Sexual Assault in Canada
Elizabeth A. Sheehy

Published by University of Ottawa Press

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

For additional information about this book
https://muse.jhu.edu/book/20786
10.
Striking Back: The Viability of a Civil Action Against the Police for the “Wrongful Unfounding” of Reported Rapes

A Blair Crew

Building on the evidence that “wrongful unfounding” of sexual assault reports discussed in the last chapter remains a central problem in women’s access to justice, Blair Crew insists that we find mechanisms by which to hold police accountable. He explores the potential of the newly recognized wrong of “negligent investigation” made possible, as discussed by Sean Dewart in Chapter Two, by Jane Doe’s precedent setting case, to fill this need. However, he notes the many difficulties posed by this avenue, including the need to prove a separate and compensable “harm” caused by the police decision to unfound a woman’s report. Blair returns to the legal theories advanced by Jane Doe of failure to warn and of sex discrimination in the enforcement of the law as the most plausible avenues to secure accountability. In so doing, he echoes one of Lucinda Vandervort’s urgent recommendations that government enact legislation that would guarantee access to funded legal representation and “standing,” as won by Jane Doe in her rapist’s criminal trial (see Appendix B at the end of this chapter), for complainants in sexual assault trials.

I came to my pro-feminist views on the investigation of sexual assaults quite by accident. As the only associate working for a lawyer who represented individuals suing the police, I was frequently contacted by women who had been raped who wished to sue, not their attacker, but the local Police Services Board because of their refusal to investigate the complaint. Never mind that there was sometimes proof of a violent assault, or an indication that the woman had been drugged, or a DNA

1 I am very deeply indebted to Sunny Marriner, Young Women At Risk [YWAR] Program Co-ordinator, Sexual Assault Support Centre [SASC] of Ottawa for all aspects of this paper. She cared passionately about the systemic unfounding of sexual assault complaints when I was still completely ignorant of the issue. Many of the thoughts expressed in this paper were worked out in response to her unending cries of “why not?!?” or reflect ideas that were initially hers. In a very real way, Sunny is responsible for my pro-feminist views, and was behind almost all of my advocacy on behalf of sexual assault survivors.
sample that had now been entered into the DNA registry: each woman had been told by the police that she was lying. She would be told that she had consented to forced sex acts. She would be told she simply had a bad “first time.” She would be told that the words that she had used to describe the rape had somehow betrayed her because she had not used the words that someone who had “really been raped” would use. Frequently, once the police told the woman involved that she was a liar, the police would persist and insist that, unless the woman recanted, she would be charged with mischief.

Many of these women have related to me that their treatment at the hands of the police was often more distressing than the initial assault. Many continued to bear anger and resentment towards the police long after working through the fact that they were involved in a situation in which they were vulnerable to exploitation by some man or several men. For many of these women, living with the knowledge that, according to society as represented by the police, they were labelled as liars became the most emotionally scarring aspect of their ordeal. The police, after all, are there to protect members of society, not to allow rapists to go about their way.

Although the extent to which sexual assaults are determined by the police to be “unfounded” has begun to be subject of closer academic attention, the many women who contacted me locally led me to question the extent to which local police were clearing reported sexual assaults as being unfounded. A request under the Freedom of Information and Protection of Privacy Act filed in 2008 revealed that, in Ottawa, between 2002 and 2007, 914 of the reported 2,817 sexual assaults, or 32.45 per cent, were cleared by the police as being “unfounded.”

---

2 See, for example, Justice Institute of British Columbia, Police Classification of Sexual Assault Cases as Unfounded: An Exploratory Study by Linda Light & Gisela Ruebsaat [unpublished] at 80. According to the Statistics Canada definition, for a sexual assault to be classified as unfounded, the police investigation must establish that a sexual assault did not occur or was not attempted. However, as Light & Ruebsaat point out, there is sometimes confusion with the statistics because of confusion between the “unfounded” category and the “founded but not cleared” category and by the use of an “unsubstantiated” category by the RCMP. In addition, Statistics Canada has discontinued the systematic collection of data on “unfounded” reports. Throughout this paper, the use of the term “unfounded” refers to cases in which a woman has reported a sexual assault, but in which the police concluded that no such assault occurred.

3 RSO 990, F31.

4 This request was filed by Teresa DuBois, when she was an LLB candidate, at the University of Ottawa Faculty of Law, as part of a fall 2007 project that gathered six feminist law students at the University of Ottawa, working under the supervision of the author, Professor Elizabeth Sheehy and Professor Daphne Gilbert, to conduct research.
Astoundingly, this represented just more than double the number of cases in which the police actually laid charges. In contrast, only 797 of 23,221, or 3.43 per cent, of non-sexual assaults and 400 of 16,747, or 2.39 per cent, of all property crimes reported in the same period were cleared by the Ottawa police as being unfounded. Overall, women in Ottawa were being told that their report of a sexual assault was fabricated at a rate that was more than ten times greater than for any other crime.  

Negligent investigations by police forces that had tunnel vision with regard to a single case theory have lead to a fine Canadian legacy of wrongful convictions. When a person is wrongfully convicted of a high-profile crime, there has often been a public outcry sufficient to merit a judicial inquiry or commission, and compensation follows as a matter of course. Yet there is no public outcry when a woman is wrongfully ac-

on the viability of, and in support of, a proposed civil lawsuit on behalf of one woman to hold the police accountable for the wrongful unfounding of her reported rape. One aspect of this research was the gathering of statistical evidence on unfounding rates in Ontario, through filing Freedom of Information and Protection of Privacy Act requests. This work, with support of the University of Ottawa Community Legal Clinic, is ongoing. The Ottawa statistics referred to here remain on file with the author.  

As of the date of writing, responses to the Freedom of Information and Protection of Privacy Act requests discussed in note 3 have been received from seven Ontario police jurisdictions: Hamilton, London, Ottawa, Peel Region, Windsor, York Region, and the Ontario Provincial Police. Responses from the Metropolitan Toronto Police Force and Kingston are forthcoming. Requests to the Durham and Halton Regional Police forces were abandoned due to funding restrictions. The statistics from York Region specifically exclude cases where a complainant is not believed. Statistics from London are not available for the entire period of study. Statistics from the reporting jurisdictions that are comparable are included at Appendix “B.” These figures confirm that reported sexual assaults are determined by many police departments to be “unfounded” at a rate that is about ten times higher than that reported for any other crime. Two of the reporting police jurisdictions are an exception to this: the Ontario Provincial Police, which has a disproportionately high unfounding rate for all reported crimes, and Windsor, which uniquely reports a very low number of sexual assaults that are determined to be unfounded.  

cused of having falsely reported a rape, even though this may lead to an increased risk to the victim because the perpetrator often has continued access to her. In large measure, this lack of response may be attributed to the fact that many sexual assault survivors begin as the most vulnerable members of society because of their race, economic circumstances, or history of abuse or mental illness. As victims of sexualized violence, these women become even more vulnerable and marginalized. However, in light of the sexist and myth-based reasons that were often provided to women as to why the police were clearing the report, as well as the sheer determination of the women who consulted me, it was clear to me that the police decision to label a complaint as fabricated bore no relationship to reality. Complaints are not only being “unfounded”; they are being “wrongfully unfounded.”  

Canada’s repeated experience with high-profile wrongful convictions has lead to a legacy of reform, including broad Crown disclosure obligations and mandatory jury warnings, for example, about the frailties of eyewitness identifications and the dangers of the evidence of jail-house informants. However, given that the public outcry over wrongful unfounding is non-existent, there has been no public pressure, apart from that of service providers and feminist advocacy groups, for police forces to reform their practices with regard to the investigation of sexual assaults. While the Jane Doe case shed light on the practices of Metropolitan Toronto Police Force [MTPF], many of the reforms instituted in Toronto have appeared to be illusory. There is also

7 I used the term “wrongful unfounding” as a focus for the research project discussed in note 3, above. As is discussed in the next section of this paper, Canadians now have a widespread understanding of the notion of “wrongful convictions.” I use the term “wrongful unfounding” as a way to reconceptualize the very notion of “unfounded” rape complaints: almost all of the time when the police determine that a rape complaint was “unfounded,” they have wrongfully arrived at this conclusion, both through the process through which this was determined and in the result.


11 Very recently, there has been just a little public attention beginning to focus on the issue of wrongful unfounding. See, for example, Jennifer O’Connor, “Undone: Hundreds of Sexual Assault Cases Each Year are Labelled ‘Unfounded’ by Canadian police Departments” (Jan-Feb 2009) This Magazine, online: <http://www.thismagazine.ca/2009/01/undone_unfounded.php>.

12 Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police (1998), 39 OR (3d) 487, 160 DLR (4th) 697 (Ont Ct (Gen Div)). The two audits of the practices of the MTPF stemming from the Jane Doe case demonstrate that, even in Toronto, pro-
no evidence that any other police force has been particularly concerned about the impugned practices in which the MTPF was engaging.

Given the lack of public outcry or incentive for law reform, it would appear that the only recourse to bring about reform to the practices of police sexual assault squads is through the courts, through judicial scrutiny of the practices of a specific police force, or through monetary damage awards that would attract the attention of many police forces. This paper examines the extent to which the recently confirmed tort of negligent investigation can be used as a means of seeking redress for women who have reported a sexual assault that has been wrongfully cleared by the police, and more generally as a means of addressing the problem of systemic wrongful unfounding of reported sexual assaults. It then compares this strategy to the extent to which the causes of action developed in Jane Doe could be again utilized to accomplish these goals.

THE TORT OF NEGLIGENT INVESTIGATION

One intuitive possible cause of action to address the wrongful unfounding of a reported sexual assault is to frame the claim in negligence. Negligence was, after all, one of the bases in which Jane Doe was successful in her claim against the MTPF. In addition, the existence of a tort of negligent investigation has now clearly been recognized by the Supreme Court of Canada.13 Ultimately, not much turns on the fact that the label of “negligent investigation” has been applied to this tort: given that the court applied a standard negligence analysis to examine the conduct of the police, the term “negligent investigation” is really just a kind of shorthand for “police professional negligence.” Ultimately, it would appear that the limited recognition afforded to the victims of crime means that a claim for negligent investigation for wrongful unfounding is likely to face considerable judicial resistance, as I will demonstrate through an examination of the traditional requirements of progress towards reform has been slow. See Jeffrey Griffiths, Review of the Investigation of Sexual Assaults—Toronto Police Service (Toronto: Toronto Audit Services, 1999) at 53–55, online: <http://www.toronto.ca/audit/1999/102599.pdf>; Jeffrey Griffiths, The 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) at 53–54, online: <http://www.toronto.ca/audit/reports2004_sub4.htm>. There is no evidence that any other police force has in any way examined their own practices in response to Jane Doe and the subsequent audits.

13 Hill v Hamilton-Wentworth Regional Police Services Board, [2007] 3 SCR 129.
a negligence claim: the existence of a duty of care, a breach of the standard of care, compensable damages, and a causal connection between the breach and the damages so caused.14

A Duty of Care
In any action for negligence, courts usually still start with an analysis of whether the alleged wrongdoer owed a duty of care to the person who suffered a loss.15 The test for the existence of duty follows the analysis first introduced in Anns v Merton London Borough Council16 and adopted in Canada as Kamloops v BC,17 as subsequently explained and clarified in a number of cases.18 As stated in Hill, “the test for determining whether a person owes a duty of care involves two questions: (1) Does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a prima facie duty of care, and, if so, (2) are there any residual policy considerations which ought to negate or limit that duty of care.”19

In Hill, the Supreme Court affirmed that the first part of the test requires a finding both that it is “reasonably foreseeable that the actions of the alleged wrongdoer would cause harm to the victim” and that “there must also be a close and direct relationship of proximity or neighbourhood” between the parties.20 The proximity inquiry asks whether there are additional factors indicating that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care.21 In Hill, a majority of the court clearly pointed out that, in affirming the existence of a duty of care between the police and a suspect, the court was considering only that “very particular” relationship. The majority noted that:

It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships

---

15 Hill, supra note 13 at para 19.
19 Hill, supra note 13 at para 20.
20 Ibid at paras 22–23.
21 Ibid at para 23.
involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh Anns analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating [emphasis added].

The court further noted that cases dealing with the relationship between the police and victims of crime were not determinative in this case, even though they might be informative. Finally, the majority noted, distressingly, that the Jane Doe decision was “a lower court decision and that debate continues over the content and scope of that case,” and specifically left open the question of whether or not there was sufficient proximity between the police and the victim of a crime for another day.

In essence, then, in order to succeed in proving that the police owe a sexual assault survivor a duty of care in conducting a rape investigation, the survivor will need to establish that: (1) it is foreseeable that she will suffer harm if the investigation is not properly conducted; and (2) there is a sufficient relationship of proximity between the police officer and the complainant to give rise to a prima facie duty of care; and (3) there are no policy reasons to negate or limit the scope of the duty.

(1) Foreseeability

In Hill, the court readily accepted that it was reasonably foreseeable that a negligent investigation could cause harm to a person suspected of committing a crime. At a glance, it would appear that the foreseeable harm caused by wrongful unfounding is obvious: every wrongfully unfounded rape complaint creates an additional risk of physical harm for all women. In specific cases, the conclusion by the police that no rape occurred leads directly to the result that no suspect is sought, and therefore caught, leading directly to a risk that another woman will be raped. This is, of course, exactly what occurred in Jane Doe’s circumstances. In these cases, a kind of harm the courts would accept for the

22 Ibid at para 27.
23 Ibid.
24 Ibid.
25 Ibid at para 33.
foreseeability analysis is abundantly clear. However, since the cause of action on which I wish to focus is not limited to those circumstances in which a subsequent assault can be proven, it will be necessary to focus the foreseeability analysis on other kinds of harm.

In the case of sexual assault survivors, a court may clearly need to be educated about the kinds of harm a survivor suffers by being called a liar before the court will accept that it is reasonably foreseeable that wrongful unfounding causes harm. There may be a tendency for a court to dismiss a survivor by narrowly focusing on the harm caused by the rape itself, instead of the larger issues of dignity, equality, and emotional and psychological well-being that can flow from having a report of a rape believed and seeing the attacker brought to justice.

(2) Proximity
With regard to proximity, although the court in Hill stated that different considerations would apply with regard to victims of crime, instead of suspects, the court did leave tantalizing breadcrumbs that would suggest that the court could be prepared, on a proper foundation, to find that there was a sufficient relationship of proximity between a survivor and the police officer assigned to investigate her complaint. For example, with regard to suspects, the court noted:

There are particular considerations relevant to proximity and policy applicable to this relationship, including: the reasonable expectations of a party being investigated by the police, the seriousness of the interests at stake for the suspect, the legal duties owed by police to suspects under their governing statutes and the Charter and the importance of balancing the need for police to be able to investigate effectively with the protection of the fundamental rights of a suspect or accused person.

There is no aspect of this discussion that could not be applied to a sexual assault survivor: a rape victim has every reasonable expectation that she will be believed and that the police will investigate a reported crime; the interests of the survivor, including her dignity interests, are very serious interests; the police have a specific duty to investigate crime under various Police Services Acts, and important fundament-

---

26 Ibid at para 27.
27 Ibid.
28 In Hill, writing for a three-member minority, Justice Charron noted that although “investigating crime” is not specifically listed as one of the duties of the police in the Ontario Police Services Act, RSO 1990, c p 15, that this duty was implicit within many
al Charter rights of a victim, including protection of her safety, privacy, personal autonomy, and dignity are all at stake.

The majority in Hill also noted that the proximity analysis should include an analysis of the nature of the plaintiff’s interests engaged, and specifically noted that the reputation of the suspect was an important interest.29 The reputation interests of not being labelled as a liar who “cried rape” is no less engaging than the interest a suspect has in not being labelled as a “criminal.”

Furthermore, the court noted that public interests also play a role in the proximity analysis in determining whether a prima facie duty of care arises. The court noted that recognizing an action for negligent police investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism.30 In this regard, the extremely low reporting, charging, and conviction rates for sexual assault can only be regarded as extreme failures of the justice system.31 Moreover, as it would be argued that the unfounding rates are themselves a result of institutional sexism on the part of the police,32 the public interest in finding a sufficient relationship of proximity is manifestly clear.

In summary, in light of the statutory duties that the police have to investigate reported crimes, a victim’s expectation that her rape will be investigated, and the nature of the personal and public interests in ensuring that such an investigation is handled competently, the proximity analysis should not present a bar to an action for negligent investigation from proceeding.

(3) Policy Reasons to Negate the Duty of Care
Assuming that a court is prepared to recognize both the foreseeability

of the specific duties listed. Although the Hill minority found that the police did not owe a duty of care to suspects of crime, their comments overall are not incompatible with the possibility that the police could owe a duty of care to victims.

29 Hill, supra note 13 at para 34.
30 Ibid at para 36.
31 The most recent statistics confirm that only about 10 percent of sexual assaults are reported to the police, and that conviction rates for sexual assaults are lower than those observed for any other crime. Canadian Centre for Justice Statistics, Sexual Assault in Canada 2004 and 2007, Shannon Brennan & Andrea Taylor-Butts (Ottawa: Statistics Canada, 2008) at 6, online: <http://www.statcan.gc.ca/pub/85f0033m85f0033m2008019-eng.pdf>.
32 See the discussion on this item below.
of harm and proximity of relationship needed to give rise to a *prima facie* duty of care, the second stage of the *Anns* test asks whether there are broader policy reasons for declining to recognize this duty of care.33

In any potential action for negligent investigation by the wrongful unfounding of a rape complaint, the police are likely to immediately respond with at least two alleged policy reasons to negate such a duty: a “floodgates” argument, and the opposing duty, so vehemently denied to exist by counsel for the police in *Hill*, owed to suspects.

The first argument, known as the floodgates argument, would be that, by recognizing a special duty of care owed to rape victims, the police would be exposed to potential liability from the victims of all crime, any time that a perpetrator was not caught and brought to justice. Such arguments are entirely misplaced: in those rare cases of “stranger rapes,” I suspect that women will have little problem understanding that, once in a while, no one is brought to justice only because the perpetrator was never caught. Cases that are left as “founded but not cleared” are entirely different than cases that are classified as unfounded. Police need not fear actions being brought by the victims of bicycle thieves unless and until those who report that their bicycles have been stolen are routinely told that they are lying, or that they actually gave their bicycle away.

The second argument, more pernicious than the first, is that there is a policy reason not to recognize a duty of care to women who report a sexual assault because, by doing so, the police will necessarily breach their duty not to subject suspects to the stigma of being publicly labelled as rapists on anything less than a “thorough evaluation of the evidence.” A court may find this argument to be tenable as the defendant police force will be likely to cite their own unfounding figures to justify their need to “weed out false complaints.” However, if the police were to start from the point of view that a woman who reports a sexual assault should be believed, the police would likely be protected from liability because they would have reasonable and probable grounds to lay charges from the moment a report is received. While the Supreme Court recognized in *Hill* that the police are properly concerned with evaluating evidence,34 the court expressly rejected the notion that the

33 *Hill*, supra note 13 at para 46.
34 *Hill*, supra note 13 at para 49. The police take a fundamentally different approach to “evaluating evidence” in sexual assault complaints than they do for any other crime. For virtually all other crimes, complainants are almost universally believed unless there is an overwhelming reason not to do so. When the methods of “evaluating evid-
police had a “quasi-judicial role” and instead held that it was only prosecutors who must be mainly concerned with whether the evidence will support a conviction. Legislative reform to provide the police with civil immunity for charging a suspect in a sexual assault case, unless done in bad faith, would be beneficial.

The Standard of Care
When evaluating the standard of care of any professional, the central question customarily asked is: “What would the reasonable professional do in like circumstances?” Clearly, the customary practice of others engaged in the same activity plays a central role in this assessment. As stated in Hill:

The general rule is that the standard of care in negligence is that of the reasonable person in similar circumstances. In cases of professional negligence, this rule is qualified by an additional principle: where the defendant has special skills and experience, the defendant must “live up to the standards possessed by persons of reasonable skill and experience in that calling.” These principles suggest the standard of the reasonable officer in like circumstances.

This standard is highly problematic for actions seeking redress for the systematic practices of the police generally. “What a reasonable police officer would do in similar circumstances” is simply an inappropriate yardstick to measure the duty of care when the central allegation is that those customary practices are themselves wholly inappropriate and discriminatory.

Teresa DuBois has highlighted evidence that confirms that police officers are trained to approach a sexual assault investigation with the suspicion that the complainant is lying. For example, in his text on criminal profiling, Brent Turvey includes an entire chapter entitled “False Reports,” which begins with the assertion, utterly unsupported by any scientific analysis, that at least 20 to 30 percent of the sexual ass-

35 Hill, supra note 13 at para 49.
36 Ibid at para 69.
37 See DuBois, supra note 34.
sault cases the authors have been involved with were determined to be false reports, and that the authors have observed “many other false reports that were not identified as such by the assigned investigator.”

John Baeza later provides his own “Baeza False Report Index” that identifies various “red flags” that a report may be false, including that the victim has stated that she wants to speak with a female officer, that the victim has previously reported a “similar crime,” or that the “victim has a long psychiatric history.” Sexual assault investigators are being trained using materials that begin with misogynistic assumptions and stereotypes.

As long as members of police forces are “trained” using materials like Turvey’s text, which promulgates such fundamental rape mythologies, and as long as police continue to be taught to believe that women lie about being raped, police will be able to defer to the practices of other police forces to show that they only proceeded in a manner that was “reasonable” and “customary.” Clearly, what is required here is feminist advocacy that demonstrates that the standard of “what would the reasonable sexual assault investigator do in similar circumstances?” is an entirely inappropriate standard of care. A more appropriate standard by which an investigation ought to be assessed is “what can women expect of a reasonable sexual assault investigation?” At a minimum, such an investigation must start from a premise of belief, not disbelief, and must involve an investigation that does not conclude with the taking of the survivor’s statement.

Damages: Convincing the Court of Compensable Harm
So far, I have outlined that even if a court were to recognize a prima facie duty of care, the policy analysis stage of the Anns test might present an obstacle to a viable action for negligent investigation for wrongful unfounding. In addition, even if that hurdle could be cleared, there could also be considerable difficulty with whether the fundamental disbelief of women by the police presented a breach of the duty of care, unless the standard of care by which an investigation is measured can look beyond customary police practices. However, both of these obstacles may be relatively minor when compared to the third

---

39 Ibid at 177.
element required for a successful action in negligence: the analysis of damages.

Leaving aside cases in which a woman is attacked again because she now has a reputation that she should be disbelieved when she reports a rape, and therefore can be raped with impunity, it is clear that any injury a woman suffers as a result of the wrongful unfounding of her rape complaint will be purely psychological injuries. Historically, the common law has had substantial difficulties with claimants’ demands for damages for nervous shock and purely economic losses.\(^{40}\) Even though nervous shock claims are now viewed in much the same way as other claims for damages,\(^{41}\) occasionally even the Supreme Court still appears to classify claims for psychological harms together with purely economic losses.\(^{42}\)

Despite this tendency, courts have been prepared to recognize claims for “nervous shock” provided that they are accompanied by a recognizable physical or psychological illness.\(^{43}\) The courts continue to distinguish between “nervous shock,” which is recoverable, and “mere sorrow, grief and emotional upset,” which are not.\(^{44}\) In other words, in order to succeed in an action for negligent investigation for wrongful unfounding, a woman will need to prove that she developed, or at least exacerbated, a mental illness because the police wrongfully refused to investigate her rape. Apart from further pathologizing sexual assault survivors, this requirement creates at least two difficulties: one that applies to all victims of crime, and the other that applies uniquely to victims of sexualized violence.

The first difficulty, which is not unique to sexual assault survivors, is the law’s continued reluctance to recognize any private interest held by the victim in the outcome of a criminal investigation. The traditional position is that the investigation and prosecution of crime are matters of public law. While the court may acknowledge that a complainant may “derive some personal satisfaction from a conviction,” that satisfaction is dismissed as a “purely personal matter” that has “no reality in law.”\(^{45}\)

The second difficulty, more subtle and distressing than the first, is

\(^{40}\) Klar, supra note 14 at 426.

\(^{41}\) Ibid.

\(^{42}\) Hill, supra note 13 at para 90.

\(^{43}\) Klar, supra note 14 at 427.

\(^{44}\) Ibid.

unique to survivors of sexual assault. Any woman who suffers from the wrongful unfounding of a reported sexual assault has, of course, been sexually assaulted. Depending on the survivor, this may or may not have led to the development of psychological injuries, including illnesses such as depression or post-traumatic stress disorder. This leaves the plaintiff in the position of needing to prove the extent to which her psychological injuries are a result of the wrongful unfounding of her case, compared to the extent to which her injuries are the result of the initial sexual assault, to a court that may be reluctant to accept that the damages the woman suffered as a result of being labelled a liar could ever be as significant as, or more significant than, the psychological harm caused by the initial rape. Clearly, what is required is significant psychological research that demonstrates the considerable independent psychological harm that is done when women are disbelieved by the very public agency set up to protect them. Of course, it will be helpful, at this stage of any potential case, that the police will be utterly unable to claim in defence that any of the woman’s injuries were caused by the initial rape, because, according to the police, this initial rape never occurred at all.

Causation
The final element in a successful action for negligence is proof of the element of causation. Recovery for negligence requires a causal connection between the breach of the standard of care and the compensable damage suffered. As Elizabeth Sheehy has eloquently pointed out, the failure to apply appropriate knowledge and common sense in performing the causation analysis made all the difference between the successful outcome in Jane Doe and the unsuccessful outcome in Mooney v

46 The difficulty here is that when she is raped, a woman has had the power to control an aspect of her sexual identity taken from her. It may be difficult for a court to accept that any psychological injury could be greater than the injury stemming from the rape itself. Given that many men perceive women primarily as sexual objects, some men will believe that a woman who has been raped has been injured in the one way that is most central to her identity as a sexual object. It is possible that a male-biased court might, therefore, perceive a rape victim primarily as a violated sexual object, such that any other subsequent injury would be viewed as being relatively unimportant. Such a court might conclude that any injury to the woman’s dignity and psychological integrity by being called a liar could not possibly be more significant than the injury caused by the rape itself. The full argument needs to be developed another day.

47 See the discussion of independent psychological harms caused by wrongful unfounding, below.
BC (Attorney General). 48

The starting point for this analysis is the “but for” test — namely, whether, on a balance of probabilities, the compensable damage would not have occurred but for the negligence of the wrongdoer. 49 As such, it would be important for an action for damages for wrongful unfounding to focus carefully on the psychological injuries that occur as a result of this unfounding, and to make it clear that the injuries on which the claimant was relying were as a result of the negligent investigation itself, not the initial sexual assault.

Summary on an Action for Negligence for Wrongful Unfounding

From the foregoing discussion, it would seem that an action for negligence for the wrongful unfounding of a reported sexual assault that was not accompanied by a demonstration of physical injury is likely to face considerable difficulties. Even if the courts were to recognize a prima facie duty of care, there is a possibility that the courts might negate the duty at the policy considerations stage of the Anns analysis. Furthermore, the analysis of whether there is a breach of the appropriate standard of care will require a paradigm shift in which customary police practice is viewed as the source of the breach of an appropriate standard of care, not the yardstick used to justify incompetent investigations. Significantly, the analysis of foreseeability of harm, causation, and compensable damages will need to rely on psychological research able to demonstrate that significant psychological injuries can and do result from telling a trauma survivor that she is lying about the source of her trauma.

Given the difficulties that an action for wrongful unfounding based on the developing concept of negligent investigation would face, it is worthwhile to examine other possible causes of action. In this regard, the twin bases of liability identified in Jane Doe present two better avenues for holding the police to account — namely, an action for negligent failure to warn, and an action for damages or other remedies under the Canadian Charter of Rights and Freedoms. It is to these possibilities that I now turn.

49 Hill, supra note 13 at para 93.
Characterizing Wrongful Unfounding as a Negligent Failure to Warn

At first glance, an action for a failure to warn a woman seems of little assistance in the search for a solution to the systemic problem of wrongful unfounding. However, in a narrow set of circumstances, this action could be used to shed light on inappropriate police practices, including the problem of systemic disbelief, much as it did in the Jane Doe case itself.

It is beyond dispute that the wrongful unfounding of reported rapes materially increases the risk of rape. First, once a specific woman has been labelled by the police as someone who has falsely reported a rape, it is almost certain that the police will disregard any further complaint she chooses to make, thereby significantly increasing the risk to that woman of a future attack. Secondly, each time that a reported rape is disbelieved, there are one or more perpetrators who have just gotten away with rape. If the police investigation has gone so far as to at least question a suspect, this may serve some deterrent effect, as the police may eventually reconsider their decision to label a complaint as “unfounded” if one man’s name were to repeatedly surface during several different rape investigations. In addition, a perpetrator who has been questioned once may be inclined to be more cautious in the future. However, where the investigation never gets to this stage because the complaint has been dismissed as being a fabrication, it seems highly likely that the perpetrator will continue to rape. More generally, the many points of attrition in a rape case, including low reporting rates, high unfounding rates, and low conviction rates, all send a message to men that rape is the most frequently perfected crime. Therefore, each

50 Again, Turvey sees the fact that a woman has previously reported a sexual assault as a reason to be suspicious of any future sexual assault that she reports. See Baeza & Turvey, supra note 38 at 177. Anecdotally, I am aware of women for whom the police will take no action, regardless of the nature of a crime she has reported, once she has been labelled as having “credibility problems.”

51 UK Home Office, A Gap or a Chasm? Attrition in Reported Rape Cases (Research Study 293) by Liz Kelly, Jo Lovett & Linda Regan (London: Home Office, 2005), online: <http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>. This study provides a particularly comprehensive examination not only of the extent of unfounding, but all the points of attrition in reported sexual assaults.
sexual assault that is wrongfully determined by the police to be a false complaint materially increases the risk of sexual assault to all women, at all times.

Unfortunately, what will be required in order for an action for the failure to warn, or a similarly framed action to succeed, is, as in the Jane Doe case, evidence of police knowledge of a series of similar sexual assaults committed within a narrow geographic range or time frame and this only incidentally and subsequently addresses the problem of wrongful unfounding.

The Jane Doe case itself provides an excellent example. It is now well known, of course, that Jane Doe was Paul Callow’s fifth known victim. The “investigations” into the first two reported rapes by the same perpetrator and, in particular, the investigation into the second assault, are perfect paradigms of wrongful unfounding. In the first case, that of PA, while the police displayed some tendency to believe she had been attacked, the police wrongfully concluded that the perpetrator was likely her boyfriend and, therefore, did not conduct a further meaningful investigation of her case.

Callow’s second reporting victim, BK, represents a classic case of wrongful unfounding. PC Moyer’s notes confirmed that, since BK told her story in a calm and relaxed manner, “this shed some doubt on the credibility of her story,” thereby invoking sexist and stereotypical myths that a woman who has been raped will be emotional. Moyer used the fact that BK’s apartment was “immaculate and undisturbed” to discredit her, evidently believing that this is an indication that no “real rape” could have occurred. Both Cst Moyer and Staff Sgt Duggan disbelieved BK’s report based on sexist mythologies, and her report was wrongfully unfounded for what Justice MacFarlane describes as “simplistic, superficial, irrelevant and generally uninformed” reasons. The phenomenon of wrongful unfounding played a crucial role in the decision not to warn Jane Doe.

That said, an action for negligent investigation for wrongful unfounding where a subsequent attack can be proven is unlikely to run into few of the problems of a general action for wrongful unfounding, as discussed above. First, the existence of a duty of care requiring the

52 Jane Doe, supra note 12 at para 1.
53 Ibid at paras 56–62.
54 Ibid at para 64.
55 Ibid.
56 Ibid at para 66.
police to warn women of a danger in certain circumstances has now clearly been recognized in *Jane Doe*: the relationship between the police and potential rape victims now fits a category of recognized relationships of sufficient proximity. Secondly, here the usual police practices may actually help to impugn a police force that has received repeated reports of similar sexual assaults from within a narrow geographic location or time frame, but the police have chosen to disbelieve the reports. Finally, a woman who is raped after the police have disbelieved, for example, four earlier similar reports will not face problems with the proof of foreseeability, damages, and causation. The difficulty with an action framed in this manner, however, is that it will require the plaintiff to acquire knowledge and proof of a series of similar prior attacks.

**EQUALITY CLAIM UNDER THE CHARTER**

If an action for negligent investigation is likely to face considerable obstacles, and if an action for the “failure to warn” would likely succeed again only in factual circumstances that require evidence that will rarely be available, then it appears that the most promising avenue to address the systemic wrongful unfounding of reported sexual assaults is through an action, as in *Jane Doe’s* case, framed in unequal protection under the Canadian *Charter of Rights and Freedoms*. As Sheehy has noted, the *Jane Doe* case “provides a blueprint for section 15 claims involving systemic discrimination in the enforcement of the criminal law.”

Conceptually, a *Charter* claim is much better suited than a negligence claim to address systemic unfounding where there has been no subsequent physical attack because the issue of “who did what?” becomes somewhat secondary to the central issue in most discrimination claims: “why did an entity take the actions that it did?”

The equality-based argument was clearly and concisely laid out by Justice MacFarlane:

> The plaintiff’s argument is not simply that she has been discriminated against, because she is a woman, by individual officers in the investigation of her specific complaint — but that systemic discrimination existed within the MTPF in 1986 which impacted adversely on all women and, specifically, those who were survivors of sexual assault who came into contact with the

57 Sheehy, *supra* note 48 at 88.
MTPF — a class of persons of which the plaintiff was one. She says, in effect, the sexist stereotypical views held by the MTPF informed the investigation of this serial rapist and caused that investigation to be conducted incompetently and in such a way that the plaintiff has been denied the equal protection and equal benefit of the law guaranteed to her by s 15(1) of the *Charter*.\(^{58}\)

Unfortunately, all that Jane Doe and Justice MacFarlane could do in the circumstances of this case was to make a finding of discriminatory beliefs held by one particular police force at one particular time, namely the MTPF in 1985–86. When one police force is found to be engaging in openly sexist behaviour, there is undeniably a public sentiment that is inclined to write this off as one rogue force, instead of a systemic practice common to all, or almost all, police forces. Furthermore, the MTPF could claim that in the twelve years that they vigorously opposed Jane Doe’s litigation, they had since moved out of their own dark ages. It will be difficult to bring public attention, and ideally even legislative scrutiny, to the issue of wrongful unfounding unless there are judicial findings that the practices in which the MTPF engaged were not isolated to one police force at one time, but are practices that continue to be very much the norm amongst all police forces.

One risk to future successful *Charter* litigation is that any defendant police force is likely to be much more cautious about their approach than the MTPF was in Jane Doe’s case. In *Jane Doe*, counsel for the police directed their efforts towards discrediting the cause of action itself.\(^{59}\) As such, it is likely that less attention was paid to challenging the actual evidential basis for the case and whether it supported that cause of action. Notwithstanding the broad disclosure obligations in the civil litigation process, any woman, group of women, or organization that brings an application alleging a denial of equality for the wrongful unfounding of reported sexual assaults will face a police force that will be much more cautious about the flow of information and the testimony of witnesses. I now turn to a brief discussion of the elements that would need to be established to succeed in a *Charter* action for wrongful unfounding, and their proof.

\(^{58}\) *Jane Doe*, *supra* note 12 at para 152.

\(^{59}\) Of course I am thinking here of the motion to strike the claim and the subsequent appeal of the decision allowing the claim to proceed. See *Jane Doe v Toronto (Metropolitan) Commissioners of Police* (motion to strike) (1989), 58 DLR (4th) 396 (Ont Ct (Gen Div)), and *Doe v Commissioners of Police* (1990), 74 OR (2d) 225 (Div Ct).
(1) Evidence that cases have been “wrongfully unfounded”
The first requirement in order for a Charter action or application to succeed will be to establish that the police are, in fact, wrongfully determining that reported sexual assaults are unfounded. Public statistics and numerous academic studies readily establish that sexual assault cases are routinely unfounded at a rate much higher than the rate for any other crime.60 Despite an overwhelming desire to say that the data speaks for itself, this will not be enough, as the police will undeniably assert that the high rate of unfounding only demonstrates that women lie, and lie frequently, about being raped.61 Accordingly, an application for a remedy for breach of the right to equal treatment will require, at its core, a woman who will be able to establish, on a balance of probabilities, that she was sexually assaulted, despite the fact that the police determined that she was not.62

(2) Evidence that “wrongfully unfounding” is widespread and systematic
Once a specific example of wrongful unfounding has been identified, the second requirement is to show that this case was not just one shoddy investigation by one bad police officer. Any potential action is

60 See, for example, Home Office Report, supra note 51, for a particularly comprehensive study. In the Canadian context, see Tina Hattem, “Highlights from a Preliminary Study of Police Classification of Sexual Assault Cases as Unfounded in Canada” Just Research: Issue no 14 (Ottawa: Department of Justice, 2007), online: <www.canada.justice.gc.ca/en/ps/rs/ > See also the many statistical studies collected in DuBois, supra at note 34, as an element of the research project described in notes 3 and 4.

61 In her groundbreaking work on the subject, Jan Jordan found that police detectives in New Zealand had not disagreed with one detective’s belief that 80 percent of all reported rapes were false. See Jan Jordan, The Word of a Woman: Police, Rape and Belief (New York: Palgrave MacMillian, 2004) at 145. The Home Office Report also contains interviews with UK police officers who expressed views that most reported sexual assaults are fabricated. One officer reported that of the “hundreds and hundreds” of cases that he had dealt with in the past few years, he could “honestly probably count on both hands” the ones he believed were genuine. See Home Office Report, supra note 51 at 51. As Teresa DuBois points out, many studies look at the number of sexual assaults determined to be unfounded and immediately conclude that this is evidence that women lie about being raped, without ever asking whether there is any validity to the determination that the cases were unfounded. See DuBois, supra note 34. What is needed here is a fundamental shift in society’s perception about what the high number of “false allegations” really means.

62 The police, of course, will virtually never reopen an investigation into a crime they alleged was never committed. BK, who did not participate in the Jane Doe litigation, was ultimately vindicated only because of the subsequent attacks on RP, FD, and Jane Doe.
best brought not by one woman alone, but by a group of women, acting together, each of whom can demonstrate that she was subjected to similar treatment. Furthermore, by acting in concert, the women also become less vulnerable to the public character assassinations and subsequent criminalizations to which the police might resort in an attempt to diminish their credibility.\textsuperscript{63} Statistics on the rate of unfounding for the specific police force would be required, and these should be relatively straightforward to obtain, either through Freedom of Information requests or through the discovery process. Academic studies and statistics on the general rate of unfounding would be helpful to demonstrate that not only did this police force disproportionately choose to disbelieve women, but that the practice was very much widespread throughout police culture.

(3) Evidence that the police hold sexist, stereotypical views, and that these beliefs continue to inform investigations

The third link in the chain to the success of an equality-based claim would be to demonstrate that the reason the police were determining that claims are unfounded is that they hold stereotypical beliefs, which continue to inform their approach to the investigation of sexual assaults. Once again, the stories of several women will be required. That said, this task may not prove as difficult as it might appear because many sexual assault investigators have a tendency to voice sexist and stereotypical reasoning behind their decisions to close a case as unfounded: Sometimes we do things in our lives that we think is the right thing at the time, and then later on we realize, oops, that was a mistake. Do you think that’s what happened here?\textsuperscript{64} Sentiments like this and those expressed in the introduction are often voiced by police officers. I am aware of at least one recent case that was cleared as unfounded in which the officer recorded in his notes that the “case may be cleared as unfounded on the basis of implied consent,” thereby demonstrating

\textsuperscript{63} I am aware of one rape victim whose name the police “accidentally” released to the media when she acted as a confidential source for a media report about the systemic unfounding of rape complaints. In another case on which I acted, a woman who filed an action against the police for an incident, which also led to criminal charges against a police officer, was picked up on a trumped up charge, released on conditions, and then subsequently arrested on not less than four series of alleged breach charges. By the time of the police officer’s criminal trial, the defendant police officer was able to argue that the complainant’s criminal history indicated that she was not credible as a witness.

\textsuperscript{64} O’Connor, supra note 11.
that this particular investigator, a member of a sexual assault squad, did not have even a basic understanding of the law with regard to the most fundamental issue in any sexual assault investigation.65

More evidence of the sexist beliefs informing sexual assault investigations is likely to be discovered by accessing the very materials used to train sexual assault investigators. For example, sexist stereotypes are rife in Baeza and Turvey’s explanation for why women lie about rape.66 There is also anecdotal evidence that suggests many police forces engage in some form of “Statement Validity Analysis,” which is a methodology that has, at its heart, the notion that a woman who has been raped will behave in a certain stereotypical fashion.67 Additional research that exposes these practices would be of benefit to demonstrate that one of the reasons sexual assault investigators wrongfully unfound reported sexual assaults is that they are trained to do so using materials that start from a sexist vantage point. Additional empirical research that documents the reasons given when the police determine that a case is unfounded would be of great value.68 The stories of women who do not wish to pursue a claim have a great deal to offer to those women who do.

(4) Resulting investigations are incompetent, or are not conducted at all
The fourth aspect of a Charter-based claim would be to prove that the resulting police investigations are conducted in an incompetent fashion. This requirement should be readily satisfied given that once the police have labelled a case as “unfounded,” there is often no further in-

66 Baeza & Turvey, supra note 38 at 178–185.
68 While I fully support all available measures to protect the privacy rights of any woman who has been sexually assaulted to the full extent that she desires, there is a manner in which those very protections can serve to protect the interests of the police in hiding police practices. Since the police never lay a charge in a case that they have labelled as unfounded, information on the case does not become a matter of public record now that Statistics Canada does not require the police to report unfounded cases. Rape Crisis Centres and Sexual Assault Support Centres (and even lawyers, for that matter!) must be entitled to hold everything that their clients say in the strictest of confidence. That said, hidden within the knowledge of women who have reported a sexual assault to the police or to a frontline worker is sufficient evidence to overwhelmingly prove, beyond any doubt, that rapes are routinely wrongfully unfounded based on openly stated sexist assumptions.
vestment whatsoever. It would appear that the police frequently determine that a case is unfounded without interviewing potential witnesses or picking up the suspect, who is very frequently known to the woman,⁶⁹ for questioning.⁷⁰

(5) Disproportinate impacts on women
It is well understood and documented that the victims of sexual assault among adults are overwhelmingly women.⁷¹ As such, the fifth requirement is to demonstrate that women are disproportionately impacted by poor quality or non-existent sexual assault investigations.

(6) Resulting in a denial of equal protection of the law
The final element of a Charter-based claim to address wrongful unfounding is proof that the practice of wrongful unfounding results in a denial of equal protection of the law. As the Supreme Court of Canada has stated the test:

Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?⁷²

Providing evidence of the discriminatory impact of the systemic unfounding of sexual assault complaints is likely to be the least problematic aspect of an equality-based claim, as the wrongful unfounding of reported sexual assaults constitutes discrimination in each of the ways discussed by the Supreme Court of Canada in Law.

Withholding a benefit
The duties of police officers are defined in the various provincial Po-

⁶⁹ In 2007, the attacker was known to the victim in 82 percent of the sexual assaults that were reported to the police in Canada (Brennan & Taylor-Butts, supra note 31 at 5.
⁷⁰ Light & Ruebsaat, supra note 2.
lice Services Acts. In Ontario, for example, section 42(1) of the Police Services Act\textsuperscript{73} specifies that the duties of a police officer include: (a) preserving the peace; (b) preventing crimes and other offences and providing assistance and encouragement to other persons in their prevention; (c) assisting victims of crime; (d) apprehending criminals and other offenders who may lawfully be taken into custody; and (e) laying charges and participating in prosecutions.

As discussed above, in Hill, the Supreme Court of Canada interpreted the Police Services Act to implicitly include a duty to investigate crime.\textsuperscript{74} The police fail to meet any of their legal obligations when they determine that they believe a woman is lying about a sexual assault based on their own discriminatory beliefs. On the most fundamental level, women are denied the equal benefit of the law, or any benefit of the law whatsoever, by police forces that wrongly choose not to investigate sexual assaults. No other class of individuals is routinely denied the protection that is the fundamental function of a police force.

Furthermore, if crimes against women are routinely not investigated because of a systemic belief that women are liars, and charges are therefore not laid on a routine basis, perpetrators are likely to become aware that a complainant is unlikely to be believed, and may thus feel at greater liberty to assault women. A very loud message is being sent by the fact that between 2002 and 2007, the Ottawa Police laid charges in only 453 of 2,817 — just over 16 percent — of all of the sexual assaults that were reported to them. As Sheehy has argued, this message results in an enlargement of power conceded to violent, misogynist men over women.\textsuperscript{75}

**Imposition of burden**

While the denial of a benefit of the law is itself significant discriminatory treatment, the burdens imposed by the manner in which police approach sexual assault investigations run much deeper.

First, the danger to any specific woman once she has reported a sexual assault presented by a specific attacker is significantly increased once her complaint is deemed to be unfounded. In many cases, the perpetrator is someone with continued access to the complainant. By choosing not to believe a woman’s complaint, the police have sent the perpetrator the message that they do not believe her, and will not pursue him. He now knows that he is under a significantly decreased risk

\textsuperscript{73} RSO 1990, c P15.
\textsuperscript{74} Supra note 28.
\textsuperscript{75} Sheehy, supra note 48 at 91.
of arrest when he assaults her again.

Second, as discussed above,76 once a woman has had a reported assault unfounded, the police are considerably less likely to believe any subsequent report she files. This presents an increase in the danger to a specific woman from all potential attackers. A woman who has reported a rape that the police considered to be false has effectively been rendered “rapeable.”

Thirdly, there are many anecdotal reports of situations where, once the police have decided that a woman is lying, they then persist and tell the woman, under interrogation-like circumstances, that if she does not recant her story, she will be charged with mischief for filing a false complaint. Recognizing that there is now no chance the police will ever charge the attacker, and under pressure from the police, a woman will often recant in order to extricate herself from the oppressive circumstances that she is now under and to avoid being charged. This practice reinforces the police approach to the investigation because the police now rely on the recantation to “confirm” their suspicions of fabrication, and to affirm that their approach is justified.77

Finally, as was discussed above, wrongful unfounding may cause further emotional and psychological harm. While more research is required on this topic, this psychological harm would clearly qualify as another type of burden imposed on women.78 However, it is also significant that, for the purposes of a Charter claim, this is only one additional type of harm that may be caused by discrimination: unlike the potential negligence action, proof of this kind of harm is not a necessary precondition to the success of the action. Given that the causation analysis of a negligence claim is so closely tied to the kind of harm that is cited, it may be that the “best” way to avoid a faulty causation analysis is to sidestep it altogether by proceeding only on equality grounds.

76 Supra note 50.
77 Further study on the extent to which threatened counter-charges provokes unreliable recantation is required.
78 Most studies so far have focused on how a determination that a complaint is unfounded has a harmful impact on a woman’s recovery following a rape, and the extent to which existing symptoms of depression and post traumatic stress disorder are exacerbated by a negative outcome in the investigation or prosecution of a sexual assault. See, for example, Rebecca Campbell et al, “Community Services for Rape Survivors: Enhancing Psychological Well-Being or Increasing Trauma?” (1999) 67 J Consulting and Clinical Psychology 847; Sarah E Ullman & Henrietta H Filipas, "Predictors of PTSD Symptom Severity and Social Reactions in Sexual Assault Victims" (2001) 14 J Traumatic Stress 369; Judith Herman, “The Mental Health of Crime Victims: Impact of Legal Intervention” (2003) 16 J Traumatic Stress 159. I am not aware of any studies that have examined independent psychological harms caused by police disbelief of complaints.
Attitudinal harm

While there are ample ways in which it could be demonstrated that wrongful unfounding both denies women the equal benefit of the law and imposes a burden on women, the most pernicious harm caused by wrongful unfounding is likely in the manner in which reports of unfounded cases cause a shift in general societal attitudes.

Every time that a reported sexual assault is cleared as unfounded, it sends society the fundamental message that, in the eyes of police, all women are liars and, specifically, that women lie about being raped on a frequent basis. To paraphrase the Supreme Court of Canada in Law, this has the effect of promoting the view that women are less capable, less worthy of recognition as human beings, and not equally deserving of concern, respect, and consideration because the fundamental message is that “women lie.”

In another way, wrongful unfounding also causes societal harm in that the perception that a woman is going to get hostile treatment at the hands of the police and the justice system is likely a significant reason why women choose not to report sexual assault at all. The practice of wrongful unfounding is fundamentally at odds with a society that claims to have an interest in encouraging the reporting of sexual offences.

Remedies

Once all of the elements of a constitutional tort have been proven, there still remains the question of appropriate remedies. While Jane Doe’s Charter claim victory is encouraging, it is disappointing that the court determined that she was “not entitled to any additional or ‘extra’ damages because the police had breached her Charter rights” and that a declaration would suffice. To my mind, this judgment failed to separate the specific harms to Jane Doe from the much broader societal harms caused by the general approach to the investigations of sexual assault taken by the MTPF. A strong award of punitive damages in recogni-

79 Fear of disbelief is often cited as a reason why women choose not to report sexual assaults. See Home Office Report, supra note 51 at 42. Brennan & Taylor-Butts, supra note 31 at 8, also found that 41 percent of women who did not report a sexual assault to the police cited “not wanting to get involved with the police” as one of the reasons why.

80 See Criminal Code of Canada, RSC 1985, c C-46, s 278.5(2)(f).

81 Jane Doe, supra note 12 at 194.
tion of the breach of Jane Doe’s equality rights would not only have provided her with more complete redress, but would have provided a stronger incentive for all police forces in Canada to closely examine their own sexual assault investigation practices.

Section 24(1) of the Charter allows a court to grant any such remedy as the court considers appropriate and just in the circumstances. While I leave as beyond the scope of this paper a full discussion of the range of creative remedies that might be possible to address proven discriminatory harms caused by wrongful unfounding, it is my hope that further studies might address this issue. Even though many of the women I have spoken with about this issue say that a monetary award is unimportant to them, I believe that significant monetary damages are likely to be the best way to get the attention of Police Services Boards in a meaningful way.

**Charter claims and access to justice**

Before concluding, it is appropriate to comment on the issue of access to justice. The most significant barrier to any kind of legal action to address wrongful unfounding is access to justice itself: in comparison, finding a pool of potential claimants would not likely be a significant obstacle.

Not only are sexual assaults most frequently committed against society’s most vulnerable women, including young women and children, survivors of childhood abuse, women suffering from mental illness, Aboriginal women, women of colour and, overwhelmingly, economically disadvantaged women and women living on the streets, but it is exactly these women whose rape complaints are most likely to be disbelieved.\(^82\) Much deeper than the fact that litigation of the type proposed is beyond the means of these already economically disadvantaged women, the last thing that almost all of these women would ever want to do is deliberately re-engage with a masculine-biased legal system that has already let them down and branded them as liars.

Even for a claimant with modest means and a fervent desire to strike back, protracted Charter litigation is far out of reach. As with the Jane Doe case, an action of the type proposed would require deeply committed feminist litigators supported by a deep pool of resources and research.

Although it may be a utopian ideal at this stage, there is one potential argument that litigation to address systemic discrimination in

---

sexual assault investigations ought to be publicly funded. The therapeutic value of litigation itself for sexual assault survivors has recently become the subject of increased attention. If the beneficial effect of litigation on a woman's psychological recovery could be further proven, then this would mean that a claimant could credibly argue that, because the right to security of the person protects the psychological integrity of the individual, she has an entitlement to legal aid funding. Given that non-pecuniary goals appear to drive much sexual battery litigation, it is not an impossible stretch to argue that the more holistic goals of litigation designed to address systemic discrimination in sexual assault investigations ought to be publicly supported, particularly given that it may be in precisely the cases where the police have declined to press charges that further litigation that vindicates the survivor might have the greatest therapeutic effect.

CONCLUSION
Having been privileged to team-teach a law school course in sexual assault law from a feminist and pro-feminist point-of-view, I have often remarked that what is needed to combat the thoroughly sexist manner in which many sexual assault investigations are conducted is more radical action. Although in some ways horrible to contemplate, what if all women in Canada collectively refused to report any sexual assault to any police force, even for just one day? Would this finally bring about the needed legislative scrutiny to the practices of sexual assault squads? What is the sense in women engaging at all with a system that “boomersangs” the focus of a criminal investigation one-third of the time, and only actually lays charges one-sixth of the time? Radical action—striking back in some form—is needed. Resorting to the courts to address the problem of systemic wrongful unfounding is hardly radical, but it would appear to be the only tool we have available.


84 See New Brunswick (Minister of Health and Community Services) v G (J), [1999] 3 SCR 46, in which the court held that for a restriction of security of the person to be made out, an impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

85 Feldthuens, supra note 83 at 211.
That said, an action framed in the traditional discourse of professional negligence is unlikely to succeed, particularly in light of the limited recognition of a victim’s interest in the outcome of a criminal case. There is a greater prospect for a favourable outcome of an action based on the equality provisions of the *Charter*, but only if such an action is properly brought by a sisterhood of survivors, acting in concert, and properly supported by expert testimony and feminist research.86 Although the institution of policing may not change in response to even many successful legal claims, it may ultimately be only the prospect of being forced to pay potentially considerable financial damages that might prompt changes to police practices that advocacy and discussion alone have been unable to achieve. It is time to build on Jane Doe’s remarkable victory and to put the police on notice: *be warned, we are watching.*

---

86 As Sheehy *supra* note 48 at 115 has noted, wins like Jane Doe’s can only be reproduced through comparable investment of resources and ingenuity.
APPENDIX B

Reported Sexual Assaults and Criminal Offences and Unfounding Rates Reported by Ontario Police Forces, 2003–2007

Windsor

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Sexual Assaults</th>
<th>Sexual Assaults Classed as “Unfounded”</th>
<th>Percentage</th>
<th>Reported Criminal Offences</th>
<th>Criminal Offences Classed as “Unfounded”</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>117</td>
<td>0</td>
<td>0.00%</td>
<td>41,893</td>
<td>149</td>
<td>0.36%</td>
</tr>
<tr>
<td>2004</td>
<td>116</td>
<td>3</td>
<td>2.59%</td>
<td>43,852</td>
<td>138</td>
<td>0.31%</td>
</tr>
<tr>
<td>2005</td>
<td>125</td>
<td>3</td>
<td>2.40%</td>
<td>40,186</td>
<td>118</td>
<td>0.29%</td>
</tr>
<tr>
<td>2006</td>
<td>101</td>
<td>4</td>
<td>3.96%</td>
<td>40,381</td>
<td>94</td>
<td>0.23%</td>
</tr>
<tr>
<td>2007</td>
<td>113</td>
<td>1</td>
<td>0.88%</td>
<td>37,691</td>
<td>149</td>
<td>0.40%</td>
</tr>
<tr>
<td>Total</td>
<td>572</td>
<td>11</td>
<td>1.92%</td>
<td>204,003</td>
<td>648</td>
<td>0.32%</td>
</tr>
</tbody>
</table>

Peel Region

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Sexual Assaults</th>
<th>Sexual Assaults Classed as “Unfounded”</th>
<th>Percentage</th>
<th>Reported Criminal Offences</th>
<th>Criminal Offences Classed as “Unfounded”</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>488</td>
<td>85</td>
<td>17.42%</td>
<td>45,938</td>
<td>714</td>
<td>1.55%</td>
</tr>
<tr>
<td>2004</td>
<td>518</td>
<td>84</td>
<td>16.22%</td>
<td>44,864</td>
<td>690</td>
<td>1.54%</td>
</tr>
<tr>
<td>2005</td>
<td>534</td>
<td>84</td>
<td>15.73%</td>
<td>43,874</td>
<td>763</td>
<td>1.74%</td>
</tr>
<tr>
<td>2006</td>
<td>531</td>
<td>142</td>
<td>26.74%</td>
<td>48,080</td>
<td>1,230</td>
<td>2.56%</td>
</tr>
<tr>
<td>2007</td>
<td>626</td>
<td>146</td>
<td>23.32%</td>
<td>47,769</td>
<td>1,526</td>
<td>3.19%</td>
</tr>
<tr>
<td>Total</td>
<td>2,697</td>
<td>541</td>
<td>20.06%</td>
<td>230,525</td>
<td>4,923</td>
<td>2.14%</td>
</tr>
</tbody>
</table>
### Hamilton

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Sexual Assaults</th>
<th>Sexual Assaults Classed as “Unfounded”</th>
<th>Percentage</th>
<th>Reported Criminal Offences</th>
<th>Criminal Offences Classed as “Unfounded”</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>545</td>
<td>86</td>
<td>15.78%</td>
<td>40,243</td>
<td>595</td>
<td>1.48%</td>
</tr>
<tr>
<td>2004</td>
<td>507</td>
<td>108</td>
<td>21.30%</td>
<td>36,150</td>
<td>581</td>
<td>1.61%</td>
</tr>
<tr>
<td>2005</td>
<td>399</td>
<td>103</td>
<td>25.81%</td>
<td>31,773</td>
<td>598</td>
<td>1.88%</td>
</tr>
<tr>
<td>2006</td>
<td>371</td>
<td>100</td>
<td>26.95%</td>
<td>32,209</td>
<td>716</td>
<td>2.22%</td>
</tr>
<tr>
<td>2007</td>
<td>329</td>
<td>79</td>
<td>24.01%</td>
<td>34,787</td>
<td>564</td>
<td>1.62%</td>
</tr>
<tr>
<td>Total</td>
<td>2,151</td>
<td>476</td>
<td>22.13%</td>
<td>175,162</td>
<td>3,054</td>
<td>1.74%</td>
</tr>
</tbody>
</table>

### Ontario Provincial Police

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Sexual Assaults</th>
<th>Sexual Assaults Classed as “Unfounded”</th>
<th>Percentage</th>
<th>Reported Criminal Offences</th>
<th>Criminal Offences Classed as “Unfounded”</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>1,989</td>
<td>556</td>
<td>27.95%</td>
<td>154,198</td>
<td>16,471</td>
<td>10.68%</td>
</tr>
<tr>
<td>2004</td>
<td>1,922</td>
<td>552</td>
<td>28.72%</td>
<td>151,857</td>
<td>16,484</td>
<td>10.85%</td>
</tr>
<tr>
<td>2005</td>
<td>2,065</td>
<td>640</td>
<td>30.99%</td>
<td>147,884</td>
<td>17,270</td>
<td>11.68%</td>
</tr>
<tr>
<td>2006</td>
<td>1,978</td>
<td>620</td>
<td>31.34%</td>
<td>149,949</td>
<td>17,766</td>
<td>11.85%</td>
</tr>
<tr>
<td>2007</td>
<td>2,036</td>
<td>645</td>
<td>31.68%</td>
<td>146,912</td>
<td>17,810</td>
<td>12.12%</td>
</tr>
<tr>
<td>Total</td>
<td>9,990</td>
<td>3,013</td>
<td>30.16%</td>
<td>750,800</td>
<td>85,801</td>
<td>11.43%</td>
</tr>
</tbody>
</table>
### Ottawa

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Sexual Assaults</th>
<th>Sexual Assaults Classed as &quot;Unfounded&quot;</th>
<th>Percentage</th>
<th>Reported Criminal Offences</th>
<th>Criminal Offences Classed as &quot;Unfounded&quot;</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>475</td>
<td>182</td>
<td>38.32%</td>
<td>51,871</td>
<td>1,194</td>
<td>2.30%</td>
</tr>
<tr>
<td>2004</td>
<td>419</td>
<td>153</td>
<td>36.52%</td>
<td>46,958</td>
<td>1,222</td>
<td>2.60%</td>
</tr>
<tr>
<td>2005</td>
<td>518</td>
<td>137</td>
<td>26.45%</td>
<td>47,947</td>
<td>1,324</td>
<td>2.76%</td>
</tr>
<tr>
<td>2006</td>
<td>431</td>
<td>121</td>
<td>28.07%</td>
<td>48,183</td>
<td>1,534</td>
<td>3.18%</td>
</tr>
<tr>
<td>2007</td>
<td>471</td>
<td>127</td>
<td>26.96 %</td>
<td>44,998</td>
<td>1,116</td>
<td>2.48 %</td>
</tr>
<tr>
<td>Total</td>
<td>2,314</td>
<td>720</td>
<td>31.11 %</td>
<td>239,957</td>
<td>6,390</td>
<td>2.66 %</td>
</tr>
</tbody>
</table>