

IN THE SUPREME COURT OF CANADA

AUG 6 3 1993

(On Appeal from the Court of Appeal
for the Province of British Columbia)

BETWEEN:

LAURA NORBERG

APPELLANT
(Plaintiff)

- and -

MORRIS WYNRIE

RESPONDENT
(Defendant)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENER

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1 PART I: INTRODUCTION

1. The Intervener ("LEAF") is an advocacy organization engaging in test case litigation, research and public education to secure equal rights for women as guaranteed by the Canadian Charter of Rights and Freedoms. LEAF has developed expertise regarding issues affecting equal access to justice for sexual assault survivors. This factum has been prepared without the benefit of receiving the Respondent's factum.

Sexual Assault is a Sex Equality Issue

2. Sexual assault is a social practice that harms women as women, because they are women. Just as women are sexually harassed based on their sex, women are sexually assaulted in other ways based on their sex. This Court has recognized that sexual harassment is used to "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status." The same is true of sexual assault.

30 Janzen and Govereau v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252 at 1285.

3. Women occupy a disadvantaged status in society as targets for coerced sex. Sexual assault, and the fear of sexual assault, function cross-culturally as a mechanism of social control over women, enabling men to assert dominance over women and maintaining the existing system of gender stratification. Sexual assault operates as both a symbol and reality of women's subordinate social status to men.

40 **The Common Law Should be Developed in a Manner Consistent with the Values in the Canadian Charter of Rights and Freedoms**

4. In Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd., McIntyre J., for this Court, stated that:

1 "the judiciary ought to apply and develop principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution....In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law."

[1986] 2 S.C.R. 573 at 603.

10 5. LEAF submits that the Court should develop common law principles in a manner most consistent with promoting the constitutional rights of such disadvantaged groups as women and persons with disabilities. These include the right to equal benefit and protection of the law (s. 15 of the Charter) and the equal right to security of the person (ss. 7 and 28).

Law Society of British Columbia v. Andrews, [1989] 1 S.C.R. 143.

R. v. Swain, May 2, 1991, not yet reported (Supreme Court of Canada).

20 6. Dr. Wynrib was Ms. Norberg's general physician. She told him in the context of the doctor-patient relationship that she was addicted to fiorinal. He did not treat her addiction. Instead, he used this information for his own sexual benefit. On about a dozen occasions, he asked her to his bedroom, put a bottle of fiorinal on the dresser, kissed and touched her sexually and got on top of her and made motions of sexual activity, and later gave her fiorinal pills or a prescription. The British Columbia Supreme Court and Court of Appeal dismissed her civil claims for sexual assault and
30 negligent prolongation of her chemical dependence.

Case p. 102, l. 16-22, p. 97, l. 7-24, p. 87, l. 6-29, p. 94, l. 17 - p. 95, l. 4, pp. 361-405.

40 7. The development of tort doctrine in this case will have a direct bearing on the degree to which women receive the equal protection and benefit of the law, and in particular, the degree to which harms experienced by women are recognized by the legal system. It raises questions, which are of particular significance to women, about the appropriate legal response to the use of positions of power to harm or exploit vulnerable people. The Court's decision will do the following:

- 1 (a) help determine the degree to which the harms suffered by victims of batteries commonly termed "sexual assault" will be recognized and redressed;
- (b) affect the ability of people who need medical assistance to consult doctors safely and without experiencing sexual exploitation;
- 10 (c) affect the legal protection offered to people suffering from a chemical dependence.

The Reality of Sexual Assault

8. At least 90 per cent of sexual assaults involve female victims. Most perpetrators of sexual assault are male. Clinical studies of rapists have found that two factors operate in their selection of a rape victim: availability and vulnerability.

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Canadian Urban Victimization Survey No. 4, "Female Victims of Crime," (1985) Ministry of the Solicitor General, Supply and Services Canada at p. 2.

Report of the Committee on Sexual Offences Against Children and Youth: Sexual Offences Against Children and Youth, vol. 1 (Ottawa: Canadian Government Publishing Centre, 1984) (Chair: R.F. Badgley) at pp. 196-98 and 213-15.

30

Katz, S. and Mazur, M.A., Understanding the Rape Victim. A Synthesis of Research Findings (New York: John Wiley & Sons, 1979) at p. 153.

9. Some women are more vulnerable than others:
- (a) People with disabilities are at least 150 per cent as vulnerable to sexual abuse as individuals of the same age and sex who are not disabled. Recent research showed that 27 per cent of the offenders were special service providers and that the more severely disabled the victims were, the more likely they were to be abused by a service provider.

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Dick Sobsey, "Sexual Offences and Disabled Victims: Research and Practical Implications" (1988) 6:4 Vis-a-vis: A National Newsletter on Family Violence, Canadian Council on Social Development at 1.

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- (b) American studies have shown that black women are substantially overrepresented in rape statistics of victims.

Katz, S. and Mazur, M.A., Understanding the Rape Victim. A Synthesis of Research Findings, *supra*, at pp. 39-44.

10

- (c) It is increasingly acknowledged that women who consult professionals are at risk of sexual exploitation. This makes it dangerous for women to seek help. Just as sexual harassment is a barrier to sex equality in the workplace, the threat and reality of sexual assault are barriers to sex equality in access to medical and other professional services.

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The Preliminary Report of the Task Force on Sexual Abuse of Patients, An Independent Task Force Commissioned by The College of Physicians and Surgeons of Ontario (May 27, 1991) (Chair: Marilou McPhedran).

Glen O. Gabbard (ed), Sexual Exploitation in Professional Relationships, Washington, American Psychiatric Press, Inc., 1989.

30

Peter Rutter, M.D. Sex in the Forbidden Zone: When Men in Power - Therapists, Doctors, Clergy, Teachers and Others - Betray Women's Trust (Los Angeles: Jeremy P. Tarcher, Inc., 1989).

Janzen and Govereau v. Platy Enterprises Ltd., *supra*.

- (c) Young women are particularly vulnerable to sexual assault, especially by those known to them.

40

Canadian Urban Victimization Survey No. 4, "Female Victims of Crime," *supra*, at pp. 2-3.

Laws Reinforcing Inequality

- 1 10. The law's response to sexual assault has played a unique role in the history of women's inequality. The law has contributed to the disadvantage women suffer by offering distinctive and unusual protections to persons accused of sexual assault.

C. Boyle, Sexual Assault (Toronto: Carswell, 1984) Ch. 1.

- 10 11. In the past decade, the criminal law has progressed towards recognizing the seriousness of the problem of sexual assault for women. Significant changes in the criminal law of sexual assault have removed husbands' immunity and corroboration warnings, and have ensured that the names of complainants will not be published against their wishes. LEAF submits that it would be consistent with this trend to ensure that tort law provides effective redress for all forms of sexual assault.

- 20 Boyle, Sexual Assault, *supra*, Ch. 3 at pp. 47-49.

Canadian Newspapers Co. v. Canada (Attorney General), [1988] 2 S.C.R. 122.

12. LEAF submits that the decisions of both courts below effectively condone sexual assault of women in general, and in particular, the sexual exploitation of chemically dependent women, in the following ways:
- 30

- (a) by applying a standard of "consent" which enables aggressors to coerce sexual submission without civil liability;
 - (b) by denying recovery to litigants regarded as "immoral," thus making them targets for uncompensable abuse;
 - (c) by failing to recognize and treat as significant the harms of sexual assault and prolonged chemical dependence.
- 40

PART II: POINTS IN ISSUE

- 1 13. From a sex equality perspective, the issues of consent, ex turpi causa and damages in this case raise the following issues:
- (a) Consent: How should the law of consent to battery in cases of sexual assault protect against abuse of the power arising from the social inequality of the parties?
- 10 (b) Ex Turpi Causa: Should the law treat chemical dependency and perceived sexual immorality as reasons for denying recovery in tort?
- (c) Damages: How should damages be assessed in order to recognize the true harm caused by sexual assault and prolonged chemical dependence?

PART III: ARGUMENT

- 20 A. CONSENT: How should the law of consent to battery in cases of sexual assault protect against abuse of the power arising from the social inequality of the parties?

14. LEAF submits that the legal standard set for consent to batteries termed "sexual assault" should restrain abuses of power. Failure to do so denies women the equal protection and benefit of tort law.

30 Analysis in Courts Below

15. The trial judge made the following findings of fact and law relevant to consent:
- 40 a) "[Ms. Norberg was] addicted to the heavy use of tranquillizers and painkillers."
- b) [Ms. Norberg] returned to Dr. Wynrib. She stated that she was desperate."
- c) "At no time did [Ms. Norberg] refuse his advances either directly or indirectly....she simply did not want to believe what was happening."
- d) "By apparently voluntarily submitting to the doctor's advances...[Ms. Norberg] gave her implied consent to the sexual contact....She obviously had deep misgivings about engaging in this conduct....Clearly she did not

wish to do so. However, at no time did she express her feelings to [Dr. Wynrib] that she did not wish to engage in sexual activities with him."

- 1 e) "It cannot be said that Dr. Wynrib either exercised force or threats of it."
- f) "While her willingness to engage in sexual activity was obviously inspired by the prescriptions which the doctor would provide, nevertheless her implied consent was voluntary."

Case, p. 365, ll. 18-20, p. 366, ll. 5-10, p. 367, l. 1, 1-12, 25-27, and 32-38.

10 16. Neither the trial judge nor the Court of Appeal articulated a standard of consent, but the adoption by the Court of Appeal of the trial judge's findings suggest that:

- 20 (a) Unless coercion is effected by overt threats or physical force, or unless the woman actively refuses or lacks cognitive capacity, a woman will be held to have consented to sexual contact;
- (b) The vulnerability of Ms. Norberg arising from the doctor-patient relationship, her chemical dependence, and her sex, does not require a doctor to refrain from sexual contact with her.

30 17. LEAF submits that both courts below adopted an unduly broad definition of consent which did not address the distinction between consent and coerced submission in the context of unequal power. They reached conclusions as to the existence of consent without consideration of the inequalities of sex, disability (chemical dependence), and the confidential relationship, here between doctor and patient. They describe Ms. Norberg's submission as if it were consent freely exercised under conditions of equality.

40 Catharine A. MacKinnon, Toward a Feminist Theory of the State (Cambridge: Harvard University Press, 1989) at 175.

John G. Fleming, The Law of Torts (7th ed.) (Sydney: The Law Book Co. Ltd., 1987) at 73.

18. LEAF submits that such an approach is inconsistent with the legal principle of sex equality. The practical result is to permit more powerful members of society to prey with impunity upon more vulnerable members. The message to the public is that if you have power you are permitted to use it; if you do not have power, you must resist the exercise of power with the power that you do not have. This approach misdescribes the exploitation of social disadvantage as a free exchange between equals.

10 19. The findings of the courts below suggest that consent is present where a person in a position of power forces a person in a position of less power to make a choice between two unwanted alternatives: in this case, between unsupervised chemical withdrawal (with its pain and dangers) and unwanted sexual activity (with its pain, indignities, and dangers). Such a forced choice should not be seen as the exercise of autonomy.

20 20. The standard utilized in the courts below can be criticized as reflecting the interests of those (mostly males) in a position to exploit their power to gain sexual access to vulnerable others. The standard classifies certain pressures (e.g. threats and force) as illegitimate and other pressures (e.g. offers of drugs to a chemically-dependent person) as legitimate. Such a standard places the obligation on people subjected to "legitimate" pressure to withstand that pressure, rather than on
30 those having greater power to avoid exerting such pressure.

21. This standard might be appropriate with respect to social, economic, physical, and psychological equals but is not appropriate when there is inequality of such aspects of power. The gender implications are clear with respect to sexual assault, where the vulnerable people are likely to be women and children, while the
40 more powerful people are likely to be men.

Inequalities of Power

22. Other areas of law commonly recognize and control relationships of power and vulnerability:

- 1
- (a) Such doctrines as duress, undue influence, and unconscionability provide relief against unfair contracts. Unconscionability applies where there has been an "unfair advantage gained by an unconscientious use of power by a stronger party against a weaker." An element of unconscionability is "inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger."
- 10
- Morrison v. Coast Fin. Ltd. (1965), 55 D.L.R. (2d) 710, at 713 (B.C.C.A.)
- (b) Doctrines and statutory protections have developed to protect the structurally weaker party in certain legally recognized relationships, such as fiduciary, consumer, employment, and tenancy relationships.
- 20
- (c) This Court has recognized the connection between power, exploitation and gender in the field of sexual harassment.
- Janzen and Govereau v. Platy Enterprises Ltd., *supra*, at 1281 and 1284.
- 30
- (d) With respect to all assaults, Section 265 of the Criminal Code distinguishes between consent and submission, and recognizes both that consent may be absent even where there are no overt signs of resistance and that the relative positions of the complainant and the accused can determine whether there was consent or submission. "[N]o consent is obtained where the complainant submits or does not resist by reason of...(d) the exercise of authority."
- 40
- (e) Consent is no defence to several offences regarding sexual contact with children. While women should not be legally seen as the same as children, these offences reflect an understanding that an inequality of power arising from youth may mean sexual contact is exploitative and/or a breach of trust rather than an exchange between equals.

Criminal Code, Sections 151, 152, 153(1)

1 23. Similar insight should inform the distinction between consent and coerced submission in the tort law of sexual assault. Achieving equality requires the recognition of social hierarchies. In this case, the factors to be recognized are sex, disability, and the confidential relationship (here between doctor and patient), factors which combined and interacted synergistically.

10 Law Society of British Columbia v. Andrews, *supra*.
R. v. Turpin, [1989] 1 S.C.R. 1296.

a) Sex

20 24. Ms. Norberg is a woman, and as such is socially vulnerable to sexual abuse. Women as a group have suffered systematic political, social and economic disadvantage. A persistent signal and instance of such disadvantage is coerced sexual activity, usually by men. Forms of sexual coercion can range from threats of death or injury to the withholding of jobs, shelter, money, medical treatment, approval, and spiritual comfort. On the basis of sex, Ms. Norberg suffered "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."

30 Janzen and Govereau v. Platy Enterprises Ltd., *supra*. at 1256.

Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (London: Yale University Press, 1979) at 1.

b) Disability

40 25. Ms. Norberg was suffering from chemical dependence on prescription drugs for which she needed treatment. The Canadian Human Rights Act recognizes that such dependence is a disability. A woman with a disability is particularly vulnerable to sexual assault. Her need to accommodate her disability presents an opportunity for the

exertion of pressure and for exploitation. Doctors can prescribe drugs and are therefore in a position to exploit chemical dependence on prescribed drugs.

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Canadian Human Rights Act, R.S.C. 1985, Ch. H-6, s. 25.

c) Doctor-patient relationship

26. Ms. Norberg was a patient seeking assistance from a doctor. A person
10 needing and seeking help is inherently less powerful than the person in a position to provide it. People with special expertise, especially professionals, are accorded power and authority by others. It may be difficult to resist someone licensed and expected to act in one's best interests.

Shirley Feldman-Summers, "Sexual Contact in Fiduciary Relationships," in
Glen O. Gabbard, ed., Sexual Exploitation in Professional Relationships,
20 supra, at p. 193.

d) Confidential relationship

27. Ms. Norberg disclosed the confidential fact of her vulnerability (dependence
on prescription drugs) to Dr. Wynrib because he was her doctor. This knowledge
(combined with his authority to prescribe drugs) gave him power over her, which he
30 chose to exploit to his sexual advantage.

Glen O. Gabbard, ed., Sexual Exploitation in Professional Relationships,
supra.

Nanette Gartrell et al., "Psychiatrist-Patient Sexual Contact: Results of a
National Survey 1: Prevalence" (1986) 143 *American Journal of Psychiatry*
1126.

40 Thomas Lyon, "Sexual Exploitation of Divorce Clients: The Lawyer's
Prerogative?" (1987) 10 *Harvard Women's Law Journal* 159.

Sheldon H. Kardener et al., "A Survey of Physicians' Attitudes and Practices
Regarding Erotic and Nonerotic Contact with Patients," (1973) 130
American Journal of Psychiatry 1077.

28. Some aspects of Ms. Norberg's vulnerability could be legally recognized by
labelling the relationship with Dr. Wynrib a "fiduciary" one.

LEAF submits that, whether or not the Court chooses to use the label "fiduciary" here, the standard for consent in the tort of sexual assault should recognize inequalities of
1 power.

Implications for Tort Law

29. The list of factors in tort law demonstrating coerced submission, rather than consent, should be open to new legal and social knowledge and development. The
10 commentary to the American Restatement of the Law of Torts suggests that the types of duress which will vitiate consent are not settled or limited to past cases. "Age, sex, mental capacity, the relation of the parties and antecedent circumstances all may be significant."

Restatement, Second, Torts, para. 892B, at p. 376.

20 30. While developments in criminal sexual assault law may be instructive, tort issues should receive independent analysis. The special protections for criminal defendants have no place in a civil context because there is no risk of unjust incarceration.

31. It is consistent with both sex equality principles and the purposes of tort law
30 to adopt a perspective on consent consistent with the interests of members of a disadvantaged group targeted for sexual assault, rather than a perspective consistent with the interests of those in a position to exploit a disadvantaged group's relative powerlessness.

32. Thus, LEAF submits that, as a general principle, the courts should find that consent to sex does not exist where the defendant occupies a position of such power,
40 trust or authority that the plaintiff is left no free choice to decline to have sex. Such an approach to consent is informed by a commitment to sex equality.

33. In unequal relationships such as with therapists, doctors and teachers, sexual behaviour of which a victim complains should generally be regarded as tortious

because in such relations "a man holds in trust the intimate, wounded, vulnerable, or undeveloped parts of a woman....[T]he factors of power, trust and dependency remove
1 the possibility of a woman freely giving consent to sexual contact."

Peter Rutter, M.D., Sex in the Forbidden Zone: When Men in Power - Therapists, Doctors, Clergy, Teachers and Others - Betray Women's Trust, supra, at 25.

34. LEAF submits that the position a doctor occupies in the doctor-patient
10 relationship should be seen as a paradigm of a position of power, trust and authority. The impropriety of sexual contact between doctor and patient is so fundamental that it is in the Hippocratic Oath: "In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women or with men...."

20 Stedman's Medical Dictionary (25 ed. 1990) at 717.

35. There is growing recognition of the harm of sexual contact in the doctor-patient and like relationships, which a number of American States have introduced legislation to address. For example, California has created a cause of action for injuries caused by sexual contact with a therapist during the period of treatment and two years afterwards. "Consent" is not a defence.

30 The Preliminary Report of the Task Force on Sexual Abuse of Patients, supra.

Denise LeBoeuf, "Psychiatric Malpractice: Exploitation of Women Patients" (1988) 11 Harvard Women's Law Journal, 83.

Cal. Civil Code, para. 43.93(b)(1), (2) (Deerings, 1990).

40 36. All doctor-patient relationships inherently contain such vulnerability, difference of power and potential for abuse that the law should place the responsibility for avoiding sexual contact with patients on the doctor. This should certainly be the case where groups enumerated in section 15 of the Charter are also involved, as between male doctors and women patients.

37. Because of the exploitation of the confidential information that Ms. Norberg was chemically dependent, this case is an extreme example of one in which the Court should not find consent. A sex equality approach to consent would aim to decrease the sexual exploitation of members of disadvantaged groups in contexts of power imbalances like lawyer-client, teacher-student, spiritual advisor-advisee. This would have the effect of enhancing women's access to safe and objective legal, medical and spiritual services and avoid compounding social inequalities which it is the purpose of section 15 of the Charter to oppose through law.

10

B. **EX TURPI CAUSA:** Should the law treat chemical dependency and perceived sexual immorality as reasons for denying recovery in tort?

38. Application of an ex turpi causa defence in tort further enables the advantaged to prey on the disadvantaged. Victims should not be placed outside the protection of tort law, thus enabling others to harm or exploit them without liability, simply on the basis that they have engaged in illicit acts or acts perceived by the Court to be immoral.

20

39. A tortfeasor may benefit from the victim's participation in the tortious activity. For example, Dr. Wynrib wanted sex. It was available to him only because he prolonged Ms. Norberg's chemical dependence on prescribed drugs. Enabling such a tortfeasor to escape liability for damages effectively allows him to profit from his own tort. This is contrary to public policy.

30

40. The majority of the B.C. Court of Appeal relied "far more heavily upon illegal than upon immoral conduct" in denying Ms. Norberg damages. It apparently relied upon the illegality in Ms. Norberg's acquisition of fiorinol and the perceived immorality of its use, and on the perceived immorality of Ms. Norberg's participation in sexual activity outside marriage.

40

Chemical Dependency

- 1 41. Canadian studies have shown women receive more prescriptions for all drugs than do men, and in particular, that women receive more prescriptions for mood-modifying drugs than men. Many more women than men receive prescriptions for tranquillizers. Barbiturates in particular are known to cause dependence. Therefore, it appears that women are particularly likely to be chemically dependent on prescription drugs.

10

Stephenson, P.S. and Walker, G.A., "Psychotropic Drugs and Women," (1980) 2 Bioethics Quarterly at p. 20.

Cooperstock, R. and Sims, M. "Mood-modifying Drugs Prescribed in a Canadian City: Hidden Problems," (1971) 61 American Journal of Public Health at p. 1007.

20

D.R. Wesson, M.D., and D.E. Smith, M.D. Barbiturates: Their Use, Misuse, and Abuse (New York: Human Sciences Press, 1977) at p. 33.

42. Suffering sexual abuse is believed to lead to chemical dependence.

D. Finkelhor, Ph.D. and A. Browne; Ph.D., "The Traumatic Impact of Child Sexual Abuse: A Conceptualization," (1985) 55:2 Amer. J. Orthopsychiatry, at p. 530.

30

Dembo et al, "Physical Abuse, Sexual Victimization, and Illicit Drug Use: Replication of a Structural Analysis Among a New Sample of High-Risk Youth," (1989) 4:2 Violence and Victims.

Lapierre, L. Canadian Women: Profile of Their Health, Statistics Canada Health Division, Ministry of Supply and Services Canada, 1984.

43. It is common to blame individuals dependent on prescribed drugs for the dependency, rather than the medical and pharmaceutical practices which develop and
40 continue the dependency, or the violence, sexual abuse and other factors which may cause the dependency. For example, "double doctoring" is considered by psychiatrists to be part of the pattern of chemical dependency. The offence may in effect blame chemically dependent people for the status of being dependent on prescribed drugs.

H.I. Kaplan, M.D. and B.J. Sadock, M.D., Synopsis of Psychiatry Behavioral Sciences Clinical Psychiatry (Baltimore: Williams & Wilkins, 1988) at p. 228.

1 McDonnell, Kathleen, ed., Adverse Effects: Women and the Pharmaceutical Industry (Toronto: Women's Educational Press, 1986).

Saskatchewan Health Joint Committee on Drug Utilization, Report No. 4. Utilization of Mood-Modifying Drugs in Saskatchewan: 1977. Part II (Regina, Sask., 1979).

10 44. LEAF submits that barring tort recovery to a victim of chemical dependence, whether on the basis that the dependence is "immoral" or on the basis of the illegality of the victimless crime which is a symptom of the dependence, is improperly "blaming the victim." It invites sexual and other exploitation of chemically-dependent women.

Sexual Immorality

20 45. The decisions of the courts below (and the obiter in Hegarty v. Shine, [1878] L.R. 2 Ir. 273) punished women for sexual activity outside marriage. In both cases, the women were denied compensation because of the perceived immorality which more powerful men created and exploited or at least enjoyed.

30 46. Application of the sexual immorality bar to compensatory recovery can mean that a person who rejects even unlegislated "morality" (for example, by being the subject of pornography) becomes an "outlaw" deprived of legal protection, and thus an easy target for uncompensable abuse (such as negligent medical treatment or physical and mental abuse).

Summary

40 47. LEAF submits that either a chemical dependency bar or a sexual immorality bar to recovery in tort will make women targets for uncompensable abuse on the basis of sex and therefore the defence of ex turpi causa should not be applied.

C. **DAMAGES:** How should damages be assessed in order to recognize the true harm caused by prolonged chemical dependence and sexual assault?

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48. LEAF submits that the principles for assessment of damages for the harms suffered in sexual assault and prolonged chemical dependence should recognize the very real physical, psychological and emotional harm suffered. Failure to adequately compensate such harms trivializes the offensive conduct, reminds women of their inferior ascribed status, and enforces that status. It fails to recognize harms suffered
10 by women and therefore fails to give women equal protection and benefit of the law. It also refrains from using tort law's potential to deter sexual assault.

Analysis of Courts Below

49. The courts below did not award damages for either sexual assault or prolonged chemical dependence. Locke, J.A., dissenting, would have awarded \$1,000
20 nominal damages for prolonged chemical dependence. In assessing this, he said the following:

a) "I do not regard it as reasonably foreseeable on the facts of this case that the defendant could ever reasonably have thought that the other party to this transaction would be so overtaken by these human feelings as to sustain mental damage. On this ground I would dismiss any action in tort for this type of damage as not being sustainable."
30

Case, p. 397, ll. 24-32.

b) "As to damages [for being] left drug dependent for a year or more....there is no specific evidence...that her life during this drug-dependent period was unpleasant, beyond the presumed unhappy life of one a slave to drugs....she has recovered, or is at least free from physical effects except for the craving, which perhaps will never leave her...nothing but nominal damages should be awarded. I award \$1,000...I would not award punitive damages."
40

Case, pp. 404-405, ll. 28-12.

General Damages

- 1 50. LEAF submits that the harms suffered by victims of both sexual assault and drug dependence include fear and anxiety, depression, nightmares, loss of self-esteem, self-hatred and self-recrimination. Victims of sexual assault may additionally suffer sexual dysfunction and a profound inability to trust and form or maintain relationships with people like those who harmed them (often men and/or caregivers).

10

Nass, Deanna, The Rape Victim (Iowa: Kendall/Hunt Publishing Company, 1977) at pp. 123 and 133.

Koss and Harvey, The Rape Victim, Clinical and Community Approaches to Treatment (Massachusetts: Stephen Greene Press, 1987) at pp. 31-41.

Goodman and Gilman's The Pharmacological Basis of Therapeutics, 8th ed., (New York: Pergamon Press, 1990) at pp. 536-537.

20

51. The courts award large sums as general and exemplary damages in cases involving trespass to land and nuisance. LEAF submits that the violation of a woman's physical, emotional, and psychological security should merit at least as much legal redress as the loss of or interference with a person's property. On a relative scale, the equality values requiring protection of women against unwanted sexual contact should rank equal to, if not higher than, those associated with the protection of property.

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Horseshoe Bay Retirement Society et al. v. S.I.F. Development Corp. et al. (1990), 66 D.L.R. (4th) 42 (B.C.S.C.). (\$33,172 general damages and \$100,000 punitive damages for trespassing and cutting down trees.)

Kates v. Hall, Unreported, B.C.C.A. No. CA011265, February 8, 1991. (\$34,000 general damages and \$26,000 punitive damages for trespassing and cutting down 13 trees.)

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Shewish et al. v. MacMillan Bloedel Limited (1990), 48 B.C.L.R. (2d) 290 (B.C.C.A.) (\$58,000 damages for trespass for value of timber taken.)

Epstein v. Cressey Development Corporation (1990) 48 B.C.L.R. (2d) 311 (B.C.S.C.). (\$25,000 general damages and \$45,000 punitive damages for trespass in installing 25-foot rods in soil.)

52. The following cases not cited by Ms. Norberg involve damages for sexual assault:

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Brander v. Brander, Unreported, Manitoba Queen's Bench, March 25, 1991, Winnipeg, CI 97-01-24465. (General damages of \$100,000 for psychological trauma and aggravated damages of \$50,000 awarded for sexual abuse by father of daughter over 9-year period.) Psychological evidence indicated plaintiff was one of worst cases of sexually damaged person encountered by the professionals and that she had a number of sexual and social difficulties and would need continuing psychotherapy.)

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N. (J.L.) v. L. (A.M.) (1988), 47 CCLT 65, [1989] 1 W.W.R. 438, 56 Man. R. (2d) 161 (Q.B.). (\$65,000 general damages for sexual assaults by stepfather of stepdaughter over 6-year period beginning when she was age 6.)

A.K.M. v. M.B., Unreported, Ontario, June 22, 1990. (\$50,000 award to girl sexually assaulted by her priest and who experienced stress, suicidal thoughts, depression, anxiety, fears of intimacy, inability to trust others, avoidance and withdrawal.)

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Wiebe v. Haroldson, (1989) Saskatchewan Q.B. No. 3571/85. (\$10,000 general damages and \$40,000 punitive damages for one incident of sexual assault).

Q. v. Minto Management Ltd. (1985), 15 D.L.R. (4th) 581 (Ont. H.C.J.). (General damages of \$40,000 for an isolated sexual assault at night in the plaintiff's apartment. The plaintiff's suffering included loss of weight, becoming more security-conscious, and experiencing a period of "feeling dirty" and fear, as well as indignity and humiliation.)

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C. v. M. (1988) Ontario District Ct. No. 3233349/88. (General damages of \$40,000 for an isolated sexual assault by the plaintiff's companion. The plaintiff's complaints included humiliation, degradation, shock, anxiety, depression, thoughts of suicide, sleepless nights, mistrust of others (particularly men), and lost self-respect.)

53. Aggravated damages should be available to compensate for intangible injuries, such as distress and humiliation suffered by a plaintiff.

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Vorvis v. ICBC (1989) 58 D.L.R. (4th) 193 at 202 (S.C.C.).

Punitive Damages

- 1 54. Commission of sexual assaults is so socially reprehensible that it merits condemnation by the court and an award of punitive damages.

Robitaille v. Vancouver Hockey Club Ltd. (1981), 30 B.C.L.R. 286 (B.C.C.A.).

Weibe v. Haroldson, *supra*.

- 10 Weisenger v. Mellor, (1989) Unreported, B.C.S.C. No. 871938.

55. Punitive damages should be awarded for sexual assault involving exploitation of a position of trust and power. Here, the sexual assaults occurred in the doctor-patient relationship and made use of confidential information obtained in the course of that relationship. In addition, Dr. Wynrib negligently and for his own gain
20 prolonged and exploited the very disability for which Ms. Norberg sought and deserved proper medical treatment.

56. Punitive damages should be awarded for deliberate conduct resulting in a personal benefit for the tortfeasor. Here, Dr. Wynrib's deliberate conduct prolonged Ms. Norberg's chemical dependence, and Dr. Wynrib derived a personal benefit from it in the form of sexual gratification.

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PART IV: NATURE OF ORDER REQUESTED

57. Based on the principles outlined above, LEAF submits that this appeal should be allowed and judgment entered for the Plaintiff against the Defendant for significant damages together with solicitor-client costs throughout.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Counsel for the Intervener,
Women's Legal Education and Action Fund

N. Victoria Gray

PART V

<u>1</u>	<u>CASES</u>	<u>Page(s)</u>
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<u>10</u>	<u>C. v. M.</u> (1988) Ontario District Ct. No. 3233349/88	19
	<u>Canadian Newspapers Co. v. Canada (Attorney General)</u> , [1988] 2 S.C.R. 122	5
	<u>Epstein v. Cressey Development Corporation</u> (1990) 48 B.C.L.R. (2d) 311 (B.C.S.C.)	18
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<u>20</u>	<u>Horseshoe Bay Retirement Society et al. v. S.I.F. Development Corp. et al.</u> (1990), 66 D.L.R. (4th) 42 (B.C.S.C.)	18
	<u>Janzen and Govereau v. Platy Enterprises Ltd.</u> , [1989] 1 S.C.R. 1252 at 1285	1 4 9 10
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	<u>Law Society of British Columbia v. Andrews</u> , [1989] 1 S.C.R. 143	2 10
<u>30</u>	<u>Morrison v. Coast Fin. Ltd.</u> (1965), 55 D.L.R. (2d) 710, at 713 (B.C.C.A.)	9
	<u>N. (J.L.) v. L. (A.M.)</u> (1988), 47 CCLT 65, [1989] 1 W.W.R. 438, 56 Man. R. (2d) 161 (Q.B.)	19
	<u>Q. v. Minto Management Ltd.</u> (1985), 15 D.L.R. (4th) 581 (Ont. H.C.J.)	19
<u>40</u>	<u>R. v. Swain</u> , May 2, 1991, not yet reported (S.C.C.)	2
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	<u>Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.</u> [1986] 2 S.C.R. 573 at 603	2
	<u>Robitaille v. Vancouver Hockey Club Ltd.</u> (1981), 30 B.C.L.R. 286 (B.C.C.A.)	20

	<u>Shewish et al. v. MacMillan Bloedel Limited</u> (1990), 48 B.C.L.R. (2d) 290 (B.C.C.A.)	18
I	<u>Vorvis v. ICBC</u> (1989) 58 D.L.R. (4th) 193 at 202 (S.C.C.)	19
	<u>Weibe v. Haroldson</u> (1989) Saskatchewan Q.B. No. 3517/85	19 20
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