Sexual Assault in Canada
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2.

_Jane Doe v Toronto Commissioners of Police:
A View from the Bar

Sean Dewart

Sean Dewart, Jane Doe's legal counsel, contributes to our understanding of the promise of law for sexually assaulted women by discussing the strategic considerations at play in the Jane Doe litigation, taking the position that it was a victory to even get the case to court so that previously unheard voices could be articulated in a legal forum. Beyond the legal victories chronicled by Elizabeth A Sheehy in the previous chapter, Sean notes that the possibility of holding police accountable in law for their conduct of investigations created by the Jane Doe case represents a public service for others wronged by police, a point picked up later in this volume by Blair Crew when he considers the possibility of a suit for wrongful unfounding by police of women's reports of sexual assault.

“Did Jane Doe (the case, not the person) make any difference?”

“Was it worth it?”

“Did it achieve anything?”

To answer these questions, one must reflect on the context in which the Jane Doe trial was conducted.

I kept a scrapbook during the trial and dusted it off to prepare this paper. The Jane Doe trial lasted eight or nine weeks in the fall of 1997 and received saturation coverage, largely due to Jane Doe's media savvy. The _Toronto Star_, which at the time was the largest circulation paper in Canada, had a reporter there and ran stories every day of the trial. The coverage in the other newspapers was only slightly less extensive. The electronic media obviously have a different attention span. However, their treatment of the matter was, by their standards, comparable.

The headlines just kept coming: “Failure to warn women morally indefensible”; “Ex-cop blasts sex-crime unit”; “Police buried damaging
report”; “Rape cases given low priority trial told”; “Police too busy to focus on rapes, court told.” And on and on it went for weeks and weeks. My scrapbook, which is undoubtedly incomplete, has more than seventy newspaper articles that appeared in the three major Toronto papers between mid-September and mid-November 1997.

This seemed completely natural at the time, because we were at the centre of the vortex, but when I looked back at the clippings ten years later, it amazed me. Because of Jane Doe’s courage, and the skill of Mary Cornish and the lawyers who worked on the file in the ten years before I became involved, the police were being questioned in a highly public forum they could neither dodge nor control. During the trial, we obviously had no idea how things would turn out. Most lawyers were persuaded that the case was unwinnable. Therefore, our official position was that simply getting to trial and airing the issues in this public forum was a victory.

Speaking for myself, I thought this was hogwash at the time. To my way of thinking, a victory would be a victory. Telling people that merely getting to trial was a victory was a defence mechanism, or as people say today, “managing expectations.” We probably wouldn’t win, so we declared victory where none existed.

I see now that I was wrong. The simple fact of a public trial was a victory for a voice and for voices that had previously been silenced. As the saying went at the time, Jane Doe was “speaking truth to power,” and people were paying a great deal of attention. I am not oblivious to the fact that the “speaking” was being done in a legal process in which Jane Doe herself was muzzled. My point is that, however imperfect the process, her story was being told and her message was getting out.

The trial ended on 1 December 1997, and the police enjoyed a respite for six months. However, the verdict came down in July of 1998 and, to put it mildly, things picked up. Banner headlines appeared on all the front pages: “Judge blasts sexist police”; “Police failed”; “Police found grossly negligent”; “Police must act on Jane Doe ruling.” I discovered a phenomenon about the media at the time, which has been proven true ten times in the ensuing ten years: whatever story is in the media at the beginning of July in Canada, as reporters and politicians begin to head out on vacation, will run for weeks, regardless of its intrinsic news value. In this case, the story was dead simple: Jane Doe won. And the news value was high.

Nevertheless, my scrapbook has another seventy-five clippings of stories that appeared between the date of the judgment, 3 July 1998, and the date when the police announced they were not appealing, 5 Au-
gust 1998. Again, the electronic media and, in particular, radio stations, provided comparable coverage. The national and international press picked it up, and all three Toronto papers ran lead editorials.

There was a frenzied debate about whether or not, and in what way, the police should apologize to Jane Doe. Ultimately, Jane Doe got her apology and, according to the front page of the Toronto Star on 10 July 1998, “City also says sorry to all Toronto women.” The police, however, could not do anything right. According to the next wave of headlines, “Apology just doesn’t cut it” and in the Ottawa Sun, “Apology not enough.” City council began to debate an audit of the Toronto Police Service; thus on and on it went, until 31 July 1998, when the head of the police union spoke out. The front page story in the Toronto Sun says it all: “We’ve had it Toronto cops say”; “Embittered by Jane Doe case and car-chase ruling, police threaten to turn blind eye on some crime.” That, of course, had been precisely our point, but the irony was lost on the police! It was truly a media frenzy for thirty days, until a decision was made that there would be no appeal, and life carried on.

My interest in the Toronto Police began when I was a teenager and just beginning to read the newspaper. I remember a week when the Globe and Mail ran a series of five or six stories about the Toronto Police hold-up squad. The series documented the use of torture (plumber’s claws) to extract confessions from accused men and various other corrupt practices. What I remember even more vividly than the stories, however, is the backlash. There was public fury that the Globe and Mail would attack the hard-working men — no mention of any hard-working women as I recall — who put their lives on the line every day to keep us safe. There were seething letters to the editor about the Globe’s “yellow journalism.” City councillors were up in arms and, smelling blood, the other newspapers piled on. Becker’s, a chain with hundreds of convenience stores, handed out free buttons for all right-thinking people to pin on their coats, claiming that “Our Cops Are Tops.” The Globe and the one or two councillors who foolishly thought the allegations might warrant further investigation slinked away with their tails between their legs.

It is fair to say that the image of the Toronto Police has taken a bit of a beating since then. While most community members are respectful of the difficult work that is honestly carried out by many police personnel, most people at least recognize that there are massive problems with the manner in which we are policed. There is little or no political will to fix things, as far as I can discern, but at least we have stopped collectively pretending that no problems exist.
I posit that the *Jane Doe* case was a pivotal factor in the continuum of events that has brought about this change in public attitudes. And this change is not confined to Toronto. It is safe to say that police services across Canada are viewed today with a healthy degree of skepticism that would have been unthinkable twenty-five years ago. The RCMP in particular has finally lost its mythic status, and while I do not pretend that meaningful reform is under way, I suggest that Canadians are finally asking the right questions, or at least are asking questions. I go so far as to say that reform is now possible, where this was not true previously. I also say that the *Jane Doe* case is one cause, and not an effect, of this change in attitudes.

The point can be seen most easily by tracing the development of the law in the United Kingdom, where courts and politicians continue to fawn over police. *Jane Doe* has been repeatedly cited in the UK by plaintiffs seeking redress for various types of police misconduct, and has been repeatedly shot down by trial and appeal courts. The House of Lords, in particular, is very sniffy about *Jane Doe*.

Anyone who has paid attention to the experience in Britain in the wake of 9/11 has seen that British authorities are as eager as those in the United States to gut basic civil liberties in the name of fighting terrorism. The rise in police power in the UK in the last ten years is dramatic, and largely unchallenged. Whatever the realities on the ground, there is no doubt that public discourse in Canada concerning police powers and responsibilities is different than in most places in the world.

Even if I am wrong about public discourse, our legal discourse on these topics is unquestionably unique. This can be seen in both the growing number of trial level decisions where police are held liable for various types of wrong-doing, and in the Supreme Court of Canada’s 2007 decision in *Hill v Hamilton-Wentworth Regional Police Services Board*. As a result of this case, people who have been wrongly convicted or wrongly charged can sue police investigators, if the detectives’ negligence caused the wrongful prosecution. There is no doubt that this is a uniquely Canadian case. Lawsuits of this type have been theoretically possible, although very rare, in Quebec for a number of years, but were absolutely unheard of anywhere else in the world.

Let me digress to tell a story that illustrates my point. When *Hill* was being argued in the Supreme Court, the lawyer for the police sensed, I think, that things were not going well. Towards the end of his argument,

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his voice had a somewhat desperate tone, and he implored the judges not to make Canada the laughingstock of the common law world.


To be clear, although I maintain that we in Canada discuss police accountability issues differently than elsewhere, I am not an utter idiot. Our enlightened public attitudes didn't do Robert Dziekanski any good, and his is only one of countless stories about the problem with the way we are policed. I have already said several times that I do not see any signs of systemic reform.

In the absence of any political will, I think we have to be realistic about what we can demand from the legal system. If the legal system can play a meaningful role in creating an environment where reform is possible, it will have served us well. Remember, after all, what a lawsuit is, or at least what the model lawsuit is. A single person with an individual problem comes to the law for a solution, or at least a way out of the problem, tailored to his or her circumstances.

Jane Doe was an individual who challenged the legal system to respond to a massive, intractable, and deeply entrenched social and political problem. In the euphoria after she won, some of us believed that the court’s judgment would be enough to effect real change by itself. This, of course, was naive and wrong.

The truth, however, is that more and more people who have been wronged by the police in Canada are obtaining redress in individual lawsuits. I believe there is some merit to the conventional theory of tort law. As the number of individual suits increases, municipal accountants and insurance underwriters will demand that their clients, the police,

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2 “Imagine,” he said, “if the common law in Canada was different from the law in the United States, in Great Britain, in Australia, in New Zealand, and in South Africa. There isn’t a single country in the world where one can claim damages in such circumstances,” he said. “We would be alone in the world,” he repeated. Judge LeBel stopped him. “That isn’t important, he said. “You would be with Quebec.” Remarks from the bench during oral argument before the Supreme Court of Canada on November 10, 2006 in Hill, ibid.

3 For more information on Robert Dziekanski, see <http://www.cbc.ca/news/background/tasers/video.html>.
change. This, together with the advances in public dialogue I have al-
luded to, will create circumstances in which real, broadly-based change is possible. The political will to do anything will have to come from somewhere other than the legal system, but that does not mean that the legal system has failed. *Jane Doe*, the case, accomplished as much as one could reasonably expect. For that reason, Jane Doe, the person, is a Ca-
nadian hero.