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1. The Victories of Jane Doe

Published by

Sheehy, Elizabeth A.

Sexual Assault in Canada: Law, Legal Practice and Women's Activism.

University of Ottawa Press, 2012.

Project MUSE. <https://dx.doi.org/10.1353/book.20786>.



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I. The Victories of Jane Doe

Elizabeth A Sheehy

In the chapter that follows, Elizabeth A Sheehy sets the stage for this book. She describes three legal landmarks that Jane Doe's engagement with the Canadian legal system achieved, but her real point is that Jane Doe waged and won her legal battles on her own terms. These terms included her insistence on being present in the courtroom when her rapist was on trial, which was contrary to "business as usual"; her active participation in the development of the legal arguments and evidence for her case, which again disrupted the ordinary practice of the law; and her questioning of sexist language and concepts such as the "gentleman rapist," which helped to win the lawsuit.

In 1986, an audacious woman known only as "Jane Doe" initiated a chain of radical actions against the Toronto Police on both political and legal fronts. In August of 1986 she had been raped in her bed in the middle of the night by a man armed with a knife. When she reported the crime to Toronto Police, they informed her that his modus operandi fit the pattern of a man they had dubbed the "Balcony Rapist" for his use of apartment balconies as his entry point to women's homes. Outraged that her rapist was familiar to police, Jane Doe demanded to know why she had not been warned. She told police that if they did not, she would warn other women in the area about this rapist.

Defying Toronto Police threats to prosecute her for "interfering with an investigation," Jane Doe and other feminists posterized her neighbourhood. Feminist grassroots knowledge tells us that rapists are ordinary men who operate within their comfort zones, often their own neighbourhoods. It was therefore no surprise, least of all to Jane Doe, when the rapist was turned in by his parole officer (he was up on wife assault charges at the time) within twenty-four hours of the appearance of the posters. He was prosecuted and pled guilty to raping five Toronto women, including Jane Doe. The police explanation for their failure to warn Jane Doe, "women would become hysterical and the rapist would flee the area," became the match to the fire. Jane Doe spent a

year working together with Women Against Violence Against Women [WAVAW] agitating for police accountability on how they investigate rape. But after watching police stonewall women's legitimate demands for change in rape investigations, Jane Doe announced her intention to sue. She initiated a ground-breaking lawsuit in 1987 against the police for sex discrimination in the policing of rape and for failing to warn her of the danger she unwittingly faced alone. By a wonderful stroke of luck, the Women's Legal Education and Action Fund [LEAF], a feminist legal fund dedicated to advancing women's equality through law, had opened its doors only two years earlier, in 1985. Jane Doe's case was taken on *pro bono* by some of the leading feminist lawyers in the country. Eleven years later, Jane Doe was vindicated by a \$220,000 damage award against the police and a judicial declaration that stated that police had violated her right to equality and had been negligent in failing to warn her.

THE STORY OF JANE DOE¹

Jane Doe tells her own story in her book of the same name. Of course her battle with the criminal justice system and the Toronto Police is neither the beginning nor the end of her story. This chapter focuses on Jane Doe's tenacity and strategic brilliance over her twelve years of litigating to hold the criminal justice system accountable. It also highlights her ongoing contributions as an educator, activist, and researcher in the struggle to make rape law and legal practice live up to its constitutional obligation of equal protection and equal benefit of the law for women who have been raped.

In the course of Jane Doe's protracted legal fight, she met many obstacles, not the least of which was that she was forced to change counsel when LEAF could no longer act for her as the trial date approached. She found lawyer Sean Dewart, an accomplished civil litigator who delights in suing police — a perfect match. But it soon became clear to him that he needed a lawyer with expertise in equality law, and so another search ensued until Cynthia Petersen stepped in to develop the sex discrimination argument. Along the way, as Jane Doe approached many lawyers as possible counsel or for advice, she was told that her case “didn't have a chance in hell.” She persevered, and painstakingly put together the witnesses whose testimony her lawyers would use to educate the judge about rape, from a feminist standpoint.

1 Jane Doe, *The Story of Jane Doe: A Book About Rape* (Toronto: Random House, 2003) [*The Story of Jane Doe*].

Jane Doe's legal saga ended in a stunning victory against the police in July of 1998. Justice Jean MacFarland delivered a judgment that damned the police and ordered them to pay Jane Doe damages for breaching her right to equal treatment under the law, guaranteed by the *Charter of Rights and Freedoms*; for her right to security of the person, also guaranteed by the *Charter*; and for carelessly failing to warn her that she fit this rapist's pattern of targets. Between the criminal trial of her rapist and her lawsuit against the police, Jane Doe made legal history at least three times.

FIRST LEGAL LANDMARK

Jane Doe fought for and won the unprecedented right to stay in the courtroom throughout her rapist's preliminary inquiry in 1987 for his five charges of rape. She had been told by the Crown attorney that she would be excluded from the courtroom during this legal process so that her trial testimony would not be "tainted" by hearing the other witnesses. This is standard practice in criminal trials; it is followed unquestioningly by lawyers. Defence lawyers will suggest that if a witness has heard other witnesses for the prosecution, they may change or at least shade their testimony to render it consistent with that of others. Alternatively, defence lawyers will claim disadvantage because they have been precluded from surprising the witness by confronting her with contradictory evidence given by others. From the Crown's point of view, they worry about the defence ability to destroy their case in just those ways described above. Knowing the odds against successful prosecution of rape in this country, Crowns may be extremely risk-averse.

Complainants — those "primary witnesses"² who testify as to criminal wrongs committed against them — and other witnesses have no "legal standing" to object on their own to matters that arise during a criminal trial. They are considered to have no personal stake in the trial. Instead, the trial is framed as a contest between the state, represented by the Crown attorney, and the accused individual, represented by a defence lawyer. Crown attorneys do not represent the interests of any witness, even the complainant. Rather, they represent the "public interest," and thus cannot be counted upon to defend the individual interests of their own witnesses, such as Jane Doe.

2 For discussion of the term "primary witness" see T Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-1988) 2 CJWL 310.

What this means is that a woman who wishes to challenge “the way things are done” in the trial of her rapist must first find a lawyer to argue for her right to “standing” to address the court on the issue. If the lawyer wins standing, he or she will then be given the opportunity to make the substantive argument to the court. However, most provincial legal aid societies will not provide funding for a complainant or witness to hire a lawyer to speak on their behalf. One relatively recent exception is that complainants whose private health and counselling records are sought by defence lawyers to discredit them are entitled to standing³ and to legal aid, at least in some provinces, so that they can defend their privacy and equality rights.⁴ But this is a very narrow exception that did not exist when Jane Doe wanted to stay in court during her rapist’s preliminary inquiry.

As Jane Doe describes in her book, her search for a lawyer to advance her right to stay in the courtroom to hear the prosecution’s case against her rapist was arduous. Many lawyers are so embedded in the legal system that to challenge some of its ways of doing business is heresy. She needed a *pro bono* lawyer to advance her claim to “standing” — one willing to make a significant court appearance without necessarily being paid for the preparation or the court time. Then she needed that lawyer to turn the legal system on its head.

Jane Doe’s persistence paid off, finally, when lawyer Rebecca Shamai accepted the challenge. To the displeasure of defence lawyers and prosecutors alike, Shamai waded into the fray to make this very unpopular argument for her client. The victory was sweet, for the judge accepted the argument that justice must not only be done; it must be seen to be done by those who have been subjected to criminal violence.⁵ The victory was sweeter still for Jane Doe when her lawyer was appointed as a justice of the Ontario criminal courts a few years later.

3 *R v Beharriel*, [1995] 4 SCR 536.

4 Legal Aid Ontario has developed a program whereby complainants in sexual assault cases whose records are sought are entitled to advice and assistance from a panel of specially trained lawyers. For discussion, see Saadia Dirie, *O’Connor/Mills Survey Report: Draft Client Satisfaction Evaluation* (Legal Aid Ontario, 2002) at 5, as cited in Lisa Addario, *Six Degrees from Liberation: Legal Needs of Women in Criminal and Other Matters* (Ottawa: Department of Justice, 2002) at Chapter Three; and “Women as Witnesses, Complainants and Third Parties in Cases of Intimate Violence and Sexual Assault,” online: <http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rro3_la20-rro3_aj20/p16.html>.

5 *R v Callow* (Ont Prov Ct Crim Div) (unreported judgment of Justice Kerr, 5 February 1987) [on file with the author].

Still, this important legal decision remains obscure, since it was never “published” by any legal reporter. The only known copy of it was obtained from Justice Shamai, who had stored it in a box in her basement. Legal reporters make determinations every day as to which legal decisions should be published. Sometimes they are published on the basis of their value as a “precedent,” meaning that a case might bind lower courts, and other times even lower decisions, such as that rendered by Justice Kerr in February 1987, might be published on the basis of their interest to other practising lawyers. Herein lies the rub: while this decision was noteworthy in that it was novel, neither defence lawyers nor Crown attorneys would have been likely to use it in their pleadings. Both camps see damaging consequences for their own cases if raped women are to stay in the courtroom while others testify. And, unfortunately, standing for those who would see value in this precedent — witnesses and complainants who wish to insert themselves into the criminal trial process — is rarely and begrudgingly granted.⁶ In other words, apart from feminist activists and lawyers working to change the legal system, there was no one to whom this legal advance would have been “of interest.”

SECOND LEGAL LANDMARK

Jane Doe made legal history a second time when her novel legal claim against the Toronto Police survived a motion to dismiss. Her successful fight to remain in the courtroom during her rapist’s preliminary inquiry provided her with critical information and the impetus to launch her civil suit one year later. During the course of the preliminary inquiry, she heard that she bore over one hundred similarities to the other women attacked by this rapist. She also learned about the role played by misogyny in the police failure to believe the first three women and to connect their rapes. As Jane Doe describes in her book, her overwhelming impression was that she had been used as bait by police, and that her rape was preventable.⁷

Once her statement of claim was filed, alleging *Charter* breaches and negligence by police, counsel for the police made a motion to dismiss. They asked the judge to throw Jane Doe’s case out of court before it was

6 For example, victims of crime do not have standing in an offender’s sentencing hearing to address the court, as was made clear by McLachlin J (as she then was) in *R v Antler* (1982), 69 CCC (2d) 480 (BCSC), except for the narrow opportunity now available under s 722 of the *Criminal Code* to read a Victim Impact Statement.

7 *The Story of Jane Doe*, *supra* note 1 at 80.

even to be heard on the merits. They argued that her claim failed to state a previously recognized legal theory of responsibility. Therefore, even if she could prove the facts she alleged, the law would afford her no remedy. Not only did Jane Doe win this motion but, like her first victory in the courtroom, she won this battle on her own terms — feminist terms. As she describes in her book, she insisted that LEAF prepare a statement of claim, here reproduced as Appendix A, written in ordinary language that she and other non-lawyers could understand, drawing upon feminist analyses of rape.⁸ For example, her claim did not use technical legal language, which in turn prompted the police to argue that “the plaintiff has failed to allege explicitly that the circumstances created a relationship of proximity between the police and the plaintiff so as to create a private law duty of care towards her.”⁹ This argument was ultimately rejected by the judge who, on hearing the motion, said, “[t]he pleading does not fail merely because the ‘traditional’ words are omitted.”¹⁰

This statement of claim advanced an early articulation of the “wrong” of the sexual assault evidence kit, a reform advocated by feminists seeking to strengthen the prosecution’s case. Paragraph eight reads: “The Plaintiff was required to submit to necessary invasive examinations to obtain evidence and to take potent medication to prevent pregnancy and infection.”¹¹ The claim articulated a feminist understanding of rape: “The Plaintiff states that the targets of sexual assault are overwhelmingly women while the perpetrators of the crime are overwhelmingly men.”¹² In paragraph seventeen, the claim asserted women’s agency, arguing that had police provided women with the relevant information, Jane Doe and other women would have been more vigilant than usual and therefore would have had the information necessary to ensure their safety. In addition, she would have known that the rapist had not murdered any of the women he had sexually assaulted. This information would have somewhat ameliorated the intense fear for her life that Jane Doe endured during the time that the rapist was in her apartment.¹³

8 *Ibid.*

9 *Jane Doe v Toronto (Metropolitan) Commissioners of Police* (1989), 58 DLR (4th) 396 (Ont HC) at para 116 [*Jane Doe No 1*].

10 *Ibid.*

11 *Ibid.*, appendix at para 8.

12 *Ibid.* at para 12.

13 *Ibid.* at para 17(c).

The claim also described police failures in systemic terms: failure to direct adequate resources to investigating and apprehending rapists because the targets are women; pursuing a policy that favoured apprehension of rape suspects over protecting likely targets because the targets are women; and discriminatory impact upon women of the policies and practices of police regarding sexual assault investigations. Finally, in paragraph twenty-five, the claim articulated the harm of discrimination and negligence by the police as well as the rape as requiring legal recognition and redress: “The Plaintiff endures continuing emotional upset as a result of this crime, including fear and insecurity about her safety, recurring violent nightmares, a sense of powerlessness and vulnerability, recurring and intrusive conscious memories of the event and the ensuing ordeal with the Police and the Courts...”¹⁴ This statement of claim laid out two different theories of responsibility for the police. It proposed that the police owed a “duty of care” to warn those women who were identifiable potential victims of the rapist. Knowing the pattern of his attacks, the area in which he was perpetrating, and the common features of his targets, police were in a position to seek out and warn women like Jane Doe. Instead, they “intentionally failed to notify her of the risk she faced.”¹⁵

The claim also proposed that the police relied on sex discrimination regarding women and rape in sexual assault investigations, including the investigation of the “Balcony Rapist.” Jane Doe was denied equal protection of the criminal law in violation of her s 15 right to equality under the *Charter*. Had the police not been handicapped by their tragically sexist beliefs, they would have been able to resolve the investigation far earlier, preventing the rapist’s attack on Jane Doe. Because her bodily security was put in jeopardy by the police decisions, she also argued that her s 7 right to security of the person was violated by their actions: police effectively used her as “bait” to catch the rapist.¹⁶

Lawyers for the Toronto Police urged the court to strike out her statement of claim for failure to state a legitimate “cause of action.” This was an interesting strategy, suggestive of some anxiety on the part of police that Jane Doe’s claim could open them wide up to legal liability for failure to do their job. In fact, one of their arguments was that if the City of Toronto, as employer of police, owed Jane Doe a private “duty

¹⁴ *Ibid* at para 25.

¹⁵ *Ibid* at para 20(c).

¹⁶ *Ibid* at para 24(c).

of care,” it “would encourage members of the public to bring actions against the police for every perceived failure to protect them against harm from criminal activity.”¹⁷

The motion to dismiss was argued in the Supreme Court of Ontario, High Court of Justice over five days at the end of January and the beginning of February in 1989. Judgment was rendered February 22nd that same year, when, in a carefully reasoned 101 page decision, Mr Justice Henry gave Jane Doe the green light to proceed to trial. He found that Jane Doe’s proposed “duty to warn” theory could, if the underlying facts were proven, show that the police knew enough about the specific danger in which Jane Doe stood, as a member of a “very limited group of foreseeable victims,” to place upon them a legal obligation to warn her or protect her.

Justice Henry also found that Jane Doe’s proposed *Charter* claims were valid legal theories of liability if the facts alleged could be proven at trial. While police are protected by common law from legal responsibility for harms caused by the lawful exercise of their discretion in carrying out their jobs, sex discrimination — for example, Jane Doe’s claim that police decided not to warn her and other women because they would become hysterical, “a judgment formed on the basis of women as perceived stereotypes,” and the deliberate use of another as “bait” — falls well outside this legitimate zone of immunity as either an abdication or abuse of police discretion.¹⁸ Justice Henry observed several times in his judgment that “the plaintiff will face an uphill battle in proving these assertions.”¹⁹ Jane Doe recalls that while affirming her right to proceed with her lawsuit, he kindly said to her, “Good luck, you’re going to need it.”²⁰

Unhappy with this result, Toronto Police appealed the judge’s decision to the High Court of Justice, Divisional Court of Ontario. Ironically, it was Justice MacFarland, who later presided over the trial itself, who granted leave to the police to appeal. The appeal was argued before a panel of three justices in 1990. This court agreed unanimously with Justice Henry and dismissed the appeal on 30 August 1990.²¹

The judges found that if Jane Doe could prove the facts alleged, the police would have been responsible in negligence law for either warn-

17 *Ibid* at para 69.

18 *Ibid* at para 177.

19 *Ibid* at para 121.

20 *The Story of Jane Doe*, *supra* note 1 at 144.

21 *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 74 OR (2d) 225 (H Ct Just Div Ct) [*Jane Doe No 2*].

ing or protecting those women identifiable as foreseeable targets of the serial rapist. While police claimed that a decision not to warn in these circumstances was immune from liability as an exercise of discretion in the legitimate fulfillment of their policy function, Jane Doe’s argument posited that the decision was motivated by discriminatory beliefs, rendering it arbitrary and irresponsible. The court accepted this argument in favour of the validity of the legal theory and went further. For the court Justice Moldaver said, “I would go further and suggest that even if the decision not to warn was one of policy and was responsibly made, it may have carried with it an enhanced duty to provide the necessary resources and personnel to protect the plaintiff and others like her.”²²

The court also upheld the validity of the *Charter* theories of liability using sections 7 and 15. The police attempted to persuade the court that there was no evidence of sex discrimination against women because Jane Doe could not easily compare how men were treated in similar investigations: “men are generally not subject to this kind of offence.” The court rejected this argument, noting that while it was “superficially attractive,” it was not determinative. The court rejected this formalistic approach to discrimination, and instead asked whether police ever would have failed to warn an identifiable group of men stalked by a serial killer for fear they would become hysterical? It was apparent to them that Jane Doe’s discrimination theory presented a triable case, and they dismissed the appeal. Doggedly, Toronto Police attempted a further appeal to the Ontario Court of Appeal. This time their appeal was dismissed out of hand, without reasons, in February of 1991.²³

THIRD LEGAL LANDMARK

Having survived the persistent attempt to dismiss the claim, Jane Doe’s case then languished in the lengthy civil litigation process for six years. During this time, her lawyers battled in the “discovery” process to secure documents and evidence from the police, in order to put flesh on the bones of the two claimed legal theories of police responsibility.

As I have argued elsewhere,²⁴ Jane Doe and her original lawyers, Mary Cornish and Susan Ursel, took a leap of faith — faith in feminist grassroots knowledge about how police process women’s reports of

²² *Ibid* at para 33.

²³ *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1991), 74 OR (2d) 225 (Ont CA) (leave to appeal denied with costs) [*Jane Doe No 3*].

²⁴ Elizabeth Sheehy, “Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know About Male Violence Against Women, or, From *Jane Doe* to *Bonnie Mooney*” (2005) 17 CJWL 97.

rape — when they boldly claimed they would prove systemic sex discrimination by the police in the Balcony Rapist investigation. At the time of filing the claim, Jane Doe had some documents secured through WAVAW's engagement with Toronto Police in 1986–87. But the discovery process secured for her the “smoking gun”: internal reviews and memoranda that demonstrated that senior officials were well aware of the systemic problems raped women faced when dealing with Toronto Police, as well as the individual notes taken by police with respect to the reports made by the first four women attacked in their beds by the Balcony Rapist.

Jane Doe worked tirelessly to find feminist experts to testify for her, who would educate the judge and the public following her case about rape, systemic sex discrimination, and women's equality. As she put it:

I wanted to call ... some expert witnesses of my own who could smash through police lines and provide the court with a definition of the crime of sexual assault, its inherent harm and the mythology that prevents us from understanding it. I wanted experts who could describe the sexist, discriminatory practices in policing and present me on the stand as an adult woman with some intelligence who reacted to her rape in ways that were “normal.”²⁵

The trial was lengthy: over eight weeks, presiding Justice Jean MacFarland heard some thirty witnesses and read “voluminous documentary evidence.” At the close of the trial, Justice MacFarland reserved judgment for seven months, and so the waiting began. Jane Doe describes that period of her life: “For seven months I just held on, waiting, un-sleeping, barely able to work.”²⁶

Jane Doe and her lawyers claimed victory because they had managed to get this ground-breaking claim to a full trial on the merits. In her book, where she includes her daily trial journal and cartoons of the witnesses, Jane Doe describes the trial as “magnificent in its horror and glory both. Grand theatre. Theatre of the absurd.”²⁷ It was a landmark simply to have a case of this magnitude and nature publicly aired. Most lawsuits against police are either shut out of the legal system or settled

²⁵ *The Story of Jane Doe*, *supra* note 1 at 172.

²⁶ *Ibid* at 275.

²⁷ *Ibid* at 273.

out of court,²⁸ which means that the evidence is kept from the public and no admission of wrong-doing is conceded.

On 3 July 1998, Jane Doe made legal history a third time when Justice MacFarland released her one-hundred page judgment finding the police responsible in law for violating Jane Doe's sections 7 and 15 *Charter* rights and for negligence.²⁹ This judgment represented the first time in Canadian law that police were found liable for failing to warn a potential victim of a crime. It was also the first time that they were held accountable for systemic sex discrimination in their enforcement of the criminal law. Toronto Police combed the decision looking for appealable errors, but the decision was carefully supported by the evidence and the law. Further, city council, the employers of the Toronto Police, refused to fund the appeal.³⁰

Beyond generating new law, Justice MacFarland's judgment is significant as a feminist primer on rape, as a record of police discrimination, and as a manual for lawyers showing how to prepare a systemic discrimination case. It represents the first time that a Canadian court has conceptualized rape in a feminist manner, "as an act of power and control rather than a sexual act. It has to do with the perpetrators' desire to terrorize, to dominate, to control, to humiliate; it is an act of hostility and aggression."³¹ Justice MacFarland described the effect of rape and the fear of rape on women's lives: "male sexual violence operates as a method of social control over women."³²

The judgment painstakingly reviewed the internal police reports that showed long-standing patterns of sex discrimination in the police processing of rape reports, official awareness of these reports, and persistent failure by police to remedy the deficiencies. For example, officers were responsible for unprofessional, incomplete rape investigations; women were "brushed off" by police when they tried to follow up on their reports and some were threatened with criminal charges if

28 For example, after the family of Albert Johnson, an unarmed African-Canadian man shot and killed by Toronto Police, managed to win against a police attempt to have the case dismissed for failure to state a legitimate legal theory (*Johnson et al v Adamson et al* (1982), 34 OR (2d) 236 (CA)), they settled with police out of court, on conditions that included no acknowledgement of liability and non-disclosure of the terms of settlement.

29 *Jane Doe v Metropolitan (Municipality) Toronto Commissioners of Police* (1998), 39 OR (3d) 487 (Ont Ct Gen Div) [*Jane Doe No 4*].

30 Discussed in more detail in *The Story of Jane Doe*, *supra* note 1 at 285–89.

31 *Jane Doe No 4*, *supra* note 28 at para 8.

32 *Ibid* at para 9.

they persisted; women were disbelieved, often without explanation or further investigation; and women were described in occurrence reports as liars and as fantasizers by misogynist officers.³³ Justice MacFarland commented: “I find it unsettling that in at least half of this random selection [of police occurrence reports] the ‘motive’ ascribed to the offence is that of ‘sexual gratification’ which to me belies a very basic misunderstanding of this crime.”³⁴ This evidence of widespread and systemic discrimination, “in every station in every division in the force,”³⁵ was particularized in the details of the investigations of the rapist’s first two rapes reported to police. Toronto Police occurrence reports for these rapes demonstrated disbelief of the complainants, overt sexism that interfered with their ability to reason, failure to investigate, and in one case, threats to the woman that she would be charged with mischief for falsely reporting rape, in addition to other serious defects.

The police inability to see rape as inherently and highly violent was also manifest in the specific investigation that Jane Doe challenged. Even when the police began to link the rapes after the third and fourth women reported being attacked, their response continued to be hampered by harmful sexist beliefs. Justice MacFarland concluded that police failed to devote sufficient resources to the investigation, failed to either warn or protect identifiable targets, and failed to release details to the public that could have sped up the investigation. She compared this “low key” investigation with another high profile investigation, and concluded that: “because [the rapist’s] victims were ‘merely raped’ by a ‘gentleman rapist’ — according to the Oliver Zink Rape Cookbook definition [a police text that categorizes different types of offenders] — this case did not have the urgency of the other.”³⁶

Their method of investigation was to identify likely targets and watch and wait for the next attack: “the women were being used — without their knowledge or consent — as ‘bait’ to catch a predator whose specific identity then was unknown but whose general and characteristic identity most certainly was.”³⁷ A warning was not issued to the women because police operated on the basis of a sexist stereotype,

33 *Ibid* at para 45, where Justice MacFarland reproduced the opinion of one officer, who said, “it would appear to me from talking to her, this young man is only fulfilling a fantasy of hers.”

34 *Ibid* at para 43.

35 *Ibid* at para 153.

36 *Ibid* at para 128.

37 *Ibid* at para 112.

believing women would become hysterical and the investigation would be jeopardized.

The judge rejected the police claim that they took sexual assault to be “a serious crime, second only to homicide”: “do they really believe that especially when one reviews their record in this area?” “I must conclude, on the evidence, they did not.”³⁸

The *Jane Doe* case as a legal precedent has been cited in over forty Canadian legal decisions, but because settled lawsuits do not receive wide publicity, we will probably never know the extent of the pressure that this case has exerted upon police to settle lawsuits against them. The decision has been analyzed in case comments and articles,³⁹ is taught as part of criminal law, tort law, and sexual assault law courses in Canadian law schools, and has served to inspire and galvanize feminist activists and university students across the country.

AFTER LEGAL VICTORY . . .

Jane Doe continued and continues to work to implement her legal victories on the ground. The *Jane Doe* case found constitutional violations of women’s rights occasioned by police practices and awarded damages, but did not order police to actually change how they investigate rape. However, the Auditor General for the City of Toronto was tasked by city council with reviewing Toronto Police practices regarding sexual assault investigations in the wake of the *Jane Doe* decision. Jane Doe and other feminists formed the Audit Reference Group (popularly known as the Jane Doe Social Audit) in order to provide input and expertise to the audit process.

The Auditor General, Jeffrey Griffith, released his report in 1999. The *Review of the Investigation of Sexual Assaults — Toronto Police Services*⁴⁰ found that, contrary to the claims of the lawyers who defended the police against Jane Doe’s suit, many of the problems identified by Justice MacFarland continued to plague women who reported sexual assault to Toronto’s police. Among many other problems, for example, police con-

38 *Ibid* at para 125.

39 See, for example, Melanie Randall, “Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of *Doe v Metropolitan Toronto (Municipality) Commissioners of Police*” (2001) 26 Queen’s LJ 451 and Scott Childs & Paul Ceyssens, “*Doe v Metropolitan Toronto Board of Commissioners of Police* and the Status of Public Oversight of the Police in Canada” (1998) 36 Alta L Rev 1000.

40 Jeffrey Griffiths, *Review of the Investigation of Sexual Assaults — Toronto Police Service* (Toronto: Toronto Audit Services, 1999).

tinued to deploy myths of so-called “false allegations” to unfound women’s rape reports; to allow untrained, first response officers, rather than members of the sexual assault unit, to erroneously make the determination of unfounded sexual assaults; to fail to maintain contact with the women who reported rapes; and to insist on lengthy and repetitive statements/interviews with women who reported rape. In consequence, Griffiths issued fifty-seven recommendations for change. He also urged police to work with community-based women’s groups to implement his recommendations.

In response, a group of feminist activists, led by Jane Doe, lobbied city counsel to support a proposal for a Sexual Assault Audit Steering Committee, composed equally of community-based women from the Violence Against Women sector and senior police, charged with the task of bringing the audit’s recommendations to fruition. Council passed the motion in early 2000, but the steering committee was not formally struck until 2003. In 2004, the Auditor General released a follow-up report⁴¹ that refuted the claim made 13 November 2003 by Julian Fantino, then chief of police, to the Police Services Board that all of the 1999 recommendations had been implemented. This second report found, among other problems, that there was little if any change regarding police follow-up with women who had reported sexual assaults; that police failed to engage in meaningful consultation with community-based experts in the area of sexual assault; that no progress had been made toward the implementation of a civilian complaints system specific to Aboriginal and racialized women who are raped; and that multiple shortcomings continued to undercut police training and the investigation of sexual assault.

The steering committee only began its work in 2005, when the Toronto Police Service finally gave its official approval for the participation of police. In an article devoted to analyzing the work of the steering committee,⁴² Beverly Bain, Amanda Dale, and Jane Doe explain that the committee’s Terms of Reference and Mandate required the members to address police training for sexual assault investigations, to examine police practices regarding the issuance of warnings regarding serial rapists, to deal with the use of technology in investigations, and

41 Jeffrey Griffiths, *Auditor General’s Follow-Up Review on the October 1999 Report Entitled: “Review of the Investigation of Sexual Assaults — Toronto Police Service”* (Toronto: Toronto Audit Services, 2004).

42 Beverly Bain, Amanda Dale & Jane Doe, “A New Chapter in Feminist Organizing: The Sexual Assault Audit Steering Committee” (2009–2010) 28 *Can Woman Stud* 6.

to develop a civilian complaints system focused on the needs of racialized and Aboriginal women. While Jane Doe's work with the steering committee produced recommendations for change on all of these fronts, the work was abruptly terminated in 2007 when the chair of the Toronto Police Services Board unilaterally dissolved the committee and cut the community-based women out of any further role in monitoring or facilitating implementation of the recommendations.⁴³

Sadly, Jane Doe's assessment is that many of the Auditor General's recommendations remain dormant to this day. She continues, however, to engage in research, activism, and public speaking aimed at exposing and challenging police and lawyers with respect to how they deal with women who have been raped and the crime itself. She published her book, *The Story of Jane Doe*, in 2003, to great acclaim. The book was nominated for several awards;⁴⁴ was reviewed in glowing terms;⁴⁵ and is required reading in several law school courses.⁴⁶ Jane Doe has also developed an original research agenda that includes interviewing women about their experiences regarding the publication ban,⁴⁷ the sexual assault evidence kit,⁴⁸ and police warnings.⁴⁹ She continues to lecture at conferences and on university campuses, to advocate for social and

43 *Ibid* at 10.

44 The book was nominated for the Writers Trust Prize for Political Writing, the Arthur Ellis Award for Crime Writing (non-fiction), and the Bouchercon Award for Crime Writing (non-fiction), all in 2004. It was re-issued in paperback in 2004 by Vintage Canada.

45 See, for example, Janine Benedet, "A Book Review About Rape — *The Story of Jane Doe: A Book About Rape*" (2003) 15 CJWL 215; Drew Milton, "Book Review: *The Story of Jane Doe: A Book About Rape*" (2005) 14 Dal J Leg Stud 221; Marion M Lynn, "*The Story of Jane Doe: A Book About Rape*: Book Review" (2005) 25 Can Woman Stud 204; Lynn Crosbie, "A story of rape: One woman's fight against the system produces a vital document; Jane Doe rejects the kind of linear narrative memoirs demand" *The Toronto Star* (20 April 2003) D12; and, most importantly, see the tribute to Jane Doe's book by Gillian Calder & Rebecca Johnson, "The Jane Doe Coffee Table Book About Rape: Reflections on Rebellious Writing and Teaching," Chapter 15 in this book.

46 CML 4111: Sexual Assault Law, University of Ottawa, Faculty of Law, as well as law courses at the University of Victoria and the University of Western Ontario.

47 Jane Doe, "What's in a Name? Who Benefits From the Publication Ban in Sexual Assault Trials?" in Ian Kerr, ed, *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (New York: Oxford University Press, 2009) 265.

48 Jane Doe, "Who Benefits From the Sexual Assault Evidence Kit?" Chapter 16 in this book.

49 Jane Doe, "A Warning About Warnings: Who Benefits From Rape Warnings?" Plenary Address, "Sexual Assault Law, Practice and Activism in a Post-*Jane Doe* Era," University of Ottawa, Faculty of Law, 6–7 March 2009.

legal change around sexual assault, and to provide countless hours of support and strategizing to women who have been raped. Jane Doe has been recognized with numerous awards for her courageous activism,⁵⁰ but perhaps her greatest victory lies in the fact that more than twenty years after she started her legal challenge against the police, and ten years after she won it, she, with all her brilliance, glamour, and humour, inspires feminists young and old to keep on keeping on.

50 Constance E Hamilton Human Rights Award, City of Toronto (2004); Women Who Have Made a Difference Award, The Linden School for Girls (2001); Rebel With a Cause Award, Canadian Association of Elizabeth Fry Societies (2000); Woman of the Year Award, Chatelaine Magazine (2000); Woman of Distinction, YWCA (2000); and Woman of Courage, National Action Committee on the Status of Women (1998).

APPENDIX A

Jane Doe v Board of Commissioners of Police

Court File No 21670/87

SUPREME COURT OF ONTARIO
BETWEEN
JANE DOE

Plaintiff

— and —

BOARD OF COMMISSIONERS OF POLICE FOR THE
MUNICIPALITY OF METROPOLITAN TORONTO,
JACK MARKS, KIM DERRY and WILLIAM CAMERON

Defendants

AMENDED STATEMENT OF CLAIM
(NOTICE OF ACTION ISSUED AUGUST 10, 1987)

1. THE PLAINTIFF'S CLAIM IS FOR:
 - (a) general damages in the amount of \$500,000.00;
 - (b) special damages in the amount of \$100,000.00;
 - (c) pre-judgment interest pursuant to section 138 of the *Courts of Justice Act*;
 - (d) a declaration that the Plaintiff's constitutional rights as provided for in the *Canadian Charter of Rights and Freedoms* and, in particular, by virtue of sections 7, 15 and 28 thereof, have been violated by the Defendants;
 - (e) damages resulting from the violation described in paragraph (d) hereof in the amount of \$600,000.00;
 - (f) costs on a solicitor and client basis;
 - (g) such further and other relief as to this Honorable Court may deem just.
2. The Plaintiff is a thirty-five year old woman who is employed as a free-lance worker in the film industry in the City of Toronto in the Province of Ontario.
3. The Defendant Board of Commissioners of Police for the Municipality of Metropolitan Toronto, (hereinafter referred to as the "Commissioners") have the statutory author-

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ity and responsibility under the *Police Act*, RSO 1980 c 381 and in particular sections 14, 16 and 17 with respect to policing in the Municipality of Metropolitan Toronto.

4. The Defendant Jack Marks (hereinafter referred to as “Chief Marks”) was at all material times the Chief of Police, responsible to the Defendant Commissioners. Chief Marks has authority and responsibility under the *Police Act*, and in particular section 57 thereof, as the Chief Police Constable, and under the regulations passed by the Defendant Commissioners for the governance of Metropolitan Toronto Police Force to direct the activities of all police officers and employees under the jurisdiction of the Defendant Commissioners. Chief Marks is liable in respect of torts committed by members of the police force under his direction and control in the performance or purported performance of their duties under the *Police Act*, s 24. Police Constables under the direction of Chief Marks whose names are unknown to the Plaintiff are hereinafter referred to as “Police Constables.”
5. The Defendant Kim Derry is a police officer and was one of the investigating officers responsible for the investigation of the Plaintiff’s rape and sexual assault. At all material times he was responsible to the Defendant Commissioners, and the Defendant Chief Marks.
6. The Defendant William Cameron is a police officer and was one of the investigating officers responsible for the investigation of the Plaintiff’s rape and sexual assault. At all material times he was responsible to the Defendant Commissioners, and the Defendant Chief Marks.
7. On August 24, 1986, the Plaintiff was sexually assaulted and raped in her own apartment, located on the second floor of an apartment building in the neighbourhood of Church and Wellesley Streets in Toronto. The rapist had gained access to the Plaintiff’s apartment by climbing up the outside of the building, and by forcibly entering through a locked balcony door. The rapist wore a mask, held a knife to the Plaintiff’s throat and threatened to kill her. He covered her head, and sexually assaulted and raped her. He then escaped through the front door which he had unlocked upon entering the apartment.
8. Immediately following these events, the Plaintiff reported the sexual assault and rape to Police Constables. Several Police Constables attended at the Plaintiff’s apartment to question her. She subsequently was taken to the Women’s College Hospital where she was examined in the Sexual Assault Centre of that Hospital. The Plaintiff was required to submit to necessary invasive examinations to obtain evidence and to take potent medication to prevent pregnancy and infection.

9. On October 3, 1986, Paul Douglas Callow was arrested by the Police and charged with the sexual assault of the Plaintiff, along with several other counts of sexual assault and other charges pursuant to the Criminal Code of Canada relating to similar attacks against other women in the same neighbourhood as the Plaintiff over the prior year.
10. A preliminary inquiry into the charges commenced in Toronto on February 2, 1987 before His Honour Judge Kerr. The Plaintiff was required to give evidence at the preliminary inquiry.
11. Following the preliminary inquiry, Paul Douglas Callow pleaded guilty to all charges against him. On February 20, 1987, he was sentenced to twenty years in prison and is now incarcerated in a penal institution.
12. The Plaintiff states that the targets of sexual assault and rape are overwhelmingly women while the perpetrators of the crime are overwhelmingly men.
13. The Plaintiff states that the Defendants knew or ought to have known that during the months prior to the assault on the Plaintiff several other women residing in the general vicinity of the Plaintiff's apartment had been sexually assaulted in a very similar manner indicating that the rapes were the work of a serial rapist.
14. The Plaintiff further states that the Defendants Derry and Cameron and Police Constables undertook an investigation in or about August, 1986 prior to the Plaintiff's sexual assault and rape which resulted in the identification of the likely apartments which would be the target of the said serial rapist, namely second and third floor apartments with balcony access occupied by single women in the Church-Wellesley area.
15. The Plaintiff asserts that she was readily identifiable by the Defendants as a likely target of the serial rapist by virtue of her distinguishing characteristics which included the fact that she was a white, single woman who resided on a second or third floor apartment with a balcony in the Church-Wellesley area.
16. The Plaintiff states that, although the Defendants identified the Plaintiff as a likely target, they specifically decided not to warn her or other women similarly situated to her for reasons which included the belief that such warning would cause hysteria on the part of the women and would alert the suspect to flee and not engage in further criminal activity.
17. The Plaintiff states that prior to her sexual assault and rape on August 24th, 1986 no

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steps had been taken by the Defendants to warn her or other women living in her neighbourhood of the fact that other sexual assaults and rapes had occurred recently, nor to alert her as to the circumstances in which the sexual assaults and rapes had taken place. If she had been warned of this potential danger, the Plaintiff states that she and other women in the area would have been more vigilant than usual and that she therefore would have had the information necessary to have chosen to take steps to ensure her safety. In addition, the Plaintiff would have known that the rapist had not murdered any of the women he had sexually assaulted. This information would have somewhat ameliorated the intense fear for her life that the Plaintiff endured during the time that the rapist was in her apartment.

18. The Plaintiff further asserts that the Police Constables knew the ethnicity and certain physically distinguishing characteristics of the serial rapist from an early date and in any event prior to August 24, 1986.
- 18a. The Plaintiff relies on the fact that the Defendants or persons acting on their behalf have admitted that they should have issued a warning in the circumstances of this case.
19. The Plaintiff further asserts that an investigation of this serial rapist conducted without the negligence of the Defendants would have led to an arrest at a much earlier stage and that as a consequence the Plaintiff would not have been raped or sexually assaulted.
20. The Plaintiff states that the Defendants Derry and Cameron were under a duty to take all reasonable steps to prevent the occurrence of the sexual assault and rape of the Plaintiff and women similarly situated to herself as identifiable victims. The Plaintiff alleges that the actions of the Defendants Derry and Cameron constitute negligence. The particulars of the alleged negligence are that they:
 - (a) failed to advise the Plaintiff, or other potential victims or to cause to be advised in a timely fashion of the nature of danger to which they were exposed and failed to alert them to steps that could be taken by them to protect themselves from the rapist;
 - (b) failed to warn the Plaintiff or other potential victims, or cause them to be warned, of the information that had been compiled on the rapist and, in particular, failed to warn the Plaintiff that she was a vulnerable and likely victim;
 - (c) knew or ought to have known that the Plaintiff was a member of a very narrow group of women who were likely victims of Paul Douglas Callow and intentionally failed to notify her of the grave risk she faced.
 - (d) failed to identify, or cause to be identified Paul Douglas Callow as a suspect notwithstanding they ought to have been aware of his prior criminal record

- for sexual assault and his residence in the area;
- (e) failed to investigate Paul Douglas Callow adequately or at all and failed to take steps to permit victims and members of the community to identify and locate him;
 - (f) within the limits of their responsibilities, failed to devote adequate resources and personnel to the protection of the Plaintiff and other women similarly situated to her;
 - (g) breached their statutory duty as provided in the *Police Act*, and in particular section 57 thereof;
21. The Plaintiff alleges that the actions of the Defendant Commissioners constituted negligence. The particulars of the alleged negligence are that they:
- (a) authorized, allowed, or failed to correct, a policy, regulation or practice carried out by persons under their direction which favoured apprehension of rape suspects over the protection of likely victims;
 - (b) failed to direct adequate resources to the investigation and apprehension of rapists, and this serial rapist in particular, when they knew or ought to have known that he would strike again against the Plaintiff or other women like her.
 - (c) breached their statutory duty as provided in the *Police Act* and in particular their responsibility under s 17 for policing and maintenance of law and order; under s 14 for ensuring the police force has adequate resources to fulfill that mandate; and under s 16 for enacting appropriate regulations to govern the force so as to prevent neglect or abuse and to render it efficient in the discharge of its duties.
22. The Plaintiff alleges that the actions of the Defendant Chief Marks constituted negligence. The particulars of the alleged negligence are that he:
- (a) directed or permitted those persons under his command to follow a policy of preferring apprehension of rape suspects over the protection of the Plaintiff and other women in a similar situation;
 - (b) failed to direct and organize those persons under his command for an efficient and effective effort to identify, investigate and arrest Paul Douglas Callow prior to his attack on the Plaintiff.
 - (c) failed to direct and organize those persons under his command to devote sufficient resources to the investigation of violence against women and in particular the activities of this serial rapist;
 - (d) breached his statutory duty as provided in the *Police Act*, and in particular section 57 thereof, and failed to exercise the responsibility put on him by virtue of the regulations passed by the Defendant Commissioners.

23. The Plaintiff states that the actions of the Defendants referred to in paragraph 24 below constitute actions which are subject to the application of the *Charter*.
24. The Plaintiff states that the Defendants violated the Plaintiff's right to security of the person provided under section 7 of the *Charter* and her right to equality both before and under the law and her right to equal protection and equal benefit of the law without discrimination and more particularly on the basis of sex all of which are provided under sections 15 and 28 of the *Charter*, the particulars of which are as follows:
- (a) the Plaintiff repeats the allegations contained in paragraphs 12–22 hereof;
 - (b) the Defendant Commissioners and Chief Marks authorized or allowed and the Defendants Derry and Cameron carried out a policy, regulation or practice which placed the value of the criminal investigation above their duty to protect the Plaintiff by using women such as the Plaintiff as bait. They did this by choosing not to warn potential targets like her by going into the community to release detailed information, especially to those at highest risk (i.e. single women in second and third floor apartments with balconies), but rather continuing to collect evidence for prosecution at the expense of ensuring women's safety;
 - (c) the Defendants failed to assign to the apprehension of the rapist an appropriate or adequate degree of energy and resources because the victims of such potential crimes were women;
 - (d) in the alternative, because the victims of sexual assault and rape are overwhelmingly women, the Defendants' policies and investigative practices in dealing with sexual assault and rape had the effect of discriminating against the Plaintiff on the basis of her sex.
25. As a result of the negligence, breach of duty and breach of the Plaintiff's constitutional rights by the above named Defendants, the Plaintiff has suffered and continues to suffer pain, inconvenience and loss of enjoyment of life. The Plaintiff endures continuing emotional upset as a result of this crime, including intense fear and insecurity about her safety, recurring violent nightmares, a sense of powerlessness and vulnerability, recurring and intrusive conscious memories of the event and the ensuing ordeal with the Police and the Courts, prolonged bouts of depression and anxiety and a generalized sense of uncertainty and distrust. She has been required to undergo psychiatric counselling and therapy. Her normal habits of daily life have been adversely and permanently affected, and she has incurred expenses and lost income.

ELIZABETH A SHEEHY

The Plaintiff proposes that this action be tried in Toronto.

October 14, 1988.

CORNISH & ASSOCIATES

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