

1-1-1995

## Civil Action for Childhood Sexual Abuse

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### Recommended Citation

Patti Mitchell, "Civil Action for Childhood Sexual Abuse" (1995) 4 Dal J Leg Stud 301.

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## Civil Action for Childhood Sexual Abuse

James W. W. Neeb & Shelly J. Harper

Toronto: Butterworths, 1994, 342 pp.

*Reviewed by* Patti Mitchell†

The topic of childhood sexual abuse has become a highly public issue in recent years. *Civil Action for Childhood Sexual Abuse* provides the legal practitioner with a basic understanding of the dynamics involved in this sensitive area. The authors provide profiles of the “typical” survivor, as well as the “typical” abuser. The book also details the profile of the non-intervening parent, usually the mother, the reasons why non-intervening parents do not act to stop abuse, and the potential liability that attaches to this parent. Particularly helpful is an overview of the most recent Supreme Court of Canada decisions on the issue of civil liability for sexual abuse. The authors also provide the most recent law in other common-law jurisdictions. For the purposes of this review, however, I will concentrate on the treatment of the Canadian experience.

### The Law

In *M.(K.) v. M.(H.)*,<sup>1</sup> the Supreme Court established two principles which have made it easier for adult victims of childhood sexual abuse to sue in civil court. First, the Court has adapted the reasonable discoverability rule regarding limitation periods. The Court has stated that the limitation period begins when the victim makes an association between the harm suffered as an adult and the events causing the harm. Typically, this occurs when the victim enters therapy, and it is not until that point that the adult’s problems are understood to be related to the abuse suffered as a child. Without such a rule, most claims would be barred by a statutory limitation period.

The second principle the Court has recognized is that the parent/child relationship is a fiduciary relationship and sexual abuse is

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<sup>1</sup> *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6.

a breach of the duty owed to the child. Furthermore, the breach of fiduciary trust can implicate the non-intervening parent in liability.

The authors also point out that the Supreme Court has accepted the existence of repressed memory. Sexual abuse can be so traumatic that victims, in order to cope with the experience, repress memories that only resurface years later. While repressed memory helps to explain the delay in filing either criminal or civil actions, it is also the focus of significant controversy. The book explores the current debate among psychologists, some of whom claim that so-called recovered memories may be false memories unwittingly suggested by therapists. The courts have not as yet recognized false-memory syndrome. Should they do so in the future, however, serious consequences will result both in terms of proving past abuse and the resulting effect this will have on the willingness of victims to come forward.

### The Victim/Survivor

The authors present a thorough overview of the general patterns of behaviour found in sexual abuse and the overwhelming impact such abuse has on the adult survivor. Having spent several years working with survivors of sexual abuse, the range of problems and behaviours discussed in this book do reflect reality.

A particularly strong feature of the book is that it highlights behaviour which may seem very strange to the outside observer. For example, it is very common for an abused child to accommodate the perpetrator by making herself available to the abuser. The child, dependent on the family for all her basic needs and often seeking to protect other siblings, accommodates rather than resists the abuser. Various dissociative disorders that arise from sexual abuse are also explored.<sup>2</sup> Abuse can manifest itself in depression, eating disorders, self-mutilation, alcohol and drug abuse, promiscuity, and re-enacting abusive relationships as adults.

It may be difficult for those who have not had experience with victims of abuse to fully appreciate the gravity of their experience. I once worked with a woman who suffered from multiple personality disorder as a result of childhood sexual abuse. The woman's three

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<sup>2</sup> James W. W. Neeb & Shelly J. Harper, *Civil Action for Childhood Sexual Abuse* (Toronto: Butterworths, 1994) at 10.

children had been placed in foster care because she would often regress into a younger personality and was simply unaware at times that she had children to care for. In addition, she would cut her arms and legs with razor blades because she had come to hold herself in such disgust. This woman, like many victims, has lost more than her childhood, and only through intense therapy and day to day support are such persons able to lead a healthy and productive life.

While this book does a good job of describing the typical experience of victims, it should be emphasized that abuse survivors react differently to abuse depending on their individual personalities, the severity and duration of the abuse, and the age at which the abuse began. For these reasons, it is important to recognize that not all women react in the same manner even if their experiences seem similar.

### The Perpetrator

One of the more difficult aspects confronting civil actions for childhood sexual abuse is the inadequacy of perpetrator profiles. The authors point out that about the only thing perpetrators have in common is that 95% are male.<sup>3</sup> While many abusers share characteristics such as drug and alcohol abuse, these same characteristics are common in men who do not abuse children. Child abusers come from all walks of life and span all class and racial boundaries. While it may be possible to establish, through expert legal testimony that a woman exhibits the behaviour typical of a victim, it is almost impossible to establish that a defendant is likely to have abused children.

The authors have, however, analyzed research that indicates that the treatment of perpetrators significantly reduces the likelihood of future abuse. Neeb and Harper estimate that it costs the public approximately \$200,000 to deal with a man who re-abuses, while costing \$700,000 to treat 100 men.<sup>4</sup>

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<sup>3</sup> *Supra* note 2 at 22.

<sup>4</sup> *Supra* note 2 at 34.

### The Non-Offending/Non-intervening Parent

The authors distinguish between a non-offending parent—those parents who act to stop abuse—and a non-intervening parent—those parents who do not act to stop abuse. While no cause of action can be brought against the former, the latter can now be found liable for breach of fiduciary duty.<sup>5</sup>

The book provides reasons why non-intervening parents do not act. These reasons include: a genuine lack of awareness of the abuse; fear of the consequences of acknowledging abuse, which include the break-down of the family and attendant financial ramifications; and complete domination, including physical abuse, by the abusive spouse. Mothers who have suffered abuse as children may, in blocking out their own experience, block out the abuse of their own children. Finally, there is a small percentage of mothers who participate in the abuse—although it is likely that these women are themselves dominated by their partners.

### Other Issues

The authors raise practical concerns that must be considered when bringing an action for childhood sexual abuse. Included in these considerations are the use of expert testimony in corroborating a victim's testimony, and avoiding limitation periods by arguing fraudulent concealment and diminished capacity. As well, the authors warn counsel about the possibility of a defamation suit to counter claims of sexual abuse. Damages are also discussed in detail. In addition to special and general damages, Canadian courts have been willing to award aggravated damages in sexual abuse cases, although the awards have tended to be small in comparison with similar awards in the United States.

While damages are behind any civil action, the authors also highlight various non-pecuniary advantages to bringing a civil proceeding. Since a civil action is not connected to a criminal prosecution, the plaintiff has the advantage of a lower standard of proof. Also, civil courts have accepted the concept of recovered memory. In criminal courts, any delay in bringing an action is often used to discredit the victim. The victim also can choose counsel who is sensitive to the complexities of childhood sexual abuse. Further, the

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<sup>5</sup> *Supra* note 1.

victim is the driving force in a civil action and no merely a witness for the prosecution. Finally, the focus in a civil action is on the consequences of abuse and not on the abuser.

One important consideration not addressed in the book is the fact that access to civil courts is necessarily limited to those who can afford litigation. Compounding the problem of costs in sexual abuse cases is the need for expert testimony and the fact that many victims only becoming fully aware of their experience in therapy. Litigation is generally limited to those who can afford therapy in the first place, and waiting lists for public mental health services are extremely long. The inadequacy of these services produces delays in treatment. In addition, symptoms are often treated with drugs, which allow victims to function, but do little to assist him or her in dealing with, or even discovering, the abuse itself. Victims caught in this system are unlikely to look to the law for help.

This book is about how to proceed with a civil action for childhood sexual abuse. While it is always sensitive to the complex and difficult issues surrounding abuse, one should not expect an expansive analysis of conditions, social or otherwise, which give rise to sexual abuse. As such, a practitioner representing clients in civil actions would be well advised to expand her research into the effects of abuse, and the social conditions that allow sexual abuse to exist, beyond the scope of this book.