det. Sgt. Derry was at that meeting on August 27, 1986. She says she only met him after August 27. Mr. Arcand testified and essentially his version of these events corroborates Ms. Doe's.

I do not think a great deal turns on these differences in the testimony of the various witnesses.

I accept that Sgt. Cameron told Ms. Doe that he believed she had been raped by a serial rapist and that four other women had been similarly attacked. While he may not have used the word "cyclical" I find it reasonable that he indicated there was a pattern of sorts to the attacks and accept that he likely indicated in Ms. Doe's case that the rapist had struck a day early. The R.P. and F.D. attacks (the third and fourth), had taken place on the 25th day of the month and Ms. Doe was attacked on the 24th day of the month. That the officers in charge of this investigation believed that the suspect was likely to attack around the 25th of the month is borne out by the arrangements later made for a stakeout of the area to be carried out five days before and after September 25, 1986. I accept that Ms. Doe was told all victims lived on second and third floors and entry had been via balconies.

Ms. Doe expressed shock that women in the neighbourhood had not been warned that a serial rapist was in their midst. Sergeant Cameron indicated, I find, that it was not the practice to issue warnings in such cases because women would become hysterical or panic (I do not see any real difference which word he used, the meaning is the same), the rapist would flee and the investigation would be compromised. Of course it was not true that it was not the policy of the MTPF to issue warnings in such cases because it had been done in the Dawson Davidson case -- just months earlier and in the very same division.

When Ms. Doe indicated that if the police were not prepared

to warn area women she would. She was told that if she did, she may be considered to be interfering in a police investigation and she could be charged for doing so.

Ms. Doe testified that when she found the green dress that had been slashed, in her closet some time later, both Sgts. Cameron and Derry attended at her apartment on that occasion. The officers record these events as having occurred on August 27, 1986. The officers made their notes more or less contemporaneously with the events described therein. Ms. Doe's evidence essentially is that when she first spoke to Sgt. Cameron he was alone and that meeting was not until August 27, 1986. In this respect I accept the officer's evidence that Sgt. Cameron attended on Ms. Doe the evening of August 27, 1986 and was alone at the time -- perhaps that is the meeting at which Mr. Arcand was present. I think Ms. Doe is simply mistaken on the dates and understandably so. This was an extremely traumatic time for her.

As for Mr. Arcand, his notes of the meeting with Sgt. Cameron and Ms. Doe were, he says, made the next day. He recorded his notes electronically. He could not recall if he ever showed the notes to Ms. Doe after they were prepared and he only gave them to her lawyer in 1996. While the word "hysterical" appears in his note -- immediately after it he wrote "or words to that effect". In his evidence he said he was sure the word "hysterical" was used by Sgt. Cameron; he could offer no meaningful reason why his notes included the words in relation to it "or words to that effect". He could not recall any discussion about a white wool scarf with two holes having been cut in it -- although he agreed it could have occurred and he did not recall it. He did recall the slashed green dress having been discussed on the evening Sgt. Cameron was there yet his notes do not record the fact. I am left in some doubt about when Mr. Arcand was present and what he heard.

By memorandum dated August 27, 1986 Sgts. Cameron and Derry for the first time requested the assistance of other officers and this, for the purpose of conducting a canvass of local apartment buildings. They requested that all apartments on the first, second and third floors of each building be checked. The

additional officers were to be instructed to tell tenants only that there had been a number of break and enters in the area and specifically instructed not to mention the sexual assaults. They were to note any single females living in the apartments canvassed.

Later in a memorandum dated September 7, 1986 Sgt. Derry indicated to Staff Sgt. Bukowski as follows:

> It is important that the officers check each apartment in order to establish the hair colour of the women and receive information from the people interviewed regarding prowlers etc.

On that same day Sgt. Cameron by memorandum detailed to Inspector Cowling, the officer in charge of 52 C.I.B. office, his request for manpower and equipment necessary for a stakeout to be carried out the five days before and after September 25, 1986. The operation is detailed as follows:

> The operation would run as follows:
>
> 1) Using the streets as boundaries each group of apartments would be covered by two, three or four men.
>
> 2) Each group of men would have at least one unmarked car at their disposal in the event there is an attack and they have to move quickly.
>
> 3) Vans would be used as stationary observation points within the area.
>
> 4) The uniform cars would stay just outside of their designated area and would be used to seal off the area around the location of any attack and stop all persons on foot or in vehicles. They will be assisted by some of the old clothes men.
>
> 5) The remainder of the old clothes men would then enter the area of attack and search on foot for any suspect that may be hiding.

6) The radio room would be advised in advance of this operation and would be required to assist in sealing off the area.

7) Sergeants Cameron and Derry would be present and take charge of the scene and direct the operation for those ten days.

8) Attached hereto is a map indicating the area of concern. Further recording will be made to the map upon completion of the canvassing detail.

Respectfully submitted
William Cameron Sgt. 2887
Kim Derry Sgt. 3373

Sergeant Derry in a memorandum to Inspector Cowling dated September 7, 1986 again detailed the request for foot patrol and beat officers to canvass the first three floors of the apartment buildings identified by him and Sgt. Cameron to obtain the apartment numbers with single females and their description. This original request to the staff sergeant had apparently been cancelled. He noted:

> If any chance at identifying possible targets through this method is not carried out, then the possibility of narrowing the surveillance cannot be done.

Once again the staff sergeants were advised that the officers conducting the canvass were "not to mention anything about sexual assaults which have occurred in the area but to advise people contacted that this is a crime prevention program and that single women are victims of break and enters and theft". Officers were to obtain the names and addresses of single women and note their hair colour.

The stakeout proceeded as planned. Unmarked vehicles were used and those participating were informed the only time the cover would be broken was in the event they observed someone attempting to climb a balcony in which event the person was to

be stopped. The stakeout did not produce any useful information except that for all the covertness of the operation, crime in the area of the stakeout was almost entirely eliminated for its duration. Obviously the criminal element was aware of the police presence.

It has been suggested that the women who occupied these apartments were being used as "bait". The police adamantly denied the suggestion which they say implies that they knew who would, and when an attack would occur, when in fact they had no idea who would, where, or even if an attack would occur. I can only conclude on the evidence that the police believed it to be a virtual certainty that there would be another attack and that it would be made against one of the women their canvass had identified as a potential target and in view of the fact that the last three victims had been attacked on the 24th or 25th of the month that the attack would likely take place during that general time period in the month -- the entire stakeout operation was premised on the assumption of these factors.

The police were there to wait and watch for an attack to occur. The women were given no warning and were thereby precluded from taking any steps to protect themselves against such an attack. Unbeknownst to them they were left completely vulnerable. When all of these circumstances are taken and considered together, it certainly suggests to me that the women were being used -- without their knowledge or consent -- as "bait" to attract a predator whose specific identity then was unknown to the police, but whose general and characteristic identity most certainly was.

The break in the investigation came when probation officer Debbie Alton contacted P.C. Gary Ellis of the 52 C.I.B. office to check a criminal record for her. Police Constable Ellis had arrested one, Paul Douglas Callow, on June 6, 1986 for assaulting his wife Jackie. Not being a "sexual" assault, the Sexual Assault Co-ordinator's office was not aware of this information. To me it is indicative that the MTPF as a whole did not understand the fundamental -- that sexual assault is not about sex, it is about violence and anger against women. Had the force co-ordinated efforts to keep track of any and all

acts of violence against women, they may have been aware of Callow's existence much sooner than they were. On September 24, 1986 Ms. Alton was preparing a pre-sentence report on Callow. Ms. Alton told P.C. Ellis that Callow had not been truthful with her about his previous criminal record and requested that he check it out for her. Callow's wife had told Ms. Alton that her husband had been convicted for rape in Vancouver which involved Callow "doing a break and enter then finding a woman sleeping and then raping her". According to the supplementary occurrence report prepared by P.C. Ellis, Callow's wife had indicated that her husband "has a sex problem (wants it all the time), booze problem and drug problem and he is still doing break and enters". Jackie Callow lived at 33 Maitland Street in the Church/Wellesley area and indicated her husband was in the area frequently and that she recently had problems with him.

Subsequent investigation would reveal that Paul Douglas Callow had, in May 1981, raped an elderly woman who resided in a fifth-floor apartment at 220 Wellesley Street East. The circumstances of that rape -- for which Callow was arrested by the MTPF were hauntingly similar to the modus operandi employed by him in the five rapes with which this action is concerned. Charges were not proceeded with in that case because of the age and health of the victim.

Police at the time felt reasonably confident however that Callow was responsible for that rape and noted that the modus operandi was similar to that used by Callow in the Vancouver rape in 1978 for which he was convicted and sentenced to four years imprisonment.

Surprisingly, P.C. Ellis took it upon himself to contact Jackie Callow directly and speak to her about her husband. I say surprisingly because of Sgts. Cameron and Derry's evidence in relation to the "low key" approach they wished to take in this investigation in order that the offender not be tipped off or displaced.

Sergeants Cameron and Derry both indicated they did not want a media blitz alerting the public to this danger because they did not want their suspect to flee as Dawson Davidson had. The

discussions, they say, which were ongoing in the 52 C.I.B. office where they worked, were to the effect that Dawson Davidson had left the jurisdiction because of the intense media coverage given to his criminal activity at the time. Additionally, they say the overwhelming and obvious police presence was a contributing factor in his departure.

For these reasons Derry and Cameron adopted the "low profile" approach next to no media coverage of the events, no community programs to specifically warn women in the area of the attacks and any additional police presence to be of a covert nature. This was also the reason that officers conducting the canvas were specifically told not to inform tenants about the sexual assaults. As Cameron and Derry said they believed their suspect lived in the neighbourhood and they could be knocking on his door during the canvass or the door of his wife or girlfriend; he would then be tipped off that a manhunt was under way and be likely to flee because of it.

When cross-examined as to why police would not have similar concerns mentioning the break and enters, i.e., that the suspect would flee knowing police were looking for him in relation to those crimes -- Sgt. Cameron gave a convoluted, and to my mind, simply an incredible explanation to the effect that any "time" (of incarceration) that a thief would get would be the kind of time this type of criminal could do "standing on his head" to quote Sgt. Cameron. In any event they thought there was no risk mentioning break and enters but was if the sexual assaults were mentioned.

I was given the clear impression from the evidence of Sgts. Derry and Cameron that these matters were topics of ongoing discussion within the 52 C.I.B. office and P.C. Ellis for one would be aware of them. I found it surprising in these circumstances that P.C. Ellis would then immediately on learning of his identity, contact the suspect's wife.

In any event Callow was soon after put under constant surveillance and arrested October 3, 1986. He ultimately confessed to having committed all five rapes. After the commencement of the preliminary inquiry he pled guilty and was

sentenced in total to a period of incarceration of 20 years.

CONCLUSIONS

Competency of the Investigation

It is suggested that the investigation into the balcony rapist was slipshod and incompetent. The plaintiff has criticized the documentary productions of the defendant and suggested they are incomplete. Professor Hodgson testified that every step in an investigation should be recorded on supplementary occurrence reports. In this way he said anyone picking up the file could be reasonably informed on the status of the investigation. While that may be the ideal I accept that it is not the reality. Often steps taken and information gathered were recorded on supplementary reports but often they were not. Officers differ in their manner and method of note and record-keeping. I accept that there were numerous documents created in relation to this investigation which unfortunately were destroyed before the litigation was commenced.

I am not persuaded on the evidence that Callow would have been identified and apprehended any earlier because of documentary deficiencies.

I am satisfied that the officers ultimately assigned to this investigation had too many other urgent assignments ongoing at the same time which prevented them from devoting the necessary attention which this investigation required. At the critical time much of their energy and attention was directed to other matters -- often for days at a time. They had no back-up, no one else directly responsible for this investigation when they were otherwise engaged.

While it is true that there was no evidence called in relation to what other demands there may have been on the MTPF for manpower at this time, one must bear in mind that it is the evidence of the police that sexual assault is a very serious crime second only to homicide and then consider the resources made available in the Annex Rapist investigation in his same division only a month or two before.

While the plaintiff submits that I must infer that Callow would have been apprehended sooner had greater resources been devoted to this investigation earlier on the theory -- the sooner a job is started the sooner it is finished -- I cannot agree with. While one may say in that event Callow might have been apprehended sooner, it is to my mind equally probable that he might not have been.

I am compelled, however, to conclude that the only difference between the Annex Rapist investigation and this investigation was the level of violence in addition to the rape itself. Dawson Davidson also physically beat many of his victims in addition to sexually assaulting them.

As this is the only real distinguishing factor between the two investigations I must conclude that it was this factor -- the lack of additional violence -- which resulted in this investigation being essentially on the back burner in so far as resources were concerned. The sense of urgency which drove the Dawson Davidson investigation was markedly absent from this investigation. I can only conclude because Callow's victims were "merely raped" by a "gentleman rapist" -- according to the Oliver Zink Rape Cookbook definition -- this case did not have the urgency of the other.

Decision Not to Warn

As I have said, Sgts. Cameron and Derry determined that this investigation would be "low key" compared to the investigation conducted into the "Annex Rapist" and no warning would be given to the women they knew to be at risk for fear of displacing the rapist leaving him free to re-offend elsewhere undetected.

I am not persuaded that their professed reason for not warning women is the real reason no warning was issued.

Firstly, there is evidence that the Annex Rapist, Dawson Davidson, did not flee to Vancouver because of the media attention paid to his crimes and/or the obvious increased police presence in the neighbourhood. Indeed, much of the

coverage occurred after Davidson had already left Toronto.

Additionally P.C. Gary Ellis, who had assisted in the Dawson Davidson investigation at one point, actually telephoned Callow's ex-wife directly when he learned of Callow's existence and record from probation officer Alton. Police Constable Ellis worked out of the same 52 Division as Sgts. Cameron and Derry and would have, presumably, been aware of any discussions in relation to the fear of displacing Callow -- by media attention or knocking on his door for the purpose of giving a warning about sexual assaults -- yet he phoned directly to Callow's wife without even hesitating it seems.

There was, I find, no "policy" not to issue warnings to potential victims in these cases -- clearly warnings had been given in the Dawson Davidson Annex Rapist investigation -- warnings with which incidentally all defence expert witnesses agreed were appropriate in the circumstances.

I find that the real reason a warning was not given in the circumstances of this case was because Sgts. Cameron and Derry believed that women living in the area would become hysterical and panic and their investigation would thereby be jeopardized. In addition, they were not motivated by any sense of urgency because Callow's attacks were not seen as "violent" as Dawson Davidson's by comparison had been.

I am satisfied on the evidence that a meaningful warning could and should have been given to the women who were at particular risk. That warning could have been by way of a canvass of their apartments, by a media blitz -- by holding widely publicized public meetings or any one or combination of these methods. Such warning should have alerted the particular women at risk, and advised them of suggested precautions they might take to protect themselves. The defence experts, with the exception of Mr. Piers, agreed that a warning could have been given without compromising the investigation on the facts of the case.

Even the experienced defence expert witnesses Det. Inspector Kevin Rossmo and former FBI special agent McCrary agreed that

as Det. Inspector Rossmo said:

> The police have a responsibility to release a balanced volume of information to protect the community. . . . where that balance is will depend on the particular facts of the case.

In my view it has been conceded in this case clearly and unequivocally by the Chief of Police at the time, Jack Marks, that no warning was given in this case and one ought to have been. His public response to the proposals of the group known as Women against Violence against Women in the aftermath of this investigation presented to the Board of Commissioners of Police could not in my view be any clearer when he said:

> I would concede that for a variety of reasons unique to the Church/Wellesley investigation, no press release in the nature of a general warning was issued and acknowledged that one should have been. This is not only a matter for concern and regret, but action has already been taken to prevent a similar breakdown from occurring in the future. Specifically, the Sexual Assault Co-ordinator who monitors all of these offences has been directed to ensure that members of the public are informed about such matters which may affect their safety. These warnings will be directed toward all potential victims with special attention given to members of the public who have been identified as most at risk, e.g. as in the case at hand, women living in high-rise buildings in the downtown area would be targeted as a high risk group and requiring extra efforts to bring the potential risk to their attention.

I accept and agree entirely with these remarks.

I must confess I was taken aback at the suggestion of Det. Sgt. Robin Breen who authored these remarks for the Chief when he suggested, I think, that in effect what it says is not what it says. The remarks were not intended to mean that the police felt a warning ought to have been given but rather were merely an invitation to get this group -- known as WAVAW -- to the discussion table.

> His evidence was pure double-talk as far as I am concerned

and simply made no sense.

It seems the MTPF has been trying to back away from these words of their then Chief ever since they were stated. The Chief's statement was an appropriate one in the circumstances and it is to his credit in my view, that he made the statement when and as he did.

There are three other factors which have influenced my decision that a warning ought to have been given.

-- the fact that Sgts. Cameron and Derry thought it appropriate to warn S.G. and M.L., that they may be potential targets of the balcony rapist after they reported break-ins to their apartments in their absence.

-- the fact that Dawson Davidson had been arrested in July 1986 received considerable publicity. Women living in the general vicinity may have felt some relief knowing that a serial rapist had been apprehended and let down their guard somewhat completely unaware that another serial rapist was on the loose in their neighbourhood.

-- the fact that Sgt. Hughes in his memo to his superior Staff Sgt. Hein -- both of 52 Division -- dated July 29, 1986 thought that building superintendents should have been contacted and told to advise "trusted tenants" especially single women to be aware of the occurrences and to advise police of any person they felt may be suspect.

I am satisfied on Ms. Doe's evidence that if she had been aware a serial rapist was in her neighbourhood raping women whose apartments he accessed via their balconies she would have taken steps to protect herself and that most probably those steps would have prevented her from being raped.

Section 57 of the Police Act, R.S.O. 1980, c. 381 (the governing statute at the time these events occurred), provides:

> 57. . . . members of police forces . . . are charged with the duty of preserving the peace, preventing robberies and

other crimes . . .

The police are statutorily obligated to prevent crime and at common law they owe a duty to protect life and property. As Schroeder J.A. stated in Schacht v. R., [1973] 1 O.R. 221 at pp. 231-32, 30 D.L.R. (3d) 641:

> The duties which I would lay upon them stem not only from the relevant statutes to which reference has been made, but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the State to protect the life, limb and property of the subject.

In my view, the police failed utterly in their duty to protect these women and the plaintiff in particular from the serial rapist the police knew to be in their midst by failing to warn so that they may have had the opportunity to take steps to protect themselves.

It is no answer for the police to say women are always at risk and as an urban adult living in downtown Toronto they have an obligation to look out for themselves. Women generally do, every day of their lives, conduct themselves and their lives in such a way as to avoid the general pervasive threat of male violence which exists in our society. Here police were aware of a specific threat or risk to a specific group of women and they did nothing to warn those women of the danger they were in, nor did they take any measures to protect them.

Discrimination

The plaintiff's argument is not simply that she has been discriminated against, because she is a woman, by individual officers in the investigation of her specific complaint, but that systemic discrimination existed within the MTPF in 1986 which impacted adversely on all women and, specifically, those who were survivors of sexual assault who came into contact with the MTPF -- a class of persons of which the plaintiff was one. She says, in effect, the sexist stereotypical views held by the MTPF informed the investigation of this serial rapist and

caused that investigation to be conducted incompetently and in such a way that the plaintiff has been denied the equal protection and equal benefit of law guaranteed to her by s. 15(1) of the Charter.

The MTPF has since at least 1975 been aware of the problems it has in relation to the investigation of sexual assaults.

Among those problems:

-- survivors of sexual assault are not treated sensitively;

-- lack of effective training for officers engaged in the investigation of sexual assault including a lack of understanding of rape trauma syndrome and the needs of survivors;

-- lack of co-ordination of sexual assault investigations;

-- some officers not suited by personality/attitude to investigation of sexual assault;

-- too many investigators coming into contact with victims;

-- lack of experienced investigators investigating sexual assault;

-- lack of supervision of those conducting sexual assault investigations.

The force has conceded in public documents as well as in internal documents at least since 1975, that it has difficulties in these areas, that it will take immediate steps to remedy these shortcomings -- yet the problems continued through to 1987 and beyond.

It seemed in that period that the public and persons who had brought their concerns in these areas to the attention of police were being publicly assured the problems would be eliminated, yet within the force the status quo remained pretty much as it had always been.

Every police officer who testified agreed that sexual assault is a serious crime, second only to homicide. Yet, I cannot help but ask rhetorically -- do they really believe that especially when one reviews their record in this area? It seems to me it was, as the plaintiff suggests, largely an effort in impression management rather than an indication of any genuine commitment for change.

Former Chief of Police, Jack Marks, said that he would not have stood for problems like those outlined above continuing in the homicide squad for example. He said, assuming he were aware of the problems, that he would "root them out" and "correct" them -- yet these problems were allowed to continue over at least the better part of two decades in relation to the investigation of sexual assaults. Although the MTPF say they took the crime of sexual assault seriously in 1985-86 I must conclude, on the evidence before me, that they did not.

The rape trauma syndrome was clearly not understood by too many officers who were charged with the responsibility of investigating sexual assaults -- others, including even some who had taken the sexual assault investigators course, adhered to rape myths. Examples can clearly be seen in this investigation -- for example, Sgt. Duggan's occurrence reports in relation to the B.K. investigation -- clearly "slanted toward disbelieving the victim", to quote Margo Pulford. It is obvious to anyone that Sgt. Duggan was strongly influenced by the fact that a bowl of potato chips on the bed where the rape occurred apparently remained undisturbed. He concluded there had been no struggle and hence no forced sexual intercourse. His denial in this regard is simply incredible in the face of his own written record. Other examples are set out above as quoted from Det. Sgt. Boyd's report and her comment that these problems existed in every station in every division in the force.

The protocol established by the force, AP No. 22, as it was designated, for the investigation of sexual assaults was often not followed and when it was not there is no evidence that any senior officer or supervisor followed up.

The problems continued and because among adults, women are overwhelmingly the victims of sexual assault, they are and were disproportionately impacted by the resulting poor quality of investigation. The result is that women are discriminated against and their right to equal protection and benefit of the law is thereby compromised as the result.

In my view the conduct of this investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped. The plaintiff therefore has been discriminated against by reason of her gender and as the result the plaintiff's rights to equal protection and equal benefit of the law were compromised.

Security of the Person

I am satisfied that the defendants deprived the plaintiff of her right to security of the person by subjecting her to the very real risk of attack by a serial rapist -- a risk of which they were aware but about which they quite deliberately failed to inform the plaintiff or any women living in the Church/ Wellesley area at the time save only S.G. and M.L. and where in the face of that knowledge and their belief that the rapist would certainly attack again, they additionally failed to take any steps to protect the plaintiff or other women like her. Clearly the rape of the plaintiff constituted a deprivation of her security of the person. As Madam Justice Wilson stated in Singh v. Canada (Minister of Employment & Immigration), [1985] 1 S.C.R. 177 at p. 207, 17 D.L.R. (4th) 422:

> . . . "security of the person" must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself.

As I have indicated, because the defendants exercised their discretion in the investigation of this case in a discriminatory and negligent way as I have detailed above, their exercise of discretion was thereby contrary to the

principle of fundamental justice.

Section 1 of the Charter has no application in circumstances because the conduct of police in issue here is not "prescribed by law" within the meaning the jurisprudence has ascribed to that phrase.

Here the plaintiff's Charter rights have been infringed by police conduct -- not a legislative enactment or a common law rule.

In any event the defendants made no effort in evidence to satisfy the requirements of s. 1 and demonstrate a s. 1 defence -- they simply denied the plaintiff's rights which were infringed. I have found differently.

In view of my findings the plaintiff is entitled under s. 24 to a remedy.

Negligence

My task has been rendered less onerous by the very thorough analysis of Henry J. of the issues raised by the pleading in this case reported at (1989), 58 D.L.R. (4th) 396, 48 C.C.L.T. 105 (Ont. H.C.J.), when the matter came before him on a motion to strike out the statement of claim and the succinct reasons of Moldaver J. (as he then was) on behalf of the Divisional Court (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580, when the decision of Henry J. went to that court on appeal.

After citing s. 57 of the Police Act, and observing that by virtue thereof the police are charged with the duty of protecting the public from those who would commit or have committed crimes, Moldaver J. (as he then was) goes on at pp. 230-31 as follows:

> To establish a private law duty of care, foreseeability of risk must coexist with a special relationship of proximity. In the leading case of Anns v. Merton (London Borough), [1978] A.C. 728, [1977] 2 All E.R. 492, 121 Sol. Jo. 377 (H.L.), Lord Wilberforce defined the requirements of this

special relationship as follows at pp. 751-52 A.C.:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises.

This principle has been approved by the Supreme Court of Canada in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 29 C.C.L.T. 97, 8 C.L.R. 1, 10 D.L.R. (4th) 641, 26 M.P.L.R. 81, 54 N.R. 1, [1984] 5 W.W.R. 1.

Do the pleadings support a private law duty of care by the defendants in this case?

The plaintiff alleges that the defendants knew of the existence of a serial rapist. It was eminently foreseeable that he would strike again and cause harm to yet another victim. The allegations therefore support foreseeability of risk.

The plaintiff further alleges that by the time she was raped, the defendants knew or ought to have known that she had become part of a narrow and distinct group of potential victims, sufficient to support a special relationship of proximity. According to the allegations, the defendants knew:

(1) that the rapist confined his attacks to the Church-Wellesley area of Toronto;

(2) that the victims all resided in second or third floor apartments;

(3) that entry in each case was gained through a balcony door; and

(4) that the victims were all white, single and female.

Accepting as I must the facts as pleaded, I agree with Henry J. that they do support the requisite knowledge on the part of the police sufficient to establish a private law duty of care. The harm was foreseeable and a special relationship of proximity existed.

Do the pleadings support a breach of the private law duty of care.

The law is clear that in certain circumstances, the police have a duty to warn citizens of foreseeable harm. See Schact v. R., [1973] 1 O.R. 221, 30 D.L.R. (3d) 641 (C.A.), affd sub nom. O'Rourke v. Schact, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453, and Beutler v. Beutler; Adams v. Beutler (1983), 26 C.C.L.T. 229 (Ont. H.C.J.). The obvious purpose of the warning is to protect the citizens.

I would add to this by saying that in some circumstances where foreseeable harm and a special relationship of proximity exist, the police might reasonably conclude that a warning ought not to be given. For example, it might be decided that a warning would cause general and unnecessary panic on the part of the public which could lead to greater harm.

It would, however, be improper to suggest that a legitimate decision not to warn would excuse a failure to protect. The duty to protect would still remain. It would simply have to be accomplished by other means.

In this case the plaintiff claims, inter alia, that the duty owed to her by the defendants required (1) that she be warned of the impending danger; or (2) in the absence of such a warning, that she be adequately protected. It is alleged that the police did neither.

Instead she claims they made a conscious decision to sacrifice her in order to apprehend the suspect. They decided to use her as "bait". They chose not to warn her due to a stereotypical belief that because she was a woman, she and others like her would become hysterical. This would have

"scared off" the attacker, making his capture more difficult.

The evidence establishes that Det. Sgt. Cameron clearly had linked the four rapes which preceded Ms. Doe's by the early days of August in 1986 and he and Det. Sgt. Derry knew that the rapist would continue to attack women until he was stopped. They knew the rapist was attacking single white women living alone in second- and third-floor apartments with balconies in the Church/Wellesley area of the City of Toronto.

On the evidence I find the plaintiff has established a private law duty of care.

Detective Sgts. Derry and Cameron determined, in the context of their investigation, that no warning would be given to any women -- let alone the specific target group they had identified and among the reasons given for deciding not to warn was their view that women would panic and compromise the investigation. Detective Sgt. Cameron gave this as a reason to Ms. Doe when he interviewed her following her rape and she asked why women had not been warned.

In spite of the knowledge that police had about this sexual rapist and their decision not to warn, they took no steps to protect Ms. Doe or any other women from this known danger. In my view, in the circumstances of this case, the police failed utterly in the duty of care they owed Ms. Doe.

The decision not to warn women was a decision made by Sgts. Cameron and Derry in the course of their investigation. It was made on the basis of "shop talk" they had overheard or been a part of, according to them, in relation to the Dawson Davidson Annex Rapist investigation. What is apparent is that neither Sgts. Cameron nor Derry made any real effort to look into that investigation and determine whether in fact it had been the publicity that caused Dawson Davidson to flee.

Their decision was based largely on rumour and "shop talk" essentially within the 52 C.I.B. and they said they relied on it alone in making the very serious decision not to warn these

women of the risk they faced. This they did in the face of the almost certain knowledge that the rapist would attack again and cause irreparable harm to his victim. In my view their decision in this respect was irresponsible and grossly negligent.

There is simply no evidence before this court which could be interpreted as suggesting that no warning should have been given in the circumstances of this case. The only persuasive expert opinion called by the defence, in fact, suggests that a suitable warning could have been and should have been given. While the defence experts were careful in giving their evidence when one looks at the totality of their evidence this conclusion is irresistible.

Sergeants Cameron and Derry made a decision not to warn women in the neighbourhood and did not do so. They took no steps to protect the women they knew to be at risk from an almost certain attack in result, they failed to take the reasonable care the law requires and denied the plaintiff the opportunity to take steps to protect herself to eliminate the danger and ensure that she would not be attacked.

In this respect they are liable to her in damages.

Charter Law

In my view the decision of the Divisional Court in this matter has already determined that the Charter can apply, in the circumstances of this case, to the police conduct. The s. 15(1) violation alleged relates to discriminatory conduct by state officials in the carrying out and enforcing of the law. In the view of Moldaver J. (as he then was) the pleadings supported a violation of the plaintiff's rights under s. 15(1). At that time the plaintiff's pleadings were mere allegations. It is implicit in the court's decision -- if the allegations were proved it would constitute a violation of rights.

For reasons given above I am satisfied on the evidence and the plaintiff has established that the defendants had a legal duty to warn her of the danger she faced; that they adopted a policy not to warn her because of a stereotypical

discriminatory belief that as a woman she and others like her would become hysterical and panic and scare off an attacker, among others.

A man in similar circumstances, implicit from Det. Sgt. Cameron's comment, would have been warned and therefore had the opportunity to choose whether to expose himself to danger in order to help catch the attacker.

It is not necessary that their decision not to warn be based solely on discriminatory grounds. It is enough that one of the bases for it was as the plaintiff has submitted:

It need not have been the only factor, nor even the major or primary factor, in order for discrimination to be found.

Counsel in this respect goes on to quote from the decision of Chief Justice Dickson in Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at p. 1288, 59 D.L.R. (4th) 352.

In the result the plaintiff has established a breach of her s. 15(1) right to equal benefit and protection of the law.

As for the breach of s. 7 the decision of the Divisional Court in respect of the pleadings is [at p. 234]:

> Section 7 reads as follows:
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The plaintiff claims that she was deprived of her right to security of the person. The defendants chose, or at least adopted a policy which favoured the apprehension of the criminal over her protection as a targeted rape victim. By using Ms. Doe as "bait", without her knowledge or consent, the police knowingly placed her security interest at risk. This stemmed from the same stereotypical and therefore discriminatory belief already referred to.

According to the plaintiff, she was deprived of her right to security of the person in a manner which did not accord with the principles of fundamental justice. These principles, while entitled to broad and generous interpretation, especially in the area of law enforcement, could not be said to embrace a discretion exercised arbitrarily or for improper motives. See R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, 36 C.R.R. 90, 45 C.C.C. (3d) 57, 66 C.R. (3d) 97, 55 D.L.R. (4th) 481, 88 N.R. 205, 71 Sask. R. 1, [1989] 1 W.W.R. 97.

As a result, the plaintiff claims that her rights under s. 7 of the Charter were violated. Again, in my opinion, these pleadings do support such a violation.

As I have found in relation to s. 15, the plaintiff has established on the evidence, the factual foundation pleaded for reasons set out herein. In the result, I am of the view that the decision of the Divisional Court was that in that event a violation of s. 7 is established. I agree with that determination but even if I did not, I would consider myself bound.

Section 1

As indicated earlier the defendants called no evidence per se in support of "demonstrating" a s. 1 defence. They point out in written argument that their conduct can be examined in all the circumstances to see if a s. 1 defence is made out. The argument shortly put is that policing is a complicated business and the courts should stay out of it.

In this respect their conduct was determined to have fallen short in part, because of their discriminatory treatment of women. Women were treated differently because some members of the force adhered to sexist notions that if warned, women would panic and scare off the attacker. The defendants do not suggest, even in argument, why such conduct in the circumstances of this case may be "justifiable". I suggest the answer is a simple one -- because it cannot.

Section 24

I will deal with the plaintiff's claim for damages fully when I deal with that aspect of her case later in these reasons.

I am satisfied on the facts of this case that the plaintiff's damages are the same in respect of the two bases upon which her action is founded, i.e., negligence and breach of Charter rights.

The result of the breaches which she has established are the personal repercussion to her having been raped at knifepoint by a stranger. They are profound.

It is the same conduct by the police which I have found supports and establishes both causes of action.

In such circumstances the plaintiff is entitled to one award of damages to compensate her for the damage she has suffered. She is not, in my view, in these circumstances, entitled to any additional or "extra" damages because the police conduct has breached her Charter rights. In this respect, assuming she is otherwise fully compensated, a declaration will suffice.

Limitation Period

(a) Charter issue

The parties are agreed that so far as my determination is concerned in this respect, this court is bound by the decision of the Court of Appeal for this province in Prete v. Ontario (1993), 16 O.R. (3d) 161, 110 D.L.R. (4th) 94. The limitation period argument therefore does not apply to the plaintiff's claims which arise by virtue of the Charter.

(b) Negligence issue

The plaintiff commenced this proceeding by notice of action dated August 10, 1987 and the defendants assert that she is beyond the six-month limitation set out in s. 7(1) of the Public Authorities Protection Act, R.S.O. 1990, c. P.38.

They argue that the plaintiff demonstrated that she was in possession of the facts necessary to commence this proceeding within the six months because:

(1) she set out in detail her complaints against the police in her October 23, 1986 letter to the Board of Commissioners of Police

And:

(2) on October 3, 1986, in an interview with the subway link newspaper, she is quoted as saying that she was contemplating legal action against the police.

They say by February 6, 1987, when the preliminary inquiry of Paul Douglas Callow was essentially completed, that the plaintiff was by that date in possession of all necessary facts but still did not issue her notice of action until August 10, 1987 and therefore is out of time.

I accept the evidence of Dr. De Marco and Dr. Barnes in this respect that the plaintiff in the months following the rape was not in an emotional or psychological condition such that she was capable of discovering and appreciating the necessary material facts upon which her cause of action was based. She was coping and barely that. She was not functioning at her normal or usual level.

It was impossible for her at this time to emotionally or intellectually cope with the fact of the preliminary inquiry where her attacker was being dealt with and at the same time retain and instruct counsel in respect of an action against police.

Additionally, I am satisfied that not until after the preliminary inquiry had concluded with an arranged plea on February 26, 1987 was she in a position and able to obtain the necessary facts which would enable her to commence this action. It was only then she was aware of the state of the police knowledge in August 1986, only then was she able to speak to the other victims of the balcony rapist.

In the result I find that the six-month period of limitation affords the police no defence in the circumstances of this case.

Damages

Ms. Doe precisely detailed the events of the early morning hours of August 24, 1986 in her evidence. It was obvious to everyone that giving this evidence was a difficult and painful process for her. Her attacker was armed with a knife and had concealed his identity with a mask he had fashioned and wore. The attack was terrifying and she feared for her life.

Following her call to 911 a number of police officers arrived at her apartment and over the next hours she was obliged to repeat the details of her attack to a number of officers.

She was taken to hospital for forensic testing by ambulance -- an intrusive and painful process.

This attack by a stranger in her own bed in her home has had a profound and lasting effect on Ms. Doe as she stated in her evidence:

> . . . my life was shattered as a result of the rape, and I experienced it literally as being shattered for at least two to three years . . .

Some of the complaints include:

-- difficulty sleeping;

-- recurrent intrusive nightmares;

-- panic attacks and nausea;

-- lack of self-confidence;

-- emotional detachment from friends;

-- inability to socialize where strangers may be present;

-- fear of men in general which impacted on everyday life, i.e., stopped using TTC at night;

-- no enjoyment of life.

Although Ms. Doe had suffered from depression prior to August 24, 1986, this condition was greatly exacerbated as the result of the rape.

On the evidence there can be no question but that the plaintiff suffered serious post-traumatic stress immediately following the rape and she continues to this day to exhibit symptoms which are consistent in post-traumatic stress disorder -- at the time of trial some 11 years after her attack.

At about 18 months before she was attacked, her treating psychiatrist at the time, Dr. Vincent DeMarco, said that Ms. Doe:

> . . . seemed to be doing quite well and that she would continue to do well . . .

He also said of Ms. Doe's pre-existing condition:

> The very essence of mood disorders, we're talking about depressive illness in particular, is that individuals who have it are much more profoundly affected by stresses of all sorts.

Following the attack Dr. DeMarco said that Ms. Doe developed all the signs and symptoms of a major depressive disorder and was diagnosed with severe post-traumatic stress disorder.

Ms. Doe was treated with medications and endured unpleasant side effects from many of them. He reported that she had early morning wakening, fatigue, loss of appetite, weight loss, loss of interest in her usual activities; she could not concentrate and had trouble with memory. She experienced disruption of menses and dissociative states.

It was early into 1988 before Dr. DeMarco noticed any significant improvement in the plaintiff's condition and when asked to compare her condition at that point in time to her condition before the rape he said:

> There is no question she had been greatly affected by the assault, and she would never return to that position before the rape. I don't think there is any going back after a trauma of this sort.

Among the continuing manifestations were that the anger never really subsides, sense of safety is forever shaken -- "a keen sense of being exposed and vulnerable" and being very cautious in relationships, especially so around men.

In his opinion Ms. Doe continues to suffer from a major depressive disorder.

The plaintiff's experts agree that there were features of this attack that are associated with a greater likelihood of severe emotional difficulties following the assault:

-- the use of a weapon;

-- the attacker threatened to kill her and she was very frightened during the attack that he would kill her;

-- vaginal penetration;

-- took place in circumstances she previously believed safe -- asleep in her own bed in own her apartment.

Dr. Rosemary Barnes gave a most helpful explanation of why sexual assault is so traumatic for individuals who experience it:

> A. There are several aspects. The person is placed in a situation where they fear that they might die and where they're violated physically and emotionally in one of the most extreme ways.

The level of the kind of threat to the individual psychologically and physically is the same as the kind of threat that a person who is assaulted would experience in a front-line kind of combat situation, and in some ways is worse in the sense that the soldier in a front-line combat situation entered into a certain kind of commitment and has been trained to carry out that commitment and is prepared as much as possible for what to expect.

A person who has been sexually assaulted experiences the same kind of sense that their life might be over in that moment or in the next few moments, that they're -- and their body has been profoundly violated and often that they feel psychologically humiliated.

The sexual assaults are also different in that they often occur in circumstances where in contrast to being in combat where the person had expected to be safe, and that's certainly the case with Ms. Doe, that she was in her own home in bed in a situation where she expected -- where she was safe and was completely, unexpectedly psychologically humiliated and physically violated in the most profound way, and thought in that moment that she would -- that her life actually would be over, and that it's being faced with that kind of threat of being violated and deeply humiliated, that's the basis for the intense kinds of psychological reactions that follow from sexual assault.

That Ms. Doe has been profoundly affected by the events of August 24, 1986 in every aspect of her life cannot be doubted on the evidence. That she continues to suffer, albeit not to the extent she did in the two years immediately following the rape, to this day is agreed by all experts.

There was disagreement among the medical professionals in this case which in my assessment, unfortunately, became somewhat personal and was unnecessary.

I had some difficulty with Dr. De Marco's evidence because, to my mind, he was not as independent as he might have been. In

my view, he has become an advocate on his patients' behalf and I found his views to be less than objective. He was openly hostile to counsel for the defence when cross-examined.

Neither Dr. Barnes nor Dr. Glancy, on behalf of the defence, had the opportunity for one-on-one observation of Ms. Doe for any extended time. I found both of them, however, to be more independent and objective in their views than Dr. De Marco.

On reviewing the evidence of Dr. Barnes and Dr. Glancy it seemed to me there was some common ground. They agree Ms. Doe suffered from chronic mild depression prior to the attack for which she sought treatment. Dr. Barnes' view that because of her pre-existing condition, Ms. Doe was likely more vulnerable in terms of her emotional reaction to the attack is reasonable and I accept it.

Doctors Barnes and Glancy agree that Ms. Doe still has post-traumatic stress disorder although her symptoms have improved significantly from what they were in the 12 to 18 months post-rape and that she still suffers mild chronic depression. They both have some reservations about what assistance further therapy is likely to be for Ms. Doe. Doctor Barnes recommends a two-year course of therapy. If pressed, I think a fair interpretation to place on Dr. Glancy's evidence in this respect is that he would not disagree.

Doctor Barnes summarized Ms. Doe's current difficulties as follows:

A. Well, I -- although the, some of the symptoms have become less intense, she continues to experience symptoms periodically in a number of respects.

She continues to experience sleep disturbance. She continues to experience an emotional detachment from other people, which is another characteristic kind of reaction to trauma, and a restrictive -- restricted kind of emotional responsiveness, particularly in intimate relationships.

She continues to, although the severity has declined

significantly, she continues periodically to experience muscle spasms, flashbacks, and panic attacks, none of which she experienced prior to the assault.

She continues to lack confidence in relation to her career. She has an inability to pursue intimate relationships, and, indeed, since ending the relationship with John, her previous boyfriend, has not been involved in any other -- any intimate relationships.

She continues to restrict her social activities in many of the ways that I described previously in terms of, for example, avoiding getting on an elevator if she will be riding alone with a man, not going out unless she is accompanied by someone, and these kinds of restrictions that she's adopted for herself because of her sense of vulnerability and the possibility that symptoms will recur, continue to restrict her social life significantly.

She has, because of the difficulties she's experienced, she appropriately has sought professional treatment. This has meant that she spent considerable time and money on psychotherapy, on chiropractic treatment, and on medication to deal with the emotional and physical sequelae of the assault.

She continues to take antidepressant medication, and she continues to be aware that there are aspects of the deep emotional trauma which she experienced as a result of the assault which she has not resolved.

So the overall, the kinds of difficulties that she experienced are consistent presently with a diagnosis of post traumatic stress disorder. So that diagnosis which was made initially immediately following the trauma has -- that -- the condition continues to be a condition which she experiences although the severity of some of the symptoms has diminished considerably.

Both Dr. Glancy's and Dr. Barnes' prognosis for the future is guarded in terms of whether a complete recovery is likely. I

interpret their evidence to mean there is a reasonable possibility, even probability, that Ms. Doe will never fully recover and will continue to exhibit symptoms of post-traumatic stress disorder always.

Rape is unlike any other sort of injury incurred by accident or neglect. Survivors of rape must bear social stigmatization which accident victims do not. Rape is not about sex; it is about anger, it is about power and it is about control. It is, in the words of Dr. Peter Jaffe, "an overwhelming life event". It is a form of violence intended to create terror, to dominate, to control and to humiliate. It is an act of hostility and aggression. Forced sexual intercourse is inherently violent and profoundly degrading.

As Mr. Justice Cory stated in R. v. Osolin, supra, at p. 669:

> It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.

It is not helpful to compare the assessments of damages in accidental injury cases nor to look to those cases for any sort of guidance in assessing damages for rape.

Ms. Doe's life has been affected by the events of August 24, 1986 in every respect, and while she has improved considerably in the 11 years since, she continues to experience symptomology related to the rape. She will never be free of the terror and the indignity that Paul Douglas Callow brought into her life and left at the very core of her being. Her condition is chronic and the persuasive evidence suggests that this is likely to continue.

In my view, damage awards in the $40,000-50,000 range are reflective of neither the horrific nature of the violation nor of the overwhelming and all-encompassing consequences of it.

In my view, an appropriate general damage award for Ms. Doe in all the circumstances of this case is $175,000.

Special Damages

The plaintiff claims the cost of therapy sessions as follows:

1. Lynn Abrams --	61 sessions February 1990-July 1991	$ 4,261.38
2. Alys Murphy --	27 sessions October 1992-October 1993	$ 1,350.00
3. Elizabeth White --	57 sessions January 1995-April 1997	$ 1,455.00
Total		$ 7,066.38

This claim represents only some therapy costs incurred by Ms. Doe for which she has not been otherwise compensated. They are reasonable in my view and I allow that item in full.

It would be difficult for Ms. Doe to produce all receipts for medications she has required since August 1986. She has estimated the cost of her medications reasonably and produced prescription drug histories from two drug stores she frequents which corroborate her estimates. I would allow her the full amount she claims to the date of the commencement of trial in the sum of $5,220.

In view of the evidence of Dr. De Marco that she is likely to require to take antidepressant medication for the rest of her life she should also have a sum to represent the future cost to her of this expense. The defendants take no specific issue with the plaintiff's calculations in respect of the present value for this item (although they suggest the plaintiff has not proved the need) and accordingly, I will award the sum of $8,062.74 which represents the present value of the future anticipated prescription costs.

I am satisfied that the cost of chiropractic treatment in 1986 and 1987 may fairly be referable to the attack. I am not persuaded that any amount should be allowed beyond that. I would allow only the sum of $515.20 in this respect for past costs and nothing for future treatment in this respect.

The cost of moving from Toronto to Montreal is in my view remote. While I accept that the plaintiff may have required a move from her neighbourhood at the time I do not think, in fairness, the defendants should bear the cost of a move to Montreal. I would reduce the amount claimed in this respect to $1,000.

As for the replacement of items Ms. Doe discarded following the rape -- items which were used by or vandalized by the rapist -- I would allow the sum of $1,000.

As for transportation costs I do not think the plaintiff's claims are unreasonable in terms of her claim for past costs. Ms. Doe claims the cost of evenings cab fares because she cannot feel safe using public transit at that time and since being raped. She estimates taking a cab four times weekly for all 52 weeks of the year. I think if the sum of $2,000 annually were allowed she would be fairly compensated. I would therefore award the sum of $22,500 to the commencement of the trial.

As for the future, I would award the present value of a sum calculated at the rate of $2,000 annually for a period of 15 years. Presumably counsel will be able to agree on what that number should be when they have these reasons but if not I may be spoken to.

I should add that the Chief of Police is responsible to see the members of his force carry out their duties properly and will be vicariously liable when they fail to do so as will the Board of Commissioners of Police which is charged with the overall responsibility of policing and maintaining law and order within the Municipality of Metropolitan Toronto (as it then was).

In conclusion the plaintiff shall have judgment against the

defendants in the following amounts:

General Damages	$175,000.00
Special Damages to date	$ 37,301.58
Future Costs	$ 8,062.74
Total	$ 220,364.32

together with an amount which represents the present value of a sum required to produce $2,000 annually for a period of 15 years and a declaration that the defendants did in 1986 violate Ms. Doe's s. 7 and s. 15(1) rights under the Canadian Charter of Rights and Freedoms.

Matters of prejudgment interest and costs to be addressed at a future date to be agreed upon among counsel and the court and arranged through the trial co-ordinator's office.

Judgment accordingly.