IMPACT LITIGATION AS TOOL TO TRANSFORM SOCIETY AND REALISE THE MOST BASIC FUNDAMENTAL RIGHTS OF WOMEN AND CHILDREN

Trynie Davel (University of Pretoria)

1 Introduction

Impact litigation, or public interest litigation, is a powerful tool to realise the rights of vulnerable groups of people in our transforming society. Our government has ratified numerous far-reaching international instruments[1] and we pride ourselves on a constitutional dispensation that guarantees fundamental rights[2] and safeguards human dignity.[3] However, for certain members of our society, these rights are in reality worthless.

The case of Esmé van Zijl, an adult survivor of child sexual abuse, was taken to the Supreme Court of Appeal by the Women's Legal Centre in Cape Town.[4] This was after the High Court[5] dismissed her and three other plaintiffs'[6] claims for damages caused by sexual assaults to which they had been subjected as children.

2 The facts

The High Court[7] accepted Van Zijl's evidence that unveiled the horrific tragedy of child sexual abuse, sodomy and rape by her uncle that culminated in a pregnancy and an abortion. She was only six years old when first exposed to this ordeal and fourteen years old when an abortion had to be performed on her.

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1 Eg the Convention on the Rights of the Child was ratified by South Africa on 16 June 1995 and the African Charter on the Rights and Welfare of the Child on 7 January 2000.

2 In the Bill of Rights which is incorporated in the Constitution of the Republic of South Africa, 1996 as Ch 2.

3 S 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."

4 http://www.wlce.co.za (8 November 2005).

5 See *Du Plessis and Others v Hoogenhout and Another* case no 9253/99 of 23 May 2003.

6 The other plaintiffs included her brother, Jaco van Zijl, who suffered from polio. This clearly demonstrates on the one hand that child sexual abuse is not only a "women's" issue (see par 4 below) and on the other hand also highlights the precarious position of children with disabilities as victims. On the latter issue, see Hesselink-Louw & Olivier "A criminological analysis of crimes against disabled children: The adult male sexual offender" 2001 (vol 2) *CARSA* 15-20. The remaining plaintiffs were cousins of Esmé and Jaco. The case under discussion therefore deals with child sexual abuse *in the family* (see 4 below with regard to the prevalence of child sexual abuse in the family context).

7 http://www.wlce.co.za/litigation/csa_lit_adult_hoogenhout.php (8 November 2005).

The consequences of the sexual abuse that the plaintiff suffered are legion, and include suffering from an extremely poor self-esteem, sleeplessness, drug and alcohol abuse, self-mutilation, suicidal tendencies and poor scholastic performance. The plaintiff lacked inter-personal skills and was unable to engage in sexual relationships. In 1997 a friend encouraged her to disclose some of her experiences at the hands of the defendant. At that stage she was convinced that what had happened between herself and the defendant was her fault. It was only when her brother revealed that the defendant had sexually abused him as well that she realised that the blame should be ascribed to the defendant. The High Court accepted that the plaintiff was an "emotional wreck" as a result of the trauma that she had suffered at the hands of the defendant, but nevertheless dismissed the claims due to prescription.

3 Prescription

The case was argued in the High Court on the assumption that the *Prescription Act* 68 of 1969[8] applied to the plaintiff's claims. Section 16(2)(a) of that Act provides that

> [t]he provisions of any law … which immediately before the commencement of this Act applied to the prescription of a debt which arose before such commencement; … shall continue to apply to the prescription of the debt in question in all respects as if this Act had not come into operation.

As the debt in issue arose before that date, it had to be determined whether the claim had in fact prescribed in terms of the *Prescription Act* 18 of 1943. This Act provided[9] that in respect of any action for damages, other than for defamation, prescription began to run

> from the date when the wrong upon which the claim for damages is based was first brought to the knowledge of the creditor, or from the date on which the creditor might reasonably have been expected to have knowledge of such wrong, whichever is the earliest date.

The Court held that Van Zijl's claim prescribed three years after she had attained majority in 1973.[10] The judgment was based on *Oslo Land Co Ltd v The Union Government*[11] and *Administrator of the Transvaal v Crocodile Valley*

8 that came into operation on 1 December 1970.
9 S 5(1)(c).
10 http://www.wlce.co.za/litigation/csa_lit_adult_hoogenhout.php (8 November 2005).
11 1938 AD 584 593.

Citrus Estates (Pty) Ltd.[12] Both these cases could be described as "usual cases" in that they were based on the premise that a wrongful act results in damage (however minimal, but prospective damages included) which the creditor is capable of ascertaining. The Court in *Van Zijl* did not consider what the effect would be on a creditor who, although aware of the facts, did not or could not, at the date of commission of the delict, through no fault of his or her own, appreciate where responsibility for the act lay and thus had no appreciation that he or she was entitled to civil redress against the person who had inflicted the harm or caused the damage. That is what the Supreme Court of Appeal called the "unusual case",[13] but "one which arises squarely in claims based on the sexual abuse of children where the victim is a 'creditor' and the 1943 Act applied".[14] The knowledge which is required is the minimum necessary to enable a creditor to institute action and ascribing of blame to the defendant is obviously a prerequisite of any claim in delict.[15]

The fact that the statute provides for the suspension of prescription under certain circumstances does not detract from this conclusion. In any event, suspension can only take place once the running of prescription has commenced. That did not happen in this case, because Van Zijl only became aware of the fact that the blame had to be ascribed to the defendant towards the end of 1997 and summons was issued on 16 August 1999.

The Supreme Court of Appeal reached the following conclusion:

> [T]here exists a category of creditor (the person abused as child who has reached adulthood before commencing the action) who does not necessarily fall into any of the categories of suspension and who should be accommodated within the legislative framework if that can be achieved without doing violence to the language.[16]

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12 1942 TPD 109 111.

13 *Van Zijl v Hoogenhout* [2004] 4 All SA 427 (SCA) 435b.

14 (n 13) 435b-c. The court also made an obiter statement that the same holds true for s 12 of the 1969 Act which provides: "(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

15 (n 13) 435c-d, based on *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 1 SA 987 (SCA) 997A (also reported at [2001] 1 All SA 107 (A)). See also *Santam Ltd v Ethwar* 1999 2 SA 244 (SCA) 252I-J; *Gericke v Sack* 1978 1 SA 821 (A) 826A 828C; *SA Insurance Co Ltd v Mapipa* 1973 3 SA 603 (E) 609A-D.

16 (n 13) 435f-g. The SCA also mentioned that the plaintiff is entitled to the benefits of a constitutional dispensation that promotes rather than inhibits access to courts of law (431d). See s 34 read with s 9(1) of the Constitution: *Beinash v Ernst & Young* 1999 2 SA 116 (CC) par 17; *Moise v Transitional Local Council: Minister of Justice and Constitutional*

Interpretation of the legislative framework, in this case the 1943 and 1969 *Prescription Acts*, must also be in accordance with the requirements of section 39(2) of the Constitution. Section 39(2) obliges courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. The Constitutional Court has emphasised that the obligation imposed by section 39(2) is not discretionary:[17]

> We should add, too, that this duty upon judges arises in respect of both the civil and criminal law, whether or not the parties in any particular case request the Court to develop the common law under section 39(2).[18]

The injunction contained in section 39(2) of the Constitution has frequently been stressed by the Constitutional Court.[19]

4 The prevalence of child sexual abuse

Statistics indicate that child sexual abuse is rife in South Africa and increasing.[20] It is therefore startling that *Van Zijl v Hoogenhout* was the first case of its kind in this country. The secretive nature of child sexual abuse makes it difficult to pinpoint the extent of the problem in South Africa.[21] Furthermore, crime statistics have been controversial for a number of years and in addition to this there are several problems with using crime statistics to determine the prevalence of child sexual abuse:[22]

(i) Using "rape" as an indicator of the prevalence of sexual abuse is problematic since the current legal definition of rape refers only to the sexual penetration of a female by a male.[23]

Development Intervening (Women's Legal Centre as Amicus Curiae) 2001 4 SA 491 (CC) par 23.

17 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 36.

18 See also *Dendy v University of the Witwatersrand* 2005 5 SA 357 (W) 371 par 25.

19 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) pars 21 & 22.

20 Sexual abuse of children increased 400% in 10 years: *Legalbrief News Diary* 2002-08-13. Also see Pitcher & Bowley on the increase of infant rape in South Africa: "Infant rape in South Africa" 2002 (vol 359) *The Lancet* 274 275; "Child rape and abuse" *Speak Out About Abuse* http://www.speakout.org.za (20 January 2006).

21 Songca *Aspects of Sexual Abuse of Children: A Corporative Study* (unpublished LLD thesis UP 2003) 14.

22 *Child Sexual Abuse and Exploitation in South Africa: A report by the Community Agency for Social Enquiry* (CASE) commissioned by Save the Children Sweden (April 2005) 5-6.

23 See, however, the (unreported) judgment of Lamprecht in the anal rape case (*S v Masiya* case no SHG 94/04 par 32): "Having established above that the current common law definition of rape is unconstitutional, because it irrationally and arbitrarily discriminates against everyone's right to determine where she or he wants to be sexually penetrated and by whom, one now has to determine what to do about it." The accused was found guilty of rape (on 11 July 2005) and the case was referred to the High Court for purposes of sentence.

(ii) Crime statistics refer only to reported cases, and rape and sexual assault are widely recognised as under-reported crimes.[24]

(iii) Crime statistics reflect only specific categories of reportable crimes and do not reflect the full range of behaviour that constitutes child sexual abuse.

(iv) Increasing crime statistics may to some extent reflect increasing levels of awareness rather than increased levels of child sexual abuse.

In 1998, the South African Police Services Child Protection Units and specialised individuals dealt with 37 352 reported crimes against children. Rape was the most prevalent, accounting for forty two per cent of total crimes against children that year.[25] In 2001, fifty eight children were raped daily in South Africa.[26] This figure correlates very closely to a report by the Medical Research Council that approximately 20 000 rapes of children were reported in South Africa in 2002.[27]

A survey conducted in the south of Gauteng indicated that by eighteen years of age, twenty per cent of females and thirteen per cent of males have suffered some form of sexual violence.[28] It is revealing to note that in 60 per cent of the cases, the victim knew the perpetrator, while family members perpetrated no less than 54 per cent of the crimes. Other researchers aver that the perpetrator may be known to the child victim in as much as 80 to 90 per cent of the cases.[29]

There can be no doubt that child sexual abuse is a pervasive problem in South Africa and that intra-familial child sexual abuse has become a major social and judicial concern.[30]

5 Enlightened transformation

It cannot be denied that each abused child has a right of recourse against his or her abuser. Cultural or societal taboos and ignorance have paralysed this right. Fortunately there is an increasing openness about sexual matters and a

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24 "Child rape and abuse" *Speak Out About Abuse* (n 20).

25 Children in *2001 Report on the State of the Nations' Children* NPA 138.

26 *Legalbrief News Diary* 2001-12-13. See also Van Niekerk "Types and prevalence of sexual abuse of children" 2002 *Speak Out About Rape* http://www.speakout.org.za (12 November 2005).

27 *Legalbrief News Diary* 2002-02-04.

28 *Report on Sexual Offences Against Children* HRC 9 (2002).

29 Müller *Child Abuse* (1998) 12-13; Eschur "Are they safer in the park with stangers" *Speak Out About Rape* http://www.speakout.org.za (12 November 2005).

30 Songca (n 21) 14; Jewkes, Levin, Mbananga & Bradshaw "Rape of girls in South Africa" 2002 (vol 359) *The Lancet* 319; "Child rape and abuse" *Speak Out About Abuse* (n 20).

growing social awareness that sexual abuse of children is an endemic problem that often translates into long-term mental and physical devastation.[31]

This phenomenon is acknowledged globally.[32] Current public discourse about rape of babies and intra-familial sexual abuse reveals an enlightened transformation in societal attitudes towards inappropriate sexual conduct involving children. Public interest groups also play a part and survivors have become more informed about their rights.[33] This enlightened transformation has led to an increased sensitivity when applying statutory time limits by the judiciary.[34]

Psychological research and expert studies have also contributed to an evolving understanding of the nature and effects of child sexual abuse.[35] The traumagenic causing factors involved in child sexual abuse is described by Finkelhor and Brown[36] as traumatic sexualisation, betrayal, powerlessness and stigmatisation. It is the conjunction of these four factors in one set of circumstances that makes the trauma of sexual abuse unique and devastating. Traumatic sexualisation is a process in which a child's sexuality is developed inappropriately and dysfunctional (eg rewarding inappropriate sexual behaviour, sexual behaviour as a strategy for manipulating others, misconceptions and confusions about sexual behaviour transmitted to the child from the offender). Betrayal refers to the dynamics by which children discover that someone on whom they are vitally dependent has caused them harm (eg realising that a loved one treats him or her with callous disregard). Powerlessness refers to the process in which the child's will, desires and sense of efficiency are continually contravened (eg the repeated invasion of the child's territory, privacy and body space, coercion or realising how conditions of dependency have trapped them). Stigmatisation refers to the negative

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31 Jewkes, Levin, Mbananga & Bradshaw (n 30) 319-320.

32 Roseman "Adult survivors of childhood sexual abuse: Revisiting the California Statute of Limitations" http://www.smith-lawfirm.com/California.html (7 December 2005).

33 Eg note that the Women's Legal Education and Action Fund intervened in *M(K) v M(H)* (1992) 3 SCR 6 and the appeal was allowed and judgment entered for the plaintiff in the sum of $50 000 including both general and punitive damages. This case concerned childhood incestuous abuse and La Forest J specifically mentioned that although the problem of incest is not new, "it has only recently gained recognition as one of the more serious depredations plaguing Canadian families". The existence of a fiduciary relationship between a father and his child played a decisive role and the judge summarised his findings as follows: "Incest is both a tortious assault and a breach of fiduciary duty. The tort claim, although subject to limitations legislation, does not accrue until the plaintiff is reasonably capable of discovering the wrongful nature of the defendant's acts and the nexus between those acts and her injuries. In this case, that discovery took place only when the appellant entered therapy, and the lawsuit was commenced promptly thereafter. The time for bringing a claim for breach of a fiduciary duty is not limited by statute in Ontario, and therefore stands along with the tort claim as a basis for recovery by the appellant."

34 *Van Zijl v Hoogenhout* (n 13) 431b.

35 Potgieter "The internal trauma of the sexually abused child" 2000 (vol 1) *CARSA* 33-39.

connotations, such as badness, shame and guilt that are communicated to the child that becomes incorporated into the child's self-image. Finkelhor and Browne's contribution amounted to a better understanding of these traumagenic factors, which are seen as the four links between the experience of child sexual abuse and the *sequelae* that are so typical of this phenomenon.[37]

When a court has to decide at what stage a victim realised or could reasonably have realised that the perpetrator/defendant is to be blamed for the abuse, the research of Herman[38] is particularly enlightening. Herman indicated how the victim denies the abuse by a process of dissociation due to the fact that the self is taken as the reference point in early childhood: in the environment of chronic abuse, self-blame seems to explain the reality of abuse. By developing a contaminated, stigmatised identity, the child victim takes the evil of the abuser into himself or herself and thereby preserves the primary attachments to the parents. These psychological defences formed in childhood become increasingly maladaptive in adulthood. Usually some cathartic experience during middle age causes a breakdown of the childhood defensive structures. In the absence of some cathartic experience, these consequences can and do persist despite the cessation of the abuse during childhood.[39]

V*an Zijl v Hoogenhout* was a groundbreaking case in South Africa. Elsewhere in the world an upsurge in claims instituted by the adult survivors of child sexual abuse likewise occurred.[40]

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36 "The traumatic impact of child sexual abuse: A conceptualization" October 1985 55(4) *American Journal of Orthopsychiatry* 530.

37 Note the reference to their research in *Van Zijl v Hoogenhout* (n 13) 431-432.

38 *Trauma and Recovery The Aftermath of Violence – From Domestic Abuse to Political Terror* (1992) 101-114.

39 Note the importance of the research in *Van Zijl v Hoogenhout* (n 13) 432-433. The expert witness indicated how these traumagenic factors manifested in Van Zijl's psychological and behavioural demeanor during and subsequent to the abuse (440).

40 Eg see the Canadian case, *M(K) v M(H)* [1992] 3 SCR 6 (n 33) above. In New Zealand the leading case is a decision of the Court of Appeal in *W v Attorney-General* [1999] 2 NZLR 709. The appellant was sexually abused by a foster-parent as a child and the Department of Social Welfare took no notice of her complaints. Her claim was dismissed in the Court a quo, but the Court of Appeal upheld the appeal. In the UK in *KR v Bryn Alyn Community (Holdings) Ltd (In Liquidation)* [2003] QB 1441 (CA) 1460 14 claimants succeeded in an action due to the sexual abuse that they suffered in residential homes run by the first defendant. In *Stubbings v United Kingdom* (1997) 23 ECHR 213 the applicants brought their claims for damages in respect of childhood sexual abuse before the European Court of Human Rights (ECHR) because it was found to be time-barred: [1993] AC 498; [1993] 2 WLR 120; [1993] 1 All ER 322 HL(E). The applicants complained that they were denied access to a court contrary to a 6(1) and discriminated against contrary to a 14 in conjunction with a 6(1) and/or a 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The ECHR found that none of these articles of the Convention was violated but noted the developing awareness of the problems caused by child abuse and its psychological effects on victims. It raised the possibility that the rules on limitations of actions applying in member States might have to be amended to make special provision for that group of claimants in future. In the USA the issue gave rise to a spate of cases, eg *Carney v Roman Catholic Archbishop of Boston* 16 Mass L Rptr 3. See Donaldson

The outcome of impact litigation in the matter of *Van Zijl v Hoogenhout* was that the appeal succeeded with costs, including the costs of the application for leave to appeal. The order of the Court *a quo* was set aside and replaced with an order dismissing the defendant's special plea of prescription.[41] The matter was remitted to the trial court for determination on quantum (and for the completion of the trial in respect of the other plaintiffs). The damages that were claimed by the plaintiff were the following:[42]

(i) General damages for pain and suffering, chronic emotional and psychological trauma and shock and stress and impairment of the normal amenities of life in an amount of R100 000.

(ii) General damages for *contumelia,* humiliation, impairment to her dignity, *injuria* to her personality in an amount of R100 000.

(iii) Future medical costs in the amount of R133 300 for intensive psychological therapy, psychiatric evaluations and anti-depressant medication.

The above amounts could be summarised as being R200 000 for infringing upon the plaintiff's personality rights and R133 300 for future medical costs.

6 Delictual remedy vindicating fundamental rights

Against the backdrop of South-Africa's transformation, the question should now be considered how the law and legal processes could be utilised to impact on the infringement of women and children's constitutionally enshrined fundamental rights. *Van Zijl v Hoogenhout* highlighted the fact that every aspect of the victim's life is severely affected by the trauma of abuse. Many of these aspects and life itself are fundamental rights entrenched in the Bill of Rights. Of particular importance in this context are sections 12(1)(c), 28(1)(d) and 10.

"Running of limitations against action for civil damages for sexual abuse of child" 9 *ALR* 5th 321 for a comprehensive annotation dealing with the case law involved. Donaldson indicates (par 3) that the concept of traumatic psychological repression of the conscious awareness of intolerable facts is an important argument running through the reported cases on this issue. The argument in these cases is essentially that, in order to maintain functional sanity, the victim of the abuse has literally and excusably forgotten all or critical aspects of the experience and should be treated as if he or she had never known these facts until the conscious awareness of them was restored either by psychotherapy or by some other strong emotional experience which "triggered" the memory of the elements of the cause of action. In Zimbabwe damages was denied in *Dube v Banana* 1999 1 BCLR 44 (ZH). The Court expressed the view that the once and for all rule should be modified, but that this required legislative action and should not be attempted by way of judicial precedent (56H-I). In many jurisdictions in the USA some type of provision extending or removing the statute of limitation for adult survivors of child sexual abuse has been made: *Legalbrief Today* 09-01-2006; The Advocate Times http://alterboys.tripod.com/Faith/Extending_thex.html (6 December 2005). See Roseman (n 32) on law reform in California.

41 See 3 above.

42 Information obtained from "Appellant's Heads of Argument".

Section 12(1)(c) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or *private* sources. In *S v Baloyi*[43] the Constitutional Court observed that "[t]he specific inclusion of private sources emphasizes that serious threats to security of the person arise from private sources".[44] In the following paragraph the Court explained that domestic violence also compels constitutional concern because it undermines the non-sexist society promised in the foundation clauses of the Constitution and the rights to equality and non-discrimination:[45]

> The ineffectiveness of the criminal justice system in addressing family violence [and child sexual abuse] intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women [and children] counts for little.

Over and above the protection afforded in section 12(1)(c), children enjoy special constitutional protection in section 28.[46] Although the plaintiff in *Van Zijl's* case is an adult, it is clear that in the context of child sexual abuse, the constitutional protection of children against abuse becomes imperative. Section 28(1)(d) of the Constitution provides every child with a right to be protected from maltreatment, neglect, abuse and degradation.

Section 10 of the Constitution provides everyone with inherent[47] dignity and the right to have their dignity respected and protected. The recognition of the right to dignity means that the intrinsic right of human beings is acknowledged.[48] The parameters of the protection of human dignity are ever-evolving.[49] It is difficult to envisage any greater indignity than that suffered by the victims of child sexual abuse.

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43 2000 2 SA 425 (CC).
44 (n 14) par 11.
45 (n 14) par 12. The words in brackets were added by the author.
46 Bekink & Brand "Constitutional protection of children" in Davel (ed) *Introduction to Child Law in South Africa* 169 177.
47 Thereby asserting that "respect for human dignity, and all that flows from it, is an attribute of life itself, and not a privilege granted by the State": Chaskalson "Human dignity as foundational value of our constitutional order" 2000 *SAJHR* 196.
48 *S v Makwanyane* 1995 3 SA 391 (CC) par 328; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 29; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) par 39.
49 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 48) par 29; Chaskalson (n 48) 205.

The question thus remains whether the delictual damages mentioned above provided appropriate relief[50] for the infringement of the above-mentioned fundamental rights. Did the delictual remedy also vindicate the infringement of these fundamental rights and deter future violations of it? If the answer is in the affirmative, the delictual remedy should be considered as appropriate constitutional relief and it then serves a dual function.[51]

Theoretically there is a clear distinction between the delictual and constitutional remedy.[52] The delictual remedy is aimed at compensation. The constitutional remedy, even in the form of damages,[53] is directed at affirming, enforcing, protecting and vindicating fundamental rights and at preventing or deterring future violations of the Bill of Rights.[54] An award of damages for violations of fundamental rights is a secondary remedy to be made in only the most appropriate cases.[55]

In *Fose v Minister of Safety and Security*[56] the claim for constitutional damages for assault and torture was not regarded as appropriate relief under the interim Constitution beside the ordinary delictual remedies. Writing for the majority, Ackerman J stated:[57]

> Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to ensure the protection and enforcement of these all-important rights.

In a concurring judgment Kriegler J explained:[58]

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50 For the enforcement of fundamental rights, see s 38 of the Constitution. Also see Okpaluba "Extraordinary remedies for breach of fundamental rights: Recent developments" 2002 *SAPR/PL* 98 105f.

51 Neethling, Potgieter & Visser *Law of Delict* (2006) 20.

52 Burchell "Delict in a bill-of-rights era – II" 1991 *Businessman's Law* 175 176; Neethling, Potgieter & Visser (n 51) 20. The constitutionality of the *Prescription Acts* was attacked in the High Court, but that issue was later abandoned.

53 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 821. Okpaluba (n 50), writing in 2002, noted that no constitutional damages have been awarded in South Africa at that stage. Since then, the Constitutional Court has awarded constitutional damages in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* unreported case CCT 20/04 par 65, on 13 May 2005. However, in that particular case no other form of relief seemed to have been appropriate.

54 Neethling, Potgieter & Visser (n 51) 21.

55 *Dendy v University of the Witwatersrand* (n 18) par 20.

56 (n 53).

57 (n 53) par 19.

58 (n 53) par 97.

> Once the object of the relief … has been determined, the meaning of 'appropriate relief' follows as a matter of cause. When something is appropriate it is 'specially fitted or suitable'. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violation of rights enshrined in ch 3. In pursuing this enquiry one should consider the nature of the infringement and the probable impact of a particular remedy. One cannot be more specific. The facts surrounding a violation of rights will determine what form of relief is appropriate.

In *Fose* the Court found that there was no ground for constitutional damages because substantive (delictual) damages were to be awarded in that case.[59] But is R333 300 a substantive amount to also vindicate the fundamental rights in issue and deter its further infringement? More recently Ngcobo J also addressed the issue of appropriate relief and summarised his conclusion as follows:[60]

> The determination of appropriate relief … calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right; second to deter future violations; third to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'.[61]

Translated into the present context we must carefully analyse the nature of the constitutional infringement in *Van Zijl's* case and decide if the delictual damages awarded to her (R 333 300) effectively addressed its source.

7 Conclusion

Without deterring in any way from the fact that *Van Zijl v Hoogenhout* constitutes a victory for women and children, it is perhaps not the final word on all the issues involved. It is difficult to accept that R 333 300 could be regarded

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59 (n 53) par 67. Also see Henderson "Show me the money!" February 1999 *De Rebus* 25 26.
60 *Hoffmann v South African Airways* 2001 1 SA 1 (CC), [2000] 11 *BCLR* 1211 (SCA) par 45.

as a substantial amount which does not allow for constitutional damages. Could the fourth factor to consider when awarding constitutional remedies mentioned by De Waal, Currie and Erasmus,[62] namely the identity of the violator, be a decisive one in this regard? They argue that the deterrent effect of a constitutional remedy, such as constitutional damages, may differ considerably depending on whether the violator of rights is public or private. If that argument is pursued, then a claim for constitutional damages would more likely succeed when children were raped in police cells and especially if there have previously been instances where delictual damages were awarded against the violator/perpetrator.[63]

It is suggested that what constitutes "appropriate relief" for the adult survivors of child sexual abuse is a question still to be decided – most probably by means of impact litigation.[64] In this way legal precedent could play a role in transforming society by eradicating the scourge of sexual abuse on children in South Africa.

61 See also *Dendy v University of the Witwatersrand* (n 18) 368-369.

62 *The Bill of Rights Handbook* (2001) 174.

63 The fifth factor mentioned by the same authors is the nature of the violation, ie whether systemic violations occur.

64 Note the following statement by De Waal, Currie & Erasmus (n 62) 188: "[C]onstitutional remedies should be forward-looking, community-orientated and structural." The authors opine that an award of damages is not forward-looking: "Rather it requires a court to look back to the past in order to determine how to compensate the victim or even to punish the violator." However, if constitutional damages could effectively deter further violations, it would definitely be forward-looking.