

~~IT'S FACTUM~~
B. 1071

Court File No. 21670/87

SUPREME COURT OF ONTARIO

Toronto Weekly Court

B E T W E E N:

JANE DOE

Plaintiff

- and -

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

Defendants

PLAINTIFF'S FACTUM

CORNISH & ASSOCIATES
Barristers & Solicitors
210 Dundas Street West
Suite 500
Toronto, Ontario
M5G 2E8

ILER, CAMPBELL & ASSOCIATES
Barristers & Solicitors
150 Simcoe Street
Toronto, Ontario
M5H 3G4

MARY CORNISH
of counsel for the Plaintiff

(416) 971-5011

CHARLES CAMPBELL
of counsel for the Plaintiff

(416) 598-0103

I N D E X

	<u>PAGE NO.</u>
I - THE MOTION	2
II - FACTS	2
III - ISSUES AND LAW	5
Issue 1 - The Test on a Motion to Strike under Rules 21.01 and 25.11	5
Issue 2 - Tort Liability Of The Defendants	7
A. Individual Officers	7
B. The Chief of Police	9
C. The Board of Commissioners	10
D. Causation	12
Issue 3 - Effect of Statutory Compensation Scheme	14
Issue 4 - Charter Liability Of The Defendants	14
A. Applicability of the Charter	15
B. Section 7	17
C. Equality	19
D. Section 1	23
IV - RELIEF REQUESTED	25

I - THE MOTION

1. This is a motion by the Defendants for an Order striking out the Amended Statement of Claim as disclosing no reasonable cause of action. The Defendants previously brought a motion for relief under Rule 25.11 which was disposed of by an order of Master Donkin dated May 2, 1988.

i.) Plaintiff's Motion Record, pp. 2 to 4.

II - FACTS

2. The female Plaintiff seeks damages arising out of her sexual assault and rape on August 24, 1986. She states that these damages were caused by the negligence and breach of her Charter rights by the Defendants, namely the Board of Commissioners of Police, Chief Marks and the investigating officers Derry and Cameron. The Plaintiff further seeks a declaration that her Charter rights have been infringed and any further relief the Court may deem just in the circumstances.

i.) Amended Statement of Claim, paras. 13-25.
Defendants' Motion Record, pp. 10-14.

3. The facts pleaded by the Plaintiff in support of her claim can be summarized as follows:

a.) During the months prior to the sexual assault of the Plaintiff, a serial rapist was assaulting a number of women in a similar manner in the general vicinity of the Plaintiff's second floor balcony apartment in the Church/Wellesley area in the City of Toronto where she resided alone.

i.) Amended Statement of Claim, para. 13,
Defendants' Motion Record, p. 10.

- b.) Prior to August 24, 1986 and in the course of the Defendants' Derry and Cameron's investigation of these serial rapes, they identified the likely targets of the serial rapist to be single women living in second and third floor apartments with balcony access in the Church/Wellesley area which included the Plaintiff herein. They also identified certain distinguishing characteristics of the likely serial rapist.
- i.) Amended Statement of Claim, paras. 14 and 18, Defendants' Motion Record, p. 10 and 12.
- c.) Although the Defendants had identified the Plaintiff as a likely target, they specifically decided not to warn her or other women similarly situated to her of the danger to which they were exposed and failed to alert them to the steps to be taken to protect themselves when they knew or ought to have known that the serial rapist would strike again.
- i.) Amended Statement of Claim, paras. 13, 16-18, 20-22, Defendants' Motion Record, pp.10-16.
- d.) Instead the Defendant Board and Chief authorized and the Defendant Chief and officers carried out policies, and practices whereby they declined to warn the likely targets of such violence because of their belief that such warning would cause hysteria among women and might lead the serial rapist to flee and refrain from further attacks.
- i.) Amended Statement of Claim, paras. 16, 17, 20-22, Defendants' Motion Record, pp. 11-16.
- e.) Targets of sexual assault and rape are overwhelmingly female and the perpetrators are overwhelmingly male.
- i.) Amended Statement of Claim, para. 12, Defendants' Motion Record, p. 10.

- f.) The Defendants Chief and officers, although aware of the above-noted information in paragraphs (a) to (e) and although they knew or ought to have known of the serial rapist (who was both resident in the area and had a prior criminal record for sexual assault) failed to allocate sufficient and adequate resources to the investigation and apprehension of the serial rapist, including the adequate investigation of Callow, so as to identify and apprehend the rapist prior to August 24th, 1986. Nor did the said Defendants provide information to the public about the rapist's distinguishing characteristics to permit members of the community to identify him.
- i.) Amended Statement of Claim, paras. 20-22, Defendants' Motion Record, pp. 12-16.
- g.) The Defendants, having chosen not to warn, failed to allocate sufficient and adequate resources to the protection of the Plaintiff and other women similarly situated to her.
- i.) Amended Statement of Claim, paras. 20-22, Defendants' Motion Record, pp. 12-16
- h.) On August 24, 1986, the Plaintiff was sexually assaulted and raped in her apartment by a serial rapist named Callow.
- i.) Amended Statement of Claim, para. 7, Defendants' Motion Record, p. 8.
- i.) On October 3, 1986, Callow was arrested by the police and charged with the sexual assault of the Plaintiff, along with several other charges of sexual assault relating to similar attacks against other women in the Plaintiff's neighbourhood over the prior year. He subsequently pleaded

guilty to all charges and was sentenced on February 20, 1987 to twenty years in prison.

- i.) Amended Statement of Claim, paras. 9-11, 11, Defendants' Motion Record, p. 9.
- j.) As a result of the Defendant's actions the Plaintiff has suffered and continues to suffer damages including substantial emotional harm, loss of personal dignity and loss of enjoyment of life.
 - i.) Amended Statement of Claim, para. 25, Defendants' Motion Record, pp. 17-18.
- k.) The Defendants have stated that they should have issued a warning in these circumstances.
 - i.) Amended Statement of Claim, para 18a, Defendants' Motion Record p. 11.

III - ISSUES AND LAW

Issue 1 - The Test on a Motion to Strike under Rules 21.01 and 25.11

- 4. On a motion pursuant to Rule 21.01
 - a.) All allegations of fact unless patently ridiculous or incapable of proof must be accepted as proven.
 - b.) If those facts raise a triable issue against the Defendants, the action should not be dismissed on the motion. The court will read the Statement of Claim as generously as possible so as to allow the Claim to proceed to trial where there is some chance of proving the Claim, particularly where the action is novel or difficult to determine on the merits.

- c.) The Defendants must show that it is plain, obvious and beyond doubt that the Plaintiff could not succeed.
- d.) Where the law is unclear, the court may only deal with the matter in a summary fashion if its decision would not be affected by any issue of fact to be determined by the trial judge.
 - i.) Operation Dismantle Inc. v. The Queen (1985) 13 C.R.R. 287 at pp. 292-93.
 - ii.) Air India Flight 182 Disaster Claimants v. Air India et al (1987), 62 O.R. (2d) 130 at p. 135, (H.C.).
 - iii.) Johnson et al v. Adamson et al (1981), 34 O.R. (2d) 236 (C.A.) at p. 240-241; 128 D.L.R. (3d) 470; 18 C.C.L.T. 282 at p. 241.

5. The Plaintiff submits that the issues raised in this case are important enough to require the full development of the evidence. The Charter issues cover areas in which the law is unclear and the factual determinations of the trial judge will be important in determining whether in fact constitutional rights have been violated by the Defendants. Therefore the only proper result is to permit the action to go to trial.

- i.) Hill v. Church of Scientology of Toronto (1985), 35 C.C.L.T. 72 (H.C.) at p. 79.
- ii.) Birchard et al v. Law Society of Alta. et al (1985), 65 A.R. 222 (C.A.)
- iii.) Goodman v. Newman (unreported, Ont. C.A., March 25, 1988)
- iv.) Bouchard v. J.L. Le Saux Ltee (1986), 58 O.R.(2d) 124 (C.A.)

6. As for the Defendants' challenge in this Motion under Rule 25.11 to the propriety of the pleaded facts, no further

attack on the pleading should be heard since the Defendants have already brought a motion under Rule 25.11. . Furthermore, the Court will only strike out an entire pleading as being frivolous and vexatious in the clearest of cases as the Court will prefer to give leave to amend.

- i.) Slan et al v. Beyak et al (1973), 3 O.R.(2d) 295 (Master Ferron).
- ii.) Steiner v. Lindzon (1976), 14 O.R.(2d) 122 (H.C.)

Issue 2 - Tort Liability Of The Defendants

A. Individual Officers

7. The duties of police officers as members of police forces are statutory and are set out in s.57 of the Police Act. It states:

The members of the police forces appointed under Part II, except assistants and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crimes and offenses, including offenses against the by-laws of the municipality, and apprehending offenders, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables. R.S.O. 1980, c. 381, s.57.

8. The Courts have also recognized that the Police have duties and obligations to the public which they are bound to perform by common law. The House of Lords confirmed that "there is no question that a police officer...may be liable in tort [including negligence]" and that "by common law police officers owe to the general public a duty to enforce the criminal law...". The Courts have held that this duty is not only impossible but inadvisable to attempt to frame in a static

definition. The duties should only be determined in light of the particular facts and circumstances of each case.

- i.) Hill v. Chief Constable of West Yorkshire, [1988] 2 All E.R. 238 at 240-241 (HL), which affirmed [1987] 1 All E.R. 1173 (C.A.).
- ii.) Beutler et al v. Beutler et al (1983), 26 C.C.L.T. 229 at pp. 272-275, (H.C.).

9. In Canada, the Supreme Court of Canada has established that negligence may be found against the police for failure to take adequate measures to warn the public of a danger and the risk of injury. It is submitted that the duty to warn is firmly rooted in Canadian jurisprudence as a head of tort liability.

- i.) Schact v. R., [1973] 1 O.R. 221; affirmed sub nom. O'Rourke v. Schact, [1976] 1 S.C.R. 53 at pp. 65-66.
- ii.) Buchan v. Ortho Pharmaceutical (Canada) Ltd. (1986), 54 O.R. (2d) 92 (C.A.).
- iii.) Millette et al v. Cote et al, [1971] 2 O.R. 155 (H.C.); reversed in part [1972] 3 O.R. 224 (C.A.); affirmed in part (sub. nom. The Queen v. Cote) (1974), 51 D.L.R. (3d) 244 (S.C.C.).
- iv.) Hendricks v. The Queen, [1970] S.C.R. 237 (S.C.C.).
- v.) Berezowski v. City of Edmonton (1986), 38 C.C.L.T. 96 (Alta. C.A.).
- vi.) Houser v. Twp. of West Lincoln (unreported, Ont.C.A., May 10, 1983); leave to appeal to the S.C.C. refused 52 N.R. 239n at pp 9-10.

10. The facts pleaded show that the Plaintiff was readily identifiable as one of a small and specific group likely to be attacked by an assailant whose modus operandi was known to the police. This is not an allegation of a general duty owed to

the public at large. Furthermore, the facts pleaded show that the Plaintiff was put into danger by the actions of the Defendant officers in the course of their investigation when they decided to put at risk the identifiable group in their attempt to apprehend the criminal . This action was deliberate and the proximate cause of the Plaintiff's injuries.

- i.) Hill v. Chief Constable, supra, at pp. 241-244.

B. The Chief of Police

11. The Chief of Police and the Board of Commissioners of Police may be sued for their own negligence independent of section 24 of the Police Act, R.S.O. 1980, c. 381.

- i.) Johnson et al v. Adamson et al, supra.

12. The Chief is the commander of the police force with the lawful authority and duty to direct its operation. The Statement of Claim alleges that the Chief was negligent in his responsibility to direct the force. The Plaintiff was a member of a specific group of potential victims and because of this the Chief owed a duty to exercise his powers without negligence. The negligence of the Chief as pleaded falls within the ambit of actionable negligence established in City of Kamloops v. Nielsen, with respect to the failure to warn; the deliberate decision to put the plaintiff at risk; the failure to apprehend; and the failure to allocate resources properly.

- i.) City of Kamloops v. Nielsen et al (1984), 29 CCLT 97 (S.C.C.).
- ii.) Sevidal et al v. Chopra et al (1987), 41 C.C.L.T. 179; 64 O.R. 169 (2d) (H.C.).
- iii.) Anns v. Merton London Borough Council, [1977] 2 All E.R. 492 (H.L.).
- iv.) Air India, supra, at pp.138-139.

C. The Board of Commissioners

13. The Board of Commissioners of Police is responsible for the actions of the police force pursuant to the Police Act.

i.) Schact v. R., supra.

ii.) Police Act, R.S.O. 1980, c.381, ss. 15, 16, 17.

14. The Board of Commissioners is the employer of the police force with the lawful authority and duty to direct its operation.

i.) Police Act, R.S.O. 1980, c.381, ss. 15, 16, 17.

ii.) Municipal Affairs Act, R.S.O. 1980, c. 303, s.7.

iii.) Municipality of Metropolitan Toronto Act, R.S.O. 1980, c. 314, as amended, ss. 174-181 [Part XII].

15. The Plaintiff was a member of a specific group of potential victims and because of this the Board owed a duty to her to exercise its powers without negligence. The pleadings allege the Board was negligent in its responsibility to direct the force. The negligence of the Board as pleaded falls within the ambit of actionable negligence established in City of Kamloops v. Neilsen, with respect to the failure to warn; the deliberate decision to put the plaintiff at risk; the failure to apprehend; and the failure to allocate resources properly.

16. It is submitted that the caselaw dealing with the legal fiction of police officers as 'independent authorities' rather than agents or employees of municipalities is irrelevant to the issues raised in the plaintiff's claim. Furthermore, those cases were decided before the 'modern era' of high-tech

bureaucratic policing. The Court of Appeal has indicated it is willing to look behind this legal fiction and deal with the realities of police organization, command and control in the circumstances of the case here alleged. Thus, in the proper circumstances, the Board of Commissioners and the Chief of Police may be held responsible - not on the basis of their vicarious liability - but for their own negligence in the control, management and operation of the police force.

The modern view of the policeman and his function recognizes that he has a wide discretion in his everyday activities but it also recognizes the fact that he is part of hierarchical, administrative organization which in fact controls and directs, to a great extent, the way he acts. The police officer has wide discretion to invoke or not to invoke the criminal process, but like every other employee... his assignments are predetermined by the organization of which he is a part. Very often such an organization has set up detailed rules of conduct for particular situations... Such rules are enforced by the organization itself by way of internal sanctions. Those rules may be devised by the police department itself, but at the top of the hierarchy, there is [pursuant to the Police Act] the Chief of Police, the Police Commission and the Municipality.

- i.) Luogrioux, "Municipal Liability for Police Torts in the Province of Quebec" (1970), 11 c.de D. 407.
- ii.) Hutton v. Ontario (A.G.) (1987), 62 O.R.(2d) 676.
- iii.) Johnson v. Adamson, supra.

17. In Ontario, a Governmental agency will be held liable under ordinary principles of negligence for a culpable failure to warn whether or not that agency was acting within a policy or discretionary area. There is a spectrum of relative exposure to liability which has to be determined on the facts of

the case. Liability may also be based on the failure to exercise a policy level function.

- i.) City of Kamloops v. Neilsen et al, supra.
- ii.) Sevidal et al v. Chopra et al (1987), 41 C.C.L.T. 179; 64 O.R. (2d) 169 (H.C.).
- iii.) Anns v. Merton, supra.
- iv.) Air India Flight 182 Disaster Claimants v. Air India et al, supra, at pp. 138-139.
- v.) Johnson v. State of California (1968) 447 P. 2d 352.

D. Causation

18. It is submitted that the facts pleaded establish the defendants negligence as a cause-in-fact of the Plaintiff's damages. The Defendants knew of the likelihood that Callow would strike again as he did. In fact the Defendants acknowledged this casual link when they decided not to warn likely female targets in part precisely because the rapist would refrain from further attack. In light of this, the decisions not to warn of the impending danger or the neglect to warn directly resulted in the grievous injuries suffered by the Plaintiff.

- i.) Birchard v. Law Society, supra, at p. 225.

19. In the alternative, the facts as pleaded establish that the Defendants materially increased the risk of injury to the Plaintiff and she suffered injuries in the area of risk created by the Defendants. The Courts have held that in these circumstances, where through no fault of the Plaintiff there is an evidential gap, this is sufficient to establish prima facie proof of causation. It remains open to the Defendant to disprove

causation but this kind of factual inquiry should be reserved for trial.

- i.) Birchard v. Law Society, supra.
- ii.) Houser v. Twp. of West Lincoln, supra.
- iii.) McGhee v. National Coal Board [1972] 3 All E.R. 1008 (H.L.)
- iv.) Linden, Canadian Tort Law, (4th ed. Toronto: Butterworths, 1988), pp. 94-103.
- v.) J.D. Dooley, "Causation and the Evidential Gap: Shifting the Onus of Proof" (1986) 7 Advocate Quarterly 1.

20. "When a person creates an unreasonable risk and injury occurs that is within the ambit of the risk, the plea that an inherent evidential difficulty prevents proof...is not likely to arouse much sympathy".

- i.) Weinrib, A Step Forward in Factual Causation, (1975) 38 Mod. L. Rev. 518 at pp. 528-529.

21. It is submitted that all the issues raised by the Defendants on this motion should be raised by way of defence at trial. It has been held in a similar case, where the issue was whether the Defendants Law Society and Securities Commission had failed to investigate or regulate their members, that the following issues: (a) governmental immunity; (b) causation-in-fact; (c) limitation of liability for public policy reasons; were all matters which had to be settled on evidence at trial and not on a motion to strike out the claim.

- i.) Birchard v. Law Society, supra.
- ii.) Buchan v. Ortho Pharmaceuticals Inc., supra, at p.99.

Issue 3 - Effect of Statutory Compensation Scheme

22. It is submitted that the Ontario Compensation for Victims of Crime Act cannot affect the Plaintiff's right to remedial relief in this case, since the claim under that Act is against the perpetrator of the crime Callow, and not against the police who are the Defendants in this action.

- i.) Compensation for Victims of Crime Act, R.S.O. 1980, c. 82.

23. Even if the Compensation for Victims of Crimes Act were relevant, it is submitted that there is no specific section of that Act which would exclude the claim advanced by the Plaintiff as might be found in, for example, the Workers' Compensation Act.

- i.) Compensation for Victims of Crime Act, supra, c. 82.
- ii.) Workers' Compensation Act, R.S.O. 1980, c.539, as amended.
- iii.) Re Medwid and The Queen in Right of Ontario et al (1988), 64 O.R. (2d) 578 (H.C.).
- iv.) Johnson v. State of California (1968) 447 P.2d 352.

Issue 4 - Charter Liability Of The Defendants

24. Even if the Court held no liability in tort, the Plaintiff further alleges there is liability under the Canadian Charter of Rights and Freedoms on the basis that her constitutional rights to security of the person and equality of protection and benefit of the law pursuant to sections 7, 15 and 28 have been infringed by the Defendants and such infringement caused her harm.

- i.) Canadian Charter of Rights and Freedoms, Constitution Act, 1982, as enacted by Canada Act, 1981 (UK), 1982, c.11.

A. Applicability of the Charter

25. The Plaintiff herein complains about the Defendants actions in carrying out their governmental duty to prevent crime and protect citizens which duties are set out in paragraphs 6 to 15 supra.

26. In Canada the Charter, and in particular section 24, provides a fresh basis for establishing liability of governmental actors for constitutional infringements of an individual's rights based on unique principles and considerations.

- i.) Reference Re s.94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at pp. 495-496, 498 per Lamer J.
- ii.) R v. Carter (1982), 39 O.R.(2d) 439 at p. 441 (Ont. C.A.)

27. In particular, the following fundamental principles apply to the instant case.

a.) The Charter guarantees are to be interpreted in light of the interests they are meant to protect, adopting an expansive and broad rather than narrow and technical approach.

- i.) R v. Big M Drug Mart, [1986] 1 S.C.R. 295 at p. 344.
Re MUA - p. 499.
- ii.) Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at pp. 209, 218-219.

b.) The starting point for analysis is the result of the challenged practice, not the motivation for it. Whether an action is direct and intentional or indirect and unintentional, it may constitute a violation of a right.

- i.) R. v. Big M. Drug Mart, supra, at pp. 359-360.
- ii.) OHRC and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 at pp. 547-551.

c.) The remedial relief flowing from an infringement may include compensation for any damages suffered and declaratory relief. Compensatory damages are available ... when the state or any person who infringes or denies the rights and freedoms of citizens acts in bad faith or knowingly or in circumstances where the consequences to the citizens can be easily perceived.

i.) Lagiorgia v. R. (1985), 18 C.R.R. 348 at p. 353 (F.C.T.D.)

ii.) Vespoli v. The Queen (1984), 12 C.R.R. 185 at p. 189 (Fed. C.A.).

28. There can be little doubt that the Charter applies to the law enforcement powers exercised by the Defendants in these circumstances. The Charter, unlike the American Bill of Rights, directly addresses in section 32 the persons to whom the Charter should apply which for our purposes includes all matters within the authority of the provincial legislature and government.

i.) DiIorio v. Warden of the Common Jail of Montreal (1977), 73 D.L.R.(3d) 491 at p. 524, 528 (S.C.C.) per Dickson J. as he then was.

ii.) R. v. Therens, [1985] 1 S.C.R. 613, p. 621.

iii.) Constitution Act, 1867 (formerly British North American Act, 1867, 30 & 31 Vic., c.3) s.92 (14).

29. The Plaintiff submits that the Defendants' arguments, focussed as they are almost exclusively on American jurisprudence, have fundamentally misconstrued the application of our Charter to police action in Canada. Hence, contrary to paragraphs 15-28 of the Defendants' factum, it is inappropriate to import American concepts of special relationship or qualified immunity in analyzing the applicability of the Charter in the instant case.

B. Section 7

30. The Plaintiff claims that her constitutional right to security of the person was infringed by the Defendants' actions in deliberately failing to warn her of the risk of being sexually assaulted and raped.

31. Further the Defendants' actions in putting at risk the Plaintiff's identifiable group in trying to apprehend the criminal, cannot be said to comport with either the procedural or substantive principles of fundamental justice enshrined in the Canadian legal system.

32. Section 7 constitutionally entrenches the principle long recognized at common law of respect and protection for individual bodily integrity. It provides as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

i.) Morgentaler v. The Queen (1988), 44 D.L.R. (4th) 385 at pp. 399-400.

33. In determining whether a section 7 breach has occurred, the Supreme Court of Canada has concluded that:

a.) "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person".

i.) Morgentaler, supra, at p. 401.

b.) A woman's security of person can be violated if her body is treated as a "means to an end which she does not desire but over which she has no control."

i.) Morgentaler, supra, at p. 492.

- c.) A threat alone to one's security of the person may violate an individual's section 7 rights.
 - i.) Singh, supra, at p. 207.
 - ii.) Morgentaler, supra, at pp. 483-484.

- d.) The "principles of fundamental justice" can relate to both procedure and substance depending on the circumstances presented before the court in a particular case. These principles of fundamental fairness are to be found in the basic tenets of our legal system and in the inherent domain of the judiciary as guardian of the justice system.
 - i.) Motor Vehicle Act Reference, supra, at pp. 499-512-513. ~~503~~.
 - ii.) Morgentaler, supra, at pp. 398-399.

- e.) It remains open whether section 7 contains an independent right to life, liberty and security of person without a breach of fundamental justice.
 - i.) Re B.C. Motor Vehicle Act, supra, at p. 500.
 - ii.) Operation Dismantle, supra at p. 322.

34. The pleadings identify the Plaintiff as being at particular risk from criminal activity. It is respectfully submitted that section 7, at minimum, guarantees to such persons that the Defendants in carrying out their duty to protect will not unnecessarily expose them to attack or an increased threat of attack.

35. It is submitted that it is fundamentally unfair in these circumstances not to warn the Plaintiff. It violates our sense of justice to place in jeopardy the Plaintiff's personal security in order to obtain the general public benefit of allegedly ensuring the rapist's conviction upon arrest.

36. Moreover, contrary to the Defendants' submission in paragraph 25 of its Factum, the imposition of an obligation to warn does not impede the Defendants' investigative abilities except to the extent that it places a constitutional limit on their ability to knowingly and unnecessarily place citizens in jeopardy. This requested limit is consistent with the Court's obligation to prevent an exercise of discretion for an improper purpose that would bring the administration of justice into disrepute.

- i.) R. v. Beare, (unreported decision of S.C.C., December 1, 1988) at p. 24-25.
- ii.) R. v. Duquay (1985), 50 O.R.(2d) 375 at pp. 386-387 (C.A.)

C. Equality

37. It is submitted that the Plaintiff's equality rights were violated in the following three ways:

- a.) The Defendants' statutory and common law duty to prevent crime and to protect citizens was pursued in a fashion contrary to section 15 which denied the Plaintiff equal treatment on the basis of sex. In particular, the Defendants failure to warn was based on stereotypical assumptions about her class, i.e. that they would behave hysterically;
- b.) The Plaintiff's right to equal benefit of the law was violated because the Defendants did not allocate the necessary level of police protection to afford her equal protection with other targets of crime; and
- c.) The Plaintiff further claims that her constitutional right in section 7 to security of the person is guaranteed by virtue of sections 15 and 28 to be equally available to men and women and the Defendants by their actions denied

her the level of police service necessary to achieve the level of security of person enjoyed by men in Canada.

38. Section 15(1) provides a constitutional right to equal protection and benefit of the law including the constitutional protection of security of the person. Section 28 further guarantees equal access by women and men to Charter rights and was added to the Charter to confirm and strengthen its commitment to gender equality. Sections 15(1) and 28 state, respectively:

15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

i.) "Summary of Conference Resolutions", in Equality Rights and The Canadian Charter of Rights and Freedoms, eds. A. Bayefsky and M. Eberts, 1985, 634-644.

39. In determining whether a section 15 breach has occurred, the following principles are applicable in the instant case:

a.) Equality is one of the fundamental values of society, against which the objects and effects of all governmental actions must be measured.

i.) R. v. Oakes, [1986] 1 S.C.R. 103, at p. 136.

ii.) McKinney (1987) 24 O.A.C. 241 at pp. 265 and 272.

iii.) Re Blainey and Ontario Hockey Ass'n et al (1986), 54 O.R. (2d) 513, (Ont. C.A.) at p. 524; leave to appeal to S.C.C. refused 58 O.R. (2d), at p. 274.

- b.) Section 15's purpose of promoting the equality of the powerless, excluded, and disadvantaged should inform the interpretation of its guarantees.
- i.) Smith Kline & French Laboratories et al v. A.G. of Canada (1985), 24 D.L.R. (4th) 321; affirmed 34 D.L.R. (4th) 584 at pp. 591-592, (Fed. C.A.); leave to appeal to S.C.C. refused April 9, 1987 at p. 591.
 - ii.) R. v. Big M Drug Mart, supra, at pp. 337-338.
- c.) True equality before the law and true equality in benefit and protection of the law may require differentiation in treatment to ensure equality of result. It may also require positive action on the part of government or government agents in order to redress previous infringement of Charter rights.
- i.) Schachter v. Canada 18 F.T.R. 199 at p. 214 (FCTD).
 - ii.) R. v. Big M. Drug Mart, supra, at 347.
- d.) A breach of section 15 does not require proof of conscious, purposive discrimination, a differential treatment or a result having a prejudicial or adverse impact is enough. The issue of reasonableness is left to the section 1 analysis.
- i.) Re McKinney, supra, at p. 267, 269-272.
- e.) A breach of the section 15 guarantees is found where
- (1) there is a class of individuals who are alleged to be treated differently; and
 - (2) it is shown that the class purported to be treated differently from another class is similarly situated to that other class in relation to the purposes of the law;
- i.) Re McKinney, supra at pp.266-267.

40. The circumstances facing the Plaintiff here represent a threat essentially unique to women. The Court can take judicial notice that women are properly regarded as a disadvantaged or disempowered group for whose protection the section 15 guarantees were enacted. Acknowledged indices of systemic discrimination, from unequal pay to physical victimization have led to the societal recognition that they are often treated as socially unequal to men.

41. It is respectfully submitted that section 15 is violated when governmental actions are based on stereotypical assumptions. The facts as pleaded disclose the Defendants' decision not to warn was based in part on the stereotypical assumption that such a warning would cause hysteria among the target group, namely women. Thus the Defendants allowed discriminatory stereotypical assumptions to adversely interfere with their duty to protect the Plaintiff and women like her.

- i.) Tetreault-Gadoury v. Canada Employment and Immigration Commission (October, 1988, unreported judgment of Fed. C.A.), at pp. 23-24.
- ii.) Schachter v. Canada supra at p. 208.

42. It is submitted that treatment without discrimination on the basis of sex in these circumstances requires that the Plaintiff, as a member of an overwhelmingly female class of targets of crime, be afforded an equal degree of security as is afforded other targets of crime.

- i.) Re McDonald and the Queen (1985), 10 O.A.C. 321 at p. 334 (Ont. C.A.).
- ii.) R. v. R.L. (1986), 14 O.A.C. 318 at p. 324 (Ont. C.A.).
- iii.) R. v. Century 21 Ramos Realty (1987), 58 O.R. (2d) 737 at pp.755-757 (Ont. C.A.).

43. The facts pleaded further disclose that the Defendants' policies and practices did not afford the Plaintiff or members of her class the necessary degree of police services and protection to achieve a level of security of the person equal to that enjoyed by men. Since sexual assault and rape is a gender crime which, both historically and to the present, has been largely perpetuated on women alone, women as a class suffer a greater degree of criminal violence than men and hence require the necessary protective resources to achieve a level of security of person equal to that afforded men.

44. The facts pleaded disclose that the Plaintiff was placed in an unequal position vis-a-vis men when she was exposed to the risk of attack or heightened risk of rape by the Defendants. This denial of equal treatment and consequent denial of equal result further infringe both section 15 and section 28 by denying those members of the class of "potential victims of rape", who are virtually all female the equal right to section 7 security of the person.

45. The adverse impact of the Defendants' actions is obvious.

D. Section 1

46. It is respectfully submitted that the Plaintiff's constitutional claims have raised triable issues and that hence the Defendants can only succeed in this motion if they establish that it is beyond belief that the Plaintiff could refute the Defendants' section 1 defence. The Plaintiff submits that the application of section 1, with its evidentiary onus on the Defendants, should not be addressed in an evidentiary vacuum, unless the constituent elements of the analysis are obvious or self-evident, which is not the case here. The expert and other evidence required is more properly adduced at trial.

- i.) Re Canadian Labour Congress and Bhindi et al.
(1985), 17 D.L.R. (4th) 193 (B.C.C.A.)
- ii.) R. v. Oakes, supra, at pp. 136-138.

47. In the alternative, it is submitted that section 1 is not a proper matter for consideration where the Defendants' impugned actions are a complete denial of the Plaintiff's constitutional rights under sections 7, 15 and 28.

- i.) Quebec Association of Protestant School Boards v. A.G. Quebec, [1984] 2 S.C.R. 66 at p. 86.

48. In the further alternative, should it be found that section 1 is properly raised in this motion, the Court must determine whether there is a governmental interest or objective of sufficient importance to warrant overriding a constitutional right, and then whether the means used are reasonable, demonstrably justifiable and proportional. It is submitted that the Defendants' actions in the circumstances of this case fail to meet this two part test.

- i.) R. v. Oakes, supra, at pp. 138-140.

49. It is further submitted that the Defendants' impugned actions do not meet the mandatory requirement in section 1 of being "prescribed by law".

- i.) R. v. Therens, supra at p. 621.
- ii.) Re Ontario Film and Video Appreciation Society and Ontario Board of Censors
(1983), 41 O.R. (2d) 583 at pp. 592-593
(Div. Ct.) affirmed (1984), 45 O.R. (2d)
80 (C.A.) leave to appeal granted (1984),
3 O.A.C. 318 (S.C.C.).

50. Further it is submitted that even if the Defendants' American jurisprudence was applied to the case at bar, the Defendants' actions would still be subject to constitutional scrutiny because of the discriminatory nature of the Defendants' actions and their knowledge of the Plaintiff's plight.

IV - RELIEF REQUESTED

51. For all of the above reasons it is respectfully requested that this motion be dismissed with costs on a solicitor/client basis.

All of which is respectfully submitted.

MARY CORNISH
of counsel for the Plaintiff
Plaintiff

CORNISH & ASSOCIATES
Barristers & Solicitors
210 Dundas Street West
Suite 500
Toronto, Ontario
M5G 2E8

(416) 971-5011

CHARLES CAMPBELL
of counsel for the

ILER, CAMPBELL & ASSOCIATES
Barristers & Solicitors
150 Simcoe Street
Toronto, Ontario
M5H 3G4

(416) 598-0103