THE CIVIL ACTION FOR SEXUAL BATTERY: THERAPEUTIC JURISPRUDENCE?

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Increasingly, victims of rape, sexual exploitation, incest, and other child sexual abuse are seeking legal relief from the civil justice system. The plaintiffs in these sexual battery tort actions are almost always women, the majority of whom were battered when they were children. The defendants are always men, and men who knew their victims prior to the battery. Judgment has been given for the plaintiff in every case except one, but the defendants are frequently judgment-proof. It appears that personal, non-pecuniary goals account for as much or more sexual battery litigation than does the prospect of monetary damages.

This article employs the emerging perspective of therapeutic jurisprudence to explore whether civil litigation might assist in the sexual battery victim's psychological recovery, as many such plaintiffs appear to expect it will. Section II outlines the potentially greater therapeutic benefits of tort compared to criminal prosecution. These derive mostly from the formal equality of tort law, and the relatively greater degree of victim control that it affords. These theoretical advantages are assessed with reference to what little relevant empirical and clinical literature exists. Section III considers more specifically the therapeutic implications of a civil suit depending on whether it

De plus en plus, les victimes de viol, d'agression sexuelle, d'inceste et d'autres formes d'abus sexuel à l'égard des enfants cherchent à obtenir réparation en s'adressant au système de justice civile. Les personnes qui intentent ces actions délictuelles pour cause de violence sexuelle sont presque toujours des femmes, dont la majorité ont été battues lorsqu'elles étaient enfants. Les défendeurs, quant à eux, sont toujours des hommes, des hommes qui connaissaient leurs victimes avant l'agression. On a rendu jugement en faveur des demanderesses dans tous les cas sauf un, mais les défendeurs sont souvent à l'abri des jugements. Il semble que les actions délictuelles pour violence sexuelle reposent autant, sinon plus, sur des buts personnels et non pécuniaires que sur la perspective d'obtenir des dommages pécuniaires.

Dans cet article, l'auteur adopte la nouvelle perspective de la jurisprudence thérapeutique afin d'examiner si les poursuites civiles peuvent aider les victimes de violence sexuelle à guérir sur le plan psychologique, comme bien des demanderesses semblent le penser. Dans la deuxième partie, il passe en revue les bienfaits thérapeutiques des actions délictuelles, qui pourraient être bien plus grands que ceux des poursuites criminelles. Ces bienfaits découlent surtout de l'égalité

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follows a criminal conviction, criminal acquittal, or no criminal action at all.

The decided cases are too new, too few, and probably too unrepresentative, to support any firm conclusions about the therapeutic benefits of the sexual battery action. This article attempts instead to isolate specific issues for further consideration and empirical study. Research of that sort will enlighten us as much about tort law generally as about sexual battery in particular.

formelle conférée par le droit de la responsabilité délictuelle et du contrôle relativement plus grand que l'action délictuelle procure aux victimes. L'auteur évalue ces avantages théoriques en tenant compte du peu d'ouvrages pertinents qui traitent de la question sous l'angle empirique et l'angle médical. Dans la troisième partie, il examine plus particulièrement les effets thérapeutiques d'une poursuite civile, selon que cette poursuite est intentée après une condamnation au criminel, un acquittement au criminel ou s'il n'y a pas eu d'action criminelle.

Les décisions rendues sont trop récentes, trop rares, et probablement pas assez représentatives pour appuyer des conclusions fermes quant aux bienfaits thérapeutiques des actions délictuelles pour cause de violence sexuelle. Dans cet article, l'auteur essaie plutôt d'isoler des questions précises sur lesquelles on devrait se pencher et faire des études empiriques. Ces recherches nous éclaireront autant sur le droit de la responsabilité délictuelle en général que sur la violence sexuelle en particulier.

I. INTRODUCTION

Something new and provocative is happening in the law of torts. Victims of rape,[1] other sexual assaults,[2] "incest",[3] and other forms of child sexual abuse[4] are using the

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[1] The rape cases have all been what S. Estrich called in REAL RAPE (Cambridge, Mass.: Harvard University Press, 1987) at 4, "aggravated rape" cases (i.e. rapes involving extrinsic violence). None were stranger rapes. Civil battery actions against the perpetrators include *Glendale* v. *Drozdzik*, [1990] B.C.J. No. 1489 (S.C.) (QL) [hereinafter *Glendale*]; *E.D.G.* v. *Drozdzik*, [1993] B.C.J. No. 532 (C.A.) (QL); *C.* v. *M.* (1990), 74 D.L.R. (4th) 129, 46 C.P.C. (2d) 254 (Ont. Gen. Div.); *Myers* v. *Haroldson*, [1989] 3 W.W.R. 604, 48 C.C.L.T. 93 (Sask. Q.B.) [hereinafter *Myers*]. *B.(P.)* v. *B.(W.)*, *infra* note 3, might be described as both an incest and a rape case. The father violently raped his daughter twice, when she was seventeen and twenty years old, after she moved into her own home. *See also Q.* v. *Minto Management Ltd.* (1986), 57 O.R. (2d) 781, 34 D.L.R. (4th) 767 (C.A.) [hereinafter *Minto*]; and *W.* v. *Meah*, [1986] 1 ALL E.R. 935 (Q.B.) [hereinafter *Meah*].

[2] *Khalsa* v. *Bhullar*, [1992] B.C.J. No. 378 (S.C.) (QL) [hereinafter *Khalsa*]; *H.R.* v. *F.M.* (1992), 129 N.B.R. (2d) 303 (Q.B.); and *P.C.P.* v. *DaCosta*, [1992] B.C.J. No. 2303 (S.C.) (QL) [hereinafter *DaCosta*]. The perpetrators in each case were known to the victims; they were, respectively, a priest, a family friend, and an employment supervisor.

[3] Incest is defined in the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Code*], s. 155(1) on the basis of *sexual intercourse* with *blood relations*. In this context, I prefer to use the term to include all defendants who were in *loco parentis* with the plaintiff including as step-fathers and foster-fathers. As well, I have not limited the category to intercourse cases. Neither blood relationship, nor intercourse specifically, are likely to be significant from the plaintiff's perspective. On this point, *see M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6, 142 N.R. 321 (upholding a jury award of $50,000); and *J.(L.A.)* v. *J.(H.)* (1993), 13 O.R. (3d) 306 (Gen. Div.). Other civil incest cases include *Madelena* v. *Kunn* (*M.(M.)* v. *K.(K.)*) (1989), 61 D.L.R. (4th) 392, 50 C.C.L.T. 190 (B.C.C.A.) [hereinafter *Madelena*]; *Brandner* v. *Brandner* (1991), 71 MAN. R. (2d) 265 (Q.B.) [hereinafter *Brandner*]; *G.* v. *R.*, [1991] B.C.J. No. 66 (S.C.) (QL); *P.(L.)* v. *L.(A.)*, [1991] O.J. No. 1360 (Gen. Div.) (QL); *B.(A.)* v. *J.(I.)* (1991), 81 ALTA. L.R. (2d) 84, [1991] 5 W.W.R. 748 (Q.B.); *M.O. and D.T.* v. *F.A.* (1991), digested in *The Lawyers Weekly* (8 February 1991) 19 (B.C.S.C.); *Beaudry* v. *Hackett* (*S.M.A.B.* v. *J.N.H.*), [1991] B.C.J. No. 3940 (S.C.) (QL) [hereinafter *Beaudry*]; *W.J.L.M.* v. *R.G.R.*, [1992] B.C.J. No. 1014 (S.C.) (QL); *R.N.* v. *S.L.S.*, [1993] N.S.J. No. 99 (S.C. T.D.) (QL); *K.G.* v. *J.T.*, [1992] B.C.J. No. 1365 (S.C.) (QL) (great uncle); *D.C.* v. *K.C.*, [1993] N.J. No. 144 (S.C.T.D.) (QL) (father-son); D. Brillinger, "Sex Assault Victim Wins $125,000 Award Against Father" *The Lawyers Weekly* (15 September 1989) 8 [hereinafter *$125,000 Award*] (a report on *Kunz* v. *Kunz*); "Daughter May Not Get $284,000" *The Globe and Mail* (3 December 1992) A1 (discussing a jury award of $284,000); and *B.(P.)* v. *B.(W.)* (1992), 11 O.R. (3d) 161 (Gen. Div.). Another case involving a successful action by a stepdaughter is referred to in *D.C.G.(Re)*, [1992] B.C.J. No. 2506 (S.C.) (QL). *See also Stubbings* v. *Webb*, [1991] 3 ALL E.R. 949 (C.A.) [hereinafter *Stubbings*].

[4] *Lyth* v. *Dagg* (1988), 46 C.C.L.T. 25 (B.C.S.C.) [hereinafter *Lyth*]; *Harder* v. *Brown* (1989), 50 C.C.L.T. 85 (B.C.S.C.) [hereinafter *Harder*]; *N.(J.L.)* v. *L.(A.M.)* (1988), [1989] 1 W.W.R. 438, 47 C.C.L.T. 65 (Man. Q.B.); *S.M.Q.* v. *Hodgins*, 36 R.F.L. (3d) 159 (Gen. Div.); *Gray* v. *Reeves* (1992), 89 D.L.R. (4th) 315, 64 B.C.L.R. (2d) 275 (S.C.) [hereinafter *Gray*]; *G.(K.)* v. *T.(J.)* (1992), digested in *The Lawyers Weekly* (28 August 1992) 27 (B.C.S.C.); *Jody Lynn N.* v. *Le Strat* (1988), digested in *The Lawyers Weekly* (11 November 1988) 19 (Man. Q.B.) [hereinafter *Jody Lynn N.*]; *D.S.* v. *D.A.M.* (*Slinn* v. *Morgan*), [1993] B.C.J. No. 315 (S.C.) (QL) [hereinafter *Slinn*]; *T.K.S.* v. *E.B.S.*, [1992] B.C.J. No. 2452 (S.C.) (QL) (cousins); and *M.(A.K.)* v. *B.(M.)* (22 June 1990), (Ont. Gen. Div.) [unreported], referred to in *C.* v. *M.*, *supra* note 1.

civil justice system to sue the perpetrators in numbers[5] and in circumstances never seen before.[6] Although some courts have referred to these as "new" tort actions for "sexual assault", in fact, the action is none other than the traditional action in battery.[7] What is new is the growing tendency for sexual battery victims[8] to exercise

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See also D.M. Van Ginkel, *Finally Compensating The Victim: Harder v. Brown* (1990), 8 CAN. J. FAM. LAW 388 at 392, noting an unreported Ontario jury award of $100,000 plus $25,000 punitive damages (this was probably *Kunz* v. *Kunz*: *see* Brillinger, *supra* note 3).

[5] I will discuss thirty-three sexual battery actions litigated since 1985: *see infra* note 9. Often these have not been reported in conventional law reports. In a few cases, I have had to rely on digests of the reasons for judgment, newspaper reports, or references to unreported decisions in other judgments.

Of these, twenty-six involve sexual batteries perpetrated against children: fourteen by persons in *loco parentis*, ten by other family members and friends, one by a teacher and one by an employment supervisor.

In all but five cases, the victims were women or girls. The exceptions were: a boy molested by his father in *D.C.* v. *K.C.*, *supra* note 3; a boy molested along with his sisters in *B.(A.)* v. *J.(I.)*, *supra* note 3; a boy molested by his uncle in *Slinn*, *supra* note 4; a male adolescent fondled by his employment supervisor in *DaCosta*, *supra* note 2; and a male adolescent enticed into a homosexual encounter with his teacher in *Lyth*, *supra* note 4. All the perpetrators have been adult males, except the defendant in *T.K.S.* v. *E.B.S.*, *supra* note 4, who was an adolescent cousin of the plaintiff.

Of the thirty civil actions in which the information is clear from the record, seventeen were undefended, and thirteen defended: *see infra* note 63. Of the twenty-nine cases in which the information is clear from the record, sixteen followed criminal convictions and two followed criminal acquittals: *see infra* note 70.

[6] One can only speculate as to what combination of social and legal change has fostered this development. Abolition of interfamilial tort immunity has permitted incest cases to go forward. Certainly, the influence of feminist legal academics and practitioners can not be discounted. Also, I suspect that many victims have not been aware of their civil option, but as the number of suits and attendant publicity grow, so too does public and professional awareness.

[7] As to the proper cause of action being battery, *see Norberg* v. *Wynrib*, [1992] 2 S.C.R. 224, 92 D.L.R. (4th) 449 [hereinafter *Norberg*]; and *M.(K.)* v. *M.(H.)*, *supra* note 3. I use the term "battery" in an effort to emphasize the crucial difference between the tort action and the criminal action for sexual "assault". As explained below, the civil sexual battery action covers some actions that would probably not meet the criminal definition of sexual assault. Nevertheless, the definition of *sexual* assault from the criminal law provides a useful point of departure:

[T]he test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy....[Sexual assault] is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

R. v. *Chase*, [1987] 2 S.C.R. 293 at 301 & 302, 59 C.R. (3d) 193 at 199, per McIntyre J.

[8] I use the word "victim" with reservation. On the one hand, the word accurately suggests that an innocent person has been terribly injured by another: *see* E.M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work On Woman-Abuse* (1992) 67 N.Y.U.L. REV. 520 at 530. On the other hand, it may also suggest a certain passivity and hopelessness entirely inappropriate for many survivors of sexual battery and especially those who have been brave enough to enter the legal forum. In N. West, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis* (1992) 50 U.T. FAC. L. REV. 96 at 114, the author suggests that the civil action may be therapeutic precisely because it breaks the victimization pattern. It is never my intention to imply passivity or helplessness on the part of the women whom I describe in the text as victims.

the long available, but largely ignored, civil option.[9]

In addition, at least two truly "new" avenues of civil relief appear to be developing in the area of sexual wrongdoing. The first deals with "sexual exploitation" in power-imbalanced relationships. The second consists of negligence claims against third parties.

In the exploitation cases, the defendant, typically a male professional, employs his relative power to secure the victim's apparent "consent" to sexual conduct.[10]

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[9] Note that common law barriers to litigation between family members meant that civil incest suits were not viable until recently. There is a possibility that parallels to the present situation might be found by examining the action for seduction, especially at the turn of the century when the action became available to women themselves in some jurisdictions. As far as I know, little research has been done in this area. *See* C. Backhouse, *The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada* (1986) 10 DALHOUSIE L.J. 45.

That aside, there exists two generations of civil actions for sexual battery. The first generation, consisting of only a few cases, was characterized by rape cases in which the plaintiff's claims were disbelieved. *See, e.g., M.* v. *P.* (*MacKenzie* v. *Palmer*) (1921), 14 SASK. L.R. 117, 56 D.L.R. 345 (C.A.), *rev'd* (1922), 62 S.C.R. 517, [1922] 1 W.W.R. 880 (failing on issue of consent). When the plaintiff was believed, the damages tended to be trivial. *See, e.g., Pie* v. *Thibert*, [1976] C.S. 180 ($2,400 damage), *S.* v. *Mundy* (1969), [1970] 1 O.R. 764, 9 D.L.R. (3d) 446 (Co. Ct.) [hereinafter *Mundy*] ($1,500 exemplary damages), and *Radovskis* v. *Tomm* (1957), 9 D.L.R. (2d) 751, 21 W.W.R. 658 (Man. Q.B.) ($2,000 damages). *See generally* S. Batt, *Our Civil Courts: Unused Classrooms For Education About Rape* in FEMINISM APPLIED: FOUR PAPERS (Ottawa: Canada Research Institute for the Advancement of Women, 1984) 56, citing 8 Canadian cases before 1976. *See also Compensation For Battered Women*, (1984) [unpublished], a handbook prepared by law students at the University of Western Ontario; and C.A. MacKinnon, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (New Haven: Yale University Press, 1979).

In the second generation, damage awards are becoming substantially larger, although still much lower than the basic rules of tort damage quantification suggest they ought to be. *See* B. Feldthusen, *Discriminatory Damage Quantification In Civil Actions For Sexual Battery* [forthcoming in U.T.L.J. in 1994]. Also, at least to date, consent has tended to be less controversial than one might have expected and usually resolved with some sensitivity to the victim's position. *See generally* E. Sheehy, *Compensation For Women Who Have Been Raped* in J.V. Roberts & R.M. Mohr, eds., CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE (Toronto: University of Toronto Press, 1994) 205. Interesting discussions of consent are found in *Norberg*, *supra* note 7; *Madelena*, *supra* note 3; *Harder*, *supra* note 4; and *Weisenger* v. *Mellor*, [1989] B.C.J. No. 1393 (S.C.) (QL) [hereinafter *Mellor*]. The first Canadian case that I would identify as belonging to the new generation discussed in this article was *Minto*, *supra* note 1. This was a negligence action against a landlord for failing to maintain secure premises, not an action against the perpetrator. *Compare Storrie* v. *Newman* (1982), 139 D.L.R. (3d) 482, 39 B.C.L.R. 376 (S.C.) [hereinafter *Storrie*]. The recent proliferation of civil sexual battery suits seems to have begun in the United States. *See* the cases cited in *M.(K.)* v. *M.(H.)*, *supra* note 3, and McConnell, *infra* note 44. In contrast, in Britain, both the civil rape claim in *Meah*, *supra* note 1 and the civil incest claim in *Stubbings*, *supra* note 3 are described as the first of their kind in the respective reasons for judgment.

[10] *See Norberg*, *ibid.* at 463, La Forest J. (doctor-patient exploitation). These are cases where, unless the court takes the power imbalance into account, the plaintiff would probably be held to have consented to the contact. There were two such cases prior to *Norberg* in which the analysis was not as explicit. *See, e.g., Mellor*, *ibid.* (doctor-patient exploitation); *Lyth*, *supra* note 4 (teacher-student exploitation). Some of the incest and other child sexual abuse cases might be

Courts are beginning to take the power imbalance seriously and to invalidate on that ground what traditionally might have been accepted as the plaintiff's consent. A majority in the Supreme Court of Canada decided recently to resolve such claims under the traditional action in battery. The two women justices, McLachlin and L'Heureux-Dubé JJ., preferred to deal with the action as one for breach of fiduciary duty.[11] Regardless, it is clear that the courts have recognized implicitly the differences between the exploitation cases and, for example, the paradigmatic case of sexual battery by threat of physical force.[12] It is premature to decide whether the exploitation cases are simply variations of traditional sexual battery, or whether they truly constitute a new and as yet imperfectly defined cause of action.

The new negligence claims are based on an allegation that the third party breached a legal duty to protect the victim from a sexual battery perpetrated by another. Defendants in third party negligence claims have included landlords,[13]

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included here, but the courts seem to take a much stricter view of these, denying the defense of consent as a matter of law. *See, e.g., Madelena, supra* note 3, *but see also* the trial judgment in *Madelena* (1987), 35 D.L.R. (4th) 222 (S.C.). *Lyth, ibid.*, and *Da Costa, supra* note 2, both involved older adolescents and fall at the borderline. I adopt this categorization scheme for analytical purposes only. Whether the law ought to distinguish the exploitation cases in doctrine or remedy is a difficult question which is not considered herein. Note that in at least one case, the plaintiff has brought an action against the doctor, and also an action in negligence against the professional regulatory agency for failing to suspend the doctor after investigating a previous complaint. *See* "Alleged Sex-Assault Victim Sues" *The Globe & Mail* (17 July 1993) A3. Other negligence actions of this type are discussed in the following paragraph.

[11] The issue is considered in both *Norberg, ibid.*, and *M.(K.)* v. *M.(H.), supra* note 3.

[12] This is clear from the attention given to the issue of consent in *Norberg, ibid.* It is even clearer from the relatively low damage awards given in these cases. In *Norberg*, for example, the majority concluded that the plaintiff had been subjected to two years of continuous non-consensual sexual relations. During that same time the defendant doctor had failed to respond to her request for help in overcoming her drug addiction. Instead, he promoted it by supplying restricted drugs in return for sexual favours. The majority concluded that the apparent consent was invalid and held the doctor liable in battery. LaForest J. stated that "[i]t is hard to imagine a greater affront to human dignity" than non-consensual sexual intercourse: *ibid.* at 470. In light of all this, it is difficult to comprehend how the majority could have awarded the plaintiff only $20,000 compensatory damages and $10,000 in punitive damages, an amount that would hardly have made a dent in her legal bills. This point was presumably noted by McLachlin J. in her minority judgment. She would have awarded costs on a solicitor and client basis, as had been done in *Mellor, supra* note 9. It is perhaps not coincidental that the two women justices, McLachlin and L'Heureux-Dubé JJ., would have awarded $45,000 compensatory and $25,000 punitive damages. It seems certain that had the plaintiff in *Norberg* been raped at knife-point weekly over a two-year period the award would have been considerably higher. *See also* the comments about the adequacy of damages awarded in *M.(K.)* v. *M.(H.), ibid.*, per McLachlin and L'Heureux-Dubé JJ. If the court in *Lyth, supra* note 4, truly believed that the adolescent student had been pressured into a non-consensual homosexual encounter with his teacher, how could it justify an award of only $5000 to a plaintiff still experiencing emotional problems years later? *See generally* Feldthusen, *supra* note 9.

[13] *Minto, supra* note 1.

child welfare agencies,[14] school boards,[15] and police officials.[16] Negligence actions have also been brought against mothers for failing to protect their daughters from sexually abusive fathers and stepfathers.[17]

It is too early to predict whether the trend to employ the civil action in sexual battery cases will continue.[18] If it does, it may have interesting implications for the entire law of torts. Today, tort law has little direct impact on individuals.[19] Few individuals, unless backed by a subrogating insurer, can afford to invoke the tort process. Fewer still are willing and able to bring an action against an effectively judgment-proof individual defendant. The true parties to most tort litigation are large enterprises, insurers, and governments. Most doctrinal and academic developments are premised on collectivist and instrumentalist notions such as loss allocation, risk distribution, deterrence, insurance and compensation. The vehicle

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[14] *Madelena, supra* note 3; *Jane Doe* v. *Awasis Agency of Northern Manitoba* (1990), 67 M.R. (2d) 260, 72 D.L.R. (4th) 738 (Q.B.); *Gareau* v. *B.C. (Family and Child Services)*, [1989] B.C.J. No. 1267 (C.A.) (QL).

[15] *Lyth, supra* note 4; *Aleck* v. *Canada*, [1991] B.C.J. No. 3058 (S.C.) (QL).

[16] *Doe* v. *Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 O.R. (2d) 225, 72 D.L.R. (4th) 580 (Gen. Div.) [hereinafter *Doe* v. *Toronto Police* cited to O.R.], *leave to appeal den'd* (1991), 1 O.R. (3d) 416 (C.A.).

[17] *See J.(L.A.)* v. *J.(H.), supra* note 3, which appears to have been the first such successful action against the non-intervening mother. She was held jointly liable with the perpetrator-father for compensatory damages, and solely liable for punitive damages, the punitive claim against the father being precluded by his previous criminal conviction. In *M.(K.)* v. *M.(H.), supra* note 3, claims of mental distress and breach of fiduciary duty were also brought against the plaintiff's mother who allegedly ignored her daughter's reports of the incest. It is unclear from the case report whether the case against the mother went to trial or to the jury, but it was reported by L. Hurst, "Sex, Memory and the Courts" *The Toronto Star* (29 August 1993) B1, that the negligence claim was unsucessful. The adoptive mother was also named as a defendant to the trial action of *Stubbings, supra* note 3, although she was not made a party to the appeal. *See also* (Feb 1993) A.B.A. J. at 16, in which two such claims, believed to be the first of this type in the United States, are discussed. Claims of this sort may be attractive because household insurance policies that exclude coverage for intentional or criminal conduct may cover parental negligence. The plaintiffs might also have therapeutic motives for seeking to hold liable the non-intervening parent. For a provocative and contextual analysis of the "bad" mother in this situation, *see* M. Ashe & N.R. Cahn, *Child Abuse: A Problem For Feminist Theory* (1993) 2 TEX. J. WOMEN & L. 75; M. Ashe, *The 'Bad Mother' in Law and Literature: A Problem of Representation* (1992) 43 HASTINGS L.J. 1017. However rational and expedient the decision in *J.(L.A.)* v. *J.(H.), ibid.*, may appear from some perspectives, one cannot help but regard the differential consequences for the mother and father-perpetrator as perverse and discriminatory from another.

[18] *See* Section II, below, in which doubt is expressed.

[19] *See generally* B. Feldthusen, *If This is Torts, Negligence Must Be Dead* in K. Cooper-Stephenson & E. Gibson, eds., TORT THEORY (Toronto: Captus Press, 1993) c. 7. I am speaking here about the role of the individual as instigator and manager of tort litigation. I do not mean to suggest, however, that once implicated in tort litigation, individuals do not experience psychological consequences from litigation. For example, being a named defendant in a tort suit, even if fully insured, may, and probably does, have psychological consequences. *See* S.C. Charles, J.R. Wibert & K.J. Franke, *Sued and Nonsued Physicians' Self-Reported Reactions to Malpractice Litigation* (1985) 142 AM. J. PSYCH. 437.

through which these goals are to be achieved is inevitably the award of substantial monetary damages.

What is striking about the sexual battery actions, or at least many of them, is that they appear far more consistent with the corrective justice model than with any instrumentalist notion of tort law.[20] Most sexual battery actions are brought by individual women standing alone, and against individual defendants.[21] Moreover, damages do not always seem central to the action. Frequently, plaintiffs have litigated sexual battery actions knowing in advance that there would be virtually no prospect of collecting on the judgment.[22]

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[20] One group of tort theorists, represented best by Weinrib, attempt to explain tort doctrine in terms of Aristotle's notion of corrective justice. Victim and perpetrator come together in an unmediated legal interaction characterized by formal equality. The action corrects the wrong by having the defendant return to the plaintiff something of value equal to that which was wrongfully taken or inflicted. *See* E.J. Weinrib, *Understanding Tort Law* (1989) 23 VAL. U. L. REV. 485. The corrective justice approach has excellent historical and intellectual credentials, but it does not purport to be, and is not generally, useful in explaining tort law as it actually functions in modern society. *See* Feldthusen, *ibid.*

[21] The Women's Legal Education and Action Fund (LEAF) actively participated in the litigation of *Norberg*, *supra* note 7; *M.(K.)* v. *M.(H.)*, *supra* note 3; and *Doe* v. *Toronto Police*, *supra* note 16. In T. Claridge, "Lawyer Says Incest Award May Not Be Paid", *The Globe and Mail* (3 December 1992) A10, the lawyer indicated that he took the case on a community service basis. I suspect that other lawyers may have done the same in other cases.

[22] It is not easy to discover this from the case reports. The plaintiff in *Myers*, *supra* note 1, admitted to the press that she had no expectation of recovery. *See* C. Allard, "Sask. Victim Wins $40,000 Punitive Award From Rapist" *The Lawyers Weekly* (28 April 1989) 2. *See $125,000 Award*, *supra* note 3. The lawyer for the plaintiffs in the apparently unreported cases of *Kunz* v. *Kunz*, and *M.L.M.* v. *R.T.*, indicated that it was unlikely the clients would collect on either judgment. The plaintiff's lawyer in *Brandner*, *supra* note 3 said: "it wasn't the money that was the issue. She wanted to make her father answerable to her for what he had done to her.... And she felt that if she came forward, and took a step like this, then maybe others would have the courage to do so as well." The lawyer indicated they expected to collect "some" of the judgment, but was unsure exactly how much. *See* D. Brillinger, "Manitoba Woman Awarded $170,000 for Sex Assaults by Father During Childhood" *The Lawyers Weekly* (12 April 1991) 1 [hereinafter *$170,000 for Sex Assaults*]. The defendant's meagre assets were discussed in *S.(B.J.)* v. *S.(F.T.)*, [1990] A.J. No. 1059 (Q.B.) (QL), a case in which the court refused to accept a settlement on behalf of the three minor plaintiffs. The matter went to trial in *B.(A.)* v. *J.(I.)*, *supra* note 3, and culminated in a substantial, and one assumes purely symbolic, award. In *P.(L.)* v. *L.(A.)*, *supra* note 3, counsel admitted that he would have to accept less than the full amount of the judgment. In Claridge, *ibid.*, the lawyer who represented (without fee) an incest victim awarded $284,000 reported that the father had attempted to make himself judgment proof and that the client was aware that she would probably not collect before taking action. Hurst, *supra* note 17, reports that the judgment in *Marciano*, *supra* note 3, has not been paid. The author says: "In reality, the chance of recovering any money are (sic) slim to nil in most cases". *See also infra* note 63, citing a substantial number of cases in which the defendant did not appear or present a defense. These raise the inference that the judgment will not be paid. *See also* Sheehy, *supra* note 9 at 217.

A similar pattern is evident with nineteenth century seduction actions. *See* Backhouse, *supra* note 9, n. 87.

Instead of the prospect of financial gain, many sexual battery plaintiffs have reported therapeutic motivations for suing.[23] By therapeutic, I mean only that some aspect of the litigation — the complaint, the process, or the outcome — is expected to, or does, assist the victim along the path to recovery.[24] For some plaintiffs, the sexual battery litigation was perceived as part of the healing process.[25] Others have

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[23] This probably strikes mental health care providers as less strange than it might strike lawyers. Herman identifies the "fantasy of compensation", which "usually includes components that mean more to the patient than any material gain. The compensation may represent an acknowledgement of harm, an apology, or a public humiliation of the perpetrator". *See* J. Herman, TRAUMA AND RECOVERY (New York: Basic Books, 1992) at 190.

[24] Therefore, the term is used to describe and include the somewhat different plaintiffs' motivations itemized in the text, ranging from altruism through cathartic testimony to revenge. Monetary recovery will also have therapeutic consequences, but I try to exclude these for analytical purposes when speaking of therapeutic expectations and outcomes in the text. I do not consider the therapeutic aspects of the litigation for persons other than the plaintiff, such as the defendant.

I use the term therapy with some misgivings. *See* M. Daly, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (Boston: Beacon Press, 1978). Yet the term therapeutic works best to emphasize in this paper the potential benefits of the action for the victim rather than more traditional collectivist goals of tort law such as deterrence. "Therapeutic Jurisprudence" as an emerging school of legal analysis is interested in the role of law as a potential therapeutic agent. *See* D. Shuman, *The Duty of the State to Rescue the Vulnerable in the United States* in M. Menlove & A. McCall Smith, eds., THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID (London: Dartmouth Press, 1993) 131 & 137. The author explains therapeutic jurisprudence as follows: "whenever possible to do so without offending other important normative values, legal rules should encourage therapeutic outcomes". *See generally* D.B. Wexler & B.J. Winick, *Therapeutic Jurisprudence As A New Approach to Mental Health Law Policy Analysis and Research* (1991) 45 U. MIAMI L. REV. 979. Borrowing from that, one might describe the sexual battery action as an explicitly therapeutic cause of action. For many litigants the therapeutic benefits are the main, not the incidental, aspects of the action.

[25] The plaintiff in *Mellor*, *supra* note 9, when asked why she was bringing the action, said: "I have a right not to be molested when I walk into a physician's office. I have a right to trust. Secondly, it is a catharsis for me to be in court." *See also $125,000 Award*, *supra* note 3. The lawyer in *Kunz*, *supra* note 3, told the reporter that his client was looking for a "cathartic effect" and that the litigation had produced such an effect. In *Beaudry*, *supra* note 3, the trial judge said:

> I am of the opinion that this trial will be therapeutic for Ms. B. Apart from any counselling and therapeutic help she may receive it should not ever again be necessary for her to go through the trauma of restating in graphic detail the events of the sexual abuse. She has done that, and I believe she has come through it very well.

In *Khalsa*, *supra* note 2, the judge, perhaps thinking the observation only relevant in an action by a Sikh woman against a Sikh priest, said:

> To some extent the impact on Mrs Bhullard (sic) is lessened, as her success in this lawsuit vindicates her and face is saved in a society where it is very important. By the same token, the plaintiff (sic) is discredited and has lost all respect and credibility in his community.

See also Herman, *supra* note 23 at 210, quoting an incest survivor who brought a civil suit against her father:

> I saw that it was a necessary thing. It wasn't that I needed a confession. I needed to do the action of holding someone accountable.

indicated that they brought suit to punish their assailant.[26] Still others claim they sought public vindication.[27] At least one plaintiff specifically hoped her suit would encourage other victims.[28] Taken together, these constitute an unusual[29] modern manifestation of the original justifications for tort law: corrective justice, vindication, appeasement, and even retribution.

This is not to say that this new trend in the civil justice system is without instrumental merit. On the contrary, sexual battery and third-party negligence actions appear to be collectively beneficial on a number of fronts.[30] But if actions of this sort are to continue, or even to flourish, it will be because individual plaintiffs continue to believe that the civil suit offers benefits, especially non-pecuniary benefits, that exceed their anticipated financial and psychological costs of litigation.

The main purpose of this article is to examine the ways in which the tort action might, and might not, achieve the therapeutic expectations which so many plaintiffs seem to hold. The analysis will of necessity be preliminary and incomplete. Although one can identify theoretical advantages of the tort suit, this is an area which

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In Hurst, *supra* note 17, one survivor is quoted as saying she wants "the satisfaction of confronting [her abusive father] in court", and a counsellor of abused men is quoted as saying "[m]oney isn't what it's about. It's about having the abusing parent acknowledge what he's done and take responsibility."

[26] In *Lyth*, *supra* note 4 at 30, the plaintiff's medical expert testified that "[h]is primary motivating force for the civil suit would appear to be his feelings of anger and his desire to seek revenge and further punish Mr. D". This was an action by a male student against a male school teacher. *Compare Brandner*, *supra* note 3, discussed in *$170,000 for Sex Assaults*, *supra* note 22. The client regarded the three year criminal sentence as "totally insufficient". Sheehy, *supra* note 9, identifies three cases in which the police had failed to press charges: *Myers*, *supra* note 1; *Harder*, *supra* note 4; and *Mundy*, *supra* note 9; and one, *C.* v. *M.*, *supra* note 1, where the defendant was acquitted of the criminal charge.

[27] *See* the discussion of *Kunz* in *$125,000 Award*, *supra* note 3 at 8, where the victim's lawyer stated that "she was after the ability to speak out and disclose the matter publicly". *See also* *Myers* and *Brandner*, discussed *ibid.*

[28] *See Brandner*, *ibid.* *See also* Herman, *supra* note 23 at 210: "I'll do it for that little girl. I'll do it for my brothers and sisters."

[29] There are other instances of ordinary individual plaintiffs using the tort system to make a point independent of recovering damages. *See* R.L. Binder, M.R. Trimble & D.E. McNeil, *Is Money a Cure? Follow-up of Litigants in England* (1991) 19 BULL. AM. ACAD. PSYCHIATRY & L. 151 at 154. There would be many more instances had a common law tort of discrimination been permitted to evolve in Canada, instead of requiring that these traditional functions of tort law be performed through statutory human rights tribunals. *See Seneca College* v. *Bhadauria*, [1981] 2 S.C.R. 181, 17 C.C.L.T. 106. *See* L.H. Mayhew, *Institutions Of Representation: Civil Justice and The Public* (1975) 9 LAW & SOC'Y REV. 401 at 413-14, indicating that parties in discrimination lawsuits tend to "seek justice" (as opposed to an expedient outcome) overwhelmingly more often than do parties to other types of civil suits.

[30] This is a topic in its own right, not considered here. I would note that what Linden would call the ombudsman function of tort law probably figures heavily here, more heavily in my estimation than deterrence. *See* A.M. Linden, *Reconsidering Tort Law as Ombudsman* in F.M. Steel & S. Rodgers-Magnet, eds., ISSUES IN TORT LAW (Toronto: Carswell, 1983) at 1. *See also* the discussion of Choisir, the French feminist action group that litigates these claims for symbolic damages only, discussed in Sheehy, and in Batt, *supra* note 9.

requires empirical investigation. The sample of reported cases is far too small, and the period following litigation far too short, to enable one to draw definitive conclusions. An attempt will be made to articulate specific questions for further investigation.

In Section II, I will outline the theoretical arguments for and against the sexual battery action as therapeutic jurisprudence. This will be based on a contrast between the role of the victim as plaintiff in tort, and as complainant in criminal prosecution. I will emphasize the formal equality between plaintiff and defendant which is the foundation of civil litigation, and the relatively greater degree of control enjoyed by the plaintiff at each stage of the tort process.

In Section III, I will explore the possibility that therapeutic expectations and outcomes may differ according to the role that has previously been played, or not played, by the criminal justice system.[31] I consider four scenarios, each exhibited in the recent case law. First is the case where civil litigation is commenced after the Crown has proven unwilling or unable to press criminal charges. Second is the case where the victim herself declines to press criminal charges. Third is the case where the tort suit is brought after the defendant has been acquitted of criminal charges in respect of the same conduct. Fourth is the case where the action is brought after the defendant has been convicted of criminal charges.

II. The Speculative Case For and Against the Civil Action for Sexual Battery as Therapeutic Jurisprudence

The fundamental distinction between the criminal and civil justice systems lies in the different roles played by the defendant and victim in each. The ostensible purpose of the criminal law is to promote the public interest by controlling criminal conduct. Only to the extent, often a limited extent, that the victim's interest is co-extensive with the state's definition of the public interest in a particular case does the criminal system address the interests of the victim.[32] Des Rosiers puts it this way:

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[31] There are many other differences amongst the sexual battery cases that might prove more significant, each of which is worthy of empirical study. Possibly significant variables include: age, sex, race, and social class of the victim, both as a victim and as a plaintiff; similar characteristics of the defendant; characteristics of the relationship between the parties — strangers, family members, trusted personal or professional acquaintances; the plaintiff's expectation and recovery of damages, including punitive damages, and the quantum thereof; the cost, duration and degree of difficulty of the litigation; the role of the defendant, if any, in the litigation; the therapeutic skills of plaintiff's counsel; the circumstances of the battery — isolated attack or prolonged series of attacks, extrinsic violence, violation of trust. The significance of some of these variables to the victims themselves has been studied. *See, e.g.*, studies cited in Feldthusen, *supra* note 9. There have been no studies of how these variables relate to the therapeutic expectations and outcomes in sexual battery actions.

[32] A stunning example was the recent decision of an Arizona court to handcuff and hold in contempt of court an eleven-year-old girl who, under pressure from her family, refused to testify against the male relative accused of sexually molesting her. *See* "Arena of intimidation" *Arizona Daily Star* (16 May 1993) F2. Therapeutic jurisprudence would have to conclude that for the sexual assault victim, the criminal process is anti-therapeutic. Herman, *supra* note 23, at 72-73

> The procedural protection to the accused, guaranteed by the *Canadian Charter of Rights and Freedoms*, will never disappear. The harm done to the victim and the place of women are not and will not be the cornerstones of our system. The criminal system is ill-equipped to reaffirm the victim's worth....[33]

In contrast to the peripheral position of the victim, the accused criminal stands at the centre of the criminal justice system. Conviction requires proof beyond a reasonable doubt. The introduction of damaging evidence is strictly controlled. The concerns of victims, the interest of rape victims in their dignity and privacy, for example, is considered less important than the accuseds' interest in an impeccably fair trial. Sentencing tends to be centred on the characteristics of the criminal, as much or more than on the characteristics of the crime.

These features of the criminal justice system may be a good thing. Indeed, the attempt to prevent innocent persons from being wrongfully convicted of crimes may be fundamental to our entire legal culture. Nevertheless, this focus on the rights of the accused inflicts costs on society, and it inflicts particular costs on victims of crime. Guilty criminals go free. The criminal process will often be alienating, and in the case of sexual crime, offensive, harmful or destructive to victims. There is also the fear (or the fact) that the acquitted or leniently sentenced perpetrator will commit further sexual crimes against the same or other victims.[34]

One of the marvellous advantages of our legal system is that it separates the criminal and civil consequences of the same act into different legal regimes. This offers the possibility that some of the shortcomings of the criminal system can be addressed by the civil system. And all this can be accomplished without influencing directly either the substantive or symbolic principles of the criminal law. Regardless of whether and how the criminal law has dealt with perpetrator and victim, the prospect of a victim-initiated civil suit remains.

The civil system is premised on the equality of the plaintiff and defendant. This is the critical difference between it and the criminal system that makes it an attractive option for victims of sexual battery. True, this is merely "formal equality".[35] Ordinarily, one would not suggest that formal equality was likely to be of much use to typical victims of sexual battery. Their civil actions are generally brought against

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says: "If one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law. Women who have sought justice in the legal system commonly compare this experience to being raped a second time." Of course, the issue here, raised but not resolved, is whether a tort suit is any better.

[33] *Limitation Periods and Civil Remedies for Childhood Sexual Abuse* (1992) 9 CAN. FAM. L.Q. 43 at 48, n. 12. *See also* Herman, *ibid.* at 72.

[34] In *S.(B.J.)* v. *S.(F.T.)*, *supra* note 22, the court stated:

> A second major effect of the abuse is that of fear. All three children, and the two girls in particular, have expressed fear that Mr. S. was "after them", i.e., that he might seek revenge for going to jail. This fear is not uncommon among sexually abused children, even though the perpetrator may not have made explicit threats to do so.

One wonders, however, whether the tort suit might provoke rather than restrain such a perpetrator.

[35] *See* Weinrib, *supra* note 20.

perpetrators who have been able to victimize them by brute force or abuse of trust and power. Not only are the victims relatively less powerful, but the perpetrators may be persons of relatively high stature to whom judicial deference might be extended.[36] Nevertheless, compared to the criminal system, the formal equality of the civil system constitutes a dramatic improvement in the relative power positions of victims and perpetrators of sexual battery.

Perhaps the best example of the significance of formal equality lies in the contrast between the civil and criminal burden of proof. In cases of sexual wrongdoing, it will often be a matter of "only her word against his". This is an argument that can stifle criminal charges, let alone convictions. However, in a civil case, courts can and do take her word over his.[37] The plaintiff's version need only be more credible than the defendant's. In the civil suit it is reasonably possible for a victim standing alone to be believed. Moreover, believing the tort plaintiff entails granting judgment on her behalf. In a criminal trial, the judge or jury might well believe the victim, but nevertheless acquit over a reasonable doubt.

Nor is it necessarily the case that tort law will be ruled by formal equality alone. We have witnessed recently, particularly in the Supreme Court of Canada, a remarkable willingness to look beyond formal equality and to consider real power imbalances in civil cases of sexual battery.[38] This is far less likely to occur in the criminal system where the power imbalance between the state and the accused is the one that dominates the agenda.[39]

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[36] In West, *supra* note 8 at 99, the author reports that a common idea in modern rape research is that rape is related to the low status of women in society. She further states that the most likely rape victims are the powerless, either by social station or by virtue of having been prior victims, and suggests that women's powerless role in criminal law reinforces this: *ibid.* at 110. *See also* the judge's comments in *Mellor*, *supra* note 9: "Her evidence must be viewed with scepticism because it is so accusatory of an apparently reputable physician."

[37] This seems to have been the case in each of the defended actions, where in every case except *R.N.* v. *S.L.S.* (plaintiff by counterclaim unrepresented), *supra* note 3, the plaintiff has prevailed. *See especially Mellor*, *ibid.*; and *C.* v. *M.*, *supra* note 1 where after giving "due allowance for emotionally driven exaggerations with respect to the number or frequency of the assaults", the court expressly took her word over his. Nevertheless, it must be kept in mind that empirical studies indicate that both men and women, but especially men, tend to regard men as more credible than women. *See* L.H. Schafran, *Practising Law in a Sexist Society* in L.L. Crites and W.L. Hepperle, eds., WOMEN, THE COURTS AND EQUALITY (Newbury Park, Calf.: Sage Publications, 1987) at 196-98. In M. Zapf, "Collecting Awards for Sex Assault Can Be Difficult" *The Lawyers Weekly* (11 June 1993) 12 [hereinafter *Collecting Awards*], counsel Joseph Murphy suggests that the very symptoms of abuse may make the victim a less credible witness. Against that, another counsel, Megan Ellis, suggests that trial judges encounter these allegations frequently in the criminal context and may have less difficulty believing them than might a typical civil litigation lawyer. *See* M. Zapf, "Suing for Sexual Assault" *The Lawyers Weekly* (11 June 1993) 1 at 1 and 10. *See also infra* note 65.

[38] *See especially Norberg*, *supra* note 7, and other cases cited *supra* note 10.

[39] *See, e.g., R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321. *See also supra* note 33.

Subject to the resource constraints discussed below, the plaintiff can control her own case. With one potentially crucial exception,[40] she can choose whether to sue at all. Within limits, the plaintiff may be entitled to proceed anonymously, or if she prefers, to insist that the parties be publicly identified by name.[41] She can choose what facts are brought before the courts, what expert evidence is presented and how,[42] and what legal theory of tortious wrongdoing constitutes her case.[43] The plaintiff may explain in detail the damaging consequences of the battery from her own personal point of view.[44] This is a matter that might receive little attention in the criminal trial.

It is an attractive assumption that by seizing control of the litigation, by speaking out, and bringing the perpetrator to justice, the once powerless victim can restore her self-control and self-respect. Authors have endorsed it, if somewhat tentatively.[45] Plaintiffs have expressed their own therapeutic expectations during and immediately after the litigation.[46] And the assumption of therapeutic benefit enjoys some support

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[40] This option may be constrained somewhat by the increasing tendency for the alleged perpetrator to initiate a civil action for defamation against women who have spoken about sexual abuse to their therapists and other family members. The party claiming to have been victimized may then have little choice but to sue in sexual battery by counterclaim. The use of the defamation action in this context is potentially very troubling, and clearly anti-therapeutic for the party attempting to cope with her problems in therapy who does not wish to litigate. Thus far, the courts have dealt effectively with these actions. *See especially Corney* v. *Corney*, [1992] B.C.J. No. 2802 (S.C.) (QL), suspending the actions until alleged victims deemed able to testify by a competent therapist. *See also Khalsa*, *supra* note 2, where the defamation claim was dismissed and the counterclaim in sexual battery succeeded; and *R.N.* v. *S.L.S.*, *supra* note 3, where both claims failed.

[41] For a discussion of the law governing whether a plaintiff is entitled to maintain an action identifying the parties solely by their initials, *see M.(S.)* v. *C.(J.R.)* (1993), 13 O.R. (3d) 148 (Gen. Div.), where the plaintiff's motion was denied. However, there are also cases where the victim prefers to be named and to have the perpetrator named as well. *See* "Judge Lifts Name Ban for Assault Victim, 11" *Saskatoon Star Phoenix* (18 June 1993) A13.

[42] *See* Sheehy, *supra* note 9 at 214-15; Feldthusen, *supra* note 9.

[43] *See infra* text accompanying notes 82-89.

[44] *See* K. Sutherland, *Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault* in Cooper-Stephenson & Gibson, eds., *supra* note 19, c. 4; Feldthusen, *supra* note 9; and J.E. McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm* (1992) 1 TEXAS J. WOMEN & L. 143. Note that s. 735 of the *Code* provides for victim participation, including a description of harm or loss, at the sentencing phase of the trial. As to the importance of the victim reconstructing the trauma to her therapist, *see* Herman, *supra* note 23 at c. 9. It is unknown whether retelling the story in court will have the same therapeutic consequences.

[45] In the specific context of sexual battery litigation, *see* West, *supra* note 8 at 114; Sutherland, *supra* note 44; Batt, *supra* note 9; and Sheehy, *supra* note 9. Sheehy is less optimistic than the others. More generally, Herman speaks of the third stage of recovery for sexual assault victims: "She is ready to take concrete steps to increase her sense of power and control" and "The first principle of recovery is the empowerment of the survivor." *See supra* note 23 at 197 & 133.

[46] *See supra* notes 25-28. *But see B.(P.)* v. *B.(W.)*, *supra* note 3 at 164. The plaintiff reported that she wished to make up for the abuse by establishing a normal father-daughter relationship with her incestuous father. It is unclear how litigation was expected to contribute to this goal. Also, the judge observed that testifying in open court had been "obviously most painful for her": *ibid.* at

in the empirical literature that deals with different types of civil litigation.[47] There we learn that litigants' evaluation of the litigation experience is *little* influenced by the actual outcome in the case, by the time or money spent on the litigation, or by variables such as age, education, race or sex. Rather, what really counts is whether or not litigants perceive that they have been treated fairly. Litigants want to perceive the proceedings as unbiased. They respond favourably to how they are treated, especially to whether they are treated with dignity and respect. They prefer a procedure in which they can participate, have a voice, or control. They value this even when they expect it to have little influence on the outcome. The formal equality of tort law has a tremendous advantage over criminal law in all these respects. In addition, there is the undoubted therapeutic benefit of achieving justice and vindication by winning the suit.[48] All people have a need for "value affirmation of their status by legal authorities as competent, equal, citizens and human beings".[49] Victims of sexual abuse have a particular need in this regard, and it is a need to which the civil justice system may be uniquely suited to respond.

In TRAUMA AND RECOVERY, Judith Herman identifies three stages of recovery for victims of trauma including sexual trauma:

> The central task of the first stage is the establishment of safety. The central task of the second stage is remembrance and mourning. The central task of the third stage is reconnection with ordinary life.[50]

If tort is to make any therapeutic contribution whatsoever, the civil action would only be useful as part of the third stage.[51] At this point, the victim is "ready to take

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166. Perhaps her motives for suing were financial. However, in that the defendant was in prison and did not chose to defend the suit, this seems unlikely.

[47] *See generally* T.R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings* (1992) 46 S.M.U. L. REV. 433 at 436-37, summarizing E. A. Lind *et al.*, *In The Eye of The Beholder: Tort Litigants, Evaluations of Their Experiences in the Civil Justice System* (1990) 24 LAW & SOC'Y REV. 953; and Binder, Trimble & McNeil, *supra* note 29. Readers should also consult L. Sas *et al.*, *Three Years After the Verdict* (1993), available from the Child Witness Project, London Family Court Clinic, 254 Pall Mall St., London, Ontario, N6A 5P6. Unfortunately, this report was published too late to be taken into account herein. It summarizes many findings that may apply to this article, and contains many important references. The study raises serious concern about the therapeutic impact of child victim testimony in criminal sexual assault cases.

[48] *See supra* note 29.

[49] *See* Tyler, *supra* note 47 at 440.

[50] *Supra* note 23 at 155. Similar stages recognized by others are summarized at 156.

[51] Obviously, civil litigation is the antithesis of the first stage. Counsel ought to take steps to advise against premature litigation. The tort suit could provide a forum in which the survivor passed through the second stage, telling "the story of the trauma....in depth and in detail": Herman, *ibid.* at 175. However, it would appear that this is better accomplished first in the care of a competent lay or professional therapist. The witness stand is no place to come to grips with repressed memories of the traumatic events. In Hurst, *supra* note 17 at B5, psychologist Judith Golden is quoted as saying: "If you attempt it at the wrong time in your healing process, you can get trapped in the angry revenge stage. If you're going to do it, you must do it at the end of therapy."

concrete steps to increase her sense of power and control....[and to make] a conscious choice to face danger."[52] "The first principle of recovery is the empowerment of the survivor."[53]

Addressing the role of the community specifically, Herman says:

> The response of the community has a powerful influence on the ultimate resolution of the trauma....[This] depends, first, upon public acknowledgement of the traumatic event and, second, upon some form of community action....[T]he community must take action to *assign responsibility for the harm and to repair the injury*. These two responses — recognition and restitution — are necessary to rebuild the survivor's sense of order and justice.[54]

Although Herman does not appear to contemplate the civil justice system as a possible vehicle for this community response, on the surface the tort action seems ideal.

In addition, a substantial minority of trauma victims find it therapeutic to make their personal tragedy the basis for social action.[55] One advocate for battered women put it this way:

> To make this system that victimized....so many women work for us, not being mean or corrupt about it, but playing by their rules and making it work: there's a sense of power.[56]

That, then, is the general case in favour of civil sexual battery litigation as a therapeutic agent. It remains to consider what remains unproven, and what reasons there are for wondering whether the case made so far might be too good to be true.

Herman does not claim to have done empirical research about the therapeutic value of civil litigation. Nothing in her book indicates that she would endorse such a course of action for the typical sexual trauma survivor. Her most explicit discussion of the issue arises when she deals with the "fantasy of compensation". She concludes that it may be better for the victim to break completely with the perpetrator and to seek restitution in a more social, general and abstract process than to struggle for compensation from the perpetrator.[57] In other words, sexual battery litigation might prolong, not assist, the recovery process. Along the same lines, Megan Ellis, who has represented a number of sexual battery plaintiffs, says: "The nature of the litigation is that the probing of both the abuse and the effects of the abuse is deeper than many survivors have experienced in therapy, and....this will precipitate a need for further therapy."[58]

Nor are the conclusions to be drawn from the empirical research about general civil litigation described above clearly relevant to this cause of action. None were

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[52] Herman, *ibid.* at 197.

[53] *Ibid.* at 133.

[54] *Ibid.* at 70 (emphasis added).

[55] *Ibid.* at 207.

[56] *Ibid.* at 211, quoting an interview with S. Buel.

[57] *Ibid.* at 190.

[58] "Suing for Sexual Assault", *supra* note 37 at 10.

based on studies of actual litigants. None tell us whether the subject might have benefited more had she not litigated, but tried to obtain vindication otherwise, or even done nothing at all. None of the litigation research to date has been conducted specifically with sexual battery victims. It is reasonable to suppose that therapeutic expectations and outcomes from litigation could differ significantly between sexual battery and other plaintiffs. Differences amongst sexual battery actions themselves, a few of which are discussed below, must also be considered before making across-the-board predictions about the therapeutic benefits of litigation. And what of the therapeutic consequences of settlement compared to litigation, especially in sexual battery actions?[59]

Pending empirical investigation, there are at least a few good reasons to suggest that civil litigation offers the potential to make matters worse, if not generally, at least in particular cases. In other contexts, cost, delay and stress usually make civil litigation the option of last resort, not something potential plaintiffs turn to for therapeutic benefit. Is the sexual battery action truly different in that regard and why?[60] Some feminists would begin with the opposite presumption; that a male-centred legal system was unlikely to offer anything of substantial benefit for women.[61]

Anecdotal remarks of plaintiffs and lawyers in the immediate aftermath of victory should be assessed with caution. We must learn how the plaintiff and others assess the experience after the euphoria wears off. What really was the therapeutic outcome? How does it compare to the plaintiff's expectations going into the litigation?

Thus far, plaintiffs have enjoyed an exceptional degree of success in their sexual battery actions.[62] But then, a great many civil battery actions have been undefended.[63]

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[59] For one victim's report of the anti-therapeutic impact of accepting a monetary settlement without securing an acknowledgement of guilt, *see* Hurst, *supra* note 17 at B5. Clients ought to be advised of this prospect by their lawyers. *See generally* P.C. Rosenblatt, *Grief and Involvement in Wrongful Death Litigation* (1983) 7 LAW & HUM. BEHAV. 351 for some useful observations about the therapeutic impact of wrongful death litigation. It seems to me that many of Rosenblatt's hypotheses ought also to be tested in the context of sexual battery litigation. For example, he speculates about how lengthy litigation may delay the recovery process, about how itemizing damages may exaggerate them and about how termination of the litigation may provoke new therapeutic needs. One of the goals of Rosenblatt's article is to sensitize lawyers to these issues so that they may take them into account when advising their clients.

[60] Sheehy, *supra* note 9, addresses cost, stress and delay in sexual battery actions. *See also* West, *supra* note 8 at 116. As to litigants' psychological dissatisfaction with accident litigation, *see* Binder, Trimble & McNeil, *supra* note 29 at 154.

[61] *See, e.g.,* M. Frye, WILFUL VIRGIN (Freedom, Cal.: Crossing Press, 1992) at 97.

[62] This is not meant to suggest that the civil system provides a complete set of remedies for all victims of sexual abuse. There undoubtedly exists sexual wrongdoing (stalking, or street and telephone harassment, for example) for which the common law has yet to fashion an adequate remedy. However, in the cases discussed herein in which the conduct is covered by the tort of battery, judgment was given for the plaintiff in every single case except one, *R.N.* v. *S.L.S.*, *supra* note 3. There the alleged victims sued by way of counterclaim to a defamation action, and proceeded at trial without legal representation, to, the judge observed, their probable detriment. Compare the ninety per cent success rate in the very common fathers' actions for seduction in late

It would be useful to determine whether this is a coincidence. Or, do plaintiffs prefer to litigate undefended suits, even without any prospect of obtaining damages, because these are a relatively safe means of achieving therapeutic goals? If so, is this a prudent investment on the part of the plaintiff or society?[64]

When the action is defended, there is a real risk that the plaintiff's high hopes might be shattered. A vigorous civil defence has the potential to be every bit as brutal for the victim as its better-known criminal equivalent.[65] This is unlikely to be perceived by the victim as a fair procedure directed toward value affirmation with dignity and respect. What will be the impact on vulnerable plaintiffs who, with the

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nineteenth century. *See* Backhouse, *supra* note 9 at 76-77. Whether plaintiffs who received low damage awards, such as in *Norberg*, *supra* note 7 or *Lyth*, *supra* note 4, would regard their cases as successful is another question. Herman, *supra* note 23 at 201 & 211 discusses the risk of a negative outcome and the necessity of accepting this in advance of the public battle.

[63] Of the thirty-two cases in which the information is clear from the record, eighteen were undefended, and fourteen defended.

The undefended actions were:

-of the rape cases listed *supra* note 1, *Myers*.

-of the other sexual assault cases, *supra* note 2, *H.R.* v. *F.M.*, and *Da Costa*.

-of the incest cases listed *supra* note 3, *Madelena*; *P.(L.)* v. *L.(A.)*; *B.(A.)* v. *J.(I.)*; *Brandner*; *Beaudry* (personal appearance first day only); *M.O. and D.T.* v. *F.A.*; *K.G.* v. *J.T.*; *D.C.* v. *K.C.*; and *B.(P.) v. B.(W.)*.

-of the other child sexual abuse cases listed *supra* note 4, *M.(A.K.)* v. *B.(M)*; *N.(J.L.)* v. *L.(A.M.)*; *S.M.Q* v. *Hodgins*; *G.(K.)* v. *T.(J.)*; *Jody Lynn N.*; and *Slinn* defended on damages only.

One defended rape action was *C.* v. *M.*, *supra* note 1, in which the defendant was acquitted previously of criminal sexual assault. *See infra* text at notes 100-01. Defended incest cases, *supra* note 3, include: *Kunz*, defended by deceased defendant's estate; *M.(K.)* v. *M.(H.)*, a case in which the defendant had prevailed on a limitations issue in the lower courts; *W.J.L.M.* v. *R.G.R.*, a case where the defendant had been acquitted at a prior criminal trial and was represented at least during the preliminary stages of the civil action; *G.* v. *R.* (personal defense); and *L.A.J.* v. *H.J.* where the father-perpetrator and mother were defended jointly. Defended child abuse cases, *supra* note 4, include: *Gray*; *T.K.S.* v. *E.B.S.*; and *Harder*, all cases in which there had been no prior criminal action. All three exploitation cases, *supra* note 10, were defended.

Amongst the undefended actions are some of those in which the highest damage awards have been made: *see B.(P.)* v. *B.(W.)*; *B.(A.)* v. *J.(I.)*; *Brandner*; and *Beaudry*; and *Kunz* all *supra* note 3; and *Jody Lynn N.*, *supra* note 4.

[64] *See infra* text accompanying notes 119-25.

[65] *But see* Sheehy, *supra* note 9 at 214-15; *but see also* at 206-07. Consider the emerging notion of the so-called "false memory syndrome", an unsubstantiated idea used to describe an allegation that the victim's claim is based on imagined memories, likely aroused by her therapist. Given the historical tendency to disbelieve women, especially about sexual assault, it is reasonable to expect that this idea will be received sympathetically in some courts. How will plaintiffs fare when told in a public forum that their injuries are based on "false memories"? This "false memory" notion also has a strong potential to invade the therapeutic process, again to the detriment of victims. For an example of a case in which it was held that some of the plaintiff's memories seemed to have been induced by her therapists, *see T.K.S.* v. *E.B.S.*, *supra* note 4. For an example of a case which is being defended vigorously, *see K.L.V.* v. *D.G.R.*, [1993] B.C.J. No. 1917 (S.C.) (QL), a case in which there have been numerous preliminary motions, including one which culminated in the plaintiff having to produce her private personal diaries on discovery.

help of their therapists, pour out the intimate details of their damages, only to have them dismissed or discounted?[66] What will happen to plaintiffs who fail to meet even the civil burden, or who are found to have consented to the conduct of which they complain?[67]

Finally, civil litigation is an expensive proposition. Damages in the exploitation cases have not yet proven sufficient to fund the litigation.[68] Many other sexual battery actions have been brought with no expectation of full, or even partial, recovery of damages.[69] True, these have often been the relatively inexpensive undefended actions against defendants previously convicted in the criminal courts, but even these cost money.[70] The possibility that the defendant's intentional misconduct will be covered by his liability insurance policies seems remote.[71]

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[66] *See* Binder, Trimble & McNeil, *supra* note 29 at 153-54, reporting psychological impact on plaintiffs who generally perceived that their damages were too low. I wonder about this in cases like *Norberg*, *supra* note 7 or *Lyth*, *supra* note 4. *See also* Rosenblatt, *supra* note 59 and Sheehy, *supra* note 9 at 214 and at 219-20. Sheehy also discusses judicial insensitivity, another therapeutic risk run by the plaintiff.

[67] *See* Binder, Trimble & McNeil, *ibid.* at 154, reporting negative effect of being blamed in litigation for own personal injury. I know of no Canadian case to have explicitly blamed the victim, although *Lyth*, *supra* note 4 and *Mellor*, *supra* note 9, come close. There are also comments from well-meaning judges which suggest that if the plaintiff suffers any future losses, especially economic losses, this will be her own fault. *See* Feldthusen, *supra* note 9. Sheehy, *supra* note 9 at 219, approaches this from the opposite perspective, speaking of the judges rewarding victims who have behaved "appropriately".

[68] *See* Feldthusen, *ibid.* One counsel who has litigated cases of this sort estimated to the author that disbursements alone to cover the costs of experts on economic loss and rehabilitation therapy would fall in the range of $7,500-$15,000. These funds must usually be paid well in advance of trial or judgment.

[69] *See supra* note 22.

[70] Seven cases were identified *supra* note 22 as ones in which plaintiffs had indicated that they knew they would not recover, or recover much, on the judgment. I could locate the necessary information about five of them, and all were undefended except *Kunz*, which was defended by the defendant's estate.

Of the twenty-nine cases in which the information is clear from the record, sixteen followed criminal convictions. *See infra* note 89. In only five of those cases did the defendant bother to defend the subsequent civil suit. Those were: *Glendale*, *supra* note 1, in which the defendant was probably solvent because the case went to appeal on quantum; *Lyth*, *supra* note 4, where liability was controversial and the defendant probably solvent; *G.* v. *R.*, *supra* note 3, where the defendant represented himself; *Slinn*, *supra* note 4, where liability was conceded; and *J.(L.A.)* v. *J.(H.)*, *supra* note 1 where the mother accused of negligence and the father-perpetrator were defended jointly.

[71] In the long run, the viability of the sexual battery action may depend on this. This has not been considered in detail in this article. *See* C. Brown, *Insuring Against Family Violence and Incest* [unpublished; on file with author]; *Storrie*, *supra* note 9; C. Cleary, *Litigating Incest Torts Under Homeowner's Insurance Policies* (1988) 18 GOLDEN GATE U. L. REV. 593; J. Colonari & D. Johnson, *Coverage for Parents' Sexual Abuse* (1992) FOR THE DEFENSE 2-5; D.K. Frey, *Application of Intentional Acts Exclusion under Homeowner's Insurance Policies to Acts of Child Molestation* (1991) 68 DENV. U. L. REV. 429 (case note on *Allstate Insurance Co.* v. *Troelstrup*, 789 P. 2d 415 (Colo. 1990)); *Collecting Awards*, *supra* note 37 at 13; and E.T. Lanham, *Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian Ad Litem? (1992)*

Who is funding this litigation? Nothing in the case reports yet suggests that sexual battery plaintiffs are typically women of substantial means, an intriguing fact in its own right.[72] If anything, many seem to have been unemployed women in precarious financial situations.[73] Do, and, if so, should Legal Aid plans fund tort litigation with no prospect of financial recovery? For how long can we continue to expect these actions to be financed by advocacy groups and charitable lawyers?[74] Eventually, will the sexual battery action exist only for the benefit of wealthy plaintiffs or to the detriment of wealthy defendants?

III. Sexual Battery Suits Compared and Contrasted According to the Presence or Absence of Prior Criminal Litigation

In this section, I consider four different sets of circumstances in which the civil action for sexual battery might be litigated. The first is the case where civil litigation is commenced after the Crown has proven unwilling or unable to press criminal charges. The second is the case where the victim herself declines to press criminal charges. The third is the case where the tort suit is brought after the defendant has been acquitted of criminal charges in respect of the same conduct. The fourth is the action brought after the defendant has been convicted of criminal charges. I will

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61 U.M.K.C. L. Rev. 101 at 113-14. *See also supra* note 17. Also, once insurers are involved, a far more vigorous defence can be expected, along with other complications in the litigation. *See* Hurst, *supra* note 17.

[72] The apparent absence of any incest or child sexual abuse litigation between members of relatively wealthy families is curious. Do the relatively wealthy avoid public civil litigation? Do they settle rather than go to trial? Are relatively wealthy defendants likely to mount such a vigorous defense as to destroy likely therapeutic benefits to the plaintiff? One U.S. study found reported child physical and sexual abuse four times more frequent in families with annual incomes of less than $15,000. If accurate, this effectively limits the prospect of damage recovery in many cases. However, the data may reflect only the incidence of *reported* abuse, not actual abuse. *See* Lanham, *ibid.* at 113.

Concern has been expressed that the development of a viable civil action may establish a new class of poorer victims, one more likely to be raped because she can not employ the civil action to her advantage. *See* West, *supra* note 8 at 116. That prospective tort liability alone would direct rapists away from wealthy victims and towards poorer victims seems unlikely. This is rather like saying that reckless drivers choose poorer neighbourhoods to minimize their damage exposure. It should, however, be the case that relatively wealthy perpetrators are better deterred than relatively poorer ones. The deterrent value of the civil sexual battery action requires more attention.

[73] I do not question Sheehy's observation that the tort process probably works best for women "relatively privileged in our current social structure by being heterosexual, able-bodied, white-skinned, and not poor". *See supra* note 9 at 228. I would only observe that neither have upper middle class or professional women tended to sue in civil battery. Virtually the same pattern has been identified with nineteenth century seduction actions. *See* Backhouse, *supra* note 9 at 75.

[74] For an example of the lawyers' traditional and understandable preference for cases that promise a financial return *see Collecting Awards*, *supra* note 37, and Hurst, *supra* note 17. One Area Director of the Ontario Legal Aid Plan indicated to me that although Area Directors might differ, he would not expect certificates to be granted in cases in which it was clear that no recovery would be possible. *See also supra* note 21.

situate the decided cases within these categories, and explore the possibility that therapeutic needs, expectations and outcomes may differ from one to the other.[75] Again I emphasize that the decisions are too few, and the issues too little explored to offer any definitive conclusions. I hope instead to suggest areas for further empirical research.

A. *The Police or Crown Decline To Press Criminal Charges*

It seems reasonable to postulate that the therapeutic benefits of tort litigation would be greatest in situations untouched by the criminal justice system. Indeed, if this were not the case, it would suggest that the criminal process itself created additional therapeutic needs for victims.[76] Furthermore, one might predict that the benefits of tort would be greatest in situations where access to the criminal justice system had been denied by state officials, rather than declined by the victim herself.[77] There are any number of reasons why officials in the criminal justice system might decide against criminal prosecution. I will consider three.

Perhaps the most common example, and also the most difficult to discover, is the case in which the police simply refuse to take and investigate the complaint seriously. A similar situation arises when the criminal sexual assault complaint is not prosecuted because officials simply do not believe the complainant. She may, perhaps accurately, strike officials as a poor, or even unreliable witness.[78] It will surely be unpleasant, if not harmful, for a willing complainant to learn that officials do not consider her case serious enough or strong enough to warrant criminal prosecution. The complainant may be victimized a second time by a criminal system that has priorities and perspectives different from her own.

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[75] There are many other differences amongst the sexual battery cases that might prove more significant, each of which is worthy of empirical study. *See supra* note 31.

[76] This is not implausible based on the discussion in Section II, above. *See especially supra* note 32.

[77] Sheehy, *supra* note 9 at 205, says: "It may be the most empowering action available to her, especially if the criminal process has derailed, as it so often does." *See also* West, *supra* note 8 at 112. The social importance of power to control entry into the legal system is also enormous, and in this context may affect dramatically what society comes to regard as typical and wrongful sexual misconduct. *See generally* D.J. Black, THE BEHAVIOR OF LAW (New York: Academic Press, 1976); and G.L. Priest, *Common Law Process and the Selection of Efficient Rules* (1977) 6 J. LEGAL STUD. 65.

[78] Here, I am considering adult complainants only. I leave aside the child and incest cases, because I am not confident that they could be described as cases in which "willing complainants" were denied access by state officials. The therapeutic aspects of tort suits involving children as plaintiffs require separate attention. *See* A.M. Boland, *Civil Remedies for Victims of Child Sexual Abuse* (1986) 13 OHIO N.U. L. REV. 223 at 228. Boland notes the difficulty with the testimony of children, the fear instilled in the child by the perpetrator, and the fact that some child victims will remain dependent living in the home of the perpetrator. *See also* Diamond, *infra* note 100. Developments in child testimony in criminal cases are discussed in A.H. Young, *Recent Canadian Developments in the Treatment of Children and their Evidence in Criminal Sexual Abuse Cases* (1992) 1 ANNALS OF HEALTH L. 157; and N. Bala, *Child Sexual Abuse Prosecutions in Canada: A Measure of Progress* (1992) 1 ANNALS OF HEALTH L. 177.

If a sufficiently large number of cases like this were to emerge, it would be useful to explore whether they exhibit unique therapeutic expectations and outcomes. Does it matter that criminal access is denied because of a negative assessment about the victim's credibility, rather than because of some non-personal problem with the substance of the criminal law? How do therapeutic expectations and outcomes compare to those where the matter has been previously tried in the criminal courts? How do they compare to those in the sexual exploitation cases?

Unfortunately, there have been so few such cases that the most we can safely conclude is that state refusal to prosecute does not account for the majority of civil battery actions. There have been two civil sexual battery cases where the evidence indicates a refusal by the police to pursue the complaint seriously.[79] There have also been at least three Canadian cases in which the civil action was initiated after the police declined to prosecute.[80] Only in one of these five cases, *Myers*, do we have any evidence that the civil suit was motivated by the state's refusal to prosecute. This was a violent acquaintance-rape case with racial overtones. The plaintiff pursued the civil case with explicit therapeutic motives and no prospect of financial gain.[81] This is a classic case of victim vindication in the face of state inaction, but it stands alone.

A second reason why officials might refuse to prosecute a sexual assault is because they have a relatively conservative definition of sexual assault. Within the limits of reasonable statutory interpretation, there is some flexibility about what constitutes a criminal sexual assault, consent, and so on. At the system entry level, state officials monopolize the power to make these definitions. The paradigmatic sexual assault in the male centred criminal justice system is the extrinsically violent stranger rape.[82] One could hypothesize that the further away from the paradigm, the

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[79] *See H.R.* v. *F.M.*, *supra* note 2 at 308:

> On October 28 the plaintiff telephoned the Fredericton City Police to report the incident. The officer with whom she spoke told her it was a very minor assault and, because of the defendant's age, she was wasting everybody's time. The officer said there was very little the police could do and suggested she see a lawyer. She later went to the City Police again and was told that, because the assault had happened outside the city, she should see the R.C.M.P. which she did. She gave them a copy of a written statement she had given her then solicitor. She called the R.C.M.P repeatedly after that with no result.

While this may have been relevant to the plaintiff's decision to sue, there is no direct evidence to confirm this. *See also Khalsa*, *supra* note 3:

> Following her disclosure of the assault to her husband they went to the police, who suggested that the matter be sorted out in the Sikh community.

Here, the victim only sued by way of counterclaim to a defamation action.

[80] Sheehy, *supra* note 9 at 211, cites *Myers*, *supra* note 1; *Harder*, *supra* note 4; and *Mundy*, *supra* note 9. In addition, *see Kunz*, *supra* note 3, where the perpetrator died before the criminal action could begin. Sheehy suggests that there might have been problems in securing a criminal conviction in *Myers* and *Mundy* because the plaintiffs were intoxicated, and because in both cases the plaintiff and defendant had been involved in a prior relationship with one another.

[81] *Supra* note 1. *See also* Allard, *supra* note 22. The attacker referred to his victim as a "squaw" while administering the beating and sexual attack.

[82] *See* J.M. Feinman, *The Ideology of Legal Reasoning in the Classroom* (1992) 57 Mo. L. Rev. 363 at 366; T.M. Massaro, *Experts, Psychology, Credibility and Rape* (1985) 69 Minn. L.

less likely are officials to believe the complaint, regard the complaint as a serious matter, or to believe (perhaps correctly) that the complaint will succeed in a criminal trial. Tort, on the other hand, offers plaintiffs the opportunity to define the wrong in the way in which they experience it. This in itself, it might be supposed, could have therapeutic benefit.[83]

We know that women are more likely to experience child sexual abuse or "non-violent" sexual assault at the hands of trusted acquaintances, than violent stranger rape.[84] One way to determine whether the tort system was being used to expand the type of sexual wrongdoing generally addressed by the criminal law would be to compare the types of cases in the two systems. One might predict, for example, that a good number of non-paradigmatic sexual assaults would be litigated in tort, certainly far more than in the criminal system.

The evidence is mixed. One striking difference between the civil and criminal cases is that there has not yet been a single civil judgment rendered against a defendant who was a stranger to the plaintiff.[85] And it is perhaps no coincidence that the two cases indicating clearly the police force's refusal to take a criminal complaint seriously were not rapes, but non-violent sexual assaults perpetrated by older acquaintances of the victim. In both cases, the victims were awarded damages in their civil actions.[86] In addition, one may speculate that in at least three other successful tort cases, criminal convictions would have been problematic. In *Harder*, it seems possible that a criminal prosecution could have failed on the issue of consent. And in two others, *Myers* and *Mundy*, a conviction might have been difficult because the complainants were intoxicated victims who knew their assailant.[87]

On the other hand, all the adult victim civil rape cases involved considerable extrinsic violence.[88] And virtually all the reported civil incest and child sexual abuse cases have dealt with conduct easily recognized as criminal. Indeed, more often than not, criminal convictions had actually been obtained before the civil actions were brought.[89]

REV. 395 at 406 citing C. Bohmer, *Judicial Attitudes Toward Rape Victims* (1974) 57 JUDICATURE 303 at 304, who claims that judges tend to accept a "real rape", "stranger in the alley" paradigm.

[83] *See* West, *supra* note 8 at 115.

[84] *See* Massaro, *supra* note 82 at 403 & 429. *See also* K. MacFarlane, *Sexual Abuse of Children* in J.R. Chapman and M. Gates, eds., THE VICTIMIZATION OF WOMEN (Beverly Hills, Calf.: Sage, 1978) 81 at 86, reporting that approximately 80 per cent of child sexual abuse cases are perpetrated by men the children knew and trusted.

[85] *See* West, *supra* note 8 at 117 who predicts this and suggests that tort is likely to be safest and most effective in these cases. Note that in general people tend to sue strangers, not close relations. *See* Black, *supra* note 77, especially at 41-48; and D.M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community* (1984) 18 LAW & SOC'Y REV. 551. Perhaps what is different about sexual battery actions in this respect is that one of the purposes of the action is to terminate symbolically the relationship. *But see supra* note 46. In any event, the plaintiff's difficulty in breaking with the general pattern should not be underestimated.

[86] *Supra* note 79.

[87] *See supra* note 80.

[88] *See supra* note 1.

[89] Cases in which the defendant had been previously convicted in the criminal courts for the same set of events are: of the rape cases, *supra* note 1, *Glendale*; of the other sexual assault cases

Only the sexual exploitation cases, and of them only two, appear to have granted legal relief where it was clearly unavailable from the criminal law.[90] They both dealt with sexual relations in "power-imbalanced (doctor-patient) relationships",[91] sexual relations that would have been defined as consensual under the *Code*. Until recently, they probably would have been defined as consensual in tort law as well. Nevertheless, civil courts have found exploitation deserving of civil punishment through punitive damages.[92]

There are a number of reasons to predict that exploitation cases would offer high therapeutic expectations and outcomes. Tort provides the victim the unique opportunity to obtain legal recognition and sanction of patently objectionable conduct. The actions deal with a particular type of misconduct, breach of trust, which may create unique therapeutic needs.[93] In two of the three reported exploitation cases the plaintiffs themselves explicitly claimed therapeutic motives for their tort litigation.[94] Again, actual data from a much larger sample of exploitation cases is required to verify the therapeutic expectations and outcomes.

What remains to be seen is whether actions of this sort will proliferate in the wake of the Supreme Court's decision in *Norberg*.[95] That may depend more on financial considerations than on therapeutic ones. On the surface, the action appears

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listed *supra* note 2, *Da Costa*; of the incest cases listed *supra* note 3, *Madelena*, *A.(B.)* v. *I.(J.)*, *Brandner*, *Beaudry*, *M.O. and D.T.* v. *F.A.*, *B.(P.)* v. *B.(W.)*, *J.(L.A.)* v. *J.(H.)*, *D.C.* v. *K.C.*, and *G.* v. *R.*; of the other child sexual abuse cases listed *supra* note 4, *N.(J.L.)* v. *L.(A.M.)*, *S.M.Q.* v. *Hodgins*, *Slinn*, and *Jody Lynn N.*; and of the exploitation cases, *Lyth*, *supra* note 10.

Only three cases appear to have been initiated after a criminal acquittal: *C.* v. *M.*, *supra* note 1; *W.J.L.M.* v. *R.G.R.*, *supra* note 3; and the case referred to in *D.C.G.(Re)*, *supra* note 3.

It is unclear from the reports whether there had been prior criminal charges in *P.(L.)* v. *L.(A.)*, *supra* note 3, *M.(A.K.)* v. *B.(M.)*, *supra* note 4, and *G.(K.)* v. *T.(J.)*, *supra* note 4.

[90] There was a prior conviction in *Lyth*, *ibid.*; the other two were *Norberg*, *supra* note 7; and *Mellor*, *supra* note 9. The closest to a criminal action for sexual exploitation is defined in s. 153 of the *Code*. It makes it an offense for an adult in a position of trust or authority to engage in sexual activity with a child between the ages of fourteen and eighteen. Consent is not a defence. *See R.* v. *M.(G.)* (1992), 11 O.R. (3d) 225, 11 C.R. (4th) 221 (C.A.). Consider also former s. 158(2) of the *Code*, now repealed. It attempted to protect relatively blameless, previously chaste female employees under the age of twenty-one from intercourse with their employers and others with power over them in the employment setting.

[91] *See Norberg*, *ibid.* at 457-58, per LaForest J.

[92] In *Mellor*, *supra* note 9, the Court awarded $15,000 in punitive damages; in *Norberg*, *ibid.*, the Court awarded $10,000 in punitive damages. No punitive damages were awarded in *Lyth*, *supra* note 4, a case in which there had been a prior criminal conviction.

[93] Exploitation cases can be compared to other breach of trust and confidence cases such as incest and many other child sexual abuse cases, cases which also constitute criminal behaviour. They can be contrasted to actions based on batteries perpetrated by strangers, and to batteries involving extrinsic violence. It would be intriguing to discover, for example, that the victims' therapeutic needs from the legal system were greatest in these exploitation cases that the law had, until recently, neglected entirely. For an analysis of the psychological significance of the breach of the professional trust relationship, *see* M.R. Peterson, AT PERSONAL RISK: BOUNDARY VIOLATIONS IN PROFESSIONAL-CLIENT RELATIONSHIPS (New York: Norton, 1992).

[94] *See supra* notes 25 & 26.

[95] *Supra* note 7.

more attractive than most others from a financial point of view. The successful plaintiff has an excellent chance of obtaining an award of punitive damages. Defendants in these cases will usually be able to honour any liability that the courts are likely to impose.[96] However, exploitation litigation may be more expensive than other sexual battery cases. The parameters of the cause of action are still uncertain. These are the types of defendants from whom a vigorous defence might be expected.[97] Moreover, damage awards in the exploitation cases have been strikingly low.[98] I suspect that relatively few plaintiffs in the future will be able to incur the risks and expense of exploitation litigation to meet therapeutic expectations alone.

B. *The Plaintiff Declines To Press Criminal Charges*

By definition, what is unique about the cases in this category is that the civil plaintiff herself has made the decision not to press criminal charges.[99] One possibility is that the victim may not want her assailant to suffer criminal penalties. For example, a mother might not want to have the father of her child incarcerated or given a criminal record.[100] Perhaps she would see this as detrimental to the child. Perhaps she could not afford to give up a possible source of child support. A more conventional, and more compelling explanation is simply that the victim did not wish to participate in a criminal trial in which her reputation and conduct might be judged more harshly than the accused's, all with no guarantee of conviction or, from her point of view, appropriate penalty. The civil suit promises the victim a safer and better chance of securing some legal relief.

The prospect of obtaining an award of punitive damages may provide an additional, or even a separate reason why a victim would decline to press a criminal charge. The significance of a prior criminal conviction for a civil claim for punitive damages is somewhat uncertain in sexual battery actions. At one time, the conventional view seemed to have been that punitive damages could not be awarded against a defendant who had been convicted previously of a crime based on the same wrongful conduct. There is still judicial support for this position.[101] However,

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[96] I say this in part because of the general correlation between power and wealth; in part because of the relatively low awards in the cases. It may also be possible to recover under the defendant's malpractice insurance in the case of professional defendants.

[97] The defendants have a financial stake in the outcome. They are also likely to have a professional stake in the outcome, particularly if there has been no prior criminal conviction. They have more resources to mount a serious defense than many other defendants. And they may seriously believe they have done nothing wrong or unlawful.

[98] *See* Feldthusen, *supra* note 9; and Sheehy, *supra* note 9. *See also supra* note 12. Compare to a similar pattern with nineteenth century seduction actions discussed by Backhouse, *supra* note 9 at 74.

[99] My assumption for the sake of analysis is that the Crown would be willing to prosecute with the cooperation of the victim.

[100] *See* West, *supra* note 8 at 113; R.L. Kohler, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence* (1992) 25 Loy. L.A. L. Rev. 1025 & 1028; and V. Diamond, *Does the Law Help the Sexually Abused Child?* (1990) 140 New L.J. 1033 at 1033.

[101] *See, e.g., Slinn, supra* note 4; and *J.(L.A.)* v. *J.(H.), supra* note 3.

exceptions are appearing in the sexual battery cases. The civil courts have awarded punitive damages because the prior criminal convictions did not cover the full course of conduct canvassed in the civil trial.[102] Moreover, at least two courts have expressed the view, in *obiter*, that a criminal conviction for precisely the same event need not necessarily preclude an award of punitive damages.[103] Regardless, it is beyond doubt that if the sexual misconduct has not been the subject of a prior criminal conviction, the successful sexual battery plaintiff is virtually assured that the court will award punitive damages.[104] So, although there is no evidence in the decided cases to suggest that the pursuit of punitive damages motivated defendants to decline to press charges, this might become a consideration in future actions against solvent defendants.

Given both these rationales, one might have expected a large number of cases in which the victim chose to employ the civil suit as an alternative to criminal prosecution.[105] In fact, more civil cases have followed criminal prosecutions than seem to have substituted for them. And of the latter, there is no case in which the plaintiff would appear to have forgone a realistic chance at criminal prosecution.[106]

If such cases ever do emerge, it would be useful to compare them to the cases in which a state official prevented a willing complainant from proceeding with a criminal prosecution. This would help us to isolate the therapeutic impact of official

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[102] *See B.(A.)* v. *J.(I.)*, *supra* note 3; *B.(P.)* v. *B.(W.)*, *supra* note 3; and *Da Costa*, *supra* note 2. In *S.M.Q.* v. *Hodgins*, *supra* note 4, punitive damages were awarded against a previously convicted defendant with no discussion. *See generally* Ontario Law Reform Commission, REPORT ON EXEMPLARY DAMAGES (Toronto: Publication Services, 1991) especially at 43-46. Query whether this may affect the criminal action. For example, it could influence whether criminal defendants are willing to plead guilty to one charge in return for having the others dropped, knowing this leaves them with residual civil exposure for punitive damages.

[103] *See especially E.D.G.* v. *Drozdzik*, *supra* note 1, per Lambert J.A., indicating a willingness to redress an inappropriately lenient sentence with a punitive damage award; and *H.R.* v. *F.M.*, *supra* note 2. In that the civil case has different parties, different burdens, and different evidence, it is not demonstrably wrong to punish the defendant for acts which did not support a conviction in the criminal trial. *See* REPORT ON EXEMPLARY DAMAGES, *ibid.*

[104] Indeed, the only argument against punitive damages in such a case is that the compensatory award is sufficiently large to achieve the goal of civil punishment.

[105] The role, or potential role, of legal counsel may be relevant here. It is not known whether any plaintiffs had received independent legal advice at the time the criminal charges were under consideration. Perhaps some plaintiffs were unaware at the time that they could forgo prosecution for a civil suit, let alone that such a choice might lead eventually to an award of punitive damages. What would be the implications of directing state officials to inform victims of their civil options? One possibility suggested to me by Professor Shuman is that the Crown might promote civil suits as an alternative to criminal prosecutions. *See H.R.* v. *F.M.*, *supra* note 2, in which the police did exactly that.

[106] Of the twenty-nine civil cases in which the information was available, only thirteen were not preceded by a criminal conviction. Two were initiated after a criminal acquittal: *see C.* v. *M.*, *supra* note 1 and *W.J.L.M.* v. *R.G.R.*, *supra* note 3. In five others, the Crown or police declined to press charges: *see supra* notes 79 & 80. In *Kunz*, *supra* note 3, the defendant died before trial. Criminal prosecution was not a realistic option in either *Norberg*, *supra* note 7, or *Mellor*, *supra* note 9. The last three actions, *M.(K.)* v. *M.(H.)*, *supra* note 3, *Gray*, *supra* note 4, and *T.K.S.* v. *E.B.S.*, *supra* note 4, were all brought many years after the event.

rejection, and the therapeutic benefit of the civil response. We might also compare these plaintiffs to those who declined to participate in either the civil or criminal justice system. But perhaps most interesting of all would be a comparison with plaintiffs who experienced both the criminal trial and the civil action. To these situations, I now turn.

C. *Defendant Previously Acquitted in a Criminal Trial*

There are numerous reasons why a criminal defendant might be acquitted of a charge of sexual assault or incest, even though he did in fact sexually assault the victim. This is the classic situation in which the civil action offers the possibility of affirming the victim's story, alleviating whatever harm she may have suffered from the criminal process and verdict, and possibly even punishing the assailant with punitive damages.[107]

Surprisingly, there appear to have been only two decided cases which fit this model, only one of which has gone to civil trial.[108] That was *C.* v. *M.*, a case in which the defendant was actually convicted of ordinary assault and sentenced to six months in jail. What makes it fit this model, and fit it rather well, was that the defendant had also been tried on criminal charges of sexual assault, buggery, and forcible confinement, but acquitted on those. Although difficult to believe after reading the reasons for judgment in the civil trial, I suspect that the defendant may have established reasonable doubt in the criminal proceedings about whether the plaintiff, after having been brutally beaten, had "consented" to the sexual acts. The defendant argued consent again in the civil action, but the judge chose to believe the plaintiff's version. The defendant was held liable for $40,000 compensatory damages. The court did not award any punitive damages because of the prior criminal conviction, although arguably it might have done so.[109] What we do not know is whether and to what extent the plaintiff in *C.* v. *M.* was motivated to sue for therapeutic reasons as opposed to financial reasons. The defendant was one of the few defendants who contested the civil action with counsel, so the possibility of a real financial stake in the outcome can not be ignored. But even if the plaintiff's motives were largely therapeutic, we can not be certain that the prior acquittal was significant in shaping these motives. There are simply too many civil suits that follow criminal convictions to allow us to draw such an inference.

Why is it that there have not been more tort actions brought after criminal acquittals? It would be interesting to interview similarly situated victims who, although aware of the tort option, had chosen not to attempt to rectify the criminal acquittal in the civil courts. Of course, it is premature to reach any firm conclusions, but a few are worth considering.

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[107] *See* Section II, above.

[108] In one of them, *W.J.L.M.* v. *R.G.R.*, *supra* note 3, a case in which the defendant was acquitted, the case has yet to come to civil trial. The plaintiff's motives are unknown.

[109] *See supra* note 102 and accompanying text.

One is that a criminal trial that results in an acquittal, especially an acquittal based on doubts about the victim's credibility or her willing participation, must be a most unpleasant, if not seriously harmful, experience for the victim. It is entirely reasonable to suppose that the last place to which such a victim would turn for therapeutic relief would be to lawyers and courts that have already failed and injured her.

Another is that the plaintiff's case will be more difficult than it would have been had the defendant been convicted. This is especially so if we expect that acquitted defendants are more likely to vigorously defend than are defendants who have been convicted and jailed. For example, it is surely no coincidence that *C.* v. *M.* was defended, whereas so many of the actions following criminal convictions were not.[110] These are discussed next.

D. *Defendant Convicted in a Prior Criminal Trial*

Once the defendant has been convicted and sentenced in criminal court, it might be reasonable to expect that relatively few victims would still feel it necessary to initiate civil actions for therapeutic reasons.[111] The decided cases support exactly the opposite conclusion. Of the twenty-six cases in which the information is clear from the record, fifteen followed criminal convictions.[112] In only four of those cases did the defendant bother to defend the subsequent civil suit.[113] And, if the number of undefended suits is any indication, there was little or no prospect of financial recovery in most of them.[114]

One possible explanation for why so many civil suits follow criminal convictions is that the criminal trial itself, including all its procedures, witness examinations, and

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[110] Cases in which defendants who were previously convicted in the criminal courts actively defended the civil suit are few: *see Lyth*, *supra* note 4 and *G.* v. *R.*, *supra* note 3. In *J.(L.A.)* v. *J.(H.)*, *supra* note 3, the civil action was defended jointly by the parents, the father having previously been convicted.

Active civil defences were the rule whenever the defendant had not previously been prosecuted in the criminal courts. This was the case in the two criminal acquittals, *C.* v. *M.*, *supra* note 1 and *W.J.L.M.* v. *R.G.R.*, *supra* note 3. Vigorous defences were also presented in cases in which no charges were laid, although they might have been: *see Gray*, *supra* note 4; *T.K.S.* v. *E.B.S.*, *supra* note 4; and *Harder*, *supra* note 4. *See also Kunz*, *supra* note 3 (defendant dying before trial) and *M.(K.)* v. *M.(H.)*, *supra* note 3 (limitations problems). Also defended were *Norberg*, *supra* note 7 and *Mellor*, *supra* note 9, two exploitation cases in which criminal charges would have been highly problematic, if not impossible. The only undefended cases in which there had been no prior criminal convictions were *Myers*, *supra* note 1; *H.R.* v. *F.M.*, *supra* note 2; and *K.G.* v. *J.T.*, *supra* note 4. There were also three actions initiated by persons who were then named in counterclaims as perpetrators of sexual battery: *see supra* note 40.

[111] These plaintiffs could also have turned to the criminal injuries compensation schemes instead of using the civil courts against presumably judgment-proof defendants. *See infra* notes 124 & 125.

[112] *Supra* note 106.

[113] *See supra* note 63.

[114] *See supra* notes 63 & 70.

sentencing, may have inflicted additional injury on the complainants which, they hope, can be remedied in the civil action.[115] A comparison with plaintiffs who have not experienced a criminal trial, especially those who decided against pressing charges, would enlighten us on this point. A related explanation would see the plaintiff turning to the civil system to further penalize a defendant who had received a criminal sentence perceived as inadequate. At least two plaintiffs have admitted as much.[116]

A somewhat different line of explanation, although not necessarily incompatible with others, follows from points raised in the previous discussion of the criminal acquittal cases. Civil suits that follow criminal convictions are probably the least expensive sexual battery actions to litigate. The plaintiff is virtually certain to prevail. The exercise is likely to be a relatively safe one for the plaintiff.[117] She may be able to rely largely on the transcript from the criminal trial. Undefended actions do not pose the risk of anti-therapeutic cross-examination.[118] So, even if the therapeutic needs were relatively less in cases of this sort, the prospects of achieving safe, cost effective therapeutic benefits may be relatively better.

If this is true, the question arises whether it is a prudent allocation of scarce judicial resources to employ an expensive formal trial when it is clear from the outset that no defense will be presented and no damages recovered. Even assuming that only formal legal process of some sort can meet these therapeutic needs, alternatives to undefended civil action are worth considering. The two logical possibilities are that the victims' legitimate therapeutic needs might be met by innovation in the criminal trial itself, or in the criminal injuries compensation schemes. If either approach were successful, it would be less expensive and time consuming than a civil trial, and would make the therapeutic benefits available to victims who could afford to maintain a civil action.

Given the criminal law's focus on the perpetrator, significant innovations there may be impossible. It is, however, possible that the interests of victims might assume relatively more importance at the sentencing phase.[119] One intriguing possibility is

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[115] *See supra* note 32.

[116] *See Lyth* and *Brander*, discussed *supra* note 26. I wonder whether this rationale would apply equally to cases where the civil action is undefended and there is, however, no prospect of recovery.

[117] I emphasize the word "relatively". Litigation is always stressful, and the procedures and outcomes always uncertain. Sexual battery victims always take a chance when they enter the civil justice system. *See also E.D.G.* v. *Drozdzik*, *supra* note 1, where the court imposed an extra cost penalty upon the defendant who forced the plaintiff to establish liability at trial, although he had been previously convicted for the same incidents.

[118] It would be interesting to compare the successful plaintiffs' levels of satisfaction after defended and undefended actions.

[119] For the reasons given in Section II, above, the ability of the criminal trial to respond to the needs of victims is limited. The victim may speak at the sentencing phase. *See supra* note 44. Another possibility is that what a judge says, and in what manner he or she says it during sentencing, could make a therapeutic difference to the criminal complainant. Also, the criminal trial is the one forum in which the defendant is certain to be present. This may in itself have therapeutic significance.

that the law could encourage defendants to offer sincere public apologies to their victims.[120] A sincere apology tendered in the criminal trial[121] might reduce the need for the plaintiff to sue an impecunious defendant in a subsequent action.[122] The parties to the civil actions have all been family members or close acquaintances, never strangers. It from those we know best that a sincere apology is most likely to be meaningful. It is also possible that encouraging sincere apologies would assist in the rehabilitation of sexual battery defendants themselves.[123]

As matters now stand, a criminal injuries compensation claim may be even more anti-therapeutic for the victim than the criminal trial itself.[124] But unlike the criminal

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[120] The role of apology is not entirely unknown in our law. Apology plays a central remedial role in defamation law, another branch of tort law where non-pecuniary loss figures so prominently. In criminal law, defendants who are perceived as having accepted responsibility for his acts is likely to receive a more lenient sentence, and *vice versa*. *See also Mellor*, *supra* note 9, where punitive damages were increased because of the defendant's perceived lack of remorse. *See generally* H. Wagatsuma & A. Rosett, *The Implications of Apology: Law and Culture in Japan and the United States* (1986) 20 LAW & SOC'Y REV. 461. In order to work to anyone's benefit, the court would have to be able to ensure that the apology was sincere. Unfortunately, at least in our culture, there may be much truth to Herman's observation that "Genuine contrition in a perpetrator is a rare miracle." *See supra* note 23 at 190.

[121] The defendant could be encouraged to tender the apology in conjunction with a guilty plea. One assumes this would suit the victim, who would not have to go through the criminal trial. It is difficult to see this having any negative repercussions for the defendant, except perhaps if he later wished to invalidate the guilty plea on appeal. It may be more problematic to encourage apologies from defendants who are convicted despite having perjured themselves to deny their guilt. Defendants who effectively admit to perjury when offering a sincere apology may risk being punished for obstructing justice more than rewarded for accepting responsibility to the victim.

It is not clear whether and how these competing interests might be balanced. In D.B. Wexler & B.J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues* (1992) 16:2 MENTAL & PHYSICAL DISABILITY L. REP. 225 at 229, the authors suggest that in the interests of effectively treating the criminal defendant, the law ought to encourage defendants to accept responsibility and plead guilty, and punish those who stand trial and offer a perjurious defence. The authors do not appear to have considered the possible therapeutic benefits for the victim who receives a sincere apology, even after a perjurious denial of guilt.

[122] Indeed, this option is most promising in cases in which the defendant is unable to pay damages. One would have to doubt the sincerity of an apology tendered by a solvent defendant if it were unaccompanied by an offer of financial reparation. An apology could still have an important role to play in actions against solvent defendants, but probably within the context of a tort action for damages. In that case, the incentive to offer the apology could be part of the civil process (reduction of punitive damages, for example). With the impecunious defendant, the incentives would have to be part of the criminal process.

[123] *See* Wexler & Winick, *supra* note 121.

[124] *See* Sheehy, *supra* note 9, who notes several possible advantages, but more anti-therapeutic aspects, to the compensation process as it presently operates. In particular, by limiting recovery to the "blameless" victim, these schemes may prove even more harmful to the sexual assault victim than the criminal process itself. Also, Newfoundland and many American states exclude claims arising from criminal acts committed by family members. *See* Sheehy, *supra* note

trial, the compensation process need not be, and indeed should not be, harmful to victims of crime. Improvements to the compensation claims process are both needed and feasible.[125] One possible development would be to have the boards mimic, so far as possible, whatever the civil court does for the benefit of the plaintiff in her suit against an absent, judgment-proof defendant.

IV. CONCLUSION

I remain sceptical that many victims will prove both willing and able to finance civil litigation in the long run without the prospect of substantial recovery. Even if tort litigation has important therapeutic benefits, a plausible but unproven hypothesis, I suspect that the costs, and other barriers to litigation, will put these benefits beyond the reach or desire of most potential plaintiffs.

The most one can claim is that the victim has far more power over the process in the civil system than in the criminal system. In consultation with good counsel,[126] the victim can be informed of the risks and benefits of litigation for and to her personally. She can make an informed decision whether or not to take the risk, and she can make an investment in the process designed to control the risk. If successful,

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9 at 228 and D.B. Wxler, *Victimology and Mental Health Law: An Agenda* (1980) 66 VA. L. REV. 681 at 688-96. *Compare* R. Langer, *Battered Women and the Criminal Injuries Compensation Board: Re A.L.* (1991) 55 SASK. L. REV. 453, and Brown, *supra* note 71.

On the other hand, a number of frontline counsellors have told me that their clients are highly satisfied with the process, and with awards typically in the $4,000 to $6,000 range. The Chairperson of Ontario's Criminal Injuries Compensation Board reports that "Sexual assault is now our biggest category, and incest cases the largest group within it", with 1,000 incest cases expected in 1993 alone. *See* Hurst, *supra* note 17.

[125] Indeed, a properly designed criminal injuries compensation scheme could perform the therapeutically necessary closing of the breach between the traumatized person and the community every bit as well as the tort action. *See* text accompanying note 54. Moreover, by using the compensation process, the victim could avoid the risk of the "fantasy of compensation" discussed *supra* note 57.

[126] It would be naive to overestimate the degree to which any client, let alone a legally-inexperienced victim of sexual abuse, actually controls her own lawyer, the civil process, or the court. It is more accurate to think in terms of the victim's lawyer (once she finds and engages one) as assuming a degree of control over the action. It must then be accepted that both the progress of the suit and the degree to which the process involves or empowers the victim will depend greatly on the skill and goals of the lawyer. One hopes that certain members of the bar will develop expertise in suits of this sort. Non-legal expertise and contacts with other professionals are also needed to guide the plaintiff, articulate the claim, and prove the damages.

Speaking more broadly, the role of the plaintiff's counsel as a therapeutic agent requires more examination. It might prove to be one of the more significant factors in influencing both therapeutic expectations and outcomes. Although I know of no writing directly on point, a substantial literature about feminist and other progressive styles of lawyering is developing. *See, e.g., Theoretics of Practice: The Integration of Progressive Thought and Action* (1992) 43:4 HASTINGS L.J. and within this issue *see especially* A.V. Alfieri, *Disabled Clients, Disabling Lawyers* at 769. The author discusses "victimization strategy" employed by benevolent lawyers to the detriment of their clients. *See also* A.V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative* (1991) 100 YALE L.J. 2107.

the tort suit has the potential to address the wrong done to the victim — a potential which is absent, by design, from the criminal system. For the victim, all of this constitutes a dramatic improvement over the criminal action. It nevertheless remains a stressful and risky proposition, and one well beyond the means of the ordinary victim of sexual battery.

Looking at the pool of cases decided to date, a few preliminary observations are in order.

The overwhelming number of these civil actions involve persons attacked as children. Does this reflect accurately the incidence of sexual abuse in our society? Do these plaintiffs have unique therapeutic needs, expectations and outcomes from civil litigation? A great deal of study directed specifically at the role of tort law for child victims is urgently needed.

It is undoubtedly significant that all of the actions to date have been brought against family members, former friends, lovers and acquaintances. Are the therapeutic benefits of the sexual battery action uniquely available for these relational wrongs?

No plaintiff has yet come forward after deciding to forgo the criminal system in favour of tort. a few seem to have been prompted to sue after being denied the right to prosecute by state officials. A few others seem to have been prompted to sue after the defendant was acquitted in the criminal courts. But the great majority brough undefended actions against persons previously convicted in the criminal courts and unlikely to be able to honour the judgment. Here, it is worht considering whether these legitimate therapeutic needs might be addressed more efficiently to the benefit of more victims outside the tort system.

The most important conclusions we can reach are these: First, the prevalence of sexual battery, especially child sexual battery, is staggering and tort litigation is one way of making this public. Second, the therapeutic needs of victims are not being met by the criminal justice system. Third, no one really knows whether the tort system is capable of meeting the therapeutic needs of victims. It is time to find out.