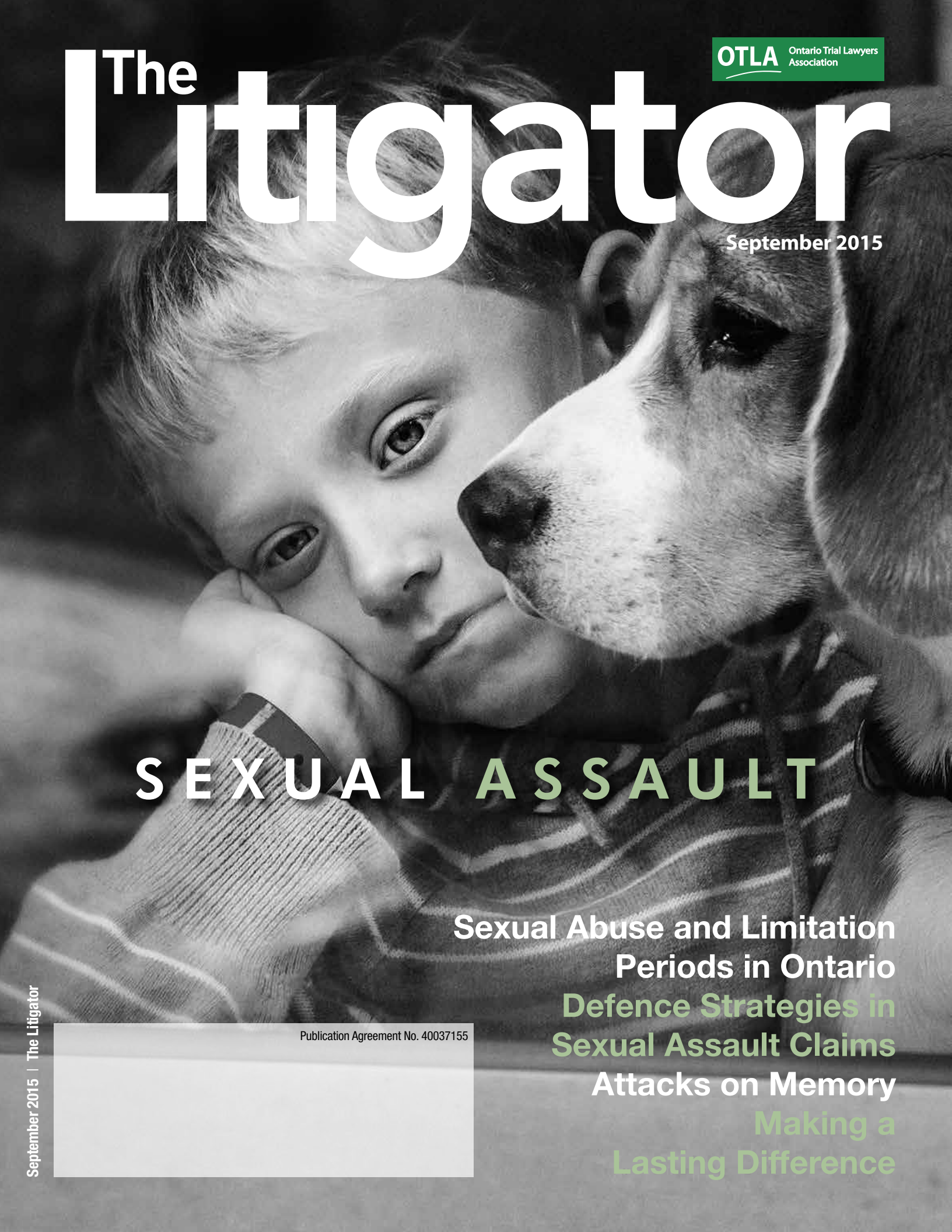

The Litigator

OTLA Ontario Trial Lawyers Association

September 2015

SEXUAL ASSAULT

Sexual Abuse and Limitation Periods in Ontario

Defence Strategies in Sexual Assault Claims

Attacks on Memory

Making a Lasting Difference

Publication Agreement No. 40037155

Defence Strategies in Sexual Assault Claims:

WHAT WAS OLD *is* NEW AGAIN

BY SUSAN VELLA AND MICHAEL WILCHESKY

Targeting the Plaintiff and his or her family

I. Introduction

In representing victims/survivors of various forms of sexual abuse and misconduct over the past 25 years, we have observed that, as in other areas of litigation, what was old is new again in terms of defence strategies. Most prominent of the new "old" defence tactics which have resurfaced, albeit perhaps with more vigour, are:

(a) targeting the plaintiff's family members, most notably parents or legal guardians, to "share" the blame,

(b) targeting the plaintiff through defamation claims or counterclaims, and

(c) targeting the plaintiff through a contributory negligence claim.

The defence strategies explored in this article may reflect the defence bar's response to the difficulty faced in defending "non-offending" defendants such as institutions, particularly where vicarious liability is a viable theory. The increasingly narrow scope of the application of defences based on an alleged expiry of a limitation period to bar claims arising out of sexual abuse, as prescribed by the *Limitations Act, 2002,*[1] has further restricted the ability of the defence bar to shield institutional defendants from liability.[2] This new reality may have caused defence counsel to search for ways in which to discourage plaintiffs from pursuing their claims to trial, or otherwise reduce their clients' exposure to damages.

This article will explore each of these defence strategies, identify some of the issues plaintiff's counsel must be alert to when confronted with one or more of these strategies in an action, and make some proposals for resisting them.

II. Claims Against Parents for Contribution and Indemnity

We are seeing, with alarming frequency, claims for contribution and indemnity brought by defendants against the parents (or the legal guardians) of the victim of sexual abuse.[3] These claims are being asserted by way of counterclaim, where the parents have asserted *Family Law Act*[4] claims, third-party claims, where the parents are not parties to the main action, and sometimes even by way of an action that is separate and independent from the victim's action for damages arising out of sexual abuse. The latter will often occur where the main action has already progressed beyond examinations for discovery and is ready for mediation. The timing of issuing independent actions raises concerns about whether a purpose of the contribution and indemnity action is to try and encourage victims to settle so as to spare their parents from protracted litigation.

Typically, these contribution and indemnity claims will be asserted by institutional or corporate defendants (or more properly, their insurers), and not the direct sexual offender.

At the heart of this defence theory is the assertion that the victims' parents should not have entrusted their children to the care of persons whom a credible institution (e.g. religious, educational, health care or residential facilities) authorized to be placed in charge of those children for particular purposes. In some cases, the only alleged bases for this type of claim are the boilerplate allegations that parents allowed their child to participate in an activity operated or sanctioned by the institutional defendant and the parents knew, or ought to have known, the inherent danger (materializing in the sexual abuse) in allowing their child to participate in that activity.

Such a tactic often provokes an emotional response in the plaintiff who, understandably, feels responsible for having caused her/his parents to be dragged into the litigation, with the associated stress and cost of now having to defend themselves, when the plaintiff had no intention of blaming her/his parents. This tactic also risks isolating the plaintiff from her/his support network.

Circumscribing the Claim

One strategy to avoid the risk of having a plaintiff's parents dragged into the litigation is to circumscribe the claim and limit it to only those damages solely caused by the named defendants. This strategy was used successfully in *Taylor v. Canada (Minister of Health),*[5] which was a class action arising out of the surgical implantation of a jaw device. In *Taylor,* the Court of Appeal held that where a plaintiff's claim is restricted to the named defendant's several liability, that defendant has no basis upon which to seek contribution or indemnity from another person since contribution rights only arise where a defendant is required to pay more than its proportionate share of a plaintiff's damages. The Court of Appeal also confirmed that a court is entitled to apportion fault against non-parties at trial in order to specify the several liability of the defendants in the action.

This approach was recently followed in *Johnston v. Sheila Morrison Schools.*[6] In *Johnston,* the plaintiffs sought damages for sexual abuse suffered at the hands of their teacher. The school board sought to commence third party claims against the parents of the plaintiffs. The Divisional Court (overturning

the motions court) denied leave to commence the third party claims on the basis that the plaintiffs had restricted their claims for damages to those amounts solely attributable to the school board's several liability.

However, in our view, this counter strategy should not be the first recourse, absent evidence of actual negligence on the part of the parents. Rather, the better course of action may be to recommend that the plaintiff maintain her/his full claim for damages and allow the defendants to attempt to prove that the parents were negligent. This type of a case might be suitable for a jury trial since the sensibilities of blaming the parents for having entrusted the care of their children, appropriately, to an institutional service provider (be it educational, religious, healthcare or otherwise) may not sit well with a jury of peers.

Conflict of Interest Concerns

Once a claim for contribution and indemnity is asserted against the parents of the plaintiff, it is likely the plaintiff will ask her/his lawyer to consider representing the interests of the parents. There is much merit to this request since the plaintiff's lawyer will already be familiar with the case, thereby delivering both efficiency and economy of fees. However, this raises potential conflict of interest concerns under the *Rules of Professional Conduct*,[7] and defence counsel have, in our experience, been proactively suggesting that plaintiffs' counsel may now find themselves in conflict of interest situations.

Section 3.4 of the *Rules* sets out the relevant provisions relating to conflicts of interest. However, if the *Rules* are carefully followed, and the plaintiff and her/his parents are legally competent and properly informed, the plaintiff's lawyer should be able to represent both the plaintiff and her/his parents without any serious risk of removal. That said, sometimes conflicts arise unexpectedly and, should that occur, the plaintiff's lawyer may well have to be removed as counsel of record for all of the parties.

Conflict of Interest Rules

What follows is a short primer on the principles and procedures which a lawyer should consider when faced with a request to represent the parents of a client, when the parents have been served with a claim seeking contribution and indemnity.

A lawyer cannot act or continue to act for a client where there is a conflict of interest, except where permitted by *Rule 3.4.* A conflict of interest is defined as follows:

> "… [P]otential risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by … the lawyer's duties to another client…. In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer."[8]

Factors for the lawyer's consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.[9]

At the heart of this defence theory is the assertion that the victim's parents should not have entrusted their children to the care of persons whom a credible institution (e.g. religious, educational, health care or residential facilities) authorized to be placed in charge of those children for particular purposes.

Rule 3.4–2 provides that a lawyer shall not represent a client in a matter when there is a conflict of interest, **unless** there is an express or implied consent from all clients (which must be fully informed **and** voluntary after disclosure) and it is reasonable for the lawyer to conclude that she/he is able to represent each client without having a material adverse effect upon the representation of, or loyalty to, the other client.

Rule 3.4–2 (and the associated Commentary) has several important practical implications for a lawyer contemplating representing both the plaintiff and her/his parents who have been made the subject of a contribution and indemnity claim by a defendant. The lawyer must inform the plaintiff of the relevant circumstances and the reasonably foreseeable ways that a conflict of interest could adversely affect the plaintiff's interests. For example, should the plaintiff decide at a future time that the parents were in fact wholly or partially to blame for the sexual abuse, the lawyer would not be able to assert that position while representing the parents. This advice should be provided by the lawyer both in person and then reflected in correspondence. Furthermore, while not a prerequisite to obtaining the consent, it is wise to recommend that the plaintiff and the parents obtain separate independent legal advice before deciding whether to provide consent.[10] If that recommendation is declined, the fact that the recommendation was made and was declined should also be reflected in correspondence.

Furthermore, the lawyer must advise each of the clients and prospective clients of the *Rules* relating to joint retainers.[11] Before accepting a joint retainer, the lawyer should consider the implications of that retainer[12] and, specifically, that if a contentious issue arises between the clients, the lawyer will be precluded from providing either client with advice on that issue and, depending on the circumstances, may have to withdraw from representation of all clients.

Special considerations apply where the plaintiff is a person under a legal disability, and a litigation guardian (or the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer) has been appointed to protect her/his interests. Notably, where the litigation guardian (e.g., a parent of a minor who was abused) becomes the subject of a contribution and indemnity claim, another litigation guardian should be appointed, and it may be prudent to put the Office of the Children's Lawyer, or Office of the Public Guardian and Trustee, as applicable, on notice as well.[13] In such cases, it is essential that the legal representative of the plaintiff be urged to obtain independent legal advice before consenting to a joint retainer.

Can a Defendant Bring a Motion to have the Plaintiff's Lawyer Removed as Lawyer of Record?

The short answer is "yes". Where there is a question of impropriety on the part of a lawyer, any other lawyer, as an officer of the court, has standing to bring the question before the court for resolution. These types of motions raise a potential conflict of interest on the part of the lawyer which, if not properly resolved, could amount to an "impropriety on the part of the solicitor". Before bringing such a motion impugning the integrity of plaintiff's counsel, there must be reasonable grounds to bring the motion, presumably beyond the mere fact of joint representation of the plaintiff and her/his parents.[14]

An important consideration in these motions will be the proposition that a litigant should not be deprived of her/his choice of counsel without good cause. The courts are clear that:

> "… If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other 'ethical' relief using the 'integrity of the administration of justice' merely as a flag of convenience, fairness of the process would be undermined."[15]

Is Homeowners Insurance an Option?

Where the parents of a victim are faced with a contribution and indemnity claim, it will be important to consider whether any potential homeowners insurance provides a duty to defend and/or indemnification. Notice of the claim should be promptly provided to the insurer. If there is potential insurance coverage giving rise to a duty to defend, the insurer may appoint independent counsel for the parents.

III. Defamation Claims

In years past, a defamation claim would often be asserted by way of a counterclaim to the main action in a sexual abuse claim. This trend has changed somewhat with the aggressive tactic by some alleged offenders of initiating a defamation claim against the alleged victim of abuse before any claim arising from sexual abuse is advanced. This tactic may be intended to send a message to the victim and the community that it is the alleged offender is the wronged party. This tactic will also often force the victim to counterclaim

for damages arising from sexual abuse, sometimes before she/he is ready to start such litigation from a psychological or emotional perspective.

The defence of justification, or truth, is an absolute defence to this tort. However, a belief in the truth will not suffice; rather, the defendant/alleged victim must prove the truth of the impugned statements.[16]

The defence of privilege is also available to resist defamation claims. Absolute privilege attaches to certain communications which, for example, occur during, incidental to, or in furtherance of judicial or quasi-judicial proceedings. No action for defamation can lie from statements that were absolutely privileged, for example when made in the course of witness preparation or under oath in a legal proceeding.[17]

The defence of qualified privilege results in a conditional immunity that attaches to communications made for certain specified purposes. Where qualified privilege applies, the maker of the impugned statements will be shielded from liability for defamation, provided that the statements were made without malice. Generally, the doctrine of qualified privilege arises when a person who makes the communication has an interest or a duty (legal, social or moral) to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.[18]

The defence of qualified privilege where an individual's sexual abuse allegations have not been proven has met with mixed success.[19] The recent decision of *Vanderkooy v. Vanderkooy*[20] sent shock waves among the plaintiffs' bar. In that case, the plaintiff successfully sued his nieces for defamation after they sent out emails to family members accusing him of sexually abusing them when they were young girls. The court did not accept the defence of justification, and further held that the defence of qualified privilege was not made out. Specifically, the court found that the sisters' email statements about their uncle were not subject to qualified privilege despite testimony from a psychologist to the effect that openly discussing abuse was the start of the healing process. The court held that "[w]hile [the psychologist's] position about the abuse being brought out into the open may indeed bode well for her clients and her therapeutic practice, as a matter of legal principle to suggest that this gave rise to some wholesale substantiation for protection from liability under the qualified privilege umbrella is not sustainable".[21]

In contrast with the court's decision in *Vanderkooy,* is the analysis found in the more recent decision in *Whitfield v. Whitfield.*[22] In that case, the plaintiff's claims of sexual abuse and other misconduct were validated, and thus the defence of justification disposed of the counterclaim for defamation. However, in *obiter dicta,* the trial court addressed the issue of qualified privilege. The plaintiff admitted to the publication of all of the alleged defamatory communications about her brother alleging various forms of sexualized and cruel behaviours. The communications consisted of 14 separate pieces of correspondence to various members of her extended family along with a number of non-relatives.

The court found that the plaintiff believed in her heart and soul that she had been the victim of unrelenting sexual abuse at the hands of her brother and that her memories of these events had been traumatically repressed for many years. Furthermore, the court found that the plaintiff had a legitimate concern to uncover her "veiled past" with the assistance of those people with whom she had grown up, and that there was no malicious intent on her part. As part of that search for the truth (which was being revealed in stages through fragmented and recovered memories), it was appropriate that she describe to her entire family circle what was happening to her memory and the reasons for that process. The court found that although some or all of the family members may have found the disclosures distasteful and offensive (her family apparently sided with the brother in the lawsuit), they had not only an interest but a familial duty to consider this "dirty family secret" and give their sister, sister-in-law and aunt at least a modest benefit of a doubt as to the validity of her claims.

During closing submissions, the defendant relied on the judgment in *Vanderkooy.* In his consideration of that decision, in *obiter,* Justice MacIsaac stated that the court in *Vanderkooy* erroneously conflated the concept of an interest into that of a duty, when the defence of qualified privilege recognizes both distinct purposes.[23] By following the analysis reflected in the decisions rendered in *B.(P.)*[24] and *N.(R.)*,[25] Justice MacIsaac endorsed the broader approach to the qualified privilege analysis by recognizing that an interest, such as the public interest, may justify a disclosure in the absence of a duty, thus satisfying this element of the defence.

IV. Blame the Victim Defence

Certain institutional defendants, many through insurance counsel, have, of late, been asserting defences based in

contributory negligence and grounded in the factual allegation that the plaintiff is in part to blame for the sexual abuse that she/he suffered for failing to extricate herself/himself from the abusive situation.[26] These allegations have been asserted even in situations where the plaintiff was a child or teenager at the time the abuse occurred.

Examples of such pleadings include allegations that the plaintiff:

(a) failed to remove herself/himself from the circumstances in which she/he alleged the sexual abuse occurred when she/he had opportunities to do so;

(b) failed to report the alleged sexual abuse on the part of the offender to the institutional employer or to her/his own parents or any other person in a position of authority in a reasonable and timely manner when she/he had opportunities to do so;

(c) concealed the alleged sexual abuse and other conduct or behaviour on the part of the alleged offender from the institutional employer, and from her/his own parents and other persons in authority, when she/he knew or ought to have known that those persons had no other means of obtaining knowledge of the alleged sexual abuse on the part of the alleged offender;

(d) failed to take reasonable steps and precautions for her/his own safety and protection;

(e) permitted the alleged sexual abuse on the part of the alleged offender to continue when she/he knew or ought to have known that she/he had the means available to prevent further abuse;

(f) failed to request assistance in a reasonable and timely manner from the institutional employer or from her/his own parents or any other persons in authority in order to stop or prevent the alleged sexual abuse on the part of the offender when she/he knew or ought to have known that such assistance would have been provided and effective in the circumstances.

We have encountered these types of pleadings in various contexts, including by educational institutions where the victim was a minor student at the time of the sexual abuse and the offender was the victim's teacher or a powerful authority figure within the school. This tactic suggests that at least some of our school boards and private schools (and their respective insurers) still do not fully grasp the coercion and silencing which results from a teacher's abuse of his/her power, authority and trust over his/her students, and which prevents the students from being able to extricate themselves from the abusive situation.

We are unaware of any reported decisions in which a defendant in an action arising from sexual abuse has successfully asserted a defence based in contributory negligence.

In our view, this type of "blame the victim" approach demonstrates a lack of insight and sensibility on the part of the institution and only serves to further humiliate the victim and delay her/his psychological recovery. An appropriate response by the plaintiff in these circumstances is to seek additional aggravated damages against the defendant asserting this defence. Support for this position is found in cases such as *P.D. v Allen*[27] and *S.Y. v F.G.C.*,[28] which recognize that a trier of fact is entitled to take into account a defendant's response to a plaintiff's claim for sexual assault as an aggravating factor.

V. Conclusion

While these defence strategies are likely to meet with little, if any, success, they pose further barriers to victims seeking compensation arising from sexual abuse by creating delay, adding to the already intense emotions that surround these types of cases, and increasing legal costs.

This article has attempted to expose some of the new "old" defence strategies that are being asserted with increasing frequency, and to make proposals for how plaintiffs' counsel can counter them.

Susan Vella *is a member of OTLA and practices with Rochon Genova LLP in Toronto, Ontario*

Michael Wilchesky *practices with Rochon Genova LLP in Toronto, Ontario*

NOTES

[1] S.O. 2002, c. 24, Sch. B. [the *"Limitations Act,* 2002"]

[2] Indeed, Premier Wynne's Action Plan ("It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment"; March 2015) appears to foreshadow further amendments to the *Limitations Act, 2000* which will further reduce the availability of this defence.

[3] See sections 1, 2 & 5 of the *Negligence Act,* R.S.O. 1990, c. N.1 [the *"Negligence Act"*].

[4] R.S.O. 1990, c. F. 3

[5] 90 O.R. (3d) 561 (C.A.) [*Taylor*]

[6] 2012 CarswellOnt 2058 (Div. Ct.) [*Johnston*]

[7] The *Rules of Professional Conduct* were recently amended, effective October 1st, 2014 [the *"Rules"*], and include important clarifications to the *Rules* relating to conflicts of interest, and the associated Commentary.

[8] *Rule* 3.4-1, and associated Commentary

[9] Commentary to *Rule* 3.4-1

[10] *R. v Neil,* 2002 SCC 70 [*Neil*]

[11] See *Rule* 3.4–5.

[12] See *Rules* 3.4–8 and 3.4–9.

[13] *Rules* 3.2–9 and 3.4–5, and related Commentary; Rule 7.02 of the *Rules of Civil Procedure, Courts of Justice Act,* R.R.O. 1990, Reg. 194

[14] *Caughey v. Gareau,* [2003] O.J. No. 3817 (Master); *Walker v. Phantom Industries Inc.,* 2006 CarswellOnt 7483 (Master)

[15] *Neil, supra* note 11

[16] A.M. Linden & B. Feldthusen, *Canadian Tort Law,* 8th ed (Markham: LexisNexis Canada Inc., 2006) [*Tort Law*], at 785-786

[17] *Tort Law,* at 787; *Watson v. M'Ewan,* [1905] A.C. 480 (H.L.), at 486; *Amato et al. v. Welsh et al.,* 2013 ONCA 258 (C.A.), at para. 34

[18] *Tort Law, supra* note 17, at 791; *Adam v. Ward,* [1917] A.C. 309, at 334 (*per* Lord Atkinson)

[19] For example, see *N.(R.) v. S.(S.L.)* (1993), 120 N.S.R. (2d) 228 (T.D.) [*N.(R.)*]; *C.(L.G.) v. C.(V.M.)* (1996), 26 B.C.L.R. (3d) 107 (S.C.); *G.(R.) v. Christison,* [1997] 1 W.W.R. 641 (Sask. Q.B.); and *B. (P.) v. E. (R.V.),* 2007 BCSC 1568 (B.C. S.C.) [*B.(P.)*].

[20] 2013 ONSC 4796 [*Vanderkooy*]

[21] *Vanderkooy, supra* note 21, at para. 193

[22] 2014 CarswellOnt 5948 (S.C.J.) [*Whitfield*]

[23] *Whitfield, supra* note 23, at paras. 82 - 88

[24] *supra* note 20

[25] *supra* note 20

[26] These allegations are made pursuant to s. 3 of the *Negligence Act, supra* note 4.

[27] 2004 CanLII 4033 (S.C.J.), at paras. 323 – 326

[28] 1996 CanLII 6597 (B.C.C.A.), at para. 57